

1 Regan Furcolo (SBN 162956)  
2 Email: [rfurcolo@wmfllp.com](mailto:rfurcolo@wmfllp.com)  
3 Laura Stewart (SBN 198260)  
4 Email: [lstewart@wmfllp.com](mailto:lstewart@wmfllp.com)  
5 WALSH MCKEAN FURCOLO LLP  
6 550 West C Street, Suite 950  
7 San Diego, CA 92101-5420  
8 Telephone: (619) 232-8486  
9 Facsimile: (619) 232-2691

10 Attorneys for Defendant  
11 JESSICA MCELFRISH, an individual

12 **UNITED STATES DISTRICT COURT**  
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 DARRYL COTTON, an individual,  
15 Plaintiff,  
16 v.

17 CYNTHIA BASHANT, an individual;  
18 JOEL WOHLFEIL, an individual;  
19 LARRY GERACI, an individual;  
20 REBECCA BERRY, an individual;  
21 MICHAEL WEINSTEIN, an individual;  
22 JESSICA MCELFRISH, an individual;  
23 and DAVID DEMIAN, an individual,  
24 Defendants.

**CASE NO. 3:18-cv-00325-TWR-DEB**

**DEFENDANT JESSICA  
MCELFRISH'S REPLY TO NO  
OPPOSITION TO MOTION  
DISMISS PLAINTIFF'S FIRST  
AMENDED COMPLAINT**

District Judge:  
Hon. Todd W. Robinson

Magistrate Judge:  
Hon. Daniel E. Butcher

Date: April 21, 2021  
Time: 1:30 p.m.  
Courtroom: 3A

**[NO ORAL ARGUMENT  
REQUESTED]**

25  
26 TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF  
27 RECORD HEREIN:

PLEASE TAKE NOTICE that there has been no written opposition filed by plaintiff DARRYL COTTON (“plaintiff”) to defendant JESSICA McELFRESH’s (“Ms. McElfresh”) Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the First Amended Complaint which is set for hearing before this Court on April 21, 2021 at 1:30 p.m.

According to this Court’s “Standing Order for Civil Cases,” any opposition to a motion must be filed no later than twenty-eight (28) days prior to the noticed hearing date.

### III. Motion Practice

#### *B. Rules for Noticed Motions*

##### *2. Briefing Schedule*

Because it is the Court’s preference to hold hearings on civil motions, the Court modifies the briefing schedule set by Civil Local Rule 7.1(e) as follows to provide both the parties and the Court sufficient time to brief and prepare for oral argument: any opposition (or statement or non-opposition) must be filed and served no later than twenty-eight (28) days prior to the noticed hearing date, and any reply must be filed and served no later than fourteen (14) days prior to the noticed hearing date.

Since the noticed hearing date on Ms. McElfresh’s motion to dismiss is April 21, 2021, plaintiff’s opposition to the motion was due on or before March 24, 2021. No opposition has been filed with the Court.

The Local Rules for the Southern District of California provide that if the plaintiff does not wish to oppose a motion, a written statement of non-opposition must be served and filed within the time required for filing an opposition. S.D. Cal. Local Rule 7.1(f)(3)(a). The Rules also provide that failure to file an

1 opposition to a motion may be treated as consent to granting the motion. S.D. Cal.  
 2 Local Rule 7.1(f)(3)(c). Rule 7.1(f)(3) specifically provides:

3 **f. Contents of Papers Filed.**

4 3. *Opposing Party.*

- 5 a. Unless otherwise provided by rule or court  
 6 order, a party opposing a motion, or other  
 7 request for ruling by the court must file a  
 8 written opposition. If such party chooses not  
 9 to oppose the motion, the party must file a  
 10 written statement that the party does not  
 11 oppose the motion or other request for ruling  
 12 by the court.
- 13 b. Opposing Party's Papers and Contents;  
 14 Documentary Evidence and Points and  
 15 Authorities. The opposition must contain a  
 16 brief and complete statement of all reasons  
 17 in opposition to the position taken by the  
 18 movant, an answering memorandum of  
 19 points and authorities, and copies of all  
 20 documentary evidence upon which the party  
 21 in opposition relies.
- 22 c. Waiver. If an opposing party fails to file the  
 23 papers in the manner required by Civil Local  
 24 Rule 7.1.e.2, that failure may constitute a  
 25 consent to the granting of a motion or other  
 26 request for ruling by the court.

27 Dismissals based on local rules stating that failure to file an opposition may  
 28 constitute consent to the granting of the motion have been upheld by the Ninth  
 Circuit Court of Appeal. See, e.g., *Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir.  
 1995).

1           Accordingly, Ms. McElfresh respectfully requests that this Court treat  
2 plaintiff's failure to file opposition papers as consent to granting her Rule 12(b)(6)  
3 motion to dismiss and dismiss the First Amended Complaint with prejudice.

4  
5 DATED: April 7, 2021

WALSH MCKEAN FURCOLO LLP

6  
7 By: /s/ Laura Stewart

8 REGAN FURCOLO

9 LAURA STEWART

10 Attorneys for Defendant

JESSICA MCELFRISH, an individual

11 Email: [rfurcolo@wmflp.com](mailto:rfurcolo@wmflp.com)

12 Email: [lstewart@wmflp.com](mailto:lstewart@wmflp.com)  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DARRYL COTTON, an individual,  
Plaintiff,  
v.

**CASE NO. 3:18-cv-00325-TWR-DEB**

**DECLARATION OF SERVICE**

CYNTHIA BASHANT, an individual; JOEL WOHLFEIL, an individual; LARRY GERACI, an individual; REBECCA BERRY, an individual; MICHAEL WEINSTEIN, an individual; JESSICA MCELFRESH, an individual; and DAVID DEMIAN, an individual,  
Defendants.

I, the undersigned, declare:

That I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the service occurred; and my business address is: 550 West C Street, Suite 950, San Diego, California.

On April 7, 2021, I served the following document(s):

- 1. DEFENDANT JESSICA MCELFRESH'S REPLY TO NO OPPOSITION TO MOTION DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT.**

in the following manner:

- ☒ **By Electronic Transfer – as indicated on the attached service list.** I caused all of the above-entitled document(s) to be served through CM/ECF addressed to all parties named below. A copy of the Notice of Electronic Filing page will be maintained with the original document(s) in our office.

- ☒ **By First Class Mail – as indicated on the attached service list.** By causing a copy to be placed in a separate envelope, with postage fully prepaid, for each addressee named below and deposited each in the U.S. Mail at San Diego, California.

**SEE ATTACHED SERVICE LIST**

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 7, 2021, at San Diego, California.

  
\_\_\_\_\_  
Michelle Davis

**SERVICE LIST***Darryl Cotton v. Cynthia Bashant, et al.**USDC, Southern District of California Case No. 3:18-cv-00325-BAS-DEB*

<b>PARTY</b>	<b>COUNSEL</b>
<b>Plaintiff DARRYL COTTON</b> <i>Pro Se</i>	<b><u>VIA FIRST CLASS MAIL</u></b> Darryl Cotton 6176 Federal Boulevard San Diego, CA 92114 Tel: 619.954.4447 <a href="mailto:indagrodarryl@gmail.com">indagrodarryl@gmail.com</a>
<b>Defendant DAVID DEMIAN</b>	<b><u>VIA CM/ECF</u></b> Corrine C. Bertsche, Esq. David M. Florence, Esq. LEWIS BRISBOIS BISGAARD & SMITH LLP 550 West C Street, Suite 1700 San Diego, CA 92101 Tel: 619.233.1006 / <b>Fax: 619.233.8627</b> <a href="mailto:Corinne.Bersche@lewisbrisbois.com">Corinne.Bersche@lewisbrisbois.com</a> <a href="mailto:David.Florence@lewisbrisbois.com">David.Florence@lewisbrisbois.com</a>
<b>Defendant GINA M. AUSTIN</b>	<b><u>VIA CM/ECF</u></b> Douglas A. Pettit, Esq. Julia M. Dalzell, Esq. PETTIT KOHN INGRASSIA LUTZ & DOLIN 11622 El Camino Real, Suite 300 San Diego, CA 92130 Tel: 858.755.8500 / <b>Fax: 858.755.8504</b> <a href="mailto:dpettit@pettitkohn.com">dpettit@pettitkohn.com</a> <a href="mailto:jdalzell@pettitkohn.com">jdalzell@pettitkohn.com</a>
<b>Defendants LARRY GERACI and REBECCA BERRY</b>	<b><u>VIA CM/ECF</u></b> James D. Crosby, Esq. 550 West C Street, Suite 620 San Diego, CA 92101 Tel: 619.450.4149 <a href="mailto:crosby@crosbyattorney.com">crosby@crosbyattorney.com</a>

**SERVICE LIST***Darryl Cotton v. Cynthia Bashant, et al.**USDC, Southern District of California Case No. 3:18-cv-00325-BAS-DEB*

PARTY	COUNSEL
<b>Defendant MICHAEL WEINSTEIN</b>	<b><u>VIA CM/ECF</u></b> James J. Kjar, Esq. Jon R. Schwalbach, Esq. Gregory B. Emdee, Esq. KJAR McKENNA & STOCKALPER 841 Apollo Street, Suite 100 El Segundo, CA 90245 Tel: 424.217.3026 / <b>Fax: 424.367.0400</b> <a href="mailto:kjar@kmslegal.com">kjar@kmslegal.com</a> <a href="mailto:jschwalbach@kmslegal.com">jschwalbach@kmslegal.com</a> <a href="mailto:gemdee@kmslegal.com">gemdee@kmslegal.com</a>
<b>Defendant The Honorable Joel R. Wohlfeil, Judge of the Superior Court of California, County of San Diego</b>	<b><u>VIA CM/ECF</u></b> Susanne C. Koski, Esq. Carmela E. Duke, Esq. Superior Court of California, County of San Diego 1100 Union Street San Diego, CA 92101 Tel: 619.844.2382 <a href="mailto:Susanne.Koski@sdcourt.ca.gov">Susanne.Koski@sdcourt.ca.gov</a> <a href="mailto:Carmela.Duke@sdcourt.ca.gov">Carmela.Duke@sdcourt.ca.gov</a>