IN THE SUPREME COURT OF MISSISSIPPI

No. 2017-IA-00895-SCT

FRANKLIN COLLECTION SERVICE, INC. ***Appellant***

v.

BANCORPSOUTH BANK ***Appellee***

Consolidated with:
2017-IA-00900-SCT

FRANKLIN COLLECTION SERVICE, INC. ***Appellant***

v.

BANCORPSOUTH BANK ***Appellee***

Consolidated with:
2017-IA-00905-SCT

BANCORPSOUTH BANK ***Appellant***

v.

FRANKLIN COLLECTION SERVICE, INC. ***Appellee***

ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE/CROSS-APPELLANT

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Appellant/Cross-Appellee Franklin Collection Service, Inc. (Plaintiff below);
2. Appellee/Cross-Appellant BancorpSouth Bank (Defendant below);
3. Claude F. Clayton, Jr., William H. Davis, Jr., and Dana G. Dearman of Clayton O'Donnell, PLLC, counsel for Franklin Collection Service, Inc.;
4. J. Patrick Caldwell and David Haadsma of Riley, Caldwell, Cork & Alvis, P.A., counsel

for BancorpSouth Bank; and

5. Honorable Jim S. Pounds, Judge of the Circuit Court of Lee County, Mississippi.

Respectfully submitted on this the 3rd day of October, 2018.

/s/ J. Patrick Caldwell
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I. Statement of the Issues

A. Issues raised by Franklin Collection Service, Inc. on Direct Appeal:

1. Whether a motion under the provisions of Rule 8(d), Miss. R. Civ. P., to deem the allegations of an amended complaint as admitted may be utilized as a substitute for the default provisions of Rule 55 and Rule 60, Miss. R. Civ. P., and, if so, whether Rule 55 and Rule 60 case law pertaining to relief from default and default judgments is applicable to such utilization.

2. Whether, under the specific procedural facts of this case, the trial court abused its discretion in allowing BancorpSouth Bank to file an out-of-time answer.

3. Whether, under the specific procedural facts of this case, the filing of BancorpSouth Bank's out-of-time answer, as allowed by the trial court, rendered Rule 8(d) of no further effect.

B. Issue raised by BancorpSouth Bank on Cross-Appeal: Whether, under the specific procedural facts of this case, the trial court erred by not granting BancorpSouth Bank's motion to set aside the clerk's entry of default when a motion for default judgment is based on that default entry was denied.

II. Statement of the Case

A. The Nature of the Case

These consolidated interlocutory appeals arise from an action filed by Franklin Collection Service, Inc. ("Franklin"), as plaintiff, against BancorpSouth Bank ("BancorpSouth"), as defendant. Franklin, a corporation, was a commercial deposit customer of BancorpSouth. Franklin alleged that BancorpSouth improperly charged overdraft fees to Franklin over a period exceeding three years and that BancorpSouth should have informed the president of Franklin, personally, that overdraft fees were being incurred, notwithstanding the fact that throughout this

period Franklin received written notices from BancorpSouth for each day that an overdraft occurred and further received written monthly statements from BancorpSouth again detailing the overdraft activity for the previous month.

B. The Course of Proceedings and Disposition in the Court Below

A thorough and detailed understanding of the highly unusual procedural history of this case is critical to the disposition of these interlocutory appeals. What follows in this subsection B is a brief summary of that history. A more detailed recounting of the proceedings below—as they are inseparable from the facts pertinent to these appeals—is set forth in subsection C, *infra* at pp. 3-9. In mid-2013, after the parties had been litigating the case for over three years, the trial court granted leave for Franklin to file a second amended complaint (RE 5, R. 335-68) (the "Second Amended Complaint"). Although BancorpSouth did not file an answer to the Second Amended Complaint, the parties continued to litigate the case for another three and a half years, at which point BancorpSouth filed a motion for summary judgment. With that motion pending, and with no prior notice to BancorpSouth, Franklin obtained a clerk's entry of default against BancorpSouth in view of the lack of an answer to the Second Amended Complaint. This triggered a flurry of additional motions.

The trial court *denied* Franklin's motion for default judgment. The trial court *denied* Franklin's separate application for default judgment. The trial court *denied* Franklin's motion to deem the allegations of the Second Amended Complaint as admitted. The trial court *denied* Franklin's motion *in limine* seeking to prohibit BancorpSouth from offering any evidence contradicting the allegations of the Second Amended Complaint. The trial court *granted* BancorpSouth's motion to file its out-of-time answer to the Second Amended Complaint to relate back to the date that the answer was originally due in 2013. But the trial court *denied* BancorpSouth's motion to set aside the clerk's entry of default. These interlocutory appeals

followed.

C. Facts

Although these appeals present largely procedural questions, those questions must be viewed in the context of the underlying facts of the case. Franklin all but ignores the underlying facts in its brief. However, a detailed discussion of the facts is essential to understanding the trial court's finding that BancorpSouth has colorable defenses to the Second Amended Complaint. It also sheds light on why Franklin so desperately wants to avoid trial on the merits.

Franklin is a large regional collection agency. It had a business banking relationship with BancorpSouth that included sizeable loans and various commercial checking accounts and other ancillary services such as electronic banking. Millions of dollars flowed through Franklin's operating account and it wrote hundreds of checks monthly. See, for example, a complete monthly bank statement, RE38, SE-F7, more fully explained below.

By the very nature of its collection business, Franklin deposited into its operating account many checks from debtors that bounced. As a result, Franklin repeatedly did not maintain a positive balance in its operating account and was overdrawn for several consecutive banking days on numerous occasions for many years. Instead of returning checks that Franklin wrote against insufficient funds, BancorpSouth routinely paid Franklin's checks into overdraft. These payments resulted in service charges to the account. For all such overdrafts and charges, BancorpSouth sent Franklin daily notices and detailed monthly bank statements.

The daily notices were unmistakable:

> NOTICE OF CHARGE FOR OVERDRAWN ACCOUNT
>
> THE ITEMS LISTED BELOW WERE PRESENTED FOR PAYMENT. OUR RECORDS INDICATE THAT FUNDS WERE INSUFFICIENT TO PAY THESE ITEMS. THE ITEMS WERE PAID AND THE CHARGES INDICATED BELOW WERE ASSESSED TO COVER THE

COSTS OF HANDLING. PLEASE ADJUST YOUR CHECKBOOK AND DEPOSIT FUNDS TO COVER THESE ITEMS.

See, e.g., Daily Notices for a single day, March 28, 2006, Collective Exhibit D-1 to the Summary Judgment Motion (part of the Sealed Exhibits, hereafter "SE"), or SE-D1, and RE 31; Daily Notices for the Month of August 2007, SE-D2 and RE 32; and Daily Notices for March 28, 2008, April 25, 2008, April 28, 2008 and May 30, 2008, SE-E and RE 33.

Monthly bank statements also detailed the overdraft changes; thirty-three monthly bank statements were sent to Franklin during the time frame involved. *See, e.g.* Bank Statement for January 2007, SE-F1 and RE 34; Bank Statement Excerpt for April 2007 SE-F2 RE 35; Bank Statement Excerpt for November 2007, SE-F5 and RE 36; Full Bank Statement for December 2007, SE-F6(a) and RE 37; and Full Bank Statement for May 2008, SE-F7 and RE 38. These daily notices and monthly statements were mailed to Franklin's principal place of business as designated on its account documents. Despite this abundance of written notice, Franklin incurred total overdraft charges in excess of $600,000 over a period of three years.[1]

Franklin demanded reimbursement of these fees and, when BancorpSouth refused, Franklin filed a first amended complaint against BancorpSouth in 2010 on counts of breach of contract, negligence, and others. (RE 6, R. 8-35) (the "First Amended Complaint").[2] BancorpSouth timely filed its answer to the First Amended Complaint in 2010 and has continuously and vigorously defended against Franklin's claims at all times since.

Regardless of the legal theory, Franklin's claims center around two themes. First, Franklin contends that BancorpSouth's practice of posting checks in the order of high amount to low amount (which Franklin admits is permissible under the Uniform Commercial Code) was

[1] $113,000 in 2006; $291,000 in 2007; and $209,000 in 2008.

[2] Franklin's accounting firm was the only defendant in the original complaint. (R. 1.) BancorpSouth was added as a defendant with the First Amended Complaint.

contractually overridden by the Account Agreement. (RE 40, SE-B.) Second, Franklin contends that its president, Dan Franklin, (who, significantly, is *not* a party to the suit) had some personal right to be directly informed about the overdrafts and resulting charges, notwithstanding that BancorpSouth's depositor was the corporation Franklin Collection Services, Inc., not its officers or any individuals such as Dan Franklin. (*See* Corporate Resolution, RE 39, SE-A; Account Agreement, RE 40, SE-B.)

Besides the obvious factual defenses of the abundance of corporate notice of the overdraft charges and the inconsistency of elementary corporate law with the theory of Mr. Franklin's personal "right" to be separately notified, BancorpSouth also raised numerous other affirmative defenses. A total of forty-three affirmative defenses were advanced by BancorpSouth in its answer to the First Amended Complaint, with the forty-fourth defense being its paragraph-by-paragraph response to Franklin's factual allegations. [BancorpSouth's Separate Answer and Defenses of Defendant BancorpSouth Bank to the First Amended Complaint ("Answer to First Amended Complaint"), RE 9, R. 79-94.]

Some two and one-half years later, in November 2012, Franklin filed a motion for leave to file the Second Amended Complaint (RE 7, R. 253-92), a copy of which was received by BancorpSouth's counsel. (Tr. 15.) Not until June 5, 2013 did the lower court enter an order granting leave to file the Second Amended Complaint. (RE 8, R. 334.) BancorpSouth's counsel has no record of receiving this order. (Tr. 17-19.) Although an answer to the Second Amended Complaint was not filed, for the next three years the parties actively litigated the case as if the Second Amended Complaint had been answered.

The Second Amended Complaint (RE 5, R. 335-68) is essentially the same as the First Amended Complaint (RE 6, R. 8-35), with the exception of a new count alleging breach of fiduciary duty based on the same underlying facts. The motion for leave to file the Second

Amended Complaint specifically shows that there are no new core factual allegations, advances the one new breach of fiduciary duty count on the same overall facts alleged in the First Amended Complaint, and states as its intent to clarify and narrow already existing allegations as to a former BancorpSouth employee. (RE 7.) The claims involving the former employee were subsequently dismissed by Franklin. (R. 614.)

There are twenty-five docket entries from the time the motion for leave to file the Second Amended Complaint was filed until the order granting it in June 2013. During the forty-month period from the entry of that order until the clerk's entry of default in October 2016, thirty-seven more docket entries were added, including *five* scheduling orders and an order setting the case for jury trial at Franklin's request. (RE 1, R. 841-47.) Apart from these docketed matters, litigation continued with discovery and depositions. For example, in addition to its continued defense against the claims raised in the First Amended Complaint and repeated in the Second Amended Complaint, BancorpSouth "otherwise defended" against the only new count, breach of fiduciary duty with targeted discovery. An example of this defense is found in BancorpSouth's deposition of Don Coker, one of Franklin's experts, taken *after* the filing of the Second Amended Complaint, where the specific topic of breach of fiduciary duty was a subject. (RE 12, R. 883-84.) Both the trial court's docket and the parties' conduct of litigation plainly reflect BancorpSouth's active, continuous and vigorous defense against all of Franklin's claims. (RE 1, R. 841-47.)

BancorpSouth filed its motion for summary judgment on September 1, 2016, (RE 10, R. 512-26, accompanied by the Sealed Exhibits) ("the Summary Judgment Motion") the last day for motions under the Fifth Amended Agreed Scheduling Order (the "Fifth Scheduling Order"). (RE 13, R. 409-10.) Franklin filed its response to the motion for summary judgment on October 14, 2016. (R. 610.) On the same day, after filing its response, Franklin filed its motion deem the

allegations of the Second Amended Complaint as admitted (R. 754),[3] filed its application for entry of default against BancorpSouth (RE 14, R. 800), and obtained entry of default by the clerk (RE 15, R. 804).

How Franklin obtained the clerk's entry of default against BancorpSouth is important. Notwithstanding that BancorpSouth had appeared in the case in early 2010 with its answer to the First Amended Complaint and had advanced its defenses at all times thereafter, Franklin employed an approach to entry of default that deprived BancorpSouth of the opportunity to contemporaneously object. Counsel for Franklin served counsel for BancorpSouth with its application for entry of default by depositing it in first class mail on Friday, October 14, 2016, as shown on the certificate of service. (RE 14, R. 801.) That same day, while BancorpSouth's copy sat in outgoing mail, Franklin's counsel *hand-delivered* the application for entry of default to the clerk's office (RE 14, R. 800) and obtained in person the deputy clerk's entry of default against BancorpSouth that same Friday, October 14, 2016 (RE 15, R. 804). This stealthy approach by Franklin ensured that BancorpSouth would have no opportunity to object, challenge, or participate in the process whereby the clerk entered default in a case BancorpSouth had been litigating for over six years.

As a part of the papers that were hand-delivered to the clerk on the same day they were deposited in the mail to BancorpSouth's counsel, Franklin's counsel included an affidavit in support of the application for entry of default that artfully adjusted the language specified by Rule 55(a).[4] While Rule 55(a) calls for supporting affidavits to show that the defaulting party "has failed to plead or otherwise defend", the affidavit of Franklin's counsel was careful to say that BancorpSouth had "failed to answer or otherwise *respond* to Franklin's Second Amended

[3] This motion was filed by Franklin well after the deadline set by the Fifth Scheduling Order.

[4] Rules are of central importance in this brief. Unless otherwise indicated in the text, every citation in this brief to a Rule refers to the Mississippi Rules of Civil Procedure.

Complaint." (Affidavit, ¶ 5, RE 16, R. 802-03, emphasis added.) This, of course, was because Franklin's counsel knew that BancorpSouth had at all times been actively defending against the allegations and counts of the Second Amended Complaint for years.

Franklin offers no explanation for waiting some three and one-half years following the answer date for the Second Amended Complaint before it furtively asked the clerk to enter default. The most likely explanation is that Franklin's counsel, proceeding for years under the impression that the Second Amended Complaint had been answered, stumbled upon the lack of an answer while preparing to respond to BancorpSouth's motion for summary judgment. Regardless of why Franklin waited forty months to ask the clerk to enter default, it did so only *after* BancorpSouth had filed its motion for summary judgment.

A month and a half after the September 1, 2016 motion deadline, Franklin filed its motion for default judgment (RE 17, R. 807-10), later advanced in an identical pleading renamed "Application for Default Judgment" (RE 18, R. 982-88), and then filed a motion *in limine* to prohibit BancorpSouth from offering evidence contrary to the allegations of the Second Amended Complaint. (RE 19, R. 996-1001.) BancorpSouth responded to the foregoing motions and filed its own motions to set aside the clerk's entry of default (RE 20, R. 822-88.) and for permission to file its answer and defenses to the Second Amended Complaint to relate back to the date on which the answer was originally due. (RE 21, R. 1042-77.)

After a day-long hearing on March 30, 2017, with exhaustive briefs, rebuttals, responses, and argument of counsel, the trial court entered its bench ruling denying Franklin's motion for default judgment, its motion to deem the allegations of the Second Amended Complaint as admitted, and its motion *in limine*, and granting BancorpSouth's motion for permission to file an answer to the Second Amended Complaint. In its bench ruling (RE 22, Tr. 151-61), the trial court allowed BancorpSouth fifteen days to file its answer to the Second Amended Complaint,

upon which the answer would relate back to the date that it was originally due. (RE 22, Tr. 152-55). BancorpSouth filed its answer to the Second Amended Complaint within the time provided in the bench ruling, even though the order mentioning that ruling had not yet been entered. (RE 22, R. 153.)[5] Notwithstanding all of the foregoing rulings, the trial court denied BancorpSouth's motion to set aside the clerk's entry of default. (RE 22, Tr. 152.) Thereafter, the trial court entered separate orders as to all of these bench rulings. (RE 23, R. 1325-27; RE 24, R. 1328-30; RE 2, R. 1335-37; RE 25, R. 1333-34; RE 3, R. 1331-32; RE 4, R. 1341-42.)

This Court granted Franklin's separate petitions for interlocutory appeal from the trial court's denial of Franklin's motion to deem the allegations of the Second Amended Complaint as admitted (No. 2017-IA-00895-SCT) and its granting of BancorpSouth's motion to file its out-of-time answer to the Second Amended Complaint (No. 2017-IA-00900-SCT). *Significantly, Franklin did not seek interlocutory appeal of the trial court's denial of its motion for default judgment.* This Court granted BancorpSouth's petition for interlocutory appeal from the trial court's denial of its motion to set aside the clerk's entry of default (No. 2017-IA-00905-SCT). Finally, this Court consolidated all three appeals, designated Franklin as appellant on its two appeals (the "Direct Appeal") and BancorpSouth as cross-appellant on its appeal (the "Cross-Appeal").

III. Introduction

This brief is BancorpSouth's Brief of Appellee on the Direct Appeal and BancorpSouth's Brief of Appellant on the Cross-Appeal. BancorpSouth's argument as appellee on the Direct

[5] It is important to note that BancorpSouth's (1) Separate Answer and Defenses of Defendant BancorpSouth Bank to the First Amended Complaint, ("Answer to First Amended Complaint"), (2) BancorpSouth's Motion for Summary Judgment ("Summary Judgment Motion"), and (3) Separate Answer and Defenses of Defendant BancorpSouth Bank to Second Amended Complaint ("Answer to Second Amended Complaint"); (RE 9, R. 79-94), (RE 10, R. 512-26), and (RE 11, R. 1153-85), respectively, consistently advanced the same defenses from pleading to pleading.

Appeal is presented first in Parts IV through VI (pp. 10-41). BancorpSouth's argument as appellant on the Cross-Appeal is then presented in Parts VII through XI (pp. 41-56). Of necessity, because the issues are related, many portions are relevant to both the Direct Appeal and the Cross-Appeal. For example, Part II, the Statement of the Case, is not repeated in the Cross-Appeal section.

IV. Direct Appeal: Summary of the Argument

Franklin reads the provisions of Rule 8(d) regarding when allegations in a complaint are deemed admitted, as a practical substitute for the entire default process under Rule 55 and Rule 60. Franklin argues that Rule 8(d) deprives a trial court of the discretion to allow a defendant to amend a prior answer or to file an additional one out of time, regardless of the factual circumstances and procedural history of the case. Franklin makes these novel arguments through citation to cases that bear little to no resemblance to the procedural history of the case at bar. Franklin ignores a large body of law under Rule 55 and Rule 60 regarding relief from default and default judgments, the principles of which contradict the misguided use of Rule 8 that Franklin seeks here. Most of all, Franklin's contention for an inventive and technical application of Rule 8 in isolation ignores the overarching standard for application of the Rules of Civil Procedure—that they be interpreted liberally to promote decisions on the merits instead of determinations on technicalities. Consistently with these standards, the trial court correctly denied Franklin's motion to deem the allegations of the Second Amended Complaint as admitted and it correctly granted BancorpSouth's motion to file an out-of-time answer to the Second Amended Complaint.

V. Direct Appeal: Argument

A. Standard of Review

Franklin offers *Veal v. J. P. Morgan Tr. Co., Nat'l Ass'n*, 955 So. 2d 843 (Miss. 2007), as support for *de novo* review as the standard for the Direct Appeal. While *Veal* does say that the application of the Rules of Civil Procedure in *that case* (a Rule 9(h) case) is a question of law to be reviewed *de novo*, nothing in *Veal* prevents use of another standard of review of a different rule under different circumstances.

Franklin seeks to use provisions of Rule 8 as the equivalent of, or a substitute for, a Rule 55 default judgment. A trial court's application of Rule 55 to relief from entry of default, consideration of a default judgment and application of Rule 60 for relief, which is really what Franklin complains about in the Direct Appeal, is reviewed for abuse of discretion. *Tatum v. Barrentine*, 797 So. 2d 223, 227 (Miss. 2001); *Windmon v. Marshall*, 926 So. 2d 867, 870 (Miss. 2006); *McKenzie v. Miss. Mun. Serv. Co.*, 193 So. 3d 676, 678 (Miss. App. 2016). The Rule 8 theory advanced by Franklin in the Direct Appeal is unprecedented, but the standard of review for application of a rule of civil procedure should comport with how the party proposes to apply the rule. Thus, where Franklin proposes to utilize Rule 8 to achieve the same consequences provided by Rule 55, and where there is considerable precedent for a trial court's application of Rule 55 and for granting relief from those consequences and for the standard of review of such application and relief, that same standard of review—abuse of discretion—should apply here.[6]

Similarly, the trial court's granting BancorpSouth's motion to file its answer to the Second Amended Complaint to relate back to the date that the answer was originally due—again, under the highly unusual facts of this case—is more closely analogous to a Rule 15 amendment of the pleadings, leave for which is to be liberally granted, and to the Rule 15 principle that pleadings are to be conformed to the evidence. The standard of review for such matters is abuse

[6] Franklin's reliance on *Hammons v. Navarre*, No. 2015-CA-00243-COA, 2017 Miss. App. LEXIS 215 (App. Apr. 18, 2017), for a *de novo* standard of review is similarly misplaced. The *de novo* standard in *Hammons* is applied there to summary judgment and interpretation of a statute of limitation as a question of law, not to interpretation of a rule of civil procedure.

of discretion. *See, e.g.*, *City of Jackson v. Presley*, 942 So. 2d 777, 781 (Miss. 2006) (*rev'd on other grounds on second appeal*, 40 So. 3d 520 (Miss. 2010)). The appropriate standard of review for the Direct Appeal is abuse of discretion.

B. Rule 8 is not a substitute for Rule 55; it must be read in the context of all of the rules.

Where a defendant is in default for failure to answer a complaint, the plaintiff does not file a motion seeking the allegations of the complaint as deemed admitted under Rule 8; the plaintiff seeks entry of default and then default judgment under Rule 55. A substantial body of law—not to mention the universal practice of litigators everywhere—supports that procedural approach. The "deemed admitted" provisions of Rule 8 do not figure into the equation when default is entered. If Rule 8 had the effect argued by Franklin, the huge body of law on the setting aside of defaults and default judgments would be rendered meaningless: if an entry of default were set aside, or even if a default *judgment* were set aside, the defendant would have nothing to show for it, and setting aside would serve no purpose, because under Rule 8, irrespective of defeating a default judgment entry, the entirety of the complaint would still stand as deemed admitted. This is not the law in any of the cases cited by Franklin, yet it is exactly what Franklin attempts here.

Even assuming as a basic starting premise that Franklin *is* correct that the allegations of a complaint, except for the amount of damages, are admitted upon the entry of default, that premise ignores the effect of the denial of a motion for default judgment or the setting aside of an entry of default or a default judgment. Simply put, once the default judgment is set aside, factual allegations of a complaint are no longer admitted. *See, e.g.*, *Garza v. Carlson*, 398 S.W.3d 848, 852 (Tex. App. 2012) ("Once the default judgment was set aside, however, the factual allegations were no longer deemed admitted."); *Tyco Fire & Sec., LLC v. Alcocer*, 218 Fed.

Appx. 860 (11th Cir. Fla. 2007) ("The entry of a default against a defendant, ***unless set aside pursuant to Rule 55(c),*** severely limits the defendant's ability to defend the action." (emphasis added)). Thus, as soon as the trial court denied Franklin's motion for default judgment the allegations of the Second Amended Complaint were no longer deemed admitted. Moreover, as soon as BancorpSouth filed its answer to the Second Amended Complaint in accordance with the trial court's order relating it back to the original due date, Rule 8(d) had no further applicability. Rule 8(d) deems admitted those matters "not denied in the responsive pleading." BancorpSouth's court-authorized answer to the Second Amended Complaint *is* the responsive pleading.[7]

Because no one reads Rule 8 as a practical substitute for Rule 55, it is difficult to find cases expressly stating that Franklin's approach is wrong. The few courts that have addressed Franklin's position, or something close to it, have appropriately determined that remedies for not answering timely are better addressed to the default judgment process under Rule 55. In *Dreyer & Reinbold, Inc. v. AutoXchange.Com, Inc.*, 771 N.E.2d 764 (Ind. Ct. App. 2002), Dreyer & Reinbold appealed the trial court's denial of its motion to have matters deemed admitted and its motion to strike an answer to a counterclaim. Dreyer & Reinbold claimed that because the counter-defendant AutoXchange had failed to timely respond to its counterclaim, all of its allegations should be admitted under Indiana's Rule 8(d), which mirrors Mississippi's. The court agreed that the counter-defendant should have answered the counterclaim timely with it being undisputed that the counter-defendant did not do so and that averments in a pleading to which a responsive pleading are required are deemed admitted when not denied in the responsive pleading. What the court found however, is that Rule 8 specifies no consequence. Instead, the consequence is found in the rule that *does* have a remedy, Rule 55.

[7] The issue of the effect of the trial court's refusal to set aside of the entry of default is treated in connection with the Cross-Appeal at pp. 41-56, *infra*. As shown there, under the unusual circumstances of this case, the trial court's refusal does not result in anything being deemed admitted.

> Here, T. R. [Rule] 8(D) states that averments are deemed admitted if not denied in the responsive pleading. However, the rule does not refer to the situation where a responsive pleading denying the averment is filed, but in an untimely manner. Put another way, the rule does not address the ramifications of a party's failure to comply with the trial rules. In contrast, Ind. Trial Rule 55, which governs default judgments, does address the appropriate remedy for noncompliance, and provides, in relevant part:
>
> > When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise comply with these rules and that fact is made to appear by affidavit, or otherwise, that party may be defaulted.
>
> Inasmuch as T.R. 8(D) does not similarly state that it applies to situations where a party has failed to comply with the requirements of the trial rules, we decline to extend its application beyond the plain language of the rule.

Id. at 766 (emphasis omitted).

The Indiana court further noted a possible nuance where a party totally fails to file any responsive pleading of any type at all:

> While we do not condone untimely filing and failure to comply with the trial rules, we will not read into the rule that which does not appear. Accordingly, we construe T.R. 8(D) as applicable only where no responsive pleading is found whatsoever, or where such pleading is timely filed but fails to deny all of the averments contained in the pleading to which it responds.

Id. at 768. The counter-defendant had not timely filed its answer; here, BancorpSouth's position is similar, but better. With the trial court's approval, BancorpSouth filed an out-of-time answer to the Second Amended Complaint *which related back to the date when the answer was originally due*. Beyond this, with BancorpSouth's timely-filed answer to the First Amended Complaint and its timely-filed comprehensive motion for summary judgment, BancorpSouth cannot be said to have failed to file any responsive pleading whatsoever.[8]

[8] *Dreyer & Reinbold* applies with equal force and result for Franklin's argument addressed by BancorpSouth in Sections E and F *infra* at pp. 25-28, that BancorpSouth's motion to file an out-of-time answer should not have been allowed. The court in *Dreyer & Reinbold* was consistent in denying the motion to strike the counter-defendant's untimely answer by restating again that Rule 55 was the relevant rule. *Id.* at 768.

Negating an attempt similar to Franklin's effort to recast Rule 8 as a substitute for Rule 55, the Eleventh Circuit opened an opinion on the subject this way:

> A '[r]ose is a rose is a rose is a rose.' And a motion for an entry of default judgment is a motion for an entry of default judgment is a motion for an entry of default judgment is a motion for an entry of default judgment—even if its writer calls it a motion for judgment on the pleadings. So Rule 55's standard of "good cause" for setting aside an entry of default judgment—not the higher one of "excusable neglect" applicable to missed deadlines outside the default context—governs the court's determination of whether, despite her one-time error in not responding to a pleading, the non-moving party should get the opportunity to have her case considered on the merits before final judgment against her is entered.

Perez v. Wells Fargo, N.A., 774 F.3d 1329, 1131 (11th Cir. 2014) (footnote omitted).

Like Franklin attempts to use Rule 8 here, in *Perez*, the attempt was to disregard Rule 55 with a Rule 12(c) motion for judgment on the pleadings. The important takeaway from *Perez* is that the rules of default procedure prevail over efforts to achieve the same consequences with other rules, whether Rule 8 as attempted by Franklin or Rule 6 as attempted by Wells Fargo, the counterclaimant in *Perez*. This is because by erroneously granting Wells Fargo's motion for judgment on the pleadings, the district court in *Perez* had accepted Wells Fargo's argument that its counterclaim allegations were deemed admitted, and entered judgment on the pleadings in Wells Fargo's favor. Recasting that result as "a default judgment by any other name" and determining that the district court erred by "effectively entering what amounted to a default judgment" against Perez, the counter-defendant, the Eleventh Circuit said:

> But process matters. And we have a strong preference for deciding cases on the merits—not based on a single missed deadline—whenever reasonably possible. So the order granting judgment on the pleadings and denying Perez the opportunity to file an answer to Wells Fargo's counterclaim must be reversed, and Perez must be given a chance to demonstrate that she should have her case considered on the merits.

Id. at 1332.

In further concluding that Perez should have been allowed to also file an out-of-time answer, the Eleventh Circuit's analysis of how the district court reached its incorrect conclusion almost exactly describes what Franklin argues here, with Wells Fargo having attempted a procedural shortcut through Rule 6 instead of Rule 8:

> [B]y taking as true all of the allegations in the counterclaim for purposes of considering the motion for judgment on the pleadings as it pertained to the counterclaim, the district court essentially conducted the analysis for determining whether a motion for default judgment should be granted after the clerk of court has entered a default under Rule 55. So it was necessary to evaluate whether Perez could file an out-of-time answer under Rule 55(c)'s standard for setting aside the clerk of court's default.

Id. at 1335.

Similar to the court's holding in *Dreyer & Reinhold* that the Rule 55 procedures have specific remedies available for non-answering parties but Rule 8 does not, the Eleventh Circuit in *Perez* reached the same conclusion in reversing the district court's application of Rule 6(b) where it should have applied Rule 55(c) instead:

> Rule 6(b)(1)(B) applies generally, when a more precise rule does not govern the situation. . . . Rule 55(c), however, which speaks directly to the particular issue of setting aside defaults, applies instead of Rule 6(b)(1)(B) where a party seeks to set aside a default.

Id. at 1338, n.8 (internal citation omitted).

A federal district court considered a motion to deem allegations admitted and a motion to strike a belatedly filed answer in *Piper vs. Panther Towing, Inc*., 2017 U.S. Dist. LEXIS 154102; 2017 WL 4181342 (S.D. Fla. 2017). In *Piper,* the plaintiff attacked the defendant's answer and defenses as filed without leave of the court approximately one hundred days after it was due and fifteen days after the discovery deadline. In rejecting the plaintiff's motions to strike and to deem allegations admitted, the court noted that the appropriate remedy was neither of those, but instead to move for a default judgment. In *Piper*, the plaintiff did not move for a default judgment. Here,

Franklin did, but its default judgment motion was denied and Franklin has not appealed that denial. Central to the denial of both the motion to strike the answer and the motion to deem allegations admitted in *Piper* was the parties' litigation course of conduct, similar to that of Franklin and BancorpSouth here, where both the plaintiff and the defendant had actively litigated the case "since its inception"—a period of a hundred days. *Id.* at 9. Here, since inception is over six years, nearly four years of which were after the filing of the Second Amended Complaint.

Franklin's argument that a defendant's failure to timely admit or deny per Rule 8(d) leaves the defendant forever and irreversibly without defenses, regardless of the circumstances, is also contrary to Mississippi precedent. This Court in *Alexander v. Womack,* 857 So. 2d 59 (Miss. 2003), began by referencing the familiar rule that if a defendant plans to rely on affirmative defenses, they should be affirmatively pled. *Id.* at 62. Yet in determining that the defendant Alexander did not raise a statute of limitations defense, this Court did not solely look to see if a statute of limitations defense was raised in Alexander's answer. This Court looked also to whether the defense had been raised in Alexander's responses to Womack's motions for partial summary judgment, and also reviewed the entirety of the record to see if the defense was raised anywhere else. *Id.* This Court can do the same thing here and look to the record to see that affirmative defenses and denials of allegations *were made* by BancorpSouth**,** not only in its answer to the First Amended Complaint, but also in its Summary Judgment Motion. *See also Taylor v. Welch,* 609 So. 2d 1225, (Miss. 1992) (the failure to answer an amended complaint did not preclude the trial court from trying certain questions of fact alleged in an amended complaint rather than deeming them admitted.)

An example of Franklin's failure to grasp the kind of principles articulated in *Dreyer & Reinhold*, *Perez,* and *Piper* is its misplaced reliance on *Poindexter v. Southern United Fire Insurance Company,* 838 So. 2d 964 (Miss. 2003). *Poindexter* actually stands in disagreement

with Franklin's overall argument that a single specific rule subdivision "means what it says" and must be enforced in an isolated vacuum. Instead, *Poindexter* stands for how one procedural rule can impact another. *Poindexter* involves a Rule 12(b)(6) dismissal that this Court reversed because the trial court failed to allow an amended complaint under Rule 15, which provides an automatic right to amend. In other words, an event can happen under one rule (*e.g.*, failure to state a claim), but a remedy or result may be allowed under another (*e.g.*, allowing amendment so that a claim is stated).[9]

The court in *Revocable Living Trust of Mandel v. Lake Erie Utils. Company*, 2015 U.S. Dist. LEXIS 58690; 2015 WL 2097738 (N.D. Ohio May 5, 2015) faced a similar attempt to twist the rules on somewhat different facts. In *Mandel*, the issue was not a failure to timely answer but an argument that the defendant's answer was inadequate. The court considered whether the responses and affirmative defenses in the answer were so deficient that the entire answer should be stricken and the allegations of the complaint should be deemed admitted under Rule 8. The court determined that, even though some of its denials were deficient, the answer should not be stricken and the allegations should not be deemed admitted because Rule 8 was not to be applied in a vacuum. In reaching its determination, the court noted as a corollary to Rule 8 the liberal amendment policies embodied in Rule 15, the application of which is left to the trial court's discretion. Here, Franklin urges this Court to read Rule 8 in a vacuum and disregard other rules that speak more directly to the circumstances.

The plaintiffs in *United States ex rel. Minge v. TECT Aero., Inc.*, 2011 U.S. Dist. LEXIS 66012 (D. Kan. 2011), argued that certain responses were not proper denials and moved to have

[9] Its denial of the plaintiff's motion to amend in *Poindexter* was premised on the trial court's conclusion that any amendment would be "futile". In noting the inadvisability of introducing concepts like futility into the applicability of Rule 15, this Court further noted the need to read individual rules in the context of all of the rules: if the amended complaint stated a claim, Rule 56 summary judgment might still be available to the defendant. Stated differently, denial of a motion to amend is not a dispositive event contemplated by the rules; summary judgment is.

the allegations deemed admitted pursuant to Rule 8. The plaintiffs also moved to strike the defendants' affirmative defenses in their answers to a fourth amended complaint. In denying both motions, the court applied some of the same factors applicable to a default circumstance, such as the need for a showing of prejudice. Noting that deeming allegations admitted is an "extreme remedy," the court found no prejudice especially because the plaintiffs failed to show they were not otherwise on fair notice as to what the defenses would be. *Id*. at 8-9. Here, it is manifestly obvious that Franklin was on fair notice of BancorpSouth's denials and defenses at all times from and after the filing of its answer to the First Amended Complaint.

It is notable that in all of Franklin's argument about Rule 8(d), it carefully avoids any mention of other applicable provisions of Rule 8. For example, Rule 8(f) requires that "[a]ll pleadings shall be so construed as to do substantial justice." Similarly, the Advisory Committee's note on the requirement of Rule 8(c) that defendants plead affirmative defenses when answering serves the purpose that it is "intended to give *fair notice* of such defenses to plaintiffs so that they may respond to such defenses." Rule 8, Advisory Committee Note, ¶ 3 (emphasis added). Here, BancorpSouth raised no defense in its answer to the Second Amended Complaint that was not already raised in its answer to the First Amended Complaint and in its motion for summary judgment.[10] Franklin was clearly on "fair notice" of all of BancorpSouth's defenses at all times.

The impropriety of Franklin's narrow fixation on Rule 8 without consideration of its interplay with other rules is demonstrated in some of the authorities it cites. For example, *Hutzel v. City of Jackson*, 33 So. 3d 1116 (Miss. 2010), is distinguishable in that it deals with waiver of affirmative defenses arising from a defendant's failure to plead specific defenses in its *initial*

[10] *See* BancorpSouth's (1) Separate Answer and Defenses of Defendant BancorpSouth Bank to the First Amended Complaint, ("Answer to First Amended Complaint"), (2) BancorpSouth's Motion for Summary Judgment ("Summary Judgment Motion"), and (3) Separate Answer and Defenses of Defendant BancorpSouth Bank to Second Amended Complaint ("Answer to Second Amended Complaint"); (RE 9, R. 79-94), (RE 10, R. 512-26), and (RE 11, R. 1153-85), respectively.

answer. *Id.* at 1119. *Hutzel* interprets Rule 8(c) "to mean that, generally, if a party fails to raise an affirmative defense in its *original answer*, the defense will be deemed waived." *Id.* (emphasis added). Unlike the defendant in *Hutzel*, BancorpSouth filed an initial or original answer that included *all* defenses to the Second Amended Complaint. The trial court's granting BancorpSouth's motion to file an answer to the Second Amended Complaint was consistent with *Hutzel*. On the facts of *Hutzel*, the defendant was not entitled to file an amended answer to raise a *new* affirmative defense that it had waived. Here, BancorpSouth's answer to the Second Amended Complaint raised no new defenses at all; rather, it was in essence an amendment of the answer to the First Amended Complaint to make it applicable to the Second Amended Complaint.

Isolated application of Rule 8 is likewise rejected in *Dreyer & Reinbold, supra* (identifying the default judgment provisions of Rule 55 as controlling over the "deemed admitted" provisions of Rule 8), and *Perez, supra* (employing Rule 55(c) standards for setting aside a clerk's entry of default to determine that the defaulting party should be allowed to file an out-of-time answer). To the same effect are *Revocable Living Trust of Mandel v. Lake Erie Utils. Company*, 2015 U.S. Dist. LEXIS 58690 at 8, 2015 WL 2097738 (N.D. Ohio May 5, 2015) (where a defendant who filed an answer neither expressly admitting nor denying the allegations of the complaint was allowed to file an amended answer rather than suffer the allegations as deemed admitted under Rule 8 "in light of Rule 15 and cautionary directives regarding striking pleadings . . .") and *United States ex rel. Minge v. TECT Aero., Inc.*, 2011 U.S. Dist. LEXIS 66012 at 8 (D.C. Kansas 2011) (denying the plaintiff's motion to deem allegations admitted and allowing the defendants to file amended answers because "[d]eeming allegations admitted is an extreme remedy").

C. Rule 8(d) is not a substitute for the equivalent of a default judgment.

Franklin argues that Rule 8 *mandates* that *all allegations* of the Second Amended Complaint stand fully, finally and forever admitted from the moment the deadline for answering it passed, leaving as the trial court's only remaining task to conduct a hearing to determine the amount of damages.[11] And Franklin agues this not through Rule 55, but by reading Rule 8 in particular isolation from Rule 55 and its accompanying interpretative case law to arrive at the same extreme drastic remedy as a default judgment. To utilize Rule 8 in that way turns a large body of law on end and disregards what this Court repeatedly favors: trial on the merits.

Instead, Franklin's reading of the effect of Rule 8 is *exactly* the equivalent of a Rule 55 default judgment and would even dispense with the need for Rule 55. Yet Rule 8 is not, and should not be, a default judgment substitute. If it were, defendants would be automatically subject to the harshest of remedies even where, as here, *a default judgment is denied.*[12]

This Court has acknowledged that, of the wide range of remedies available, "the entry of default judgment is the *most drastic* and should be applied only in *extreme* circumstances". *State Sec. Life Ins. Company v. State,* 498 So.2d 825, 831 (Miss. 1986) (emphasis added). Franklin proposes not only to reinterpret Rule 8(d) as automatically resulting in the most drastic remedy in the law, but also to ignore whatever the attendant circumstances may be and to exempt Rule 8 from the same kinds of checks and safeguards arising from the large and longstanding body of law governing the setting aside of entries of default and default judgments. So extreme is

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[11] *See* Appellant's Brief at 14. ("Accordingly, every averment of Franklin's Second Amended Complaint, except those as to the amount of damages, were admitted on June 18, 2013.") Franklin attributes this same mandatory effect to the clerk's entry of default. *See* Appellant's Brief at 16. ("Upon her [the clerk's] entry (in other words, at the very moment of her entry), every allegation of Franklin's Second Amended Complaint (except those as to the amount of damages) was admitted.")

[12] Ignored in Franklin's argument are the denials of Franklin's application for default judgment and motion for default judgment, the denial of its motion *in limine* to prohibit BancorpSouth from introducing evidence contradicting any allegation of the Second Amended Complaint and Franklin's failure to appeal any of those denials.

Franklin's position that it argues that Rule 8 dictates that BancorpSouth has been helpless since June 18, 2013, the date on which its answer to the Second Amended Complaint was originally due, despite BancorpSouth's having at all times in the four years since vigorously defended against it with no objection from Franklin during that time.

Rule 8(d) cannot be viewed in such isolation. Particularly under the unusual circumstances of this case, all of the provisions of Rule 6 (governing time) and Rule 15 (governing amendments) must inform the application of Rule 8(d).

D. Rule 8(d) is designed for application to the failure to admit or deny particular individual allegations, not for failure to answer a complaint.

This Court need look no further than the cases relied upon by Franklin to see that Rule 8 cases primarily involve application to a complaint's single paragraphs or allegations, not to an entire pleading. These cases, considered in their specific facts, and not with out-of-context quotes or incomplete or misleading parenthetical summaries, illustrate the true purpose and effect of Rule 8.

For example, Franklin's reliance on *Universal Computer Servs., Inc. v. Lyall*, 464 So. 2d 69 (Miss. 1985), is not only out of context, but actually supports BancorpSouth's position. In *Lyall*, the question was a single allegation as to ownership of an automobile and the defendant's inconsistent responses to that allegation in three letters, and then in its initial answer, and again in an amended answer to an amended complaint. While this Court did say that by failing to deny the single allegation of ownership, the defendant's position could not be maintained under Rule 8(d), this Court did not rule on this basis alone. Instead, this Court noted how the trial court was surprised by the inconsistency of the defendant's positions and allowed the plaintiff to reopen his case for the purpose of proving the single allegation of ownership instead of deeming the

allegation admitted under Rule 8(d), all of which was found to be within the trial court's discretion. *Id.* at 74.

The string cites in Franklin's brief at 14, n. 8, purportedly standing for the proposition that Rule 8(d) leaves the defendant who fails to deny forever and irreversibly helpless and defenseless, should also be closely scrutinized well beyond Franklin's parenthetical extractions. As a prime example, *Hall v. Aetna Cas. & Sur. Co.,* 617 F.2d 1108 (5th Cir. 1980), is not only easily distinguishable from the present case, but in its proper context supports the position of BancorpSouth. *Hall* supports that the proper application of Rule 8(d) is to the failure of a responsive pleading to deny a specific allegation, in which event that specific allegation is deemed admitted; nothing in *Hall* suggests applicability of Rule 8 to a party's failure to file a responsive pleading at all.

Further, the court was quite clear in *Hall* that the failure of the defendant, Aetna, to answer a specific allegation as to insurance coverage only received heightened scrutiny because its failure arose from the "most unusual, indeed to us inexplicable, circumstances." *Id.* at 1111. Those most unusual circumstances also went beyond Rule 8(d), as the allegation was admitted in Aetna's answers to interrogatories which were introduced as an exhibit at trial. Under those circumstances, the court determined that the sufficiency of the plaintiff's evidence on this allegation did not solely depend upon it being deemed admitted. *Id*.

Another case in Franklin's string citations, *John Daly Enterprises, LLC v. Hippo Golf Co., Inc.*, 646 F. Supp. 2d 1347 (S.D. Fla. 2009), further supports BancorpSouth's Rule 8(d) position. Plaintiff Daly's business entity sought summary judgment on all counts of his complaint, but only obtained partial summary judgment arising from a single admission of a single allegation of an amended complaint. The facts in *Daly* bear no resemblance to the case at bar. The defendant in *Daly* answered the complaint and expressly *admitted* in its answer the

allegation which led to partial summary judgment. There was no attempt in *Daly* to utilize Rule 8(d) as a substitute for default judgment and there is nothing in *Daly* to suggest the kind of Rule 8 result that Franklin seeks here.

Also in Franklin's string citations is *Jones v. Lopez*, 262 F. Supp. 2d 701 (W.D. Tex. 2001), supporting the conventional application of Rule 8 to failures of responsive pleadings to deny specific allegations within a broader complaint, not to failures to answer at all (which are the province of Rule 55). Franklin's parenthetical comment on *Lopez* comes from a footnote identifying "specific allegations" not denied in the defendants' answer and thus deemed admitted under Rule 8. *Id*. at 709, n. 2. Franklin's context-free citation to *Lopez* also ignores that the defendants did not care about the specific allegations that were deemed admitted; the issue was whether the defendants were even proper parties to the action. The application of Rule 8 in *Lopez* did not result in anything resembling a Rule 55 default or default judgment against the defendants; it resulted in denial of a motion for summary judgment.

In citing this Court to *King Vision Pay Per View, Ltd. v. J. C. Dimitri's Rest., Inc*., 180 F.R.D. 332 (N.D. Ill. 1998), Franklin relies on a case that has nothing whatever to do with use of Rule 8 as a default substitute for Rule 55. In *King Vision* the defendant filed an answer that repeatedly responded to the individual paragraphs of the plaintiff's complaint with "Neither admit nor deny the allegations of said Paragraph . . . but demand strict proof thereof." *Id.* at 333. The trial court found this kind of response impermissible under Rule 8, and because the specific allegations were expressly neither admitted nor denied, they were deemed admitted. *King Vision* does not remotely suggest that in the event of a defendant's *failure* to file an answer, Rule 8 immediately and automatically supplants Rule 55 and the case then proceeds to default judgment. To the contrary, *King Vision* supports BancorpSouth's construction of Rule 8—that it

applies where a defendant files a responsive pleading that fails to deny a specific allegation in a complaint, not to a defendant's failure to file a responsive pleading at all.

E. Conforming pleadings to the evidence is especially appropriate under the unusual facts of this case.

At the time of the trial court's hearing on the motions which are now the subject of these consolidated appeals, BancorpSouth, having not then filed an answer to the Second Amended Complaint, could have stood on its motion for summary judgment as the responsive pleading to the Second Amended Complaint. Under such circumstances, where the question presented is the "technical necessity" to formally file an answer when a dispositive motion is pending, under the right procedural circumstances the filing of an actual answer can be a mere "redundancy". *Rankin v. Clements Cadillac, Inc.* 905 So. 2d 710, 715 (Miss. Ct. App. 2004) (*rev'd on other grounds*, 903 So. 2d 749).

In *Rankin*, where the defendant brought a motion asserting the affirmative defense of release—a defense which was not raised in his answer—the issue was "the argument that a technical necessity existed to amend the answer and not just raise the matter by motion." 905 So. 2d at 713. While *Rankin* acknowledges that such matters should be raised in an answer, *Rankin* rejects the kind of application of Rule 8 that Franklin argues here:

> Rule 8 does not state what is to occur if an affirmative pleading is not made and the issue is raised later. The rules do state that they "shall be construed to secure the just, speedy, and inexpensive determination of every action." M.R.C.P. 1.

Id. at 713. Then, resorting to the familiar concept of Rule 15(b) of conforming pleadings to the evidence, *Rankin* makes clear that the concept is applicable to affirmative defenses raised in motions:

> Even if there is no consent, the trial judge should allow an amendment to pleadings "when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence [for which amended pleadings are needed] would prejudice the

> maintaining of the action or defense upon the merits." The circuit judge in this case could easily have permitted an amendment but he was never requested to do so.

Id. at 715 (*quoting* Rule 15(b); bracketed insertion in original). Thus, while BancorpSouth could have stood on its motion for summary judgment as a response to the Second Amended Complaint, it obtained leave to file its answer and then filed it, even though by that point in the long history of the case doing so was the kind of redundancy mentioned in *Rankin*.[13]

In extending the Rule 15(b) concept of amendments to conform to the evidence to the pretrial motion stage, *Rankin* underscores that express consent is not required. Instead, the much broader concept of implied consent applies. Implied consent by Franklin is manifest throughout the seven-year history of this case, including Franklin's failure for *three and a half years* following the filing of the Second Amended Complaint to say anything whatever about the lack of an answer to it, while BancorpSouth vigorously defended against it.

F. Rule (6)(b) governs out-of-time requests, not Rule 8(d).

Franklin's implausible and unsupported argument is that Rule 8(d) mandates that all allegations of a complaint to which no responsive pleading is filed results in the allegations of the complaint standing fully, finally and forever admitted from the moment the deadline for answering it passes. Franklin then argues that the natural result of this incorrect premise is that trial courts are powerless to meaningfully permit an untimely answer, because when they do so the answer is instantly rendered a nullity by the "deemed admitted" effect of Rule 8(d). This is not the law. Rule 6(b) governs enlargement of time to file a pleading after the time it is due.

[13] This is all the more so in view of BancorpSouth's answer to the nearly-identical First Amended Complaint. With only one new count and legal theory advanced in the Second Amended Complaint, the dictates of *Rankin* were fully met by virtue of BancorpSouth's addressing the new count in the motion for summary judgment. *See* Exhibit I to BancorpSouth's motion to set default aside; being collective excerpts from BancorpSouth's Summary Judgment Motion and Memorandum in Support Thereof (RE 20, R. 871-75).

There are six exceptions to the applicability of Rule 6(b): Rule 50(b) (motion for judgment notwithstanding the verdict), 52(b) (amendment of findings by the court), 59(b) (motion for new trial), 59(d) (*sua sponte* motion for new trial), 59(e) (motion to alter or amend a judgment), 60(b) (relief from judgment) and 60(c) (reconsideration of a transfer order) "except to the extent and under the conditions therein stated." Rule 6(b). Conspicuously missing from this list of exceptions is a motion to file an answer out of time or any mention of any Rule 8 matter.

Where a motion under Rule 6 to file an out-of-time answer is made after the answer was originally due, the standard is excusable neglect. Rule 6(b). Just as "good cause" for setting aside default under Rule 55 has been broadly interpreted,[14] the trial court has "wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time." Advisory Committee Note, Rule 6. The concept of excusable neglect under Rule 6 is equally broad. The standard is to be particularly broadly applied where, as here, a defendant moves to file an answer out of time; in such circumstances the excusable neglect standard should be essentially the same as the "good cause" standard under Rule 55(c). *See, e.g., Perez v. Wells Fargo N.A.*, 774 F. 3d 1329 (11th Cir. 2014).

In *Kucik v. Yamaha Motor Corp.*, 2009 U.S. Dist. LEXIS 96704, 2009 WL 3401978 (N.D. Ind. Oct. 16, 2009), the court held that even if the plaintiff's failure to timely respond to the defendant's motion to dismiss was his own fault, there was nothing in the record to suggest that the plaintiff acted with anything other than in good faith, or that he knowingly, willfully, or purposefully disregarded the response deadline or that "he simply let things go in the case." *Id.* at 5. The court in *Kucik* also noted plaintiff counsel's genuine surprise to learn of the pending motion and the lack of a response. In allowing the request for an enlargement of time to file an

[14] *See* the extensive discussion of *Tucker v. Williams*, 198 So. 3d 299 (Miss. 2016), in the Cross-Appeal section, pp. 44-46, 49-51, 54, *infra*.

out-of-time response, the court also observed that no other deadlines were missed or ignored by the plaintiff. *Id*. at 6. The same situation exists here.

The excusable neglect standard is an elastic concept that includes a variety of factors:

> [T]his "elastic concept" may include, under appropriate circumstances, neglect due to simple, faultless omissions to act or carelessness. The determination of whether the Plaintiff's neglect is "excusable" is ultimately "an equitable one, taking account of all relevant circumstances surrounding the party's omission." Those factors include evaluating the danger of prejudice to the non-moving party, the length of delay and its potential impact on the court's proceedings, the reason for the delay, including whether the delay was in the movant's control, and whether the movant acted in good faith.

Kucik at 3-4 (*quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 392, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (internal citations omitted)). These concepts encompass the very kinds of matters the trial court decided *adversely* to Franklin in its denial of Franklin's motion for default judgment (from which Franklin took no appeal): the existence of BancorpSouth's colorable defenses, the lack of prejudice to Franklin, and Franklin's inordinate delay in bringing the issue of the absence of an answer to the trial court's attention.[15]

G. Franklin argues use of Rule 8 as a substitute for Rule 55 with cases that are procedurally distinguishable from the case at bar.

Despite Franklin's incessant themes of being "bound by the rules" and "the rules mean what they say," Rule 55(a) is silent concerning the consequence of an entry of default. The supposed "mandated consequence" that Franklin repeatedly urges[16] by reading Rule 8(d) in isolation ignores interpretations that review the entire rule in the broader context of all of the rules. This "mandated consequence" argument also ignores, and even seeks to prevent this Court from evaluating, case law interpreting Rule 8. Beyond that, Franklin's reliance on *American 3-CI v. Farrow*, 749 So. 2d 298 (Miss. App. 1999) and *Journey v. Long*, 585 So. 2d 1268 (Miss.

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15 All of these factors are addressed in detail in the Cross-Appeal section, pp. 46-51, *infra*.

16 *See, e.g.*, Appellant's Brief at 16.

1991), arises from entirely different procedural circumstances not present in this case; thus, these cases are clearly distinguishable.

In both *Farrow* and *Journey,* default judgments were set aside *only* due to the trial court's *failure to make a record of the hearing on damages*. *See, e.g., Farrow* at 299. In both cases, there was no attempt to set aside the entry of default. As a result, the cases were remanded for a hearing on damages solely in that posture, with the entry of default undisturbed because it was not challenged by the defendant, either originally in the trial court or on appeal.

Here, the trial court *refused* to grant both Franklin's motion and application for default judgment, and did not base that refusal on any form of ministerial or *procedural* nuance such as the lack of making a record. Instead, in denying Franklin's request for a default judgment, the trial court addressed all of the *substantive* standards for setting aside a default judgment, *i.e.*, colorable defenses, lack of prejudice, and Franklin's delay. Franklin carefully avoids discussion of the procedural contexts of *Farrow* and *Journey.* Considered in procedural context, *Farrow* and *Journey* merely address the role of an evidentiary hearing on the record as to damages following the entry of a default not challenged by the defendant.

Franklin's reliance upon *Barfield v. Miss. State Bar Association*, 547 So. 2d 46 (Miss. 1989), is yet another instance of its argument of a case that bears no resemblance to this one. In *Barfield*, a default judgment case—not a Rule 8 case or a Rule 15 case—Barfield was served with a bar complaint and filed a motion for additional time to answer it. He gave as a reason that there were no exhibits to the complaint. Barfield's motion was never noticed or brought for hearing, but the Bar as a matter of professional courtesy did not oppose the motion, consented to additional time, and furnished the exhibits. However, no answer was ever filed by Barfield. The Bar obtained entry of default, filed a motion for default judgment and sent them to Barfield, who also received the notice for hearing on the motion. Despite all of this Barfield failed to appear for

the hearing. Only in the entirety of this procedural context did the tribunal take the allegations of the bar complaint as confessed and enter default judgment. Under the totality of those circumstances, this Court refused to set aside the default judgment. *Barfield* is nowhere close to the circumstances here.

Franklin complains that the trial court's denial of its motion to deem the allegations of the Second Amended Complaint as admitted allowed BancorpSouth "to escape the separate, mandated consequences of a circuit clerk's entry of default . . . (in other words at the very moment of her entry), every allegation of Franklin's Second Amended Complaint (except those as to the amount of damages) was admitted." Appellant's Brief at 16. An example of a factually and legally distinguishable citation that simply does not hold as Franklin argues is a bankruptcy case offered as its ultimate authority for its position that where an entry of default remains of record, there can be no trial on anything other than the amount of damages. Instead, in *In Re JRA 222, Inc.*, 365 B.R. 508 (Bankr. E.D. Pa. 2007), the court not only *denied* a motion for default judgment but found a request for relief from the entry of default *meritorious*. That is exactly what BancorpSouth seeks in the Cross-Appeal; thus, instead of supporting Franklin, *JRA 222* actually supports BancorpSouth.

JRA 222 involved the defendants' failure to respond to the original complaint and entry of default approximately six months after their answers were due, in sharp distinction to the procedural context of the case at bar where the First Amended Complaint was timely answered and a Summary Judgment Motion thoroughly addressing the virtually-identical Second Amended Complaint was filed, with no hint of default breathed until some three and a half years later, after vigorous prosecution and defense on each side. Just as BancorpSouth's Summary Judgment Motion could suffice under the circumstances as its answer to the Second Amended Complaint,[17]

[17] *See* discussion *supra*, at pp. 25-26.

the court in *JRA 222* allowed a response to the plaintiff's request for entry of default and motion for default judgment to serve as the answer to the complaint. "The lack of prejudice to the Trustee [the plaintiff] combined with a policy favoring decisions on the merits, rendered it appropriate to grant Kimberly [the defendant] relief under Rule 55(c) and to treat her response as an answer to the Complaint." *Id.* at 514.[18]

Yelp, Inc. v. Catron, 70 F. Supp. 3d 1082 (N. D. Calif. 2014), is yet another case where Franklin's quotation—"the well-pleaded allegations of the complaint relating to a defendant's liability are taken as true"—is taken out of context. First, *Yelp* is a default judgment case where the defendant was served with an original complaint, filed nothing in response, totally failed to appear, and the clerk entered default. Even under such circumstances, the court still considered a set of factors to determine whether to grant a default judgment:

> (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action[,] (5) the possibility of a dispute concerning material facts[,] (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decision on the merits.

Id. at 1091.

Importantly, Franklin's parenthetical quote from *Yelp* omits the beginning phrase: "In this analysis . . ." *Id.* at 1091. In other words, the allegations of the complaint relating to the defendant's liability were taken as true not solely because of any automatic consequence of Rule 8 but only because the court addressed and found that underlying circumstances tested by the seven factors above warranted entry of default judgment.

Franklin's citation to inapposite authorities continues with *Enpac, Inc. v. Budnic*, 773 F. Supp. 2d 1311 (N. D. Fla. 2011). Yet again, the issue was a motion for default judgment, not a

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[18] The court also noted that the plaintiff was on notice of the nature of the defendant's defenses and her opposition to the litigation for more than three years, during which time the plaintiff requested several continuances.

Rule 8 motion, where the defendant failed to appear or respond in any way to the complaint or to respond in opposition to the plaintiff's motion for default judgment. Only in that specific context—evaluating a motion for default judgment—do these cases stand for the premise that the effect of the entry of default is that factual allegations are taken as true. Franklin offers no case where allegations were deemed admitted after, as here, *a motion for default judgment was denied*.

Franklin cites *Twist and Shout Music v. Longneck Express, N. P.*, 441 F. Supp. 2d 782 (E.D. Texas 2006), for its version of an apparently universal black-letter law premise that a clerk's entry of default cuts off a defendant's right to appear in the case with respect to liability issues.[19] While promoting it as an "an excellent analysis of the legal effect of a clerk's entry of default," Franklin again ignores the procedural context of the case cited. *Twist and Shout* is an analysis of facts bearing no resemblance to those of this case: the defendant in *Twist and Shout* never answered the original complaint or appeared at all.

The language in *Twist and Shout* to the effect that a clerk's entry of default cuts off a defendant's right to appear in the case with respect to liability issues was not applied in that case because no defendant was attempting to appear for any purpose. Rather, the language is the trial court's broad interpretation of the holding in *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Rlty, Corp.*, 973 F. 2d 155 (2nd Cir. 1992). That language does not actually appear in *Greyhound*, and, more to the point (and not surprisingly), *Greyhound* is factually and procedurally distinguishable from the case at bar. In *Greyhound,* the defendant made no response to the original complaint and made no appearance in the action. Default was entered and a hearing on the amount of damages was scheduled. At that point, the defendant appeared and asked that the entry of default be set aside. Because the plaintiff's claim was sizable, the court ordered the setting aside of the

[19] Appellant's Brief at 16, n. 9, 20-21.

default on the condition that the defendant post a bond to protect the plaintiff from intervening actions by the defendant with respect to real property that was the subject of the action. The defendant failed to post the bond, and the court *then* entered judgment. The defendant responded with a motion to vacate the judgment. In denying the motion, the district court said:

> It is readily apparent that [the defendant] holds little regard for rules of civil procedure and for orders of the court. The court lacks confidence that [the defendant] would observe an order to maintain the status quo. A vacatur would simply provide [the defendant] with an opportunity for further wrongdoing, at the expense of [the plaintiff].

Id. at 158. Neither *Greyhound* nor *Twist and Shout* is remotely similar on facts or procedure to the case before this Court, and *Twist and Shout's* overbroad summary of what *Greyhound* holds is not an accurate description of the law applicable here.

Similarly, with its citation to *In Re Uranium Antitrust Litigation*, 473 F. Supp. 382 (N.D. Ill. 1979), Franklin turns to another factually and procedurally distinguishable case. Franklin cites *Uranium* for a parenthetical proposition that "the defaulting defendant loses his standing to defend on the merits." Appellant's Brief at 21. *Uranium* involved a suit against twelve defendants, nine of whom failed "to appear or answer the complaint in any manner whatsoever, despite ample opportunity to do so." 473 F. Supp at 390. The other three defendants appeared. Default was entered against the nine, and the plaintiff sought entry of default judgment against them along with detailed findings of fact and conclusions of law. The issue in *Uranium* was the effect of the plaintiff's proposed findings of fact and conclusions of law on the non-defaulting defendants. The court entered a "bare minimum" default judgment against the nine defaulting defendants but refused to adopt findings of fact and conclusions of law because such would prejudice the non-defaulting defendants. Like the many other of its citations discussed above, Franklin's reliance upon *Uranium* is woefully out of the context of this case where the trial court

refused to enter a default judgment against a defendant who has, through multiple pleadings and vigorous defense over a course of years, substantively responded to an amended complaint.

Franklin's reliance on *B. C. Produce, Inc. v. Don's Wholesale Produce, Inc.*, 550 F. Supp. 2d 124 (D. Maine 2008), is likewise misplaced. *B. C. Produce* involves a default judgment, resulting from the defendant's failure to file any answer at all. The opinion addresses only whether, following entry of default judgment, the plaintiff could be awarded attorney's fees. Noting that the default judgment had been granted, the court merely found that, by having not answered at all, the defendant had confessed the allegations related to attorney's fees. *B. C. Produce* is not a Rule 8 case, notwithstanding Franklin's suggestion to the contrary in its string citation .

Burlington Northern Railroad Co. v. Huddleston, 94 F. 3d 1413 (10th Cir. 1996), is also distinguishable. There, the defendant consciously and purposefully did not answer the complaint because she did not dispute the plaintiff's factual allegations. Instead the defendant filed a motion to dismiss, and the court, at the parties' request, decided the case on undisputed facts as a matter of law. The court merely noted the effect of Rule 8 on the defendant's decision not to contest the factual allegations. There is nothing in *Huddleston* to suggest the kind of Rule 8 result that Franklin seeks here.

Finally, Franklin's reliance on *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377 (Miss.1987) and *Flagstar Bank, FSB v. Danos*, 46 So. 3d 298 (Miss. 2010), is misplaced because these are default judgment cases, not Rule 8 cases. Unlike the case at bar, each of these cases involves a defendant's failure to answer the original complaint after being personally served with a summons. Of interest, however, *Guaranty Nat'l* reiterates that the presence of colorable defenses is the most important aspect in evaluating a motion to set aside a default judgment. 501

So. 2d at 388-89.[20] And in *Flagstar,* applying an abuse of discretion standard to setting aside a default judgment, the decision not to set the default judgment aside was "based on the facts and circumstances *peculiar to the particular case*." 46 So. 3d at 309 (emphasis added). Neither of these cases nor any of the others cited by Franklin supports the use of Rule 8 as a procedural substitute for Rule 55, most of all when viewed in the context of the facts and circumstances peculiar to this particular case.

A case not mentioned by Franklin, and perhaps the one most closely resembling the case at bar is *City of Jackson v. Presley*, 942 So. 2d 777, 781 (Miss. 2006) (*rev'd on other grounds on second appeal*, 40 So. 3d 520 (Miss. 2010)). There Presley sued the City and the City timely answered the complaint "by denying the material allegations of the complaint and by asserting numerous affirmative defenses." 942 So. 2d at 780. Presley later filed an amended complaint, which the City, without explanation, failed to answer. For the next four years, with the amended complaint unanswered, the parties litigated the case, engaged in extensive discovery and attempted mediation. Three weeks before trial, the City filed an answer to the amended complaint, some four years after it was originally due. The amended complaint was identical to the original complaint with the exception of a single addition of a property damage claim. The late answer was identical to the original answer with the exception of three new affirmative defenses. *Id*. at 784.

To that point, *Presley* significantly tracks the path of the instant case. *Presley* then moved to a pretrial order setting forth the City's affirmative defenses with specific reference to its answer to the amended complaint, listing contested issues of fact, and providing that the pleadings were conformed to the pretrial order. As the procedural comparable here, BancorpSouth advanced its defenses in its motion for summary judgment which, by extension of

[20] *See* discussion of colorable defenses in the Cross-Appeal section, pp. 46-47, *infra*.

Rule 15(b) to pretrial motions, conformed the pleadings to the evidence. *See Rankin v. Clements Cadillac, Inc.,* 905 So. 2d 710 (Miss. Ct. App. 2004), discussed at pp. 25-26, *supra.*

On the day of trial in *Presley*, the trial court granted Presley's motion to strike the late answer and then *sua sponte* entered a default judgment against the City on the issue of liability. The trial court then proceeded with a bench trial only as to the amount of damages and ultimately entered a six-figure judgment against the City.

This Court found that the trial court abused its discretion by *sua sponte* placing the City in default without applying the Rule 55 considerations for determining whether default is appropriate. Among those considerations which this Court found in favor of the City were the amount of money potentially involved, whether the default was *largely technical*, and whether Presley had been substantially prejudiced by the delay given her active litigation for over four years and her preparation on the issue of liability on the day of trial. *Id*. at 794. Distinguishing those circumstances from the more typical default case "when there is a total failure of a duly served defendant to appear and respond to a complaint," this Court held that "when there appears a desire on the part of a defaulting litigant to defend, the entry of a default judgment is not the preferred way of disposing of litigation." *Id*. at 795. The default judgment in *Presley* was set aside and the case was remanded for trial as to both liability and damages.

Although the plaintiff in *Presley* never sought the default which the trial court erroneously granted, her motion to strike the City's answer[21] to the amended complaint pursued the identical objective as Franklin's motion to deem admitted the allegations of the Second Amended Complaint—to render defenseless a defendant who had been actively defending the case for years. This Court saw the inherent impropriety of that under the procedural history of

[21] Still pending in the trial court is Franklin's motion to strike BancorpSouth's answer to the Second Amended Complaint. R. 1186-1238

Presley; the result there—reversal and remand for trial on the merits—compels the same result here.

H. Not only is Franklin's waiver argument not properly before the Court, it backfires on Franklin.

Franklin's argument that BancorpSouth has waived its defenses to the Second Amended Complaint due to alleged delay in advancing them has nothing to do with the waiver principle stated in the case on which Franklin relies, *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006).[22] Franklin raised the issue of waiver of defenses below in its response to BancorpSouth's Summary Judgment Motion, see, for example, ¶ 8, R. 612, and the trial court specifically deferred ruling on the issue. (Bench Ruling, RE 22, Tr. 156; Order Preserving Objections to Answer and Affirmative Defenses and Waiver of Affirmative Defenses, RE 26, R. 1348-49.[23] Thus, Franklin's argument concerning BancorpSouth's alleged waiver of defenses in these consolidated appeals is improper and should not be considered by this Court.

That said, Franklin's waiver of default and "deemed admitted" arguments *are* germane to these appeals because the trial court especially noted in its bench ruling denying the motion for default judgment Franklin's own delay in bringing the issue to the attention of the court for over three years. (Bench Ruling, RE 22, Tr. 155.)

In *MS Credit Cent, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006), this Court found that delay in pursuing the right to compel arbitration and actively participating in litigation on the merits constituted a waiver of the right to pursue arbitration. The waiver rule in Horton is not limited merely to affirmative defenses:

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[22] Franklin additionally cites to the following *Horton* waiver cases where defenses were asserted and later deemed waived: *Stuart v. University of MS Med. Center*, 21 So. 3d 544 (Miss. 2009); *Estate of Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008); *East Mississippi State Hosp. v. Adams*, 947 So. 2d 887 (Miss. 2007). None of these are Rule 8, Rule 15, Rule 12, or Rule 6 cases.

[23] Franklin continued to assert waiver in a post-hearing Motion that sought not only to strike BancorpSouth's answer, but re-urged that all defenses were waived. (Motion, R. 1186-1238.)

> [A]bsent extreme and unusual circumstances—an eight month unjustified delay in the assertion and pursuit of any affirmative defense *or other right* which, if timely pursued, could *serve to terminate the litigation*, coupled with active participation in the litigation process, constitutes a waiver as a matter of law.

Id. at 181 (emphasis added). Franklin's claimed right under Rule 8 to deem all allegations of the Second Amended Complaint admitted or under Rule 55 to entry of default and default judgment *ripened* on June 18, 2013, when the answer to the Second Amended Complaint was due. Yet not only did Franklin continue to actively litigate the case for another three and a half years (as did BancorpSouth in active defense), Franklin obtained an order setting the case for *jury trial*, all without any hint of any default or anything being deemed admitted. (R. 588.)

To the extent that this Court considers waiver of defense a proper issue in these consolidated appeals, BancorpSouth here addresses the issue as an example of how desperately Franklin seeks to avoid any kind of trial on the merits whatsoever. Yet, by virtue of the scheduling orders entered in this case and its advancing of defenses consistent with the scheduling orders, the *Horton* waiver rule has no application to BancorpSouth. (RE 26, R. 1348-49.)

In *Fredericks v. Malouf*, 82 So. 3d 579 (Miss. 2012), the defendants raised the defense of improper venue and filed a motion to change venue. That motion was contested by the plaintiff and was not brought on for hearing. Litigation continued for nearly three more years before the defendants filed a supplemental motion to renew the original motion. The supplemental motion was filed after the motion deadline set forth in an agreed scheduling order. Because the parties had continued to litigate the case, obtaining three trial dates in the process, and because the supplemental motion was not filed until after the deadline set in the scheduling order, this Court affirmed the trial court's ruling that the venue defense was waived:

> Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases. Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril.

Id. at 583 (*citing Bowie v. Montfort Jones Memorial Hospital*, 861 So. 2d 1037 (Miss. 2003)). *See also Spann v. Diaz*, 987 So. 2d 443, 448 (Miss. 2008) (finding no waiver of an affirmative defense where the defense was advanced in a motion for summary judgment filed *within the time frame* set by a scheduling order).

Here, there were *five* scheduling orders. All set a deadline for motions, all were agreed, *with three entered at the request of Franklin.* Additionally, at Franklin's behest, an order was entered *suspending all case deadlines* until further order of the court. (RE 27, R. 391-92.) BancorpSouth advanced all of its defenses to the Second Amended Complaint in its motion for summary judgment, which was filed within the time frame required by the agreed scheduling order. To the contrary, Franklin did not file any of its motions which are related to these consolidated appeals—for entry of default, for default judgment, to deem allegations admitted—until well *after* the expiration of deadline for motions under the agreed scheduling order, even though Franklin had been on notice of the claims raised in those motions for over three years.[24]

I. Franklin's interpretation of Rule 8 is the antithesis of Rule 1.

In all of its misguided discussion of Rule 8, Franklin carefully avoids mention of Rule 8(d): "All pleadings shall be so construed as to do substantial justice." This mandatory provision of Rule 8(d) is a close corollary to the last sentence of Rule 1: "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."

[24] While BancorpSouth's motions to set aside the entry of default and to file an answer to the Second Amended Complaint were also filed after this same deadline, those motions, of course, were prompted by Franklin's untimely motions.

Mississippi law endorses the principle, especially when applied to matters left to the discretion of the trial court, that the Rules of Civil Procedure "be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the ends of justice *and facilitates decisions on the merits, rather than determinations on technicalities*." *Smith v. Normand Children Diversified Class Tr.*, 122 So. 3d 1234, 1238 (Miss. App. 2013) (emphasis added). The kind of rule-reading that Franklin seeks in the Direct Appeal is an exaltation of determination on technicalities driven by fear of the merits. Of the last sentence of Rule 1 the Advisory Committee notes that "[t]here probably is no provision in these rules more important that this mandate: it reflects the spirit in which the rules were conceived and written and in which they should be interpreted." This is the spirit in which this Court should decide the Direct Appeal.

VI. Direct Appeal: Conclusion

The Direct Appeal can only be understood in the context of the particular and unusual procedural history of this case. While the entire history is important, seven points are crucial:

(1) BancorpSouth had already answered the First Amended Complaint prior to Franklin's filing the Second Amended Complaint. In its answer to the First Amended Complaint, BancorpSouth denied the allegations and raised numerous affirmative defenses.

(2) The Second Amended Complaint set forth substantially the same allegations as the First Amended Complaint. The Second Amended Complaint was not a new pleading, but rather an amendment of the complaint that BancorpSouth had already answered.

(3) *Prior to* Franklin's obtaining entry of default against BancorpSouth and Franklin's filing its motion to deem the allegations of the Second Amended Complaint as admitted, BancorpSouth filed a comprehensive motion for summary judgment asserting numerous core defenses and further developing the denials of Franklin's allegations.

(4) The trial court granted BancorpSouth's motion to file an out-of-time answer to the Second Amended Complaint to relate back to the date on which the answer was originally due, and BancorpSouth in fact filed the out-of-time answer within the time allowed by the trial court.

(5) Pursuant to the *Fifth* Amended Scheduling Order, motions were due to be filed on or before September 1, 2016. Franklin's motion to deem the allegations of the Second Amended Complaint as admitted was filed one and one-half months *after* this deadline.

(6) BancorpSouth has actively defended this lawsuit for six years, including four years after the filing of the Second Amended Complaint.

(7) The trial court *denied* Franklin's motion for default judgment and application for default judgment and Franklin did not appeal those denials.

Especially when viewed against the unusual and particular facts of this case, no authority supports application of Rule 8 as a substitute for Rule 55, or as derogating the large and long-standing body of law governing relief from default and default judgments, or as depriving a trial court of the discretion to allow the filing of out-of-time answers where circumstances warrant. Here the trial court recognized that there is no authority for this approach and it likewise recognized its obligation to apply the Rules of Civil Procedure in a way that promotes decisions on the merits and avoids determinations on technicalities. The decisions of the trial court to deny Franklin's motion to deem the allegations of the Second Amended Complaint as admitted and to grant BancorpSouth's motion to file an out-of-time answer to the Second Amended Complaint should each be affirmed.

VII. Cross-Appeal: Statement of the Issue

The issue raised in the Cross-Appeal is whether, under the specific procedural facts of this case, the trial court erred by not granting BancorpSouth's motion to set aside the clerk's entry of default when a motion for a default judgment based on that default entry was denied.

VIII. Cross-Appeal: Statement of the Case

The statement of the case for the Cross-Appeal is the same as the statement of the case for the Direct Appeal. *See* Part II, pp. 1-9, *supra*.

IX. Cross-Appeal: Summary of the Argument

The trial court's denial of BancorpSouth's motion to set aside the clerk's entry of default was inconsistent with its denial of Franklin's motion for default judgment, its denial of Franklin's motion to deem the allegations of the Second Amended Complaint as admitted, its denial of Franklin's motion *in limine*, and its granting of BancorpSouth's motion to file an answer to the Second Amended Complaint to relate back to the date when the answer was originally due. While BancorpSouth's filing of the answer in accordance with the order that authorized it should be regarded as the procedural equivalent of setting aside the clerk's entry of default, leaving the entry of default intact in the face of the trial court's other rulings creates an anomaly that must be corrected on appeal. *Tucker v. Williams*, 198 So. 3d 299 (Miss. 2016), sets forth the law applicable to a request for relief from a clerk's entry of default. While the trial court cited *Tucker*, it failed to correctly apply it when it refused to set aside the entry of default. BancorpSouth clearly established the existence of colorable defenses and the lack of prejudice consistent with *Tucker*, which, in accordance with well-established Mississippi law, disfavors default, favors trial on the merits, and expects trial courts not to be grudging about setting aside defaults. Under the unusual circumstances of this case, the trial court erred in refusing to set aside the clerk's entry of default.

X. Cross-Appeal: Argument

A. Standard of Review

While a trial court's denial of a motion to set aside an entry of default is reviewed on appeal for abuse of discretion, the trial court's discretion must be exercised in accordance Rules

55(c) and 60(d). *Windmon v. Marshall*, 926 So. 2d 867, 870 (Miss. 2006) (*citing Tatum v. Barrentine*, 797 So. 2d 223, 227 (Miss. 2001). But if the trial court's decision was based on an error of law, then the decision will be reversed. *Tucker v. Williams*, 198 So. 3d 299, 303 (Miss. 2016). On appeal, review for abuse of discretion asks whether the trial court applied the correct legal standard, whether the decision was reasonable, and whether "there is a definite and firm conviction that the trial court committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors." *See, e.g.*, *Bowdry v. T. Mart, Inc.*, 240 So. 3d 489, 494 (Miss. Ct. App. 2018) and cases cited there. As is shown in the following discussion of the factors relevant to the setting aside of entries of default, here the trial court clearly erred by failing to set aside the default entered against BancorpSouth and it therefore abused its discretion.

B. Introduction to Cross-Appeal

There is consistency in what the trial court did with the default-related motions, to a point. It was correct in ruling against Franklin's inventive reading of Rule 8 and denying the motion to deem the allegations of the Second Amended Complaint as admitted. In view of the unusual facts and involved procedural history of the case and Franklin's long delay in raising the question of default, and applying the legal standards discussed in the following sections,[25] the trial court was correct in denying the motion for default judgment. In view of the same facts and procedural history and applying the same standards, the trial court was likewise correct in granting BancorpSouth's motion to file an out-of-time answer to the Second Amended Complaint to relate back to the date when the answer was originally due, and to allow BancorpSouth fifteen days to do so. However, a procedural anomaly resulted from the trial court's denial of BancorpSouth's motion to set aside the clerk's entry of default.

[25] The trial court expressly looked to *Tucker v. Williams*, 198 So. 3d 299 (Miss. 2016), discussed at length *infra*.

In the context of the trial court's other rulings, the meaning and effect of not setting aside the entry of default can only be to provide that if BancorpSouth had *failed* to file its answer to the Second Amended Complaint within the time frame required by the order which authorized it, then the entry of default would stand.[26] However, BancorpSouth *did* file its answer to the Second Amended Complaint in accordance with the terms of the order allowing it, with the result, per the order, that it *related back* to the date in 2013 that the answer to the Second Amended Complaint was originally due, over three years before default was ever entered. Thus, the effect of BancorpSouth's compliance with the order was to render the clerk's entry of default moot. If the entry of default were allowed to stand *after* BancorpSouth's compliance with the order allowing the out-of-time answer to relate back, then that order is made meaningless. Viewed in the overall context of the trial court's other interrelated rulings, its failure to set aside the clerk's entry of default was error.[27]

C. The standard for setting aside an entry of default is more lenient than for setting aside a default judgment.

This Court has set forth different standards for setting aside an entry of default and setting aside a default judgment, with the latter standard being more demanding. Yet Franklin would have this Court apply to setting aside an entry of default an even a higher standard than that for setting aside a default judgment. That is not Mississippi law.

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[26] An additional reason for refusing the set aside the clerk's entry of default was the trial court's apparent hesitation to suggest that the deputy clerk, prevailed upon by the maneuvers of Franklin described at pp. 7-8 *supra*, did anything wrong herself: "The reason is I feel it was properly entered by the clerk, as they are in any case, on the Entry of Default." (Tr. 152:20-22; RE22.)

[27] For a similar circumstance involving the prospective effect of failure to answer an amended complaint within the additional time allowed by the court, *see W. Sur. Co. v. Leo Constr., LLC*, 2013 U.S. Dist. LEXIS 4904 (D. Conn. Jan. 11, 2013), where the court granted the defaulting defendants' motion to open the default but in doing so directed the defendants to file their answers or responses within fourteen days "or once again, risk default." *Id*. at 16-17.

In *Tucker v. Williams*, 198 So. 3d 299 (Miss. 2016), this Court set forth the respective standards for setting aside entries of default and default judgments.[28] *Tucker* clearly indicates that the standards are different for each. An entry of default may be set aside for "good cause shown" under Rule 55(c). *Id*. at 309. Setting aside a default judgment, on the other hand, requires one of the significantly more compelling reasons enumerated in Rule 60(b). *Id*. Concerning the lesser standard for setting aside an entry of default, good cause is shown when the defendant provides an explanation for the default or gives reasons why setting aside the entry of default "would serve the interests of justice." *Id*. at 310.

> "Any of the reasons sufficient to justify the vacation of a default judgment under Rule 60(b) normally will justify relief from a default entry and in various situations a default entry may be set aside for reasons that would not be enough to open a default judgment . . . ." Thus, when considering whether the trial court abused its discretion by failing to set aside an entry of default, the Court considers the nature and legitimacy of the explanation for the default, whether there is a colorable defense to the claim, and the extent of prejudice to the plaintiff if the default is set aside. When reviewing the trial court's refusal to set aside an entry of default, the Court applies a more liberal standard to its consideration of these factors than it applies when reviewing a default judgment.

Id., 198 So. 3d at 310 (internal citations omitted). A defendant is *not* required to satisfy all three considerations in order to have an entry of default set aside. *Id*. at 311. Finally, *Tucker* teaches that trial courts "should not be grudging about setting aside a default judgment" (or an entry of default); the law does not favor defaults, and any doubt should be resolved in favor of hearing the case on its merits. *Id*. at 309.

Because the setting aside of a default judgment justifies the setting aside of the entry of default on which it was based, it follows that a trial court's *denial* of a motion for a default judgment ought to justify relief from the entry of default on which the motion was based. With that corollary to the rule in *Tucker* in mind, the discussion turns to the three factors by which this

[28] As will be seen, *Tucker* all but requires that the Cross-Appeal be decided in BancorpSouth's favor. Franklin's failure to mention *Tucker* in its brief is telling.

Court tests whether the trial court abused its discretion in failing set aside the clerk's entry of default against BancorpSouth: (1) the nature and legitimacy of the explanation for the entry of default, (2) whether BancorpSouth has colorable defenses to Franklin's claims, and (3) the extent of prejudice to Franklin if the default is set aside. The most important of these factors is by far the second, and the least important is the first (which, as will be shown, is not even required). Accordingly, the discussion that follows treats the three factors in descending order of importance.

D. BancorpSouth has ample colorable defenses.

Tucker emphasizes "colorable defenses" to the plaintiff's claims as the most important factor to weigh in setting aside a default. 198 So. 3d at 311. In *Tucker*, two colorable defenses were raised. Here, BancorpSouth raised thirteen colorable defenses in its motion for summary judgment with forty-three colorable defenses having been advanced in its original answer and again in its answer to the Second Amended Complaint. In no way can this factor of great importance as applied to this case not meet the test set forth by this court in *Tucker*.

> "'Colorable' is defined as '*appearing* to be true, valid, or right'" A colorable defense is one that reasonably may be asserted, given the facts of the case and the current law. A defense need not be compelling, be proven to trial standards, or be supported by sworn evidence in order to qualify as a "colorable defense." Rather, the defense must be a reasonable one. "Indeed, this Court has held that even a defense of 'questionable' strength may be colorable."

Id., 198 So. 3d at 312 (emphasis in original; internal citations omitted).

Reiterating this Court's rule that a "colorable defense to the merits of a claim" is the most important of the factors and outweighs the others, the Court of Appeals in *American Cable Corp. v. Trilogy Communs., Inc.*, 754 So. 2d 545 (Miss. Ct. App. 2000), added that to show a colorable defense, "a party must show facts, not conclusions, and must do so by affidavit or other sworn for of evidence." *Id*. at 554. That is exactly what BancorpSouth did below.

At the hearing on the matters now before this Court, the trial court also heard BancorpSouth's motion for summary judgment. The default-related motions and the summary judgment motion were argued back-to-back, with the argument overlapping in respect to colorable defenses. The relevance of the trial court approaching matters in this way was that the very robust argument of BancorpSouth on summary judgment informed the question of colorable defenses. The trial court expressly told BancorpSouth that there was no need to formally introduce into evidence the various exhibits included with the motion for summary judgment and related filings. (RE 12-13, Tr. 12-13.) This Court can thus refer to the Summary Judgment Motion and the Sealed Exhibits in support thereof (RE 10, R. 512-26; SE-all) and to the overall record to review BancorpSouth's numerous defenses, accompanying exhibits, and sworn proof in the form of deposition excerpts from several key witnesses and can readily determine, as did the trial court, that such a showing undeniably satisfies the criterion for colorable defenses to Franklin's claims, all of which are raised in BancorpSouth's answer to the Second Amended Complaint, the filing of which, in accordance with the trial court's order, relates back to a date over three years prior to the entry of default.

E. Franklin is not prejudiced by setting aside the entry of default.

In the trial court, Franklin identified only one instance of prejudice that would result from the setting aside of the entry of default: one of its expert witnesses had become so ill that he could not testify live at trial. The chronology of events surrounding this claim of prejudice deserves particular consideration.

Franklin designated Dr. William Staats as an expert on May 31, 2012. (R. 188-95.) BancorpSouth took the deposition of Dr. Staats on March 12, 2013. Franklin attended the deposition, chose not to examine Dr. Staats, even though having the opportunity to do so (RE 20, R. 878-79). Five years later, when Franklin sought to set the case for trial, apparently having had

no contact with Dr. Staats in the long interim, Franklin learned that he had been diagnosed with Alzheimer's disease two years previously and would be unable to testify. (Affidavit as to Staats' unavailability, RE 28, R. 974-75). Franklin took a calculated risk by, for whatever reason, not examining Dr. Staats at his deposition or otherwise preserving his testimony or checking in with him over a period of several years. Although the trial court found no prejudice resulting to Franklin over the consequences of that course of action (or inaction), the trial court nevertheless allowed Franklin sixty days to designate a new expert to replace Dr. Staats. (RE 22, Tr. 159:18-25, 160:1-18; RE 29, R. 1343-45.)

Lone Star Casino Corporation v. Full House Resort, Inc., 796 So. 2d 1031 (Miss. Ct. App. 2001), is instructive on the question of prejudice here:

> Full House maintains that its case has been prejudiced by the fact that Lone Star allowed twenty months to elapse without taking any action on the case while in the meantime one of Full House's principal witnesses, Mr. McComas, now suffers from serious illnesses and cannot offer valuable testimony and another, Mr. Paulson, is now deceased. Being mindful of Full House's argument, we are also aware that depositions were taken to preserve the testimony of these witnesses.
>
> Rule 32 of the Mississippi Rules of Civil Procedure governs the use of depositions. Rule 32(a)(3) clearly provides that in certain instances a court may allow a deposition in lieu of live testimony. One instance is when the witness is dead and another is when the witness is unable to attend or testify because of age, illness, or infirmity. *As long as all parties had an opportunity* to pose questions and cross examine McComas and Paulson at the depositions and that evidence has been preserved, this Court finds that Full House would not be prejudiced by the inability of these witnesses to testify in person.

Id. at 1033 (emphasis added).

Franklin made the strategic litigation decision to risk the unavailability of an expert witness it had retained by not availing itself of the opportunity to pose questions and examine him at the deposition conducted by BancorpSouth or at a separate deposition conducted by Franklin. Even if the Second Amended Complaint had been answered on its original due date in 2013, Franklin would still have found itself in the same position with regard to its expert at trial.

Now Franklin attempts to create prejudice out of what would otherwise be non-prejudicial circumstances by invoking the clerk's entry of default. That attempt is precluded by *Tucker*: "Prejudice does not result from 'the loss of rights that were obtainable only by default.'" 198 So. 3d at 316 (*quoting In re Estates of Gates*, 876 So. 2d 1059, 1065 (Miss. Ct. App. 2004)). Setting aside the entry of default results in no prejudice to Franklin.

F. Explanation or excuse for the default is neither determinative nor required, particularly in view of the procedural history of the case and Franklin's long delay in bringing it to the attention of the trial court.

While "the nature and legitimacy of the explanation for the default" is a consideration for setting aside an entry of default, *Tucker* makes clear that such an explanation is *not* necessary:

> The Williamses argue that, without a bona fide excuse for the failure to respond to the complaint, a defaulting party is entitled to no relief from an entry of default. As discussed above, this Court has not interpreted the "good cause" requirement of Rule 55(c) so narrowly. Rather, we have held that a default entry may be vacated for good cause or in the interests of justice, and that the same three factors considered under Rule 60(b) are relevant to a consideration of whether to set aside an entry of default. In *Green*, the Court held that an entry of default should have been set aside due to the existence of a colorable defense even though the defendant failed to present a persuasive reason for its failure to answer. In fact, it would be senseless to require a defaulting party to provide an excuse for the default to justify setting aside an entry of default, but to require no such excuse under the higher standard for setting aside a default judgment, in which a defaulting party may prevail upon a strong showing of a colorable defense and lack of prejudice. *See, e.g., Woodruff v. Thames*, 143 So. 3d 546, 556 (Miss. 2014) (reversing a default judgment where the colorable defense and prejudice factors favored the defaulting party, although that party had provided no persuasive excuse for the default).

Id. at 310-311 (*citing Allstate Ins. Co. v. Green*, 794 So. 2d 170, 174 (Miss. 2001); internal citations omitted).

Although *Tucker* does not require an explanation for the default, BancorpSouth did offer the trial court the best explanation it could reconstruct under the unusual circumstances of this case: BancorpSouth's counsel has no record of having received the order granting leave to file the Second Amending Complaint, yet for the next three years the parties litigated the case as if

the Second Amended Complaint had been answered. (RE 22, Tr. 13-21.) Central to those unusual circumstances, and frustrating the explanation, was the over three-year delay by Franklin in bringing to the trial court's attention the lack of an answer to the Second Amended Complaint. With Franklin's long delay, BancorpSouth's counsel has been left to rely on little more than faded memory to reconstruct what occurred. Even tort defendants are not subjected to such expectations.[29] Nor does *Tucker* impose on BancorpSouth to speculate as to an explanation,[30] because where colorable defenses and lack of prejudice are shown, explanation is not required.

In *American Cable Corp. v. Trilogy Communs., Inc.*, 754 So. 2d 545 (Miss. Ct. App. 2000), the Court of Appeals considered and balanced the same factors later discussed at length in *Tucker* when faced with the question of whether to affirm a trial court's decision not to set aside a default *judgment* where the defendant had no explanation for the default:

> Does the fact that no valid reason exists for failing to respond to the litigation by itself justify the manner in which the trial court's discretion was exercised? The supreme court has made this relevant statement: "upon a showing by the defendant that he has a meritorious defense, we would encourage trial judges to set aside default judgments in a case where, as here, no prejudice would result to the plaintiff. The importance of litigants having a trial on the merits should always be a serious consideration by a trial judge in such matters." After quoting this encouragement in a later case, the court even stated that "any error made by a trial judge should be in the direction of setting aside a default judgment and proceeding with trial. . . ."

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[29] It is worth noting that if the issue raised by Franklin in October of 2016 was not the failure to file an answer in June of 2013, but instead some tort claim for negligence that arose in June of 2013, then the claim would be time-barred. This, of course, is because statutes of limitation expect that valid claims will be promptly pursued and not neglected so as to prevent assertion of stale claims "when evidence has been lost, memories have faded, witnesses are unavailable, or facts are incapable of production because of the lapse of time." *Miss. Dept. of Public Safety v. Stringer*, 748 So.2d 662, 665 (Miss. 1999).

[30] For example, distribution of the trial court's orders from which these consolidated appeals are taken provides a possible explanation for BancorpSouth's having no record of receipt of the order granting leave the file the Second Amended Complaint. Those orders were sent by the circuit clerk to the wrong post office boxes. Neither BancorpSouth nor Franklin was aware of the entry of the orders until one of the persons who received them at the wrong the post office box notified Franklin's counsel of the misdelivery. (*See* Notice of Late Receipt, RE 30, R. 1397-1399.) Yet the trial court docket purports to show the clerk's delivery of all orders in the case.

> We follow the supreme court's directives in this as in other appeals, and add that the discretion of the trial court is not "unfettered" when considering whether to set aside a default. Here there was a delay, even possibly a lack of zeal, by an out-of-state defendant in making certain that it had timely acquired a Mississippi attorney to protect its interests. There was not, however, on this record a failure to take some steps in responding to the litigation. The actions, though negligent, were not frivolous. The procedural mis-steps by American Cable, which are grounds for finding the first factor in the default analysis against them, are not sufficient by themselves to permit the upholding of the trial court's denial of the motion to set aside the default.

Id. at 556 (internal citations omitted). The standard for setting aside a default judgment is more onerous than for setting aside an entry of default. Franklin makes too much of BancorpSouth's explanation for the default. Colorable defenses and lack of prejudice have been thoroughly established. Under *Tucker*, the explanation or lack thereof is therefore unimportant.

G. The circumstances under which Franklin obtained entry of default especially warrant its setting aside.

This Court must remain mindful that the determination of these consolidated interlocutory appeals turns upon the highly unusual procedural history of this case. At the center of that procedural history is the matter of the covert manner by which Franklin obtained the clerk's entry of default, narrated at pp. 7-8, *supra*. Notwithstanding its answer to the First Amended Complaint, its timely filing of a comprehensive motion for summary judgment, and its active defense against Franklin's claims continuously and vigorously for over six years, Franklin dropped in the mailbox a copy of its application for entry of default addressed to BancorpSouth's counsel, and with the copy sitting in the mailbox, Franklin's counsel walked over to the clerk's office, filed the original, and coordinated entry of default on the spot. *Id*. Nothing about that comports with the purposes and intent of Rule 5.

Rule 5 requires that *every* pleading subsequent to the original complaint, *every* written motion other than one which may be heard *ex parte*, "and *every* written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper" be served upon

each of the parties. An exception is that "[n]o service need be made on parties in default for failure to appear." Rule 5(a). BancorpSouth had not failed to appear. *Eight hundred pages* of materials in the court file prior to the entry of default attest that. Under the unprecedented circumstances of this case, BancorpSouth deserved prior notice of the application for entry of default. Had it been afforded prior notice, BancorpSouth would have objected, and there is no reason to think that in the face of an objection the clerk would have entered default anyway; there is every reason to think that, with many hundreds of pages already in the court file, she would have referred the application to the court.

One critical aspect that BancorpSouth would have included in an objection if it had been afforded prior notice of the application was the fact that the affidavit of Franklin's counsel in support of the application carefully departed from the language of Rule 55 and Official Form 36 for establishing grounds for entry of default. Rule 55 requires the applicant to show that the adverse party "has failed to plead or otherwise defend as provided by these rules." Rule 55(a). Form 36 expects a sworn showing that the defendant has failed to "serve a copy of any answer or other defense which he might have. . . ." Form 36, ¶ 3. Instead, Franklin's counsel offered an affidavit stating only that BancorpSouth had "failed to answer or otherwise *respond* to Franklin's Second Amended Complaint." (Affidavit, ¶ 5, RE 16 R. 802-03, emphasis added.) Franklin's counsel knew, after over six years of litigation and BancorpSouth's recent filing of its comprehensive motion for summary judgment, that BancorpSouth had in fact otherwise defended and served him with copies of its defenses. Default should be entered only upon sufficient documentation. *See, e.g., Durr v. City of Picayune*, 185 So. 3d. 1042, 1046 (Miss. Ct. App. 2015). The affidavit of Franklin's counsel and procedural history of the case as evidenced by the clerk's file did not provide sufficient documentation for entry of default against BancorpSouth.

Franklin incorrectly suggests that "otherwise defend" refers *only* to an answer or a Rule 12(b)(6) motion. The Rule 55 Advisory Committee note on which Franklin relies makes clear that "if the party appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default judgment." Here, the trial court *did* refuse to enter a default judgment for all of the reasons discussed above, all of which point to the impropriety of entering default in the first place.

That "otherwise defend" has a broader meaning than suggested by Franklin is illustrated by *King v. Segrest*, 641 So. 2d 1158 (Miss. 1994), where an entry of an appearance and filing a motion to set aside default and for additional time to file an answer was held to be "an act conveying an attempt to defend." *Id.* at 1162. Thus, if a defendant who has not yet made any answer can "otherwise defend" by moving for relief from default and for leave to answer, the procedural history of BancorpSouth's actions undeniably satisfy the standards for otherwise defending under *King*.[31]

Finally, Franklin insists that, other than an answer, only a Rule 12(b)(6) motion constitutes otherwise defending. Thus, Franklin's argument concedes that if BancorpSouth had filed a Rule 12(b)(6) motion, Franklin would not have been entitled to entry of default. However, a motion for summary judgment is the "functional equivalent" of a Rule 12(b)(6) motion because each tests the legal sufficiency of the evidence. *See Gray v. Baker*, 485 So. 2d 306, 307 (Miss. 1986).[32] It follows then, that the prior filing of BancorpSouth's comprehensive motion for

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[31] *Harrison v. Mississippi Bar*, 637 So. 2d. 204 (Miss. 1994), cited by Franklin for its narrow reading of "otherwise defend", is distinguishable. There, the defendant lawyer did not answer but instead wrote a letter to the Bar, which he failed to file with the clerk, and he failed to appear at the hearing on the resulting motion for default judgment. *Harrison* bears no resemblance to the long procedural history of the case at bar involving the prominent advancement of defenses.

[32] Cases from around the country hold that a motion for summary judgment satisfies the "otherwise defend" test under rules mirroring Mississippi's Rule 55. *See, e.g., Dekoven v. Avengelical Press*, 1999 WL 34794967, 4 (W.D. Mich. 1999) (summary judgment motion filed prior to a motion for default

summary judgment precluded the entry of default, even if the Second Amended Complaint had not yet been answered.

In the particular procedural context of this case, Franklin was not entitled to entry of default in the first place, and the trial court erred by not setting it aside.

H. The trial court's other rulings point to trial on the merits, such that the clerk's entry of default serves no further purpose.

A consistent theme in cases where default judgments are denied or set aside is that the entry of default which served as the basis for the judgment no longer carries any effect, even where the setting aside of entry of default is not expressly mentioned. Invariably, these cases simply send the case back to the trial court for trial on the merits, a result inconsistent with any notion that the original *entry* of default has any further effect. *Tucker* illustrates this point: ". . . due to the importance of affording litigants *a trial on the merits,* 'any error made by a trial judge should be in the direction of setting aside a default judgment and *proceeding with trial*.'" 198 So. 3d at 309 (*quoting Allstate Ins. Co. v. Green*, 794 So. 2d 170, 174 (Miss. 2001), emphasis added). To the same effect is *United Airlines, Inc. v. McCubbins*, 2018 Miss. App. LEXIS 188 (Miss. App. 2018), following *Tucker* and setting aside a default: "Under the 3-part balancing test, the default judgment in this case must be set aside *so that the case may be heard on the merits.*" *Id.* at 13 (emphasis added). Similarly, in *Woodruff v. Thames and Collins,* 143 So. 3d 546 (Miss. 2014), after setting aside a default judgment, this Court remanded the case for trial on the merits,

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qualifies as otherwise defending against the complaint); *Rashidi v. Albright*, 818 F. Supp. 1354, 1355-56 (D. Nev.1993) (a defendant may escape default judgment by filing a motion for summary judgment); *Johnson v. Warner*, 2009 U.S. Dist. LEXIS 17143 (W.D. Va. Mar. 6, 2009) (filing a motion for summary judgment instead of answering the complaint constituted otherwise defending the lawsuit); *Havre Daily News, LLC v. City of Havre*, 2006 MT 215 (Mont. 2006) (default may not be entered against a defendant who has filed a motion for summary judgment but not an answer to the complaint). Moreover, the filing of a motion for summary judgment prior to the filing of an answer tolls the delay for the filing of an answer during the pendency of the motion. *See, e.g., First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); *Brooks v. Menifee*, 2010 U.S. Dist. LEXIS 19736, 2010 WL 774049 (W.D. La. 2010); *Marquez v. Cable One. Inc.*, 463 F.3d 1118 (10th Cir. 2006); *Rashidi v. Albright, supra*; *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391 (6th Cir. 1987); *Southern Pacific Transportation Co. v. National Molasses Co.*, 540 F.2d 213 (5th Cir. 1976).

noting that "default judgments are not favored in the law, and reasonable doubt should be resolved in favor of opening the judgment and allowing the case to *proceed on the merits.*" *Id.* at 557 (emphasis added). Finally, in *American Cable Corp. v. Trilogy Communs., Inc.*, 754 So. 2d 545 (Miss. Ct. App. 2000), the Court of Appeals itself set aside a default judgment:

> Our setting aside the default on appeal is the procedural equivalent of the trial court's having initially done so. This case *starts anew* with the requirement of the plaintiff to prove *any contested factual underpinnings of its position* regarding jurisdiction as well as *the merits*.

Id. at 556 (emphasis added).

These cases all serve to underscore the point that leaving an entry of default intact after a default judgment is set aside or denied would result in a procedural anomaly that is inconsistent with this Court's longstanding rule disfavoring defaults and preferring trial on the merits. Instructive on this point is *Hartford Cas. Ins. Co. v. Malavos*, 2005 U.S. Dist. LEXIS 50560 (E.D. Cal. 2005), where the defendants "intentionally ignored" and did not answer the plaintiff's complaint. *Id*. at 16. When considering the defendants' motion to set aside entry of default, the court stated that the defendants' intentional and "culpable" failure to answer a complaint would not normally be excused. *Id*. However, because the court denied the plaintiff's motion for default judgment, the court recognized that an "anomaly" would be created if it did not also set aside the entry of default: to the leave the entry of default intact under such circumstances would place the defendants in "procedural limbo." *Id*.

Procedural limbo is where the trial court left BancorpSouth by denying Franklin's motion to deem the allegations of the Second Amended Complaint as admitted, denying its motion for default judgment, granting BancorpSouth's motion to file an out-of-time answer to the Second Amended Complaint to relate back to the date when the answer was originally due, and yet denying BancorpSouth's motion to set aside the clerk's entry of default. Of course, by allowing

BancorpSouth to file its answer to the Second Amended Complaint relating back, the trial court effectively *did* undo the clerk's entry of default. But in its desperate attempts to avoid at all costs a trial on the merits, Franklin persists its efforts to exploit the apparent procedural limbo resulting from the continued presence of the clerk's entry of default.[33]

XI. Cross-Appeal: Conclusion

Disposition not only of this Cross-Appeal but also of the Direct Appeal should be approached with the utmost deference to the longstanding principle that defaults are not favored, that trials on the merits are preferred, and that courts will be lenient in granting relief from defaults. "Of a court's wide range of remedies, . . . the entry of default judgment is the *most drastic*, and should be applied only in *extreme circumstances*". *State Sec. Life Ins. Co. v. State*, 498 So. 2d 825, 831 (Miss. 1986) (emphasis added). By denying Franklin's motions for default judgment and to deem the allegations of the Second Amended Complaint as admitted, and by granting BancorpSouth's motion to file an answer to the Second Amended Complaint to relate back to the date when the answer was originally due, the trial court followed these principles. However, once BancorpSouth filed its answer in accordance with the order allowing it, the clerk's entry of default served no further purpose, and the trial court clearly erred by denying BancorpSouth's motion to set aside the entry of default, particularly in the face of the highly unusual procedural history of the case, Franklin's long delay in raising the lack of an answer to the Second Amended Complaint, and BancorpSouth's showing of the existence of colorable defenses and the lack of any prejudice to Franklin.

The trial court's denial of BancorpSouth's motion to set aside the clerk's entry of default should be reversed, and this case should be remanded for trial on the merits.

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[33] There can be no certainty that even a decision in favor of BancorpSouth in these consolidated appeals will be accepted by Franklin as the final word on the subject: awaiting the trial court on remand is Franklin's *motion to strike* BancorpSouth's answer to the Second Amended Complaint. (R. 1186-1238.)

This the 3rd day of October, 2018.

Respectfully submitted,

BANCORPSOUTH BANK

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below I served a copy of the foregoing BRIEF OF APPELLEE/CROSS-APPELLANT upon the following counsel by electronically filing said brief with the Clerk of the Court through the Mississippi Electronic Courts filing system:

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I further certify that I have hand-delivered a copy of the foregoing BRIEF OF APPELLEE/CROSS-APPELLANT upon:

Honorable Jim S. Pounds
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THIS, the 3rd day of October, 2018.

/s/ J. Patrick Caldwell
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