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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRENT ALLEN WINTERS, et al.,

Plaintiffs,

No. 2:09-cv-00522 JAM KJN PS

v.

ORDER

DELORES JORDAN, et al.,

Defendants.

_____ /

On October 9, 2009, defendant Valerie Logsdon filed a special motion to strike plaintiffs’ Third Amended Complaint pursuant to California Code of Civil Procedure § 425.16, and a timely motion to dismiss plaintiffs’ Third Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (See Dkt. Nos. 72.) However, Logsdon simultaneously filed an answer to plaintiff’s Third Amended Complaint. (Dkt. No. 77.) As stated below, the undersigned will strike Logsdon’s answer, subject to refileing if necessary, and will consider the pending motions.

“A Rule 12(b)(6) motion must be made *before* the responsive pleading.” Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 954 (9th Cir. 2004) (emphasis in original); see also Dent v. Cox Commc’ns Las Vegas, Inc., 502 F.3d 1141, 1143 n.3 (9th Cir. 2007). Here, Logsdon has presented the court with a novel circumstance by filing a Rule 12(b)(6) motion and an answer at the same time, and before the close of pleadings. It appears that Logsdon intended

1 that the court consider her Rule 12(b)(6) motion notwithstanding the fact that she filed an answer
2 to the operative pleading on the same day. The undersigned construes the answer as having been
3 protectively filed. The undersigned will strike, *sua sponte*, Logsdon's answer pursuant to Federal
4 Rule of Federal Procedure 12(f)(1), subject to refiling, if necessary, after the court has resolved
5 Logsdon's special motion to strike and motion to dismiss.

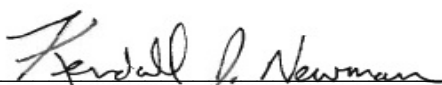
6 For the foregoing reasons, IT IS HEREBY ORDERED that:

7 1. Defendant Valerie Logsdon's answer to plaintiffs' Third Amended
8 Complaint (Dkt. No. 77), is stricken without prejudice to refiling.

9 2. If necessary, Logsdon may file an answer to the Third Amended
10 Complaint within 14 days after the court has fully resolved her special motion to strike and
11 motion to dismiss (Dkt. Nos. 72). The court will resolve Logsdon's special motion to strike and
12 motion to dismiss through a separate order and/or proposed findings and recommendations.

13 IT IS SO ORDERED.

14 DATED: June 15, 2010

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18 KENDALL J. NEWMAN
19 UNITED STATES MAGISTRATE JUDGE
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