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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CARL L. JIMENA,)	No. CV-F-07-367 OWW/SKO
)	
)	MEMORANDUM DECISION AND
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION TO ENTER DEFAULT
vs.)	AGAINST UBS AG AND UBS FS
)	(Doc. 170)
)	
UBS AG BANK, et al.,)	
)	
Defendants.)	
)	
)	

Plaintiff Carl L. Jimena, proceeding *in pro per*, has filed a motion to enter default against Defendants UBS AG and UBS FS.

As to UBS FS, Plaintiff asserts that he considers "UBS FS still a pary [sic] to this case as a temporary nominal party, since the Court stated that if after discovery, UBS FS is justified to be an alter ego, agent or liable under fraud theory, the complaint would then be amended." Plaintiff "inquires from the Court if it agrees that UBS FS is a temporary nominal party in this case until after discovery" but if not, Plaintiff "request [sic] that the parties be informed of the current status

1 of UBS FS."

2 The Court is unaware of any authority providing for a
3 "temporary nominal party" in federal court. UBS FS is not a
4 party to this action, see "Memorandum Decision and Order Denying
5 in Part and Granting in Part Plaintiff's Amended Motion to Admit
6 Third Amended Complaint, Striking Allegations Against UBS FS, and
7 Directing Clerk of Court to file Third Amended Complaint" filed
8 on October 6, 2009 (Doc. 155; "October 6, 2009 Memorandum"). A
9 default cannot be entered against a non-party.

10 At the hearing, Plaintiff asserted that UBS AG's Answer to
11 the Third Amended Complaint establishes that UBS FS cannot be
12 dismissed from this action because UBS AG's Answer changes the
13 status of UBS FS. UBS AG's Answer "denies that UBS AG is the
14 'parent company' of the three listed branches, as none of the
15 branches are subsidiaries of UBS AG or corporations of any kind,
16 but rather branch offices maintained by UBS AG or UBS Financial
17 Services Inc. ('UBS FS')." Because UBS AG had previously
18 admitted that UBS FS is a subsidiary of UBS AG, Plaintiff
19 contended that UBS FS is a proper party to this action. This
20 contention was raised for the first time at the hearing.
21 Arguments raised for the first time in a reply brief or at the
22 hearing on a motion are disregarded as a general rule. See
23 *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir.1992); *United*
24 *States v. Boyce*, 148 F.Supp.2d 1069, 1085 (S.D.Cal.2001). In any
25 event, Plaintiff's belated contention does not mandate entry of
26 default against UBS FS pursuant to Plaintiff's motion. UBS FS

1 has been dismissed from this case. Only if UBS FS is reinstated
2 as a defendant in this action by Court order upon motion and
3 fails to timely respond will a request for entry of default
4 against UBS FS be entertained.

5 Plaintiff's motion to enter default against UBS FS is
6 DENIED.

7 As to UBS AG, Plaintiff asserts that he "filed" the Third
8 Amended Complaint on June 19, 2009. (Doc. 141). However,
9 Plaintiff also filed on June 19, 2009 a "motion to admit the
10 Third Amended Complaint." Consequently, the Third Amended
11 Complaint was not "filed" but "lodged" on the docket. By Order
12 filed on June 19, 2009, Plaintiff was ordered to file a notice of
13 motion regarding his motion to admit the Third Amended Complaint,
14 setting the motion for hearing on the Court's civil motion
15 calendar as required by Rule 78-230(b), Local Rules of Practice
16 (now Rule 230, Local Rules of Practice). (Doc. 142). Plaintiff
17 filed the notice of motion on June 23, 2009, setting the motion
18 to admit the Third Amended Complaint for hearing on July 22,
19 2009. (Doc. 145). By minute order filed on June 26, 2009, the
20 hearing on Plaintiff's motion was continued to September 28,
21 2009. (Doc. 147). UBS AG timely filed an opposition to the
22 motion on September 11, 2009. (Doc. 150). The motion was heard
23 on September 28, 2009. (Doc. 153). The October 6, 2009
24 Memorandum was filed, (Doc. 154), directing the Clerk of the
25 Court to file the proposed Third Amended Complaint, after
26 striking the allegations in the proposed Third Amended Complaint

1 as to the alter ego, fraud and agency liability of UBS FS for the
2 alleged actions of UBS AG. The Order regarding the October 6,
3 2009 Memorandum was filed on October 15, 2009 and the Third
4 Amended Complaint was filed on October 15, 2009. (Docs. 159 &
5 160). UBS AG filed an Answer to the Third Amended Complaint on
6 October 27, 2009. (Doc. 166).

7 In seeking a default against UBS AG, Plaintiff relies on
8 Rule 15(a)(3), Federal Rules of Civil Procedure, as in effect
9 before its amendment on December 1, 2009:¹

10 Unless the court orders otherwise, any
11 required response to an amended pleading must
12 be made within the time remaining to respond
13 to the original pleading or within 10 days
14 after service of the amended pleading,
15 whichever is later.

16 Plaintiff argues that the filing by UBS AG of its opposition to
17 Plaintiff's motion to admit the Third Amended Complaint does not
18 toll the ten-day period set forth in Rule 15(a)(3). Plaintiff
19 relies on *General Mills, Inc. v. Kraft Foods Global, Inc.*, 495
20 F.3d 1378 (Fed.Cir.2007).²

21 In *General Mills*, General Mills brought an action against
22 Kraft alleging infringement of its patent relating to rolled food
23 products. Kraft filed an answer and counterclaim, alleging that
24 General Mills breached a settlement agreement by bringing suit.
25 General Mills replied to Kraft's counterclaim and Kraft moved for

26 ¹Effective December 1, 2009, Rule 15(a)(3) sets forth a 14-day
period to respond to an amended pleading.

²Plaintiff's citation to this case is "2006-1569, - 1606,
decided: July 31, 2007."

1 summary judgment. General Mills then filed an amended complaint
2 in which it reasserted the patent infringement claim from the
3 original complaint and asserted a new breach of contract claim on
4 the ground that Kraft breached the settlement agreement. Kraft
5 moved to dismiss both counts of the amended complaint. Kraft
6 never answered the amended complaint or reasserted its
7 counterclaim. The district court granted Kraft's motion to
8 dismiss and dismissed General Mills' patent infringement claim.
9 Exercising its discretion under 28 U.S.C. § 1367(c)(3), the
10 district court then declined to exercise jurisdiction over
11 General Mills' state-law contract claim and entered judgment for
12 Kraft. After entry of judgment, Kraft sought guidance by letter
13 to the district court as to how to proceed with its counterclaim.
14 The district court treated Kraft's letter as a motion to alter or
15 amend the judgment and denied the deemed motion, ruling that
16 because Kraft did not reassert its counterclaim in response to
17 the amended complaint, no counterclaim was pending when the
18 district court entered judgment. In *General Mills, Inc. v. Kraft*
19 *Foods Global, Inc.*, 487 F.3d 1368 (Fed.Cir.2007), the Federal
20 Circuit addressed Kraft's contention that its counterclaim
21 remained extant at least until the deadline for filing the
22 amended answer, and that deadline had not yet passed when the
23 district court entered judgment. Kraft argued that Kraft's
24 timely filing of a motion to dismiss under Rule 12(b)(6), Federal
25 Rules of Civil Procedure, tolled the deadline for filing a
26 responsive pleading until 10 days after the motion was ruled

1 upon. 487 F.3d at 1376. The Federal Circuit ruled:

2 The relevant tolling provision is found in
3 Fed.R.Civ.P. 12(a)(4)(A). Although neither
4 party cites authority that construes Rule
5 12(a)(4)(A) - and we have found none
6 ourselves - by the terms of that rule, the
7 filing of a motion to dismiss does not extend
8 the time for filing an answer to an amended
9 complaint, at least in the circumstances here
10 where the time for responding to the original
11 complaint has already run. Rule 12(a)(1)-(3)
12 sets forth the deadlines for answering
13 original complaints and cross-claims under
14 various circumstances. Rule 12(a)(4) then
15 provides that '[u]nless a different time is
16 fixed by court order, the service of a motion
permitted under this rule [including a Rule
12(b)(6) motion to dismiss] alters *these*
17 *periods of time*' so as to extend the deadline
18 until a motion is ruled upon ... However, the
19 time for answering an *amended complaint* is
20 not one of 'these periods of time.' Rather,
21 the deadline for responding to an amended
22 complaint is established separately under
23 Rule 15: 'A party shall plead in response to
an amended pleading within the time remaining
for response to the original pleading or
within 10 days after service of the amended
pleading, whichever period may be longer,
unless the court otherwise orders.'

17 Thus, because no time 'remain[ed] for
18 response to the original pleading' when
19 General Mills filed its amended complaint,
20 Kraft had only 10 days after service of the
21 amended complaint - not 10 days after the
22 district court's ruling on the motion to
23 dismiss - to file an answer and counterclaim
or take such other action as may have been
permitted to protect its interests. Because
Kraft did not do so before its deadline had
passed, the district court did not abuse its
discretion in finding that Kraft had
abandoned its counterclaim.

24 487 F.3d at 1376-1377.

25 In the opinion relied upon by Plaintiff here, the Federal
26 Circuit clarified its ruling:

1 Kraft argues in its petition for rehearing
2 that our decision undermines the 'clearly
3 expressed intent' of Rule 12 - to permit
4 certain defenses, including failure to state
5 a claim upon which relief can be granted, to
6 be raised by motion instead of in a
7 responsive pleading. However, '[t]he Federal
8 Rules should be given their plain meaning.'
9 *Walker v. Armco Steel Corp.*, 446 U.S. 740,
10 750 n.9 ... (1978). Here, where the meaning
11 of Rule 12 is unambiguous, we decline to
12 ignore the text of the rule in service of a
13 purported purpose.

14 As we previously explained, Rule 12(a)(4) by
15 its express terms only alters 'these periods
16 of time.' ..., where 'these periods' can only
17 refer to the periods of time enumerated
18 immediately before, in Rule 12(a)(1)-(3): 20
19 days after service of a summons and complaint
20 (Rule 12(a)(1)(A)); 60 or 90 days after a
21 request for waiver of process is sent (Rule
22 12(a)(1)(B)); 20 days after service of a
23 cross-claim or counterclaim (Rule 12(a)(2));
24 and 60 days after service of a pleading on
25 the United States or its agencies, officers,
26 or employees (Rule 12(a)(3)). The period of
time to answer an amended complaint is not
only missing from this list of affected
periods, but it is, in the relevant
circumstances, of a different length: '10
days after service of the amended pleading.'
See Fed.R.Civ.P. 15(a). The language of the
rule is unambiguous: Rule 12(a)(4) does not
extend the time for filing an answer to an
amended complaint when 'the time remaining
for response to the original pleading' has
elapsed

Our holding is narrower than Kraft's petition
suggests. We did not and do not hold that
the tolling provision of Rule 12(a)(4)(A)
never applies to responses to amended
pleadings. This is because Rule 15(a), which
sets the deadline for answering an amended
pleading, has two prongs: 'A party shall
plead in response to an amended pleading
[(1)] within the time remaining for response
to an amended pleading or [(2)] within 10
days after service of the amended pleading,
whichever period may be longer.' ...

1 Ordinarily, 'the time remaining for response
2 to the original pleading' will be defined by
3 one of the periods of time enumerated in Rule
4 12(a) and tolled by Rule 12(a)(4)(A). Thus,
5 when there is 'time remaining for response to
6 the original pleading' - for example, when a
7 plaintiff amends her complaint as a matter of
8 right before serving the defendant or before
9 the defendant answers - the first prong of
10 Rule 15(a) (which refers to a deadline that
11 is tolled by Rule 12(a)(4)(A)) becomes the
12 longer of the two prongs, and the extended
13 deadline of Rule 12(a)(4) controls.

14 495 F.3d at 1379.

15 Relying on this Federal Circuit authority, Plaintiff
16 contends that UBS AG should have filed its Answer to the Third
17 Amended Complaint within 10 days from June 16, 2009, when UBS AG
18 was served with the Third Amended Complaint and that UBS AG's
19 failure to do so results in its default.

20 However, Plaintiff's motion to admit the Third Amended
21 Complaint prayed that "the attached Third Amended Complaint be
22 admitted on record upon receipt hereof." In his motion to admit
23 the Third Amended Complaint, Plaintiff contended that he was in
24 full compliance with the Orders of the Court. As UBS AG
25 contends, the Third Amended Complaint was not then an operative
26 pleading because the Court had not yet granted leave to Plaintiff
to file it. When the Court directed the Clerk of the Court to
file the Third Amended Complaint on October 15, 2009, the ten-day
clock started to run and UBS AG's Answer was filed within that
ten-day period, excluding intervening Saturdays and Sundays
pursuant to Rule 6, Federal Rules of Civil Procedure.

Plaintiff replies that the Clerk of the Court did not comply

1 with Plaintiff's request in the motion to admit the Third Amended
2 Complaint that the attached Third Amended Complaint be admitted
3 on the record, but rather lodged the Third Amended Complaint.
4 Plaintiff asserts that the lodging of the Third Amended Complaint
5 by the Clerk was not in compliance with Local Rule 78-230(b),
6 Local Rules of Practice (now Rule 230(b)):

7 Motions defectively noticed shall be filed,
8 but not set for hearing; the Clerk shall
9 immediately notify the moving party of the
10 defective notice and of the next available
11 dates and times for proper notice, and the
12 moving party shall file and serve a new
13 notice of motion setting forth the proper
14 time and date.

11 Plaintiff asserts that, pursuant to this local rule, the Clerk
12 "has a duty to file the Third Amended Complaint, not merely
13 lodged it" and, therefore, the Third Amended Complaint was
14 operative as of June 15, 2009.

15 Plaintiff's position is without merit. By Court Order,
16 following the Local Rule, Plaintiff was advised that the motion
17 to admit the Third Amended Complaint was defectively noticed and
18 ordered to file a notice of motion setting it for hearing.
19 Because the motion prayed that the Third Amended Complaint be
20 "admitted," the Clerk could only lodge the proposed Third Amended
21 Complaint pending a ruling by the Court on Plaintiff's motion.

22 Plaintiff further argues that he served a copy of the Third
23 Amended Complaint on UBS AG on June 15, 2007, referring to
24 Exhibit 1 to his motion for default. Exhibit 1 is a certified
25 receipt that Plaintiff mailed the "motion to admit 3rd Amended
26

1 Complaint with it attached" to UBS AG on June 15, 2009. However,
2 until leave to "admit" the Third Amended Complaint was ordered by
3 the Court, the Third Amended Complaint was not served.

4 Furthermore, entry of default is governed by Rule 55,
5 Federal Rules of Civil Procedure. Rule 55(a) provides:

6 When a party against whom a judgment for
7 affirmative relief is sought has failed to
8 plead or otherwise defend, and that failure
is shown by affidavit or otherwise, the clerk
must enter the party's default.

9 The fact that Rule 55(a) gives the clerk authority to enter a
10 default is not a limitation on the power of the court to do so.
11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §
12 2682, p. 19. Even if Plaintiff had established he is entitled to
13 entry of default against UBS AG, entry of default judgment
14 against UBS AG is governed by Rule 55(b)(2). The Court may set
15 aside an entry of default for good cause, Rule 55(c), and has
16 discretion to decline to enter a default judgment. Wright,
17 Miller & Kane, *id.*, § 2693. Here, Plaintiff's inconsistent
18 positions, continued refusal to timely comply with Court Orders,
19 failure to comply with the Federal Rules of Civil Procedure and
20 the Local Rules of Practice, and taking appeals from non-
21 appealable orders caused or contributed to the present prolix
22 procedural posture of this action. Plaintiff's erratic conduct
23 continues to delay the progress of this case. Defaults and
24 default judgments are viewed with disfavor and UBS AG has
25 consistently opposed Plaintiff in this litigation.

26 CONCLUSION

1 For the reasons stated, Plaintiff's motion to enter default
2 against UBS AG and UBS FS is DENIED.

3 IT IS SO ORDERED.

4 Dated: June 9, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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