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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DONALD DOWNS,

Plaintiff,

v.

NO. CIV. 2:08-cv-2590 FCD DAD

ORDER

HARTFORD LIFE and ACCIDENT
INSURANCE COMPANY; and DOES 1
through 30, inclusive,

Defendants.

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This matter is before the court on defendant Hartford Life and Accident Insurance Company's ("Hartford") motion to dismiss plaintiff's complaint and motion to strike jury demand. In his opposition, plaintiff does not substantively respond to the motion, but rather, seeks leave to amend his complaint to state a claim pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") against defendant Hartford and other parties.

Under Rule 15(a) of the Federal Rules of Civil Procedure, a plaintiff may amend an original complaint "once as a matter of

1 course" before being served with a responsive pleading. A
2 defendant's Rule 12 motion is not a responsive pleading. St.
3 Michael's Convalescent Hosp. v. State of Cal., 643 F.2d 1369,
4 1374 (9th Cir. 1980).

5 Defendant removed this action to federal court on October
6 29, 2008, on the grounds that plaintiff's common law claims were
7 preempted by ERISA. At the time of removal, defendant had not
8 filed an answer or otherwise responded to the complaint in state
9 court. (Notice of Removal, filed Oct. 28, 2008, ¶ 6). Further,
10 defendant has not filed an answer or responsive pleading in this
11 court. Accordingly, plaintiff may file an amended complaint as a
12 matter of right. Such an amended complaint would moot the
13 pending motion to dismiss and motion to strike. Therefore, the
14 court VACATES the hearings on defendant's pending motions and
15 DENIES them as MOOT.

16 Plaintiff shall file and serve his First Amended Complaint
17 within ten (10) days of this Order. Defendants shall have thirty
18 (30) days from the date of service thereof to file their
19 responses.

20 IT IS SO ORDERED.

21 DATED: January 5, 2009



22 FRANK C. DAMRELL, Jr.
23 UNITED STATES DISTRICT JUDGE
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