

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01871-CBS

CORINNE BROGREN,
Plaintiff,

v.

U.S. DEPT. OF VETERANS AFFAIRS,
Defendant.

ORDER

Magistrate Judge Craig B. Shaffer

This civil action comes before the court on: (1) Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Doc. # 28) for Failure to State a Claim, and (2) Plaintiff's Motion for Leave to File a Second Amended Complaint. Defendant objects to the requested amendment on the grounds that it is futile based on failure to exhaust administrative remedies and failure to state a claim to which relief can be granted. The court has reviewed the Motions and the entire case file and is sufficiently advised in the premises. The court finds that Defendant's futility argument is better raised in a Rule 12(b) motion, rather than indirectly through opposition of a Rule 15(a) motion. *See General Steel Domestic Sales, LLC v. Steelwise, LLC*, 2008 WL 2520423 (D.Colo. 2008) (noting 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"). Accordingly, IT IS ORDERED that:

1. Plaintiff's Motion for Leave to File a Second Amended Complaint (filed January 15, 2016) (Doc. # 32) is GRANTED. The Second Amended Complaint (Doc. # 32-1) is accepted for filing as of the date of this Order. Defendant shall file an answer or otherwise

respond to the Complaint on or before February 29, 2016.

2. Defendant's Motion to Dismiss Plaintiff's Amended Complaint for Failure to State a Claim (filed December 28, 2015) (Doc. # 30) is DENIED without prejudice to refiling as directed to the Second Amended Complaint.

DATED at Denver, Colorado, this 2nd day of February, 2016.

BY THE COURT:

s/Craig B. Shaffer
United States Magistrate Judge