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8   IN THE UNITED STATES DISTRICT COURT

9   FOR THE NORTHERN DISTRICT OF CALIFORNIA

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11   MARIA JIMENEZ,   No. C 09-0146 MEJ

12   Plaintiff(s),

13   **ORDER DENYING AS MOOT**
      vs.   **DEFENDANT'S MOTION TO DISMISS**
14   HOMECOMINGS FINANCIAL LLC,   **SECOND ORDER FOR PLAINTIFF TO**
                                                         FILE CONSENT/DECLINATION
15   Defendant(s).
                                                    /
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18   Pending before the Court is Defendant's Motion to Dismiss. (Dkt. #5.) However, on March

19   4, 2009, Plaintiff filed an Amended Complaint. (Dkt. #13.) Under Federal Rule of Civil Procedure

20   15(a), a party may amend its pleading once "as a matter of course" at any time before a responsive

21   pleading is served. "A motion to dismiss is not a 'responsive pleading' within the meaning of Rule

22   15." *Crum v. Circus Circus Enters.*, 231 F.3d 1129, 1130 n. 3 (9th Cir. 2000). Thus, where a

23   motion to dismiss is filed instead of an answer, Rule 15(a) allows a plaintiff to amend the original

24   complaint once without obtaining permission from the court. An "amended complaint supersedes

25   the original, the latter being treated thereafter as non-existent." *Forsyth v. Humana, Inc.*, 114 F.3d

26   1467, 1474 (9th Cir.1997).

27   Here, Defendant did not file an answer, but instead filed a motion to dismiss. As no prior

28   amended complaints have been filed, Plaintiff was entitled to file an amended complaint as a matter

1 of course under Rule 15(a). The amended complaint supersedes the original complaint, and the

2 original complaint is treated as non-existent. Since Defendant's motion is based on Plaintiff's

3 original and now "non-existent" complaint, Defendants' motion is now moot. Accordingly, the

4 Court hereby DENIES Defendant's motion as moot. Defendant shall file an answer or other

5 responsive pleading within 30 days from the date of this Order.

6   Further, the Court instructs Plaintiff that no further amendments to her complaint may be

7 made without seeking leave of Court pursuant to Rule 15 and Civil Local Rule 7. Any attempt to

8 file an amended complaint without proper notice to Defendant under Civil Local Rule 7 and a court

9 order shall be stricken.

10   Plaintiff is also reminded that she must file her consent/declination form, as previously

11 ordered on February 10, 2009. (Dkt. #9.) Failure to file the consent/declination by March 19, 2009

12 shall result in the issuance of an order to show cause for failure to comply with this Court's orders.

13   **IT IS SO ORDERED.**

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15 Dated: March 5, 2009

MARIA-ELENA JAMES
16   United States Magistrate Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MARIA C. JIMENEZ,

          Plaintiff,

  v.

HOMECOMINGS FINANCIAL et al,

          Defendant.
_____/

Case Number: CV09-00146 MEJ

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 5, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Maria Jimenez
5176 Grass Valley Way
Antioch, CA 94531

Dated: March 5, 2009

                        Richard W. Wieking, Clerk
                        By: Brenda Tolbert, Deputy Clerk

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