

Appellate Case No.: 22-56077

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

DARRYL COTTON, an individual  
Plaintiff/Appellant,

v.

GINA M. AUSTIN, individually, JESSICA CLAIRE McELFRESH,  
individually, and DAVID S. DEMIAN, individually,  
Defendants/Respondents.

---

LAWRENCE (a/k/a LARRY) GERACI, an individual,  
Real Party in Interest.

---

Appeal from a Judgment in the United States District Court  
For the Southern District of California  
Case No. 3:18-cv-00325-JO-DEB  
The Honorable District Judge Jinsook Ohta

---

**RESPONDENT GINA M. AUSTIN’S REPLY TO APPELLANT’S  
OPPOSITION TO MOTIONS TO DISMISS**

---

Douglas A. Pettit, Esq. (SBN 160371)  
Annie F. Fraser, Esq. (SBN 144662)  
PETTIT KOHN INGRASSIA LUTZ & DOLIN PC  
11622 El Camino Real, Suite 300  
San Diego, California 92130  
Phone: (858) 755-8500  
Facsimile: (858) 755-8504  
dpettit@pettitkohn.com  
afraser@pettitkohn.com  
Attorneys for Defendant/Respondent  
GINA AUSTIN

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. This Court Should Grant The Motion to Dismiss the Appeal As This Court Does Not Have Jurisdiction To Hear This Appeal.....	3
II. Conclusion.....	5
Form 8. Certificate of Compliance for Briefs.....	6
Form 15. Certificate of Service for Electronic Filing.....	7

## **TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b>Cases</b>	
<i>Melendres v. Maricopa Cnty</i> 815 F.3d 645, 649.....	4
<i>United States v. Sadler</i> 480 F.3d 932, 937.....	4

**I. This Court Should Grant The Motion to Dismiss the Appeal As This Court Does Not Have Jurisdiction To Hear This Appeal**

Appellant failed to timely file his notice of appeal within 30 days, as is statutorily required. 28 U.S.C.S. § 2017(a); Fed. R. App. P. 4(a)(1)(A). The rule is mandatory and jurisdictional. *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007). This court is not “at liberty to overlook a defect with the notice of appeal no matter how compelling an appellant’s argument may be.” *Melendres v. Maricopa Cnty*, 815 F.3d 645, 649.

In spite of the clear lack of jurisdiction to file this appeal, Appellant’s Opposition to the Motion to Dismiss (“Opposition”) rehashes what Appellant believes to be the merits of his appeal, and does not address his failure to timely file his notice of appeal. Appellant, who is representing himself, claims he cannot get counsel to represent him because reputable law firms do not want to argue judicial bias or sue other attorneys (Opposition at pp. 18-19), the state court judge was biased (Opposition, at pp. 21-22), and that he is a victim of fraud on the court (Opposition, at p. 30.) Appellant argues that there is “no time limit for bringing an action or motion to vacate a judgment or order obtained via a fraud on the court.” (Opposition, p. 20.) Appellant cites cases interpreting Rule 60, which grants relief from a judgment or order. (Opposition, p. 20.) He does not cite any case law or authority for ignoring the mandatory rule for timely filing a notice of appeal.

A party can move in the district court to extend the time for filing an appeal within 30 days after the time for filing the notice expires, and shows excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A). Appellant never moved in the district court to extend the time, or attempted to show good cause or excusable neglect.

As appellant cannot overcome his failure to timely file the notice of appeal, he is statutorily barred from bringing this appeal. Therefore, this Court must dismiss the appeal.

## II. CONCLUSION

Based on the foregoing, Defendant requests this court to dismiss Plaintiff's appeal.

Respectfully submitted,

**PETTIT KOHN INGRASSIA LUTZ & DOLIN PC**

Dated: January 9, 2023

By: s/Annie F. Fraser

Douglas A. Pettit, Esq.

Annie F. Fraser, Esq.

Attorneys for Respondent

GINA M. AUSTIN

[dpettit@pettitkohn.com](mailto:dpettit@pettitkohn.com)

[afraser@pettitkohn.com](mailto:afraser@pettitkohn.com)

## Form 8. Certificate of Compliance for Briefs

**9<sup>th</sup> Cir. Case Number 22-56077**

I am the attorney or self-represented party.

**This brief contains 366 words**, excluding the items exempted by Fed. R. App. P. 32(f). the brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief: (*select only one*):

☒ [X] complies with word limit of Cir. R. 32-1.

☐ [ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.-1

☐ [ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

☐ [ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

☐ [ ] complies with the longer length limited permitted by Cir. R. 32-2(b) because (*select only*):

☐ [ ] it is a joint brief submitted by separately represented parties;

☐ [ ] a party or parties are filing a single brief in response to multiple briefs; or

☐ [ ] a party or parties are filing a single brief in response to a longer joint brief.

☐ [ ] complies with the length limit designated by court order dated \_\_\_\_\_.

☐ [ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature** s/Annie F. Fraser, Esq.

**Date:** January 9, 2023

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 15. Certificate of Service for Electronic Filing**

**9th Cir. Case Number: 22-65077**

---

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

**Service on Case Participants Who Are Registered for Electronic Filing:**

[X] I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Corinne C. Bertsche, Esq.  
David M. Florence, Esq.  
Lewis Brisbois Bisgaard & Smith, LLP  
550 West C Street, Suite 1700  
San Diego, CA 92101  
**Attorneys for Defendant and Appellee**  
**David S. Demian**  
Email:  
[corinne.bertsche@lewisbrisbois.com](mailto:corinne.bertsche@lewisbrisbois.com)

Laura Stewart, Esq.  
Walsh McKean Furcolo, LLP  
550 W C Street, Suite 950  
San Diego, CA 92101  
**Attorneys for Defendant and**  
**Appellee**  
**Jessica Claire McElfresh**  
Email: [lstewart@wmflp.com](mailto:lstewart@wmflp.com)

Darryl Cotton  
6176 Federal Boulevard  
San Diego, CA 92114  
Email: [indagrodarryl@gmail.com](mailto:indagrodarryl@gmail.com);  
[151darrylcotton@gmail.com](mailto:151darrylcotton@gmail.com)

**Signature** *s/Mona C. Jones*

**Date:** January 9, 2023