

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

JUDITH SOKAL as Personal Representative  
to the Estate of Wilbur Denny Arant,  
GARY S. ARANT, DEBORA A. ARANT, and  
CHRISTOPHER D. ARANT,

Plaintiffs,

v.

CASE NO: 8:07-cv-213-T-26TGW

UPSHER-SMITH LABORATORIES, INC.,  
HEALTHSOUTH REAL PROPERTY  
HOSPITAL OF SARASOTA, L.P., and  
ALBERTSON'S, INC. d/b/a SAV-ON PHARMACY,

Defendants.

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**ORDER**

Upon due consideration, Defendant Albertson's Partial Motion to Dismiss or Strike Plaintiff's Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) (Dkt. 10) is denied because it is a nullity in light of the filing of its answer and affirmative defenses. As the Eleventh Circuit Court of Appeals has noted, "by filing an answer, the defendant[] ha[s] eschewed the option of asserting by motion [under Rule 12(b)(6)] that the complaint failed to state a claim for relief." Leonard v. Enterprise Rent A Car, 279 F. 3d 967, 971 n.6 (11<sup>th</sup> Cir. 2002).

**DONE AND ORDERED** at Tampa, Florida, on February 13, 2007.

*s/Richard A. Lazzara*  

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**RICHARD A. LAZZARA**  
**UNITED STATES DISTRICT JUDGE**

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Counsel of Record