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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Van E. Flury,

) No. CV 09-848-PHX-JAT

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Plaintiff,

) **ORDER**

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vs.

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Desert Schools; First USA Bank, NA,

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Defendants.

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Plaintiff Van Flury filed this action on April 22, 2009. Defendant Chase bank answered on July 2, 2009 (Doc. #8), and filed a Cross Motion for Summary Judgment on August 7, 2009 (Doc. #15). Plaintiff never filed a response to Defendant’s Cross Motion for Summary Judgment. Instead, he filed “Plaintiff’s Notice of the Dismissal of the Action (Doc. #20),” pursuant to Federal Rule of Civil Procedure 41(a)(1)(A). Defendant filed a response to Plaintiff’s voluntary motion to dismiss, pointing out that he could no longer dismiss under Rule 41(a)(1).

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Rule 41(a)(1)(A)(i) provides, in relevant part: “[P]laintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment” Because Defendant had both answered and filed a motion for summary judgment at the time Plaintiff filed his motion to dismiss, unilateral dismissal without a Court order under Rule 41(a)(1)(A)(i) was no longer available. The Court therefore will deny Plaintiff’s Notice of Dismissal.

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1 The Court suspects Plaintiff thought that by filing the motion for voluntary dismissal,
2 he did not need to respond to Defendant's Cross Motion for Summary Judgment. If that is
3 the case, then Plaintiff was incorrect. Plaintiff needs to get a response on file or the Court
4 will dismiss this action for lack of prosecution. Plaintiff has had Defendant's Cross Motion
5 since August, so the Court will give him a very limited time to file his response.

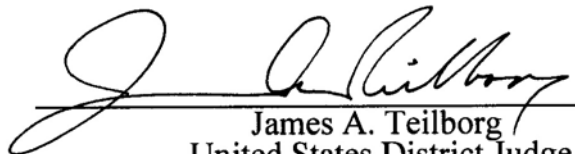
6 Plaintiff shall file a response to the Cross Motion for Summary Judgment by January
7 11, 2010. If Plaintiff does not file a response by that date, the Clerk shall dismiss this action
8 without further notice for lack of prosecution pursuant to Federal Rule of Civil Procedure
9 41(b). Defendant shall file a reply in support of its cross motion, if any, by January 29, 1010.

10 Accordingly,

11 **IT IS ORDERED** Denying Plaintiff's Notice of the Dismissal of the Action (Doc.
12 #20).

13 **IT IS FURTHER ORDERED** that if Plaintiff does not file a response to Defendant's
14 Cross Motion for Summary Judgment by January 11, 2010, the Clerk shall dismiss this action
15 without further notice pursuant to Rule 41(b).

16 DATED this 18th day of December, 2009.

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20 James A. Teilborg
21 United States District Judge