

1 WO

2

3

4

5

6

**UNITED STATES DISTRICT COURT**

7

**DISTRICT OF ARIZONA**

8

Edward G. Lesofski,

)

CV 11-840 TUC DCB

9

Plaintiff,

)

10

v.

)

**ORDER**

11

Jarrold Lash, et al.,

)

12

Defendants.

)

13

On June 25, 2013, this Court denied in part and granted in part a Motion for Judgment on the Pleadings filed by the Arizona School of Acupuncture & Oriental Medicine (the School) and a Motion to Dismiss filed by the Accreditation Commission for Acupuncture & Oriental Medicine (the Commission). The Court set a deadline for the parties to complete discovery by October 1, 2013, to file dispositive motions by November 1, 2013, and file a pretrial order by December 1, 2013. (Order (Doc. 105) at 8.).

14

15

16

17

18

19

The Court directed the Plaintiff to file a Second Amended Complaint, *nunc pro tunc*, to change the caption of the Third Claim to Fraud by Misrepresentation, the only claim remaining against the Commission. The Court dismissed the Fourth Claim for bullying.

20

21

22

23

24

25

26

27

28

Since then, Defendant Don Lightener, filed a Motion for Summary Judgment, which explains that the Second Amended Complaint mentions him three times: ¶ 14) names him as the Academic Dean of the School and point contact for disabled students; ¶ 90) alleges he never contacted the Plaintiff to work with him; and ¶ 91) alleges the Plaintiff attempted to contact Lightner through email but never got a response. Defendant Lightener has attempted

1 to get the Plaintiff to voluntarily dismiss him from this action because these three allegations  
2 fail to state a claim against him in the Second Amended Complaint.

3 Defendant Lightener has well grounded reasons for seeking summary judgment.  
4 Plaintiff has failed to file a Response.

5 Under Rule 7.2(i) of the Rules of Practice for the United States District Court,  
6 District of Arizona, a failure to file a responsive pleading may be deemed consent to the  
7 motion and this Court may dispose of the motion summarily.<sup>1</sup> “A motion for summary  
8 judgment cannot be granted simply because the opposing party violated a local rule.”  
9 *Marshall v. Gates*, 44 F.3d 722, 725 (9<sup>th</sup> Cir. 1995) This is so because a party may oppose  
10 a motion for summary judgment without offering affidavits or any other materials in support  
11 of its opposition. ““Summary judgment may be resisted and must be denied on no other  
12 grounds than that the movant has failed to meet its burden of demonstrating the absence of  
13 triable issues.”” *Henry v. Gill Industries Inc.*, 983 F.2d 943, 950 (9<sup>th</sup> Cir. 1993).

14 Here the Court has reviewed the Complaint and considered the merits of the motion  
15 and the case. In light of these considerations, the Court finds that summarily granting the  
16 motion is warranted, pursuant to Rule 7.2(i).

17 In reviewing the case the Court discovered that the Plaintiff has failed to file the  
18 Second Amended Complaint, *nunc pro tunc*, as directed by the Court to correct the caption  
19 for the Third Claim to be Fraud by Misrepresentation.

20 It also appears that the Plaintiff has failed to respond to the Commission’s Requests  
21 for Admissions because the Commission has filed a motion asking this Court to deem the  
22 Requests admitted. Plaintiff’s response to the Motion for Court Order Deeming Request for  
23 Admissions Propounded to Plaintiff Admitted is due September 13, 2013. Any failure by the  
24  
25

---

26 <sup>1</sup>Dismissal is proper where party fails to follow a district court's local rules. United  
27 States v. Warren, 601 F.2d 471, 474 (9th Cir. 1979).

1 Plaintiff to file a Response shall be deemed his consent to summarily grant the Commission's  
2 motion, pursuant to LR Civ. 7.2(i).

3 The Commission has noticed the Plaintiff's deposition for September 16, 2013, at  
4 9:00 a.m. in Phoenix, Arizona. Plaintiff has filed a Motion for a Protective Order seeking  
5 to have the deposition done telephonically or by electronic means in Montana where he  
6 resides. Plaintiff asserts that he has difficulty traveling because he has a service dog and that  
7 he is currently undergoing cancer treatment. The limited information provided by Plaintiff  
8 is insufficient for the Court to find that Plaintiff should not attend a deposition in this State  
9 where he has filed suit and invoked the legal protections of this forum. (Response to Motion  
10 for Protective Order (Doc. 121) at 3) (citations omitted). However, the Court is concerned  
11 that depositions not be any more burdensome than necessary. The Court anticipates that the  
12 School will also want to depose the Plaintiff, but that deposition has not yet been noticed.

13 The Commission has filed a motion requesting a Second Rule 16 Scheduling  
14 Conference, which was held prior to the Commission's appearance in the case. The Court  
15 will grant the request for a Scheduling Conference to afford the parties an opportunity to  
16 update the case management deadlines. The parties should discuss actual dates for the  
17 Plaintiff's deposition. Defendants should attempt to coordinate their depositions so that  
18 Plaintiff's travel is minimized. The parties should consider whether an electronic deposition  
19 might serve their needs for purposes of filing dispositive motions, if a subsequent in-person  
20 in Tucson, Arizona, deposition were conducted for purposes of trial, in the event the case is  
21 not resolved by dispositive motion.

22 **Accordingly,**

23 **IT IS ORDERED** that the Motion for Summary Judgment (Doc. 109) is  
24 GRANTED, and the Clerk of the Court shall dismiss Defendant Lightener from the case.

