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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

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Edward G. Lesofski,
Plaintiff,

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CV 11-840 TUC DCB

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v.

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ORDER

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Jarrold Lash, et al.,

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Defendants.

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On October 3, 2012, the Court granted in part the Motion for Summary Judgment filed by Defendant Arizona School of Acupuncture and Oriental Medicine (ASAOM) and individually named Defendants associated with ASAOM. The Court ordered Plaintiff to show cause why summary judgment should not be entered on the Defendants' challenge that he is not disabled as defined by the American with Disabilities Act (ADA). The Court granted the Motion to Dismiss, with leave to amend, filed by Defendant McKenzie, the Chair of the Accreditation Commission for Acupuncture and Oriental Medicine. Finally, the Court granted Plaintiff an extension of time to serve the Amended Complaint.

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The Court has now reviewed the Plaintiff's filing made in response to the OSC and finds he has sufficiently supported his claim of disability to survive the ASAOM motion for summary judgment. Additionally, the Court has reviewed the Second Amended Complaint, and finds it fails to identify the named Defendants in the caption of the case. Rules of Practice of the United States District Court for the District of Arizona (LRCiv), Rule 7.1(a)(3). The Plaintiff shall refile the Second Amended Complaint, *nunc pro tunc*. There are no longer any unserved Defendants in this case.

1 On November 7, 2012, the ASAOM Defendants filed a Renewed Motion for
2 Summary Judgement. Defendants assert again that Plaintiff is not disabled. This time, the
3 Defendants submit evidence that Plaintiff either told them he was not disabled or only told
4 them that he was physically disabled. The evidence submitted by the Plaintiff in response
5 to the OSC reflects that there is a material issue of fact in dispute regarding the question of
6 Plaintiff's disability, sufficient to dispute the contrary evidence presented in this "renewed"
7 motion.

8 The remainder of the "renewed" motion for summary judgement is really a motion
9 to dismiss. Defendants argue that under any pleading standard, the Plaintiff fails to state a
10 claim. (Defendants' Renewed Motion for Summary Judgment at 6-8.) A Motion to Dismiss
11 for failure to state a claim is properly urged pursuant to Fed. R. Civ. P. 12(b)(6). Defendants
12 filed an Answer on March 13, 2012. The Defendants may, however, seek a judgment on the
13 pleadings under Fed. R. Civ. P. 12(b)(c), but have not done this.

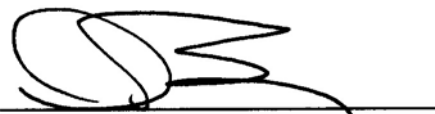
14 **Accordingly,**

15 **IT IS ORDERED** that the Defendants' Motion for Summary Judgment (Doc. 73)
16 is DENIED.

17 **IT IS FURTHER ORDERED** that the Plaintiff shall refile the Second Amended
18 Complaint to reflect the named Defendants in the caption.

19 DATED this 19th day of November, 2012.

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David C. Bury
United States District Judge