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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Michael Grady; Jennifer Grady, )

No. CV 11-2060-PHX-JAT

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Plaintiffs, )

**ORDER**

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vs. )

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Bank of Elmwood; Elmwood Financial )  
Corporation; Jonathan Levin; Sarah Levin, )

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Defendants. )

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Tri City National Bank, )

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Counterclaimant, )

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vs. )

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Michael Grady and Jennifer Grady, )

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Counterdefendant. )

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The Federal Deposit Insurance )  
Corporation as Receiver for Bank of )  
Elmwood, )

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Intervenor. )

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Pending before the Court is Tri City National Bank's (TCNB) motion to strike  
25 Plaintiffs' answer to TCNB's counterclaim. TCNB filed its answer and counterclaim on  
26 April 28, 2010 (as will be discussed more fully below, because TCNB was not a named  
27 Defendant in the First Amended Complaint, it is not clear to the Court why TCNB  
28 answered). Thereafter, Plaintiffs moved to amend their complaint. The Court denied

1 Plaintiff's motion to amend.<sup>1</sup>

2 After the Court denied all of Plaintiffs' requests to amend, TCNB sought to be  
3 dismissed as a Defendant in this case arguing that there were no claims against it because  
4 leave to amend was denied. The Court agreed with TCNB. Doc. 122. Specifically, the  
5 Court's Order stated:

6 Pending before the Court is a motion to strike two claims from Plaintiffs'  
7 Second Amended Complaint. Defendant Tri City National Bank (TCNB)  
8 argues that all claims against it should be dismissed because the Court, on  
9 futility grounds, denied Plaintiffs' motion to amend to add additional claims  
against TCNB (the Court allowed amendment as to other claims). Thus,  
TCNB argues that the Second Amended Complaint, which includes claims  
against it, runs afoul of the Court's order.

10 Plaintiffs respond and argue that the First Amended Complaint had claims  
11 against TCNB. Plaintiffs argue that the Second Amended Complaint reasserts  
12 those claims from the First Amended Complaint, but does not add new claims  
13 that the Court did not allow when the Court denied leave to amend. Plaintiffs  
go on to argue that the Court denying leave to amend to add new claims  
against TCNB did not operate to dismiss the claims against TCNB that were  
listed in the First Amended Complaint.

14 TCNB replies and argues that the claims in the First Amended Complaint  
15 which Plaintiffs argue survived the motion to amend were claims against Bank  
16 of Elmwood. TCNB acknowledges that it acquired some of the Bank of  
17 Elmwood's assets from the Federal Deposit Insurance Company (FDIC) after  
18 the FDIC took the Bank of Elmwood into receivership, but TCNB denies that  
it and Bank of Elmwood are one and the same for pleading and liability  
purposes.<sup>2</sup> Further, TCNB notes that the FDIC, not TCNB, moved to be  
substituted for the Bank of Elmwood.

19 The Court finds that Bank of Elmwood and TCNB are not one and the  
20 same. Thus, any claims against Bank of Elmwood in the First Amended  
Complaint do not continue to the Second Amended Complaint as claims  
against TCNB.

21 Accordingly, **IT IS ORDERED** that the claims against TCNB listed in  
22 the Second Amended Complaint are dismissed, and TCNB is dismissed as a  
Defendant. Thus, the motion to strike (Doc. 57) is granted as to TCNB only.

23 Doc. 122 at 1-2.

24 The July 14, 2009 First Amended Complaint was the complaint on which the Court

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26 <sup>1</sup> The history of Plaintiffs' various motions to amend is recounted in Doc. 102 at 1-4.

27 <sup>2</sup> [Footnote from Doc. 122] The Court has reviewed the First Amended Complaint  
28 (Doc. 1-2 at 1) and notes that TCNB is not named as a Defendant.

1 relied to reach the conclusion in the Order at Doc. 122. The Court has located TCNB's  
2 "answer" in which it calls itself an "intervenor/counterclaimant." Doc. 1-3 at 1-32. This  
3 filing, which was filed over nine months after the First Amended Complaint, responds to the  
4 First Amended Complaint. The Court has not located any evidence from the state court  
5 record that TCNB was granted leave to intervene. The Court further cannot determine  
6 whether the "answer" was timely.

7 TCNB, as evidenced by the Order at Doc. 122, has convinced the Court that it was  
8 not, and is not, a Defendant in this case. The Court is now concerned by this conclusion  
9 given that TCNB "answered" the First Amended Complaint as if it was a Defendant, and  
10 continues to assert "counterclaims" as a "counterclaimant" even though it has convinced the  
11 Court it was never a Defendant to the First Amended Complaint.

12 If TCNB was in fact a Defendant to the First Amended Complaint, then Plaintiffs  
13 were correct that this Court denying leave to amend to add "new" claims against TCNB did  
14 not operate as a dismissal of the existing claims against TCNB. *See* Doc. 122 (summary of  
15 arguments). However, if this Court is correct that TCNB was never a Defendant,  
16 procedurally the Court is at a loss as to how TCNB can now be a counterclaimant against  
17 Plaintiffs.

18 Against this backdrop, the Court must now decide whether Plaintiffs' answer to the  
19 counterclaims is untimely. As discussed above, TCNB filed the counterclaims on April 28,  
20 2010. Plaintiffs answered the counterclaims on March 20, 2013, and amended that answer  
21 on March 21, 2013. TCNB moved to strike the answer arguing it is 511 days late. Doc. 152  
22 at 2.

23 TCNB has indicated that if this Court grants the motion to strike it will decide whether  
24 to move for default judgment or voluntarily dismiss its claims. Doc. 148 at 10 (stating that  
25 once Court grants motion to strike, "TCNB can choose between proceeding to obtain a  
26 default judgment or even dismissing the Counterclaim under Rule 41..."). Given the  
27 procedural posture of this case, the Court can not allow TCNB to proceed to default without  
28 significant further briefing. Accordingly, the Court will allow Plaintiffs' their untimely

1 answer.

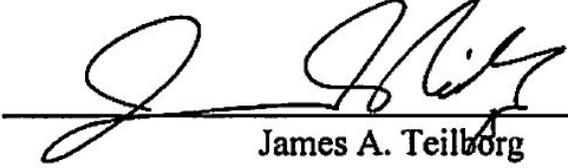
2 Based on the foregoing,

3 **IT IS ORDERED** that the motion to strike (Doc. 144) is denied.

4 **IT IS FURTHER ORDERED** that each party shall file a supplemental brief by 10:00  
5 a.m. Wednesday, April 3, 2013, discussing:

- 6 1) whether a non-party can file a counterclaim;
- 7 2) whether, assuming TCNB's April 28, 2010 counterclaims were viable,  
8 TCNB's failure to answer and assert counterclaims to the second amended  
9 complaint (Doc. 56) waived those counterclaims;<sup>3</sup>
- 10 3) and, assuming TCNB's April 28, 2010 counterclaims were viable, and that  
11 TCNB's failure to answer the Second Amended Complaint and reassert the  
12 counterclaims did not constitute a waiver of the counterclaims, did the Court  
13 striking the claims against TCNB's in the Second Amended Complaint in the  
14 order of December 14, 2012 (Doc. 122), by finding TCNB was not a party to  
15 this case, extinguish TCNB's right to assert a counterclaim.

16 DATED this 2<sup>nd</sup> day of April, 2013.

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James A. Teilborg  
Senior United States District Judge

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<sup>3</sup> *Wagner v. Choice Home Lending*, 266 F.R.D. 354, 358-60 (D. Ariz. 2009) (discussing whether a response to an amended complaint must reassert counterclaims); *Johnson v. Berry*, 228 F.Supp.2d. 1071, 1079 (E.D. Mo. 2002) (holding that defendant abandoned counterclaim when it failed to replead in response to an amended complaint).