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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Kevin Halbig,

10 Plaintiff,

11 vs.

12 Navajo County, a political subdivision of
13 Arizona, et al.,

14 Defendants.

No. CV09-8124 -PCT-DGC

ORDER

15 On November 5, 2010, Defendants filed a motion for summary judgment.
16 Doc. 55. *Pro se* Plaintiff has filed no response, and the time for doing so has expired.
17 See LRCiv. 56.1(d); Fed. R. Civ. P. 6(d). On March 1, 2011, the Court ordered Plaintiff
18 to file a response by March 25, 2011. Doc. 57. Plaintiff has not complied.¹

19 Rule 56 of the Federal Rules of Civil Procedure provides, in pertinent part:

20 When a motion for summary judgment is made and supported
21 as provided in this rule, an adverse party may not rest upon
22 the mere allegations or denials of the adverse party's
23 pleading, but the adverse party's response . . . must set forth
24 specific facts showing that there is a genuine issue for trial. *If*
the adverse party does not so respond, summary judgment, if
appropriate, shall be entered against the adverse party.

25 Fed. R. Civ. P. 56(e) (emphasis added); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-
26 23 (1986) (holding that summary judgment is appropriate against a party who "fails to

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28 ¹ Pursuant to Local Rule of Civil Procedure 7.2(i), "such non-compliance may be deemed a consent to the . . . granting of the motion."

1 make a showing sufficient to establish the existence of an element essential to that party's
2 case"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)
3 ("When the moving party has carried its burden under Rule 56(c), its opponent must do
4 more than simply show that there is some metaphysical doubt as to the material facts.").

5 Defendants' arguments as to qualified immunity, municipal vicarious liability, and
6 Plaintiff's failure to show a material factual dispute as to his state law claims are
7 persuasive in the absence of Plaintiff's opposition. Defendants' other arguments are also
8 colorable. The Court will grant Defendants' motion for summary judgment because the
9 undisputed evidence offered in support of the motion "show[s] that there is no genuine
10 issue as to any material fact and that [Defendants are] entitled to judgment as a matter of
11 law." Fed. R. Civ. P. 56(c); *see Celotex*, 477 U.S. at 322-23.

12 In the alternative, the Court will dismiss Plaintiff's remaining claims against
13 Defendants for failure to comply with the Court's order and for lack of prosecution. The
14 Ninth Circuit has developed "a five-part 'test' to determine whether a dismissal sanction
15 is just: '(1) the public's interest in expeditious resolution of the litigation; (2) the court's
16 need to manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the
17 public policy favoring disposition of cases on their merits; and (5) the availability of less
18 drastic sanctions.'" *Valley Eng'rs, Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1057 (9th
19 Cir. 1998) (quoting *Malone v. USPS*, 833 F.2d 128, 130 (9th Cir. 1987)); *see also*
20 *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). "[W]here a court order is
21 violated, factors 1 and 2 support sanctions and 4 cuts against case dispositive sanctions,
22 so 3 and 5 . . . are decisive." *Valley Eng'rs*, 158 F.3d at 1057. Factor 5 "involves
23 consideration of three subparts: whether the court explicitly discussed alternative
24 sanctions, whether it tried them, and whether it warned the recalcitrant party about the
25 possibility of dismissal." *Id.*

26 Considering this five-factor test, the Court concludes that dismissal is an
27 appropriate sanction in this case. The public's interest in expeditious resolution of
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1 litigation and the Court's need to manage its docket require action when a plaintiff
2 refuses to prosecute a case. In addition, Defendants will be subject to prejudice if a
3 sanction of dismissal is not imposed. Defendants are unable to move forward with their
4 defense of this case when Plaintiff refuses to respond to their motion and the Court's
5 order. Finally, the Court has considered less drastic sanctions, but none is apparent.
6 Plaintiff has not responded to the motion for summary judgment and has refused to
7 comply with the Court's order. The Court specifically stated the actions Plaintiff must
8 take to defend against the motion for summary judgment (Doc. 57), Plaintiff failed to
9 comply, the Court had advised the parties that failure to respond to a motion within
10 prescribed time periods will be deemed a consent to granting the motion (Doc. 28 at 4:15-
11 18), and the motion has been pending for five months. The Court concludes that the
12 appropriate resolution of this problem is to dismiss Plaintiff's case.

13 **IT IS ORDERED:**

- 14 1. Defendants' motion for summary judgment (Doc. 55) is **granted** as stated
15 above.
16 2. The Clerk shall terminate this action.

17 Dated this 15th day of April, 2011.

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22 David G. Campbell
23 United States District Judge
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