

1 Regan Furcolo (SBN 162956)
2 Email: rfurcolo@wmfllp.com
3 Laura Stewart (SBN 198260)
4 Email: 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
13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

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

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

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

DEFENDANT JESSICA
MCELFRISH'S OPPOSITION TO
PLAINTIFF'S *EX PARTE*
APPLICATION FOR AN
EXTENSION OF TIME TO FILE
AMENDED COMPLAINT

District Judge:
Hon. Jinsook Ohta

[NO ORAL ARGUMENT
REQUESTED]

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

28 Defendant JESSICA MCELFRISH ("Ms. McElfresh") hereby opposes
plaintiff DARRYL COTTON's ("plaintiff") *ex parte* application for an extension
of time to file an amended Complaint as follows:

I. Plaintiff's Ex Parte Application Should Be Denied Because He Has Not Complied With Local Rule 83.3(g)

The Local Rules for the United States District Court for the Southern District of California provides the following:

g. Ex Parte Motions and Orders.

1. All motions to a judge of this court for ex parte orders must be made by a party appearing in propria persona or by an attorney of this court.
2. A motion for an order must not be made ex parte unless it appears by affidavit or declaration (1) that within a reasonable time before the motion the party informed the opposing party or the opposing party's attorney when and where the motion would be made; or (2) that the party in good faith attempted to inform the opposing party and the opposing party's attorney but was unable to do so, specifying the efforts made to inform them; or (3) that for reasons specified the party should not be required to inform the opposing party or the opposing party's attorney.

Here, plaintiff's *ex parte* application was filed with the Court on January 5, 2021 and served on the parties the following day. Plaintiff's declaration attached to the application does not show that plaintiff notified Ms. McElfresh or her attorney of when and where the application would be made, that he in good faith attempted to inform Ms. McElfresh but was unable to do so, or the reasons why he should not be required to inform Ms. McElfresh or her attorney.

For this reason alone, the application should be denied.

II. There Is No Good Cause To Extend The Time For Plaintiff To Amend His Complaint

Federal Rule of Civil Procedure, Rule 6 provides as follows:

Rule 6. Computing and Extending Time; Time for Motion Papers

(b) EXTENDING TIME.

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Here, plaintiff is requesting an extension of time to amend his Complaint, but the Court has not actually ruled that he *can* amend his Complaint yet. The hearing on Ms. McElfresh's Rule 12(b)(6) motion to dismiss for failure to state a claim, which asks the Court to dismiss the Second Amended Complaint against her *without leave to amend*, is set for hearing on March 16, 2022. Plaintiff's request for additional time to amend his Complaint is therefore premature and cannot be made until after the Court rules on Ms. McElfresh's Rule 12(b)(6) motion.

III. There Is No Good Cause To Extend The Time For Plaintiff To Oppose The Motion To Dismiss

To the extent that plaintiff is asking for an extension of time to oppose Ms. McElfresh's Rule 12(b)(6) motion to dismiss, that request is also not supported by good cause. Plaintiff says he has filed yet another lawsuit in State Court to vacate the *Cotton I* judgment and he wants this Court to wait until after the hearing on that motion to rule on the defendants' motions to dismiss in this case. But, neither Ms. McElfresh nor any of the other defendants should have to wait for the hearing on any motion in plaintiff's new State Court case, especially where they were not

1 parties to the *Cotton I* case and this Court is not charged with addressing the
2 validity of the *Cotton I* judgment.

3 In any event, plaintiff can include such arguments, if he wishes, in his
4 opposition to Ms. McElfresh's motion to dismiss, which he will have more than
5 sufficient time to prepare based on the March 16, 2022 hearing date.

6 **IV. CONCLUSION**

7 For the foregoing reasons, plaintiff's *ex parte* application for an extension of
8 time to amend the Complaint should be denied.

9
10 DATED: January 21, 2022

WALSH MCKEAN FURCOLO LLP

11
12 By: /s/ Laura Stewart

13 REGAN FURCOLO

14 LAURA STEWART

15 Attorneys for Defendant

16 JESSICA MCELFRISH, an individual

17 Email: rfurcolo@wmflp.com

18 Email: lstewart@wmflp.com
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DARRYL COTTON, an individual,
Plaintiff,

v.

GINA M. AUSTIN, an individual;
JESSICA MCELFFRESH, an
individual; and DAVID DEMIAN, an
individual; and DOES 1-50, inclusive,

Defendants.

CASE NO. 3:18-cv-00325-JO-DEB

DECLARATION OF SERVICE

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 January 21, 2022, I served the following document(s):

1. **DEFENDANT JESSICA MCELFFRESH'S OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR AN EXTENSION OF TIME TO FILE 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 January 21, 2022, 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*

PARTY	COUNSEL
Plaintiff DARRYL COTTON <i>Pro Se</i>	<u>VIA FIRST CLASS MAIL</u> Darryl Cotton 6176 Federal Boulevard San Diego, CA 92114 Tel: 619.954.4447 indagrodarryl@gmail.com
Defendant DAVID DEMIAN	<u>VIA CM/ECF</u> 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 / Fax: 619.233.8627 Corinne.Bersche@lewisbrisbois.com David.Florence@lewisbrisbois.com
Defendant GINA M. AUSTIN	<u>VIA CM/ECF</u> Douglas A. Pettit, Esq. PETTIT KOHN INGRASSIA LUTZ & DOLIN 11622 El Camino Real, Suite 300 San Diego, CA 92130 Tel: 858.755.8500 / Fax: 858.755.8504 dpettit@pettitkohn.com