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

ARCHIBALD CUNNINGHAM,

No. C 14-03033 JSW

Plaintiff,

**ORDER STRIKING MOTION TO  
DISMISS AND VACATING  
HEARING AND SETTING  
DEADLINE BY WHICH  
PLAINTIFF SHALL FILE  
MOTION FOR LEAVE TO FILE  
AMENDED COMPLAINT**

v.

MARIA SCHOPP, et al.,

Defendants.

\_\_\_\_\_ /

On July 2, 2014, Plaintiff filed the Complaint in this case. (Docket No. 1.) On July 22, 2014, Defendants Maria Schopp and Mary Wang filed their Answer. (Docket No. 7.) On September 5, 2014, Defendants Schopp and Wang filed a joinder to the motion to dismiss filed by the City and County of San Francisco. (Docket No. 30.) On September 12, 2014, the Court denied the joinder without prejudice to filing a proper motion to dismiss. (Docket No. 34.) Because this case had been reassigned from another district court judge, the Court inadvertently overlooked the fact that Schopp and Wang had filed an Answer before filing their joinder.

Pursuant to Federal Rule Civil 12(b), a motion asserting the defense of failure to state a claim on which relief may be granted, “must be made before pleading if a responsive pleading is allowed.” An answer is a “pleading.” Fed. R. Civ. P. 7(a)(2). Ms. Schopp and Ms. Wang’s motion to dismiss under Rule 12(b)(6) is untimely and procedurally improper.<sup>1</sup> Because they filed an Answer, they should have filed a motion for judgment on the pleadings. Fed. R. Civ. P.

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<sup>1</sup> The Court also notes that Defendants’ legal analysis in support of their motion to dismiss is woefully inadequate. Defendants must do more than assert Plaintiff’s claims are “defective” and make reference to statutes and case law. Rather, the Defendants should apply that law to the facts alleged in Plaintiff’s complaint.


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12(c1). Accordingly, the Court STRIKES the motion to dismiss and VACATES the hearing scheduled for December 19, 2014.

In his case management statement and his response to an Order to Show Cause, Plaintiff has stated that he intends to seek leave to file an amended complaint. Accordingly, the Court HEREBY ORDERS Plaintiff to file his motion for leave to file an amended complaint by no later than November 24, 2014. Because this case is related to earlier filed cases, Plaintiff shall notice his motion for a hearing that is open and available for terminal digits 1 and 2.

**IT IS SO ORDERED.**

Dated: November 3, 2014

  
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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE