UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DIAL CORPORATION, *et al.*,

Plaintiffs,

-against-

NEWS CORPORATION, *et al.*,

Defendants.

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13cv6802

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Defendants News Corporation, News America Inc., News America Marketing FSI L.L.C., and News America Marketing In-Store Services L.L.C. (collectively, "News Corp.") move to amend this Court's June 18, 2015 Memorandum & Order certifying a class under Fed. R. Civ. P. 23(c)(1)(C). For the following reasons, News Corp.'s motion is granted.

BACKGROUND

On June 18, 2015, this Court certified a class of non-retailer consumer packaged goods firms residing in the United States that have directly purchased in-store promotions from News Corp. at any time on or after April 5, 2008. See Dial Corp., et al. v. News Corp. et al., 13 Civ. 6802, 2015 WL 4104624 (S.D.N.Y. June 18, 2015). Plaintiffs first alleged the April 5, 2008 start date for the class period when they filed an amended class action complaint on October 24, 2013. And the class definition was the subject of extensive discovery, culminating in a motion for class certification filed on August 11, 2014. That motion contained thousands of pages and was freighted with voluminous expert reports. It appeared that the parties left no stone unturned.

But on December 30, 2015, for the first time, and over six months after this Court's class certification order, News Corp. raised an argument to amend the start date of the

class period from April 5, 2008 to May 2, 2009. News Corp.'s proposed amendment of the class period is no minor adjustment. Plaintiffs' counsel report that the effect of such a modification would be to shrink the class by approximately sixty class members. And News Corp.'s explanation for its failure to bring this matter to this Court's attention earlier—that counsel "didn't focus on it"—is lame. (ECF No. 448–1, Jan. 26, 2016 Tr. at 17.) Just two months before trial, Plaintiffs' counsel are justifiably upset and object.

News Corp. contends that the proper start date for the class period is May 2, 2009—four years prior to the filing of the May 2, 2013 class action complaint.[1] In considering one facet of News Corp.'s argument, this Court ruled during a January 26, 2016 conference that the April 4, 2012 tolling agreement between News America Marketing and Dial Corporation and H.J. Heinz Company did not toll the claims of any other named Plaintiffs or class members in this litigation and that the class period could not begin on April 5, 2008. In view of that ruling, the parties now spar over whether the class members' claims raised in the May 2, 2013 class action complaint relate back to the original complaint filed by Dial on December 21, 2012.

DISCUSSION

Under Fed. R. Civ. P. 23(c)(1)(C), this Court's class certification order may be "altered or amended before final judgment." That News Corp. could, and should, have made its motion earlier—somewhere in its extensive class certification or summary judgment briefing—does not alter this Court's analysis. The issued presented is a question of law that must be resolved prior to trial. Indeed, this Court "must define, redefine, subclass, and decertify as

[1] Plaintiffs' first class action complaint alleged a class period start date of April 26, 2009—four years prior to the filing of Plaintiffs' motion to amend their complaint to add class allegations. (See ECF No. 22.)

appropriate in response to the progression of the case from assertion to facts." Boucher v. Syracuse Univ., 164 F.3d 113, 118–19 (2d Cir. 1999) (internal quotations omitted).

Plaintiffs contend that the class allegations raised for the first time in Plaintiffs' May 2, 2013 class action complaint relate back to Dial's original December 21, 2012 complaint under Fed. R. Civ. P. 15(c)(1)(B). Rule 15(c)(1)(B) permits a new claim in an amended complaint to relate back to an earlier complaint when "the amendment asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." See Fed. R. Civ. P. 15(c)(1)(B). But the May 2, 2013 class action complaint added new plaintiffs, i.e., the putative class and named Plaintiff Foster Poultry Farms, not new claims. And nothing in Dial's original complaint, save for minor references to "other consumer packaged goods companies," (see ECF No. 1 at ¶¶ 107, 113, 119, 126), put News Corp. on notice that class allegations would be added to a later complaint. Thus, this Court looks to Rule 15(c)(1)(C), not Rule 15(c)(1)(B). See, e.g., Wilder v. News Corp., 11 Civ. 4947, 2015 WL 5853763, at *14–15 (S.D.N.Y. Oct. 7, 2015) (applying Rule 15(c)(1)(C) to an amended complaint's addition of class members); Espinosa v. The Delgado Travel Agency, 05 Civ. 6917, 2006 WL 2792689, at *3–4 (S.D.N.Y. Sept. 27, 2006) (same).

Rule 15(c)(1)(C) provides that when an amendment "changes the party . . . against whom a claim is asserted" relation back applies if the failure to include the party was due to a mistake concerning its identity. See Fed. R. Civ. P. 15(c)(1)(B). The Second Circuit has applied Rule 15(c)(1)(C) to both amendments changing defendants and amendments changing plaintiffs. See Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F. 3d 11, 19 (2d Cir. 1997); Levy v. U.S. General Accounting Office, 97 Civ. 4016, 1998 WL 193191, at *5 (S.D.N.Y. Apr. 22, 1998), aff'd, 175 F.3d 254 (2d Cir. 1999) (per curiam) ("Because . . . [the] Amended Complaint

seeks to add . . . plaintiffs as additional parties to [the] lawsuit . . . Rule 15(c)[(1)(C)] governs whether that amendment relates back to . . . [the] original complaint.").

The Second Circuit in Levy, and several judges in this District, have concluded that the omission of a plaintiff from the original pleading bars relation back of that plaintiff's claim unless the omission was the product of a "mistake." See, e.g., Levy, 175 F. 3d at 255 ("[T]he claims of the [added plaintiffs] in the . . . Amended Complaint do not relate back to the . . . complaint. [Plaintiff] did not seek to add the [additional plaintiffs] because of a mistake, as required by Fed. R. Civ. P. 15(c)[(1)(C)]."); Wilder, 2015 WL 5853763, at *15 ("Given that Levy and its progeny hold that the Rule 15(c)(1)(C) mistake requirement governs 'relation back' . . . where a plaintiff seeks to add new plaintiffs . . . , that requirement will be applied here."). But see In re South African Apartheid Litig., 617 F. Supp. 2d 228, 289 (S.D.N.Y. 2009) ("Courts in this Circuit have more recently rejected the suggestion that amendments seeking to add new plaintiffs must satisfy Rule 15(c)(1)(C)'s 'mistake' requirement.").

The reason undergirding application of Rule 15(c)(1)(C)'s "mistake" requirement to bar amendments adding new plaintiffs has even greater persuasive power in the context of a class action. Permitting relation back of an entire class of plaintiffs would blindside a defendant who thought it was dealing with a small, enumerated group of plaintiffs. Plaintiffs do not contend that their addition of class allegations to the May 2, 2013 complaint resulted from any "mistake" concerning the parties' identity. Thus, Plaintiffs' May 2, 2013 class action complaint cannot relate back to Dial Corporation's original December 21, 2012 complaint under Rule 15(c)(1)(C). Accordingly, the start date of the class period is amended to April 26, 2009, the

date on which Plaintiffs filed a motion to amend their complaint to include class action allegations.[2]

CONCLUSION

For the foregoing reasons, Defendants News Corporation, News America Inc., News America Marketing FSI L.L.C., and News America Marketing In-Store Services L.L.C.'s motion to amend the start date of the class period under Fed. R. Civ. P. 23(c)(1)(C) is granted. The start date of the class period is amended to April 26, 2009.

The Clerk of Court is directed to terminate the motion pending at ECF No. 446.

Dated: February 9, 2016
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

All Counsel of Record (via ECF).

[2] The date of the filing of the motion to amend is the date the action was commenced for statute of limitations purposes, since News Corp. was on notice of the new parties as of the filing of the motion. See Rothman v. Gregor, 220 F.3d 81, 96 (2d Cir. 2000).