

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

**BIO GEN, LLC, DRIPPERS VAPE SHOP, LLC,
THE CIGARETTE STORE LLC d/b/a SMOKER
FRIENDLY, and SKY MARKETING
CORPORATION d/b/a HOMETOWN HERO,**

PLAINTIFFS

v.

Case No. 4:23-CV-718-BRW

**GOVERNOR SARAH HUCKABEE SANDERS,
in her official capacity; ATTORNEY GENERAL
JOHN TIMOTHY GRIFFIN
in his official capacity;
TODD MURRAY, SONIA FONTICIELLA,
DEVON HOLDER, MATT DURRETT,
JEFF PHILLIPS, WILL JONES, TERESA HOWELL,
BEN HALE, CONNIE MITCHELL, DAN TURNER,
JANA BRADFORD, FRANK SPAIN, TIM BLAIR,
KYLE HUNTER, DANIEL SHUE, JEFF ROGERS,
DAVID ETHREDGE, TOM TATUM, II,
DREW SMITH, REBECCA REED MCCOY,
MICHELLE C. LAWRENCE, DEBRA BUSCHMAN,
TONY ROGERS, NATHAN SMITH, CAROL CREWS,
KEVIN HOLMES, CHRIS WALTON,
and CHUCK GRAHAM, each in his or her official capacity
as a prosecuting attorney for the State of Arkansas;
JIM HUDSON, in his official capacity as director of the
ARKANSAS DEPARTMENT OF FINANCE
AND ADMINISRTATION; GREG SLED,
in his official capacity as director of the ARKANSAS
TOBACCO CONTROL BOARD; WES WARD,
in his official capacity as secretary of the ARKANSAS
DEPARTMENT OF AGRICULTURE; and
MATTHEW MARSH, in his official capacity as
chair of the ARKANSAS STATE PLANT BOARD**

DEFENDANTS

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Bio Gen, LLC (“Bio Gen”), Drippers Vape Shop, LLC (“Drippers”), The Cigarette Store LLC d/b/a Smoker Friendly (“Smoker Friendly”), and Sky Marketing Corporation d/b/a Hometown Hero (“Sky Marketing”) (collectively, “Plaintiffs”), by and through their attorneys, and for their Response to Defendants’ Motion to Dismiss, state:

1. Plaintiffs filed their original Complaint for Declaratory and Injunctive Relief on July 31, 2023, alleging various constitutional violations arising from the enactment of Act 629 by the 94th General Assembly of Arkansas against Defendants, The State of Arkansas (“Arkansas”), Governor Sarah Huckabee Sanders in her official capacity (“Governor Sanders”), Attorney General John Timothy Griffin in his official capacity, Todd Murray, Sonia Fonticiella, Devon Holder, Matt Durrett, Jeff Phillips, Will Jones, Teresa Howell, Ben Hale, Connie Mitchell, Dan Turner, Jana Bradford, Frank Spain, Tim Blair, Kyle Hunter, Daniel Shue, Jeff Rogers, David Ethredge, Tom Tatum, II, Drew Smith, Rebecca Reed McCoy, Michelle C. Lawrence, Debra Buschman, Tony Rogers, Nathan Smith, Carol Crews, Kevin Holmes, Chris Walton, and Chuck Graham, each in his or her official capacity as a prosecuting attorney for the State of Arkansas (“Prosecutors”); Arkansas Department of Finance and Administration, Arkansas Tobacco Control Board, Arkansas Department of Agriculture; and Arkansas State Plant Board (collectively, “Defendants”).

2. On August 8, 2023, Defendants filed a motion to dismiss asking the Court to dismiss Plaintiffs’ claims against the State of Arkansas, the Governor of Arkansas, the Arkansas Attorney General, the Arkansas Department of Finance and Administration, the Arkansas Tobacco Control Board, the Department of Agriculture, and the Arkansas State Plant Board. *See* ECF No. 38.

3. Plaintiffs filed their Amended Complaint for Declaratory and Injunctive Relief as a matter of course on August 15, 2023. ECF No. 51.

4. It is well established that an amendment under Rule 15 supersedes the original complaint. *Karnes v. Poplar Bluff Transfer Co. (In re Atlas Van Lines, Inc.)*, 209 F.3d 1064, 1067 (8th Cir. 2000) (citations omitted).

5. Upon Plaintiffs' filing the amended complaint within the time permitted by Rule 15, that amended complaint becomes the sole operative complaint in this case.

6. As a result, Defendant's motion to dismiss is now moot. See *Pure Country v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002) (holding that the plaintiff's filing of an amended complaint rendered the defendants' motion to dismiss the original complaint moot).

7. Accordingly, Defendants' motion to dismiss should be denied as moot.

WHEREFORE, Plaintiffs respectfully request that the Court deny Plaintiffs' Motion to Dismiss, and for all other just and proper relief.

Respectfully submitted,

Abtin Mehdizadegan (2013136)
Joseph C. Stepina (2020124)
Allison T. Scott (2020205)
HALL BOOTH SMITH, P.C.
200 River Market Avenue, Suite 500
Little Rock, Arkansas 72201
Telephone: (501) 214-3499
Facsimile: (501) 604-5566
abtin@hallboothsmith.com
jstepina@hallboothsmith.com
allisonscott@hallboothsmith.com

- and -

Justin Swanson
Paul Vink
Admitted Pro hac vice
BOSE MCKINNEY & EVANS, LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
(317) 684-5404
(317) 223-0404
jswanson@boselaw.com
pvink@boselaw.com

Attorneys for Plaintiffs