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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 David K. Everson and Patricia M.)
Everson,)
10 Plaintiff,)
11 vs.)
12)
13 David D. and Kirsty Everson, Husband)
and Wife; Mandalay Homes, Inc., an)
14 Arizona Corporation,)
15 Defendants.)
16 _____)

No. CV-08-1980-PHX-GMS

ORDER

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18 Pending before the Court are: (1) Plaintiffs’ Motion to Deem Admissions (Doc. 106);
19 (2) Defendants’ First Motion to Amend/Correct “Deemed” Admissions (Doc. 107); (3)
20 Plaintiffs’ Motion to Amend/Correct Amended Complaint (Doc. 109); (4) Plaintiffs’ Motion
21 to Strike Response in Opposition to Motion (Doc. 116); and (5) Plaintiff’s Motion to Modify
22 Answer to Request No. 8 (Doc 118).

23 For the reasons listed below Defendants’ First Motion to Amend/Correct “Deemed”
24 Admissions (Doc. 107) is granted, therefore Plaintiffs’ Motion to Deem Admissions (Doc.
25 106) is denied as moot. Plaintiff’s Motion to Modify Answer to Request No. 8 (Doc. 118)
26 is also granted. Plaintiff’s Motion to Strike Response in Opposition to Motion (Doc. 116)
27 is denied, and Plaintiff’s Amended Motion for Leave to File Second Amended Complaint
28 (Doc 109) is denied.

1 **Request For Admissions**

2 Plaintiffs mailed their First Set of Request For Admissions to Defendants' Counsel
3 on July 19, 2010. Defendants did not file timely answers to the request for admissions.
4 On September 3, 2000, Plaintiffs filed their Motion to Deem Admissions and Memorandum
5 in Support on September 3, 2010, Doc. 106. On the same date, Defendants' counsel realized
6 her error. She wrote Plaintiffs indicating that she had made an error resulting in the filing
7 of late answers because her assistant had incorrectly calendared the date for response
8 pursuant to her understanding of the state rather than the federal rules. Four days later, on
9 September 7, Defense Counsel filed answers to the Requests which was eleven days after
10 their due date. Defendants further filed their Motion to Permit Amendment. Defendants
11 requested permission to amend their answers pursuant to an affidavit filed by Counsel's staff
12 indicating that she had incorrectly calendared the date for response.

13 The Court may "permit amendment if it would promote the presentation of the merits
14 of the action." The Court is persuaded that permitting the amendment in this case would do
15 so. Many of the requested admissions apparently have to do with claims that have already
16 been dismissed from this case on the merits. Failing to allow amendment would only result
17 in waste and confusion as Plaintiffs apparently seek such admissions in what would be a
18 fruitless attempt to revive claims against parties that have been definitively dismissed, based
19 not upon the facts of the matter, but upon remaining Defendants docketing error that resulted
20 in a deemed admission. Further, Plaintiffs establish no prejudice in maintaining or defending
21 the action on the merits if the Court permits the late filing of the answers to the request for
22 admissions. Plaintiffs' only argument is to again reurge the canard repeatedly rejected by
23 this Court that Defendants habitually engage in late filing. It is true, in this instance, that
24 Plaintiffs received Defendants' answers eleven days after they were due. Plaintiffs, however,
25 establish no prejudice that they will suffer by permitting late amendment of the answers.
26 Therefore, Defendants' answers to the Request for Admissions, already served on the
27 Plaintiffs are deemed timely filed.

28 For the same reasons, Defendants' Motion to Modify Answer to Request No. 8 is

1 granted.

2 **Motion to Amend**

3 Plaintiffs further seek leave of the Court to amend their complaint to add additional
4 facts and allegations to their claim against the Estate of Louis B. Schaeffer as well as to add
5 Mandalay Investments, Inc. and MHI Residential, Inc., as party Defendants to this action.
6 The Estate of Louis B. Schaeffer was long ago dismissed as a Defendant from this case. An
7 amendment to seek to resurrect the claim would be futile, and the Court can see no reason
8 to permit the late amendment to add parties of which Plaintiffs have been long aware, and
9 which, are inextricably intertwined with the amendment proposing the addition of factual
10 allegations to claims that have already been dismissed. Therefore, leave to amend is denied.

11 Further, Plaintiffs' Motion to Strike and Response to the Estate's Opposition to
12 Plaintiffs' Motion to Amend Complaint and Motion to Strike, Doc. 116 is also denied.
13 Plaintiffs again base their motion to strike on the argument that they were not timely served
14 by the Estate with their Response. The Court has already repeatedly rejected the argument
15 set forth by Plaintiffs as a basis for striking papers in this matter. It has considered Plaintiffs'
16 argument in this respect and finds it without merit. The Motion to Strike is therefore denied.

17 Therefore, for the reasons stated above,

18 **IT IS HEREBY ORDERED:**

- 19 1. Granting Defendants' First Motion to Amend/Correct "Deemed" Admissions
20 (Doc. 107).
- 21 2. Denying as moot Plaintiffs' Motion to Deem Admissions (Doc. 106).
- 22 3. Granting Plaintiff's Motion to Modify Answer to Request No. 8 (Doc. 118).
- 23 4. Denying Plaintiff's Motion to Strike Response in Opposition to Motion (Doc.
24 116).
- 25 5. Denying Plaintiff's Amended Motion for Leave to File Second Amended
26 Complaint (Doc 109).

27 DATED this 24th day of November, 2010.

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G. Murray Snow
United States District Judge