

1 basis for a dismissal fo a complaint for failure to satisfy Rule 9(b), and Defendant does
2 not cite any authority that such dismissal is appropriate.

3 A motion to dismiss under Rule 12(b)(6) “must be made before pleading if a
4 responsive pleading is allowed.” Fed. R. Civ. P. 12(b). An answer to a complaint is a
5 responsive pleading. Fed. R. Civ. P. 7(a)(2). Defendant filed an answer to the complaint
6 in this matter on April 28, 2007. (Dkt. 5.) Relief under Rule 12(b)(6) is therefore
7 foreclosed. Defendant’s request for relief under Rule 12(e) is foreclosed for the same
8 reason. Fed. R. Civ. P. 12(e) (“The motion must be made before filing a responsive
9 pleading.”)

10 The defense of failure to state a claim may be raised by a motion for judgment on
11 the pleadings under Rule 12(c). Fed. R. Civ. P. 12(h)(2). A party may move for
12 judgment on the pleadings after the pleadings are closed. Fed. R. Civ. P. 12(c). Relief
13 under Rule 12(c) is therefore not foreclosed. However, as Rule 12(c) is only one of
14 several purported bases for Defendant’s request, several of which are currently
15 unavailable, the Court will strike Defendant’s motion with leave to refile. To avoid any
16 further delay in this matter, Defendant shall be required to file a renewed motion for
17 judgment on the pleadings by September 15, 2008.

18 B. Response in Opposition

19 The request for an extension of time to respond to Defendant’s Rule 12 motions is
20 denied. First, the Rule 12(e) Motion for a More Definite Statement has been denied,
21 therefore rendering Plaintiffs’ request moot as to the Rule 12(e) motion. (See Dkt. 26,
22 Order dated Sept. 4, 2008.) As to Defendant’s Motion to Dismiss (Dkt. 15), the striking
23 of that motion renders Plaintiffs’ request moot. The Court notes that Plaintiffs’ request
24 fails to comply with Local Rule 7.3(b), which requires a party moving for an extension of
25 time to state the position of each other party, or to state why their efforts to determine the
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1 position of any other party were unsuccessful. LRCiv 7.3(b).¹

2 C. “Reply Memorandum”

3 The request for extension of time to “file their Reply Memorandum in response to
4 the Defendant’s Memorandum of Points and Authorities” will also be denied. First,
5 Plaintiffs will be filing a responsive memorandum, not a “reply memorandum.” LRCiv
6 7.2(c), (d). Reply memoranda are the province of the moving party, not the non-moving
7 party. Second, Plaintiffs’ responsive memorandum and Plaintiffs’ opposition to
8 Defendant’s motion are one and the same. See LRCiv 7.2(c).

9 D. Discovery

10 The request for a stay of discovery will be granted. Defendant has served
11 Plaintiffs with Requests for Admission, Requests for Production, and Uniform Contract
12 Interrogatories. (See Dkts. 16, 18.) “A party *may not seek discovery* from any source
13 *before the parties have conferred* as required by [Federal] Rule [of Civil Procedure]
14 26(f),” except in situations not applicable here. Fed. R. Civ. P. 26(d)(1). Defendant’s
15 discovery requests violated of the discovery stay already imposed by Federal Rule 26(d).
16 The Court will therefore grant Plaintiffs’ request for stay of discovery.

17 E. Preliminary Pretrial Conference

18 As mentioned, Defendant will be permitted to file a renewed motion for judgment
19 on the pleadings. Therefore the Court will vacate the Preliminary Pretrial Conference
20 currently set for September 15, 2008. The Court will set a new date for a Preliminary
21 Pretrial Conference if this matter is not disposed of on the pleadings.

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27 ¹ The Rules of Practice of the United States District Court for the District of Arizona
28 are referred to as the “Local Rules” and are cited as “LRCiv.” The Federal Rules of Civil
Procedure are referred to as the “Rules” or “Federal Rules” and are cited as Fed. R. Civ. P.

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Accordingly,

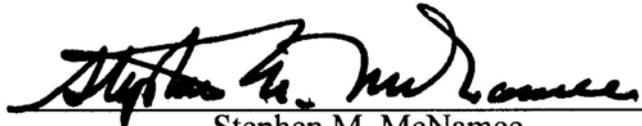
IT IS HEREBY ORDERED striking Defendant's Motion to Dismiss (Dkt. 15) with leave to refile on or before **September 15, 2008**.

IT IS FURTHER ORDERED granting in part Plaintiffs' Motion (Dkt. 22) to the extent it requests a stay of discovery.

IT IS FURTHER ORDERED denying the balance of Plaintiffs' Motion (Dkt. 22).

IT IS FURTHER ORDERED vacating the Preliminary Pretrial Conference set for September 15, 2008.

DATED this 4th day of September, 2008.



Stephen M. McNamee
United States District Judge