

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**DARRELL WHITE,**

**Plaintiff,**

**v.**

**Case No. 2:10-CV-1167  
JUDGE SARGUS  
MAGISTRATE JUDGE KING**

**FIFTH THIRD BANK,**

**Defendant.**

**ORDER and  
REPORT AND RECOMMENDATION**

This matter is before the Court for consideration of the Plaintiff's *Motion for Default Judgment*, Doc. No. 9; *Motion to Compel Default Judgment*, Doc. No. 15; and *Motions for Leave to Supplement the Complaint*, Doc. Nos. 13 and 14. For the reasons that follow, it is recommended that Plaintiff's motions pertaining to default judgment be denied. Plaintiff's motions seeking leave to supplement or amend the *Complaint* are granted.

**I.**

Plaintiff Darrell White ["Plaintiff"], a state inmate who is proceeding without the assistance of counsel, filed this action on December 29, 2010 against Defendant Fifth Third Bank [hereinafter "the Bank" or "Defendant"] asserting a variety of claims.<sup>1</sup> According to the *Complaint*, Doc. No. 4, Plaintiff has an account at the Bank but has allegedly been denied access

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<sup>1</sup>The original *Complaint* asserts various federal claims and claims under state law. As the Court observed in its *Initial Screen of the Complaint*, Doc. No. 5, the only federal claim that might proceed against this non-governmental Defendant is a claim for race discrimination under 42 U.S.C. §1981; it appears that the Court would have supplemental jurisdiction over Plaintiff's state law claims.

to that account. *Id.* at 6. Plaintiff alleges that his attorney, Kevin Stotts, presented a power of attorney to the Bank in order to permit Plaintiff to access the account on behalf of a minor, but the Bank declined to honor that document. *Id.* at 6-7. According to Plaintiff, this denial of access amounts to a breach of contract and negligence. *Id.* at 10. Plaintiff also alleges that the Bank acted in breach of its contract with Plaintiff on account of Plaintiff's African-American race. *Id.*

Following the filing of Plaintiff's *Complaint*, the Court directed that the United States Marshal effect service of process on the Defendant Bank. *See* Doc. No. 5. Service of process was apparently made on December 31, 2010. *See Summons Returned Executed*, Doc. No. 8. The Defendant Bank has not responded to Plaintiff's *Complaint*.

On February 4, 2011, Plaintiff filed a *Motion for Default Judgment*, Doc. No. 9, and on April 4, 2011, Plaintiff filed a *Motion to Compel Default Judgment*, Doc. No. 15. Plaintiff has also filed two *Motions to Supplement the Complaint*. Doc. Nos. 13 and 14.

## II.

Plaintiff seeks leave to amend the *Complaint* to join the Federal Deposit Insurance Corporation ["FDIC"] as an additional defendant and to assert additional claims against the Bank and the FDIC. For example, Plaintiff proposes to add claims for breach of warranty, fraud, conspiracy, and infliction of emotional distress. Plaintiff also seeks relief on behalf of a purported class of plaintiffs. Although Plaintiff filed two separate motions, Doc. Nos. 13, 14, the Court receives the motions as a single request for leave to amend the *Complaint*.

Under Rule 15 of the Federal Rules of Civil Procedure, a party may amend the original complaint, without leave of court, within 21 days after that complaint is served. Fed. R. Civ. P.

15(a)(1)(A). The *Complaint* in this action was apparently served on Defendant on December 31, 2010; Plaintiff's request for leave to amend the *Complaint* was made on February 23, 2011 – *i.e.*, more than 21 days after service of the *Complaint*.

A party may also amend a complaint with leave of court, and "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The grant or denial of a request to amend a complaint is left to the broad discretion of the trial court. *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1130 (6<sup>th</sup> Cir. 1990). In exercising its discretion, the trial court may consider such factors as "undue delay, bad faith or dilatory motive on the part of a movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [and] futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Moreover, leave to amend is properly denied where the claim sought to be asserted by the amendment would not survive a motion to dismiss. *Kottmyer v. Maas*, 436 F.3d 684, 692 (6<sup>th</sup> Cir. 2006) ("A district court may deny a plaintiff leave to amend his or her complaint. . . when the proposed amendment would be futile.")

Because this case is in its earliest stage, and because there has been no response to the original *Complaint*, the Court concludes that its discretion is better exercised in granting plaintiff leave to amend the *Complaint*.

### III.

Plaintiff has asked that judgment by default be entered against the Bank. Rule 55 of the Federal Rules of Civil Procedure contemplates a two-step process in obtaining a default judgment against a defendant who has failed to plead or otherwise defend. First, a plaintiff must request from the Clerk of Court an entry of default, describing the particulars of the defendant's

failure to plead or otherwise defend. Fed. R. Civ. P. 55(a). If default is entered by the Clerk, the plaintiff must then move the court for entry of a default judgment. Fed. R. Civ. P. 55(b).

In this case, Plaintiff's motions for default judgment, Doc. Nos. 9, 15, were filed without first applying for entry of default by the Clerk. Because Plaintiff's motions for default judgment are procedurally defective, and because Plaintiff has sought and been granted leave to assert additional claims against the Bank, the Court recommends that his motions for default judgment be denied.

#### IV.

**WHEREUPON** Plaintiff's motions for leave to supplement or amend the *Complaint*, Doc. Nos. 13, 14, are **GRANTED**. Plaintiff is **ORDERED** to file, within fourteen (14) days, a comprehensive amended complaint that contains all of the claims (whether presented in his original *Complaint* or in his motions for leave to amend that *Complaint*) that he intends to assert against each of the Defendants.<sup>2</sup> Plaintiff must also serve a copy of the anticipated amended complaint on the Bank and arrange for service of process, by the United States Marshal Service, on the FDIC. *See* Fed. R. Civ. P. 4(i). Plaintiff is reminded that claims against any defendant not served with process within 120 days must be dismissed. *See* Fed. R. Civ. P. 4(m).

It is **RECOMMENDED** that Plaintiff's *Motion for Default Judgment*, Doc. No. 9 and *Motion to Compel Default Judgment*, Doc. No. 15, be **DENIED**.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within fourteen (14) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof

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<sup>2</sup>The Court will require that all of Plaintiff's claims against every Defendant be presented in a single document so as to minimize the risk of confusion and uncertainty in the record.

in question, as well as the basis for objection thereto. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Foundation of Teachers, Local 231, etc.*, 829 F.2d 1370 (6<sup>th</sup> Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6<sup>th</sup> Cir. 1981).

**April 6, 2011**  
**DATE**

*S/ Norah McCann King*  
**NORAH McCANN KING**  
**UNITED STATES MAGISTRATE JUDGE**

