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28E-FILED on 9/1/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVE TRACHSEL et al.,

Plaintiffs,

v.

RONALD BUCHHOLZ et al.,

Defendants.

No. C-08-02248 RMW

ORDER GRANTING GRACE
DEFENDANTS' REQUEST FOR LEAVE TO
FILE A LATE REPLY**[Re Docket No. 78]**

On April 30, 2008, plaintiffs filed a complaint against numerous defendants involving the purchase of investment property by four defendants, Ronald Buchholz, Charice Fisher, RDB Development, LLC and Solomon Capital, LLC ("the Buchholz defendants" or "defendants") allegedly from the remaining defendants, Jonathon Vento, Grace Capital, LLC, Grace Capital dba Grace Communities, Donald Zeleznak, Z-Loft LLC, and Zeleznak Property Management, LLC dba Keller Williams Realty ("the Grace defendants") and Keller Williams Realty Inc. ("KWRI").

On May 28, 2008, before this action was assigned to the undersigned, the Grace defendants filed a motion to dismiss for lack of personal jurisdiction, improper venue and for failure to state claims against them under Fed. R. Civ. P. 12(b)(6). As a result of the reassignment, that motion was

1 continued until August 8, 2008. On July 17, 2008, plaintiffs filed an opposition to the motion to the
2 Grace defendants' motion to dismiss. The Grace defendants did not file a reply.

3 By the court's own motion, the Grace defendants' motion to dismiss was continued to
4 September 5, 2008 in order to consolidate the hearing with a separate motion to dismiss filed by
5 KWRI. The clerk's notice continuing the motion noted that "defendants Jonathon Vento, Grace
6 Capital, LLC., Donald Zeleznak, Z-lofts, LLC, and Zeleznak Property Management, LLC shall not
7 be permitted to file a reply brief on their motion to dismiss, as the time for doing so on the
8 previously-noticed schedule has now passed" unless otherwise stipulated by the parties. The Grace
9 defendants sought a stipulation from plaintiffs permitting them to file a reply. Plaintiffs declined to
10 so stipulate.

11 The Grace defendants now seek permission from the court to file a reply brief. Counsel
12 asserts that he did not receive an electronic notification that plaintiffs had filed an opposition due to
13 technical difficulties with his firm's email server and thus was unaware that they had done so until he
14 requested and received a copy of the opposition from plaintiffs' counsel on July 28, 2008. Decl.
15 Michael Descalso, Docket No. 79, ¶ 3. By that time, the deadline for submitting a reply under N.D.
16 Cal. Civil L.R. 7-3(c) had passed. Counsel argues that plaintiffs will suffer no prejudice regarding
17 the late-filed reply as they would ordinarily not be expected to file a response to a reply.


18 Plaintiffs assert that counsel should have known even without notification that the Grace
19 defendants' reply was due under the local rules and could have simply visited the ECF website
20 docket to confirm that an opposition had been filed. They further assert that they will suffer
21 prejudice because the Grace defendants will have had the benefit of reviewing the arguments in the
22 motion to dismiss by KWRI and plaintiffs' opposition thereto.

23 The court is sympathetic to the Grace defendants' counsel's lack of electronic notification,
24 especially in light of the continuance of the hearing date for their motion to dismiss due to the
25 reassignment of the case to the undersigned. It is also unpersuaded that plaintiffs will suffer any
26 prejudice from the late-filed reply, particularly given that the Grace defendants filed their opposition
27 two weeks prior to the rescheduled hearing and that they will likely raise the same arguments at the
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hearing. In the interest of efficiency and considering the motion to dismiss on the merits, the court will therefore consider the proposed reply brief submitted on August 21, 2008 at Docket No. 80.

DATED: 8/29/08



RONALD M. WHYTE
United States District Judge

1 **Notice of this document has been electronically sent to:**

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11
12 Counsel are responsible for distributing copies of this document to co-counsel that have not
13 registered for e-filing under the court's CM/ECF program.

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16
17 **Dated:** 9/1/08 /s/ MAG
18 **Chambers of Judge Whyte**