

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JACOB MCKEAN, individually, on
behalf of himself and all others
similarly situated,

Plaintiff,

v.

ABC FINANCIAL SERVICES, INC.,
an Arkansas Corporation; THE
ARENA MARTIAL ARTS, a business
entity form unknown,

Defendants.

No. 3:18-cv-00923-WQH-RBB

ORDER

HAYES, Judge:

The matter before the Court is Plaintiff's Ex Parte Application for an Order Continuing the Hearing Date on Plaintiff's Motion for An Order Granting Leave to File First Amended Complaint. (ECF No. 29).

I. Background

On October 25, 2018, this Court granted Defendant ABC Financial's motion to dismiss without prejudice, and ordered that Plaintiff file for leave to amend within twenty days. (ECF No. 26). On November 13, 2018, Plaintiff timely filed a Motion for Leave to File First Amended Complaint. (ECF No. 27). In Plaintiff's accompanying Memorandum of Points and Authorities (ECF No. 27-1), Plaintiff described in detail how the attached proposed First Amended Complaint (FAC) differs from Plaintiff's initial Complaint. *See id.* at 2-3. Plaintiff failed, however,

1 to attach to Plaintiff’s Motion a “version of [the] pleading that shows—through
2 redlining, underlining, strikeouts, or other similarly effective typographic
3 methods—how that pleading differs from the previously dismissed pleading” as
4 required by Local Civil Rule 15.1(c). On December 3, 2018, Defendant ABC
5 Financial filed Opposition on the sole ground that Plaintiff “fail[ed] to comply with
6 the Court’s October 25, 2018 Order and Local Rule 15.1(c).” (ECF No. 28 at 2).

7 On December 4, 2018, after Defendant declined to stipulate to the filing of a
8 redlined version of Plaintiff’s FAC, Plaintiff filed the Ex Parte Motion at issue,
9 seeking “an [o]rder continuing Plaintiff’s motion for leave and further [o]rder[ing]
10 the filing of the redacted/redlined Proposed FAC attached to the Declaration of
11 Sheldon A. Ostroff in support of this ex parte application as Exhibit 2, *nunc pro*
12 *tunc*, as of November 13, 2018.” (ECF No. 29 at 3). On December 5, 2018,
13 Defendant filed Opposition to Plaintiff’s Ex Parte Motion. (ECF No. 30).

14 **II. Ruling of the Court**

15 “In any case for the convenience of the parties in interest, or in the interest of
16 justice, a judge may waive the applicability of these rules.” S.D. Cal. Civ. R. 1.1(d).

17 In this case, Plaintiff states that the failure to include a redlined copy of the
18 proposed FAC in Plaintiff’s Motion to File First Amended Complaint “was an
19 inadvertent and unintended oversight.” (ECF No. 29 at 3). In Defendant’s
20 Opposition to Plaintiff’s Ex Parte Motion, Defendant states, “ABC was prejudiced
21 because this redlined version of the proposed new pleading was not provided with
22 the motion filed on November 13, 2018 and Plaintiff’s effort to correct this 21 days
23 later cannot change the inherent defects in the motion.” (ECF No. 30 at 2).
24 Defendant does not provide any detail, however, as to how Defendant was
25 prejudiced by Plaintiff’s failure to include a redlined copy in Plaintiff’s November
26 13, 2018 Motion. In Defendant’s prior December 3, 2018 Opposition to Plaintiff’s
27 Motion to Amend, Defendant’s sole contention is that Plaintiff’s Motion should be
28 denied because of a failure to comply with Local Rule 15.1(c). Defendant states “it

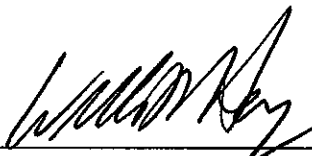
1 will address all substantive defects in this proposed first amended complaint in a
2 motion to dismiss.” (ECF No. 28 at 2).

3 The Court finds that Plaintiff’s November 13, 2018 Memorandum of Points
4 and Authorities (ECF No. 27-1) was sufficiently detailed to put Defendant on notice
5 of differences between the original Complaint this Court dismissed on October 25,
6 2018 and the proposed FAC. Defendant explicitly chose not to address “substantive
7 defects” in Plaintiff’s FAC, and consequently has failed to show that allowing
8 Plaintiff’s redlined version to be filed *nunc pro tunc*, as of November 13, 2018,
9 would cause any prejudice to Defendant. The redacted/redlined Proposed FAC
10 attached to the Declaration of Sheldon A. Ostroff (Ex. 2, ECF No. 29-1) shall be
11 considered filed *nunc pro tunc* as of November 13, 2018. The Court declines to
12 continue the December 17, 2018 hearing date on Plaintiff’s Motion for Leave to File
13 First Amended Complaint. (ECF No. 27).

14 IT IS HEREBY ORDERED that Plaintiff’s Ex Parte Application for an Order
15 Continuing the Hearing Date on Plaintiff’s Motion for An Order Granting Leave to
16 File First Amended Complaint (ECF No. 29) is GRANTED IN PART AND
17 DENIED IN PART. Plaintiff’s redacted/redlined Proposed FAC attached to the
18 Declaration of Sheldon A. Ostroff (Ex. 2, ECF No. 29-1) shall be considered filed
19 *nunc pro tunc* as of November 13, 2018. Plaintiff’s request for a continuance of the
20 December 17, 2018 hearing date on Plaintiff’s Motion for Leave to File First
21 Amended Complaint (ECF No. 27) is denied.

22
23 Date: _____

12/6/18



24 **William Q. Hayes**
25 United States District Judge
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