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

BRENT ALLEN WINTERS, et al.,

Plaintiffs,

No. 2:09-cv-00522 JAM KJN PS

v.

DELORES JORDAN, et al.,

Defendants.

ORDER

Presently before the court are two ex parte applications filed by defendants David Silber and Delores Jordan, which seek leave to file motions to dismiss plaintiffs' Third Amended Complaint or for a more definite statement pursuant to Federal Rule of Civil Procedure 12. (Dkt. Nos. 253, 254.) The proposed motions, which notice a hearing date of March 31, 2011, are attached to the applications. It does not appear that Mr. Silber, who is a named defendant and is also representing Ms. Jordan,¹ served plaintiffs with the pending ex parte applications.

Briefly stated, Mr. Silber declares that due to his excusable neglect and trying personal circumstances over the last year, he neglected to actually file his and Ms. Jordan's respective responsive motions in or around November 2009. (See Silber Decl. ¶¶ 5-6, 7.) Apparently, Mr. Silber drafted those motions in 2009, did not actually file those motions, and

¹ Mr. Silber also represents defendants Virginia Armstrong and Michael Armstrong in this case and previously filed successful motions to dismiss on those defendants' behalf. (See Silber Decl. ¶ 5; Dkt. Nos. 179, 180.)

1 just recently realized his error. (Id. ¶¶ 3, 5, 7.) David Silber also appeared at the February 17,
2 2011 hearing on plaintiffs’ motion for default judgment (Dkt. No. 189) to explain the same.
3 Plaintiffs failed to appear at that hearing.²

4 IT IS HEREBY ORDERED that:

5 1. The ex parte applications for leave to file responsive motions pursuant to
6 Federal Rule of Civil Procedure 12, filed by defendants David Silber and Delores Jordan (Dkt.
7 Nos. 253-54), are granted.

8 2. The motions to dismiss or for a more definite statement submitted by
9 defendants David Silber and Delores Jordan, which are attached to the ex parte applications, are
10 deemed filed on February 17, 2011. The hearing on Mr. Silber’s and Ms. Jordan’s motions to
11

12 ² Defendant Delores Jordan is named as one of the “Non-Responding Defendants” in
13 plaintiffs’ motion for default judgment. (Mot. for Default J. ¶ 2.) David Silber is not. It is
14 unclear from that motion for default, which is factually addressed to the acts of the so-called
15 “Federal Defendants” and defendant John Taylor, whether it also sought a default judgment
16 against Ms. Jordan or Mr. Silber.

17 In any event, and as will be stated in a forthcoming order denying plaintiffs’ motion for
18 default judgment, plaintiffs’ motion is, at a minimum, procedurally improper and thus not well-
19 taken. Federal Rule of Civil Procedure 55 governs the entry of default by the clerk and the
20 subsequent entry of default judgment by either the clerk or the district court. As the Ninth
21 Circuit Court of Appeals has stated, Rule 55 requires a “two-step process” consisting of:
22 (1) seeking a clerk’s entry of default, and (2) filing a motion for the entry of default judgment.
23 See Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986) (“Eitel apparently fails to understand
24 the two-step process required by Rule 55.”); accord Symantec Corp. v. Global Impact, Inc., 559
25 F.3d 922, 923 (9th Cir. 2009) (noting that Rules 55(a) and (b) provide a two-step process for
26 obtaining a default judgment); see also Norman v. Small, No. 09cv2235 WQH, 2010 WL
5173683, at *2 (S.D. Cal. Dec. 14, 2010) (unpublished) (denying plaintiff’s motion for default
judgment because the clerk had not yet entered a default); Cramer v. Target Corp., No.
1:08-cv-01693-OWW-SKO, 2010 WL 2898996, at *1 (E.D. Cal. July 22, 2010) (unpublished)
 (“Obtaining a default judgment in federal court is a two-step process that includes: (1) entry of
default and (2) default judgment.”); Bach v. Mason, 190 F.R.D. 567, 574 (D. Idaho 1999)
 (“Plaintiffs have improperly asked this court to enter a default judgment without first obtaining
an entry of default by the clerk. Since plaintiffs’ motion for entry of default judgment is
improper, it is denied.”), aff’d, 3 Fed. Appx. 656 (9th Cir. 2001), cert. denied, 534 U.S. 1083
(2002). Here, plaintiffs did not request or obtain a clerk’s entry of default from the Clerk of
Court upon a showing by affidavit or otherwise that defendants failed to plead or otherwise
defend themselves. Accordingly, plaintiff’s motion for default judgment is procedurally
improper and not properly before the undersigned.

