

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-01144-WYD-CBS

DANIEL FALCO, and
JASON VESTAL,
Plaintiffs,
v.

YRC, INC. f/k/a Roadway Express, Inc.,
TEAMSTERS LOCAL UNION 961, and
DOES 1-25,
Defendants.

ORDER

Magistrate Judge Craig B. Shaffer

This civil action comes before the court on “Plaintiff’s Motion for Leave to Amend Complaint” (filed June 22, 2009) (doc. # 15). Pursuant to the Order of Reference dated June 2, 2009 (doc. # 10) and the memorandum dated June 23, 2009 (doc. # 19), this matter was referred to the Magistrate Judge. The court has reviewed the Motion, Defendant YRC, Inc.’s Response (filed July 2, 2009) (doc. # 21), the entire case file, and the applicable law and is sufficiently advised in the premises.

A plaintiff has a right to amend the complaint once as a matter of course before a defendant has filed and served a responsive pleading. Fed. R. Civ. P. 15(a). Here, no responsive pleading has been filed and therefore nothing has cut off Plaintiffs’ right to amend without leave of court. See *Breuer v. Rockwell Int’l Corp.*, 40 F.3d 1119, 1131 (10th Cir.1994) (“Because defendants’ motions to dismiss or for summary judgment were not responsive pleadings, [plaintiff] could have amended her complaint prior to

dismissal without requesting or receiving leave of the court.”). Defendant Teamsters Local Union 961 does not oppose Plaintiffs’ Motion. Defendant YRC objects to Plaintiffs’ Motion on the basis that it is futile for the same reasons presented in its Motion to Dismiss filed on May 26, 2009 (doc. # 7). The District Court for the District of Colorado has noted that “[r]ather than force a Rule 12(b)(6) motion into a Rule 15(a) opposition brief, the defendants may be better served by waiting to assert Rule 12 motions until the operative complaint is in place.” *General Steel Domestic Sales, LLC v. Steelwise, LLC*, 2008 WL 2520423 (D. Colo. 2008). Accordingly,

IT IS ORDERED that “Plaintiff’s Motion for Leave to Amend Complaint” (filed June 22, 2009) (doc. # 15) is GRANTED. The First Amended Complaint filed on June 22, 2009 (doc. # 17) is accepted for filing *nunc pro tunc* June 22, 2009.

DATED at Denver, Colorado this 7th day of July, 2009.

BY THE COURT:

s/ Craig B. Shaffer
United States Magistrate Judge