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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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12 Elizabeth Walters Williams,)

13 Plaintiff,)

No. CIV 06-2747 PHX RCB

14 vs.)

O R D E R

15 Connecticut General Life)

Insurance Company; John)

16 Hancock Life Insurance)

Company; Black Corporations)

17 I-X, Inclusive; ABC Companies)

I-X, Inclusive; and John Does)

18 I-X, Inclusive,)

19 Defendants.)

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21 Currently pending before the court is a motion for summary
22 judgment by defendants Connecticut General Life Insurance Company
23 and John Hancock Life Insurance Company (doc. 22) and their related
24 motion to strike plaintiff's statement of facts (doc. 29). Finding
25 oral argument unnecessary, the court denies defendants' requests in
26 that regard.

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Background

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When defendants filed their original motion to dismiss, as the

1 parties are well aware, there was some confusion as to which
2 complaint that motion was directed - the original complaint filed
3 on September 5, 2006, in the Superior Court of Arizona, Maricopa
4 County, Arizona, or the Amended Complaint filed in that same court
5 on October 20, 2006. See Williams v. Connecticut General Life
6 Ins., Co., 2007 WL 1839710 (D.Ariz. June 26, 2007). As will be
7 more fully explained below, there is similar confusion surrounding
8 the pending motions. Some procedural context is necessary to
9 resolve the issue of which is the operative complaint for purposes
10 of the pending defense motions.

11 When confronted with defendants' initial motion to dismiss,
12 because the record was unclear as to the operative complaint, the
13 court ordered defendants to clarify the state of the record. Id.
14 at *2. Defendants did that by filing an affidavit from their
15 counsel averring that prior to removal, on October 17, 2006, they
16 were served with the original complaint. Affidavit of John C.
17 West (doc. 12) at 2:3-4, ¶ 3. Attorney West further averred that
18 defendants were not served with the amended complaint, however,
19 until November 17, 2006 - eight days after removal. See id. at 2,
20 ¶¶ 6 and 7.

21 After that clarification, to resolve defendants' motion to
22 dismiss, the court looked to the original complaint, attached to
23 their Notice of Removal. See Doc. 13 at 2. The court then held
24 "that to the extent [the] original complaint asserts state law
25 claims relating to and arising from an employee benefit plan, those
26 claims are preempted under ERISA." Id. at 3:17-19. Shortly
27 thereafter, defendants filed their answer, explicitly stating that
28 they were "answer[ing] the remaining allegations of Plaintiff's

1 *Original Complaint*, which was filed on September 5, 2006." Ans.
2 (doc. 16) at 1 (emphasis added). Similarly, in their "Separate
3 Statement of facts in Support of [their] Motion for Summary
4 Judgment[,]” defendants’ cites to the complaint directly correspond
5 to allegations in the original complaint. See, e.g., DSOF (doc.
6 23) at 1, ¶ 1:23-24; and at 2, ¶9. Thus, although defendants
7 recognize that the amended complaint was filed and served, their
8 motions are directed to the original complaint. As more fully
9 discussed below, defendants’ reliance upon the original complaint
10 is a fundamental flaw which the court cannot overlook.

11 Discussion

12 I. Summary Judgment Motion

13 “It is hornbook law that an amended pleading supersedes the
14 original, the latter being treated thereafter as non-existent
15 Once amended, the original no longer performs any function
16 as a pleading[.]’” Doe v. Unocal Corp., 27 F.Supp.2d 1174, 1180
17 (C.D.Cal. 1998) (quoting Bullen v. De Bretteville, 239 F.3d 824,
18 833 (9th Cir. 1956)) (other citations omitted), aff’d and adopted
19 on other grounds, 248 F.3d 915 (9th Cir. 2001). Or, more recently,
20 as the First Circuit colorfully pronounced in Connectu LLC v.
21 Zuckerberg, 522 F.3d 82 (1st Cir. 2008), “the earlier complaint is
22 a dead letter and no longer performs any function in the case.”
23 Id. at 91 (internal quotation marks and citation omitted). The
24 point of supersedure occurs “when the amended complaint is properly
25 served, *not* when it is filed.” Doe, 27 F.Supp.2d at 1180 (footnote
26 omitted) (emphasis added) (citing International Controls Corp. v.
27 Vesco, 556 F.2d 665, 669 (2d Cir. 1977)).

28 For that reason, along with the settled rule that “[i]n

1 determining the existence of removal jurisdiction based upon a
2 federal question, [the federal court] must look to the complaint as
3 of the time the removal petition was filed[,]” Williams, 2007 WL
4 1839710, at *1 (internal quotation marks and citations omitted),
5 when defendants brought their motion to dismiss, the operative
6 pleading was the original complaint. See Momans v. St. John’s
7 Northwestern Military Academy, Inc., 2000 WL 33976543, at *2
8 (N.D.Ill. April 20, 2000) (in evaluating defendants’ fraudulent
9 joinder argument, court looked to the first amended complaint,
10 rather than the second amended complaint, because the latter was
11 filed in state court prior to removal, but not served on defendants
12 until after removal). In light of the foregoing, because
13 defendants readily admit that they were served with the Amended
14 Complaint on November 17, 2006, at that point, the original
15 complaint became “non-existent.” Necessarily then, the court must
16 deny as moot defendants’ summary judgment motion directed at that
17 original complaint. See Spokane County Legal Services, Inc. v.
18 Legal Services Corporation, 433 F.Supp. 278, 280 (E.D.Wa. 1977)
19 (denying summary judgment motion where issues raised therein were
20 moot in light of amended complaint; accord Lopez v. Metropolitan
21 Government of Nashville, 2008 WL 913085, at *2 (M.D.Tenn. April 1,
22 2008) (declining to consider previously filed dispositive motions
23 where plaintiffs had filed a third amended complaint, which
24 superseded the original complaint). Indeed, given the filing and
25 service of an amended complaint in this action, any ruling
26 pertaining to the original complaint would be a nullity. See
27 Miller v. American Export Lines, Inc., 313 F.2d 218-19 (2d Cir.
28 1963) (grant of summary judgment after service of amended

1 complaint, but before district court was aware of filing of such
2 complaint, was a nullity because that court did not have the
3 amended complaint before it). Perhaps, at the end of the day,
4 there will be no meaningful distinction between the original and
5 the amended complaint, at least insofar as defendants frame their
6 summary judgment arguments. The court is not free to speculate in
7 that regard, however.

8 **II. Motion to Strike**

9 Likewise, the court denies defendants' motion to strike.
10 First, this motion has been rendered moot by the court's ruling on
11 the related summary judgment motion. Even if this motion was not
12 moot, LRCiv 7.2(m)(2) precludes it, at least in part.

13 Effective December 1, 2006, LRCiv 7.2 was amended to add
14 subsection (m), specifically addressing "Motions to Strike." That
15 Rule plainly states in relevant part:

16 An objection to the admission of evidence offered
17 in . . . opposition to a motion must be presented
18 in the objecting party's responsive or reply
19 memorandum (or, if the underlying motion is a motion
20 for summary judgment, in the party's response to
another party's separate statement of material facts)
and *not in a separate motion to strike* or other
separate filing.

21 LRCiv 7.2(m)(2) emphasis added). Defendants are moving to strike
22 Plaintiff's Statement of Facts ("PSOF") because allegedly: (1) she
23 has failed to timely make her initial Rule 26 disclosures; (2) the
24 attached exhibits are not properly authenticated; (3) the attached
25 exhibits contain hearsay; and (4) PSOF is irrelevant. Although
26 LRCiv 7.2(m)(1) allows a motion to strike on the first ground,
27 subsection (2) of that Rule, as just recited, precludes the
28 remaining three bases for this defense motion.


1 The court hereby ORDERS that:

2 (1) the motion by defendants Connecticut General Life
3 Insurance Company and John Hancock Life Insurance Company (doc. 22)
4 is DENIED as moot; and

5 (2) the motion by defendants Connecticut General Life
6 Insurance Company and John Hancock Life Insurance Company (doc. 29)
7 is DENIED as moot.

8 DATED this 9th day of September, 2008.

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Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record