IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROY WERBEL,

                   Plaintiff,

         v.

KELLOGG USA,

                  Defendant.

NO. C09-4457 TEH

ORDER GRANTING MOTION TO DISMISS

United States District Court
For the Northern District of California

     This matter comes before the Court on Defendant Kellogg USA's motion to dismiss under Federal Rule of Civil Procedure 12(b)(5) for insufficient service of process. Rule 4(m) of the Federal Rules of Civil Procedure provides that:

> If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Plaintiff Roy Werbel filed this action on September 22, 2009, making the due date for service January 20, 2010. To this date, the record reflects no proof of service.

     In addition, the motion was noticed for hearing on March 8, 2010, making the opposition or statement of non-opposition due no later than February 15, 2010. Civ. L.R. 7-3(a)-(b). Plaintiff failed to file either an opposition or statement of non-opposition, and the Court construes this silence as a concession that timely service was not effectuated. In the absence of any argument to the contrary by Plaintiff, the Court also finds no good cause to extend time for service.

1        Accordingly, with good cause appearing, the March 8, 2010 hearing is VACATED,

2  and Defendant's motion is hereby GRANTED.  This case is dismissed without prejudice

3  pursuant to Rules 4(m) and 12(b)(5) of the Federal Rules of Civil Procedure.  The Clerk shall

4  close the file.

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6  **IT IS SO ORDERED.**

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8  Dated:   02/18/10

                       THELTON E. HENDERSON, JUDGE

9                        UNITED STATES DISTRICT COURT

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