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NOT FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Federal Deposit Insurance Corporation,)

No. CV-08-2075-PHX-FJM

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Plaintiff,)

ORDER

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vs.)

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Penn 1st Financial Services, Inc.,)

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Defendant.)

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This case was originally filed in the Superior Court of Arizona in Maricopa County by First National Bank of Arizona (“FNBA”). When the Federal Deposit Insurance Corporation (“FDIC”) was appointed receiver for First National Bank of Nevada, successor in interest to FNBA, the FDIC removed the case to this court pursuant to 12 U.S.C. § 1819(b)(2)(B). Prior to removal, the state court issued a minute entry granting Penn 1st’s motion to dismiss the complaint for FNBA’s failure to respond. At the time the motion to dismiss was granted, the parties had agreed to extend the response deadline. We now have before us the FDIC’s motion to lift that minute entry and allow it to amend the complaint (doc. 5), Penn 1st’s response (doc. 8), and the FDIC’s reply (doc. 10).

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“[A]fter removal, the federal court takes the case up where the State court left it off.”

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Jenkins v. Commonwealth Land Title Ins. Co., 95 F.3d 791, 795 (9th Cir. 1996) (quotation omitted). Pursuant to Rule 54(b), Fed. R. Civ. P., an order may be revised at any time before

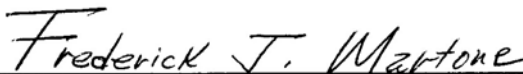
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1 entry of final judgment. Based on the parties' agreement to extend the time to respond, we
2 vacate the July 21, 2008 minute entry granting Penn 1st's motion to dismiss.

3 Although leave is not required, we also grant the FDIC's motion for leave to amend
4 the complaint. Under Rule 15(a), Fed. R. Civ. P., a "party may amend its pleading once as
5 a matter of course . . . before being served with a responsive pleading." A motion to dismiss
6 is not a responsive pleading within the meaning of Rule 15(a). Fed. R. Civ. P. 7(a); Rick-
7 Mik Enters., Inc. v. Equilon Enters., LLC, 532 F.3d 963, 977 (9th Cir. 2008). Here, Penn 1st
8 has not filed an answer; it only filed a motion to dismiss. The FDIC may amend its pleading
9 as a matter of right, notwithstanding that a motion to dismiss was granted. Rick-Mik Enters.,
10 Inc., 532 F.3d at 977 ("Neither the filing nor granting of . . . a motion [to dismiss] before
11 answer terminates the right to amend.") (citation omitted). We disagree with Penn 1st that
12 the proposed amendment would be futile.

13 **IT IS ORDERED GRANTING** the FDIC's motion to set aside the July 21, 2008
14 minute entry and for leave to amend the complaint (doc. 5). Because there is no pending
15 application for fees and costs, **IT IS ORDERED DENYING** as moot the FDIC's motion to
16 dismiss Penn 1st's application (doc. 5). If there were such an application, it has been mooted
17 by this order.

18 DATED this 13th day of February, 2009.

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 Frederick J. Martone
23 United States District Judge
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