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## MOTION FOR MANDATORY DISMISSAL

# Dismiss a Case for Failure to Bring to Trial

*This Guide includes instructions and sample forms. Links to download the fillable forms are at the end of this Guide. Additional copies of this Guide can be accessed at [www.saclaw.org/motion-mandatory-dismissal](http://www.saclaw.org/motion-mandatory-dismissal)*

## BACKGROUND

[California Code of Civil Procedure \(CCP\) §§ 583.310-583.360](#) set time periods in which a plaintiff must bring an action to trial. The law creates these time limits to ensure that cases are brought to trial before evidence is lost or destroyed, and while witness memories are still reliable. Additionally, requiring cases to be brought to trial within a set time period ensures that cases do not drag on, leaving issues undecided indefinitely.

Under [CCP § 583.310](#), an action must be brought to trial within five years after it is commenced against the defendant. An action “commences” on the date the original complaint is filed with the court against the defendant. If other defendants are later added, those actions will have a different date of commencement.

An action is “brought to trial” when the jury is sworn in a jury trial, or when the first witness is sworn in a non-jury trial. If parties stipulate to arbitration, the arbitration proceedings must begin within the five year period.

This five year period is “tolled” or paused in some situations. Examples include periods after settlement is reached or judgment is entered; periods when it is “impossible, impractical or futile” to bring the action to trial ([CCP § 583.340\(c\)](#)); while the trial court’s jurisdiction is suspended, such as when a case is on appeal, or during the time between the death of a defendant and the appointment of a personal representative; during a court-ordered stay of proceedings; or during contractual or judicial arbitration or mediation.

If the action is not brought to trial within five years, dismissal is mandatory on the motion of any party or on the court’s own motion. The court makes no determination as to the merits of the case or on the evidence. The dismissal is based solely on a failure to move the case to trial in five years. The court must order a dismissal without prejudice, which allows the plaintiff to re-file the case, if it is still within

### Extension of Time

If it becomes clear that trial cannot commence within five years, the parties to the case may stipulate to extend the time to commence trial either in writing or by an oral agreement made in open court.

**Disclaimer:** This Guide is intended as general information only. Your case may have factors requiring different procedures or forms. The information and instructions are provided for use in the Sacramento County Superior Court. Please keep in mind that each court may have different requirements. If you need further assistance consult a lawyer.

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the statute of limitations period. For more information, see our guide "[Statutes of Limitation](#)" ([www.saclaw.org/statutes-limitation](http://www.saclaw.org/statutes-limitation)).

## STEP-BY-STEP INSTRUCTIONS

### Step 1: Prepare the Motion

#### 1.1 Motions in General

A request to dismiss a case for failure to bring to trial is made through a motion. A "motion" is a request made in a case asking the court to issue an order of some sort. Most motions are in writing. With few exceptions (such as in family law cases), there is no Judicial Council form for making a motion. Instead, the motion must be typed on 28-line pleading paper. A written motion consists of four parts:

- 1) Notice of Motion;
- 2) Motion;
- 3) Points and Authorities; and
- 4) Declaration

The Notice of Motion lets the opposing party know when and where the motion is scheduled to be heard, while the Motion lets the court and the opposing party know what is being requested. The Points and Authorities explain to the court and the opposing party the legal basis of the motion, while the Declaration provides evidence, sworn under penalty of perjury, supporting the motion.

The first two parts, the Notice of Motion and Motion, are typically combined together in the same document, while the Points and Authorities and Declaration are often separate documents. In many instances, however, they may be combined together into the same document, as in the case of the sample included in this Step-by-Step guide.

#### 1.2 Modify the Template Motion and Proposed Order

At the end of this guide is a sample motion to dismiss for failure to bring to trial. You may download customizable templates of the Motion and Proposed Order from our website:

- *Motion to Dismiss for Failure to Bring to Trial*  
[saclaw.org/sbs-motion-for-mandatory-dismissal-motion.rtf](http://saclaw.org/sbs-motion-for-mandatory-dismissal-motion.rtf)
- *Proposed Order for Dismissal for Failure to Bring to Trial*  
[saclaw.org/sbs-motion-for-mandatory-dismissal-order.rtf](http://saclaw.org/sbs-motion-for-mandatory-dismissal-order.rtf) .

#### 1.3 Setting the Date of the Motion

In Sacramento, the party asking to dismiss the case is responsible for setting the date for hearing the motion. Motions to dismiss are heard at the Hall of Justice building, 813 Sixth St. in Department 53 at 2:00 p.m. or Department 54 at 9:00 a.m., Monday through Friday except for holidays. To determine whether your motion is in department 53 or 54:

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- For NEW CASES filed after January 1, 2013: If your case number is ends in an odd number, then your law and motion department is 53 at 2:00 p.m. If it ends in an even number, it is department 54 at 9:00 a.m.
- All Law and Motion matters for CASES filed prior to January 1, 2013 shall be heard by the Law and Motion department previously assigned.

There are two very important deadlines you must consider when setting the date of a motion: the **filing deadline** and the **service deadline**.

**Filing Deadline:** The motion must be filed with the court at least sixteen court days prior to the motion date ([CCP § 1005](#)). Court days are Monday through Friday, excluding court holidays. To determine whether a particular filing date will meet this deadline, start with your desired hearing date and count backward ([CCP § 12c](#)) sixteen court days. Day one is the court day prior to the hearing. The sixteenth court day prior to the hearing is the last possible date that the motion can be filed with the court.

MAY							JUNE						
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat
		1	2	3	4	5						1 Day 11	2
6	7	8	Day 5 falls on a weekend, so the last day for service by mail rolls over to the previous court day.			12	3	4 Day 10	5 Day 9	6 Day 8	7 Day 7	8 Day 6	9
13	14	15	16	17	18 Last day to serve by mail	19 Day 5	10	11 Day 5	12 Day 4	13 Day 3	14 Day 2	15 Day 1	16
20 Day 4	21 Day 3	22 Day 2	23 Day 1	24 Day 16 Last day to file	25 Day 15	26	17	18 Hearing Date	19	20	21	22	23
27	28 Holiday	29 Day 14	30 Day 13	31 Day 12			24	25	26	27	28	29	30

For example, suppose you wanted to have your motion heard on June 18, 2012. You would start counting backward using June 15, 2012 as day one. Do not count weekends or court holidays (there is only one court holiday in this example, which is Memorial Day, May 28). Your sixteenth court day before the hearing would be May 24, 2012, which would be the latest that the motion could be filed.

**Service Deadline:** Prior to filing the motion with the court, all other attorneys, or self-represented parties in a case must be served with a copy of the motion. This means that someone over the age of 18 who is not a party in the case must either personally deliver a copy of the motion and related documents to the attorney or self-represented party or mail a copy of the motion and related documents to the party by first class mail.

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If the motion is personally served, the service must be at least sixteen court days prior to the date of the motion, the same as the minimum filing deadline.

If the motion is served by first-class mail, additional time is added to the calculation, depending on where the mail originates and where it is sent ([CCP § 1005](#)). For example, if the documents are mailed from California to an address in California, five calendar days are added before the sixteen court days. Calendar days include weekends and holidays, but if the final day lands on a weekend or holiday, it is rolled over to the previous court day. So, if June 18, 2012 was the hearing date, the sixteenth court day before would be May 24, 2012, but counting back five more calendar days results in Saturday, May 19, 2012. Because the fifth day fell on a weekend (or holiday), the deadline for service rolls back to May 18, 2012, the last court day before the deadline.

When choosing the date of your motion, be sure that you have left enough time for the motion to be both served and filed in a timely fashion.

## STEP 2: MAKE COPIES

Make four (4) copies of your Motion and Order. One of these copies is to be served on the other side's attorney (or the other side, if the other side does not have an attorney); the original and the other three copies are to be filed with the court. Staple each of the copies, but leave the original unstapled so the court can scan it.

## Step 3: Have the Motion Served

The person who is serving your Motion for you must complete a proof of service form, typically, either a *Proof of Personal Service* (POS-020) or a *Proof of Service by First Class Mail* (POS-030). For more information on these Proofs of Service, see the guides on our website at [www.saclaw.org/personal-service](http://www.saclaw.org/personal-service) and [www.saclaw.org/mail-service](http://www.saclaw.org/mail-service), respectively.

The proof of service form should be completely filled out, but not signed. **Make a copy of the unsigned proof of service before proceeding.**

The person over the age of 18 who is not a party to the case must then personally deliver or mail a copy of the Motion along with a copy of the unsigned proof of service form on the opposing attorney or self-represented litigant. The unsigned proof of service form can be attached as the last page of the Motion.

The person doing the serving then signs the Proof of Service form, and gives the signed Proof of Service to you.

## Step 4: Copy the Signed Proof of Service

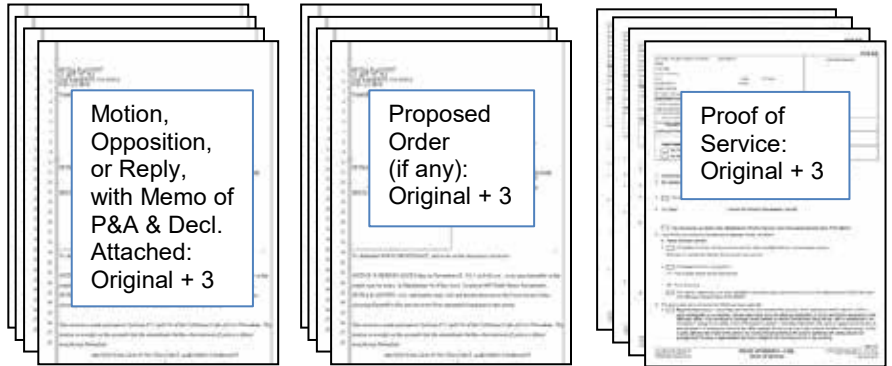
Make three (3) copies of the signed Proof of Service. It is not necessary to copy the instruction page.

## Step 5: Assemble Your Documents for Filing

Assemble your packet for filing as follows:

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- Motion with all pages, plus three (3) copies. In Sacramento, leave the original unstapled for scanning, and staple each copy.
- Proposed Order with all pages, plus three (3) copies. In Sacramento, leave the original unstapled for scanning, and staple each copy.



- Completed Proof of Service Form. The original (unstapled) plus three (3) copies. *This proof of service can be attached as the last page of the Motion when filing.* If this is the case, then the original Proof of Service should be attached to the original Motion, and the copies of the Proof of Service should be attached to the copies of the Motion.

### Step 6: Filing/Fees

File your motion and proof of service at the Law and Motion civil filing window in the Hall of Justice building, 813 Sixth St., Room 212.

At this time there is a \$60 filing fee, unless your fees were waived. Current fees are available at [Statewide Civil Fee Schedule](http://www.saccourt.ca.gov/fees/docs/fee-schedule.pdf) ([www.saccourt.ca.gov/fees/docs/fee-schedule.pdf](http://www.saccourt.ca.gov/fees/docs/fee-schedule.pdf)). If you newly qualify for a fee waiver, you may file a request with the court. For more information, see our guide on [Fee Waivers](http://www.saclaw.org/fee-waiver-guide) ([www.saclaw.org/fee-waiver-guide](http://www.saclaw.org/fee-waiver-guide)).

### Step 7: Opposition and Reply

If opposing counsel or self-represented party opposes your request for dismissal, he or she may serve and file an opposition at least nine court days prior to your hearing date. Be sure to check your mail, and read any documents you receive carefully.

If the opposing attorney or party opposes your motion, you may serve and file a reply to the opposition (also written on pleading paper), at least five days prior to the motion. This reply should carefully address any points made by the opposition, especially if that point was not originally addressed in your motion.

### Step 8: Tentative Ruling

Pursuant to [Local Rule 1.06](#), the court will make a tentative ruling on the merits of your matter by 2:00 p.m. the court day **before the hearing**. You may read the tentative ruling online, or may call the clerk for Department 53 ((916) 874-7858) or Department 54 ((916) 874-7848) to hear it. For information on viewing the ruling online, see the Sacramento County Superior Court's guide "[Tentative Ruling Information](#)" (CV/E-190) ([www.saccourt.ca.gov/civil/docs/cv-190.pdf](http://www.saccourt.ca.gov/civil/docs/cv-190.pdf)).



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Closely review the tentative ruling. Since you are asking the court to dismiss the case, you are looking for your motion to be “GRANTED.” If the court does not grant your request, your motion will be “DENIED.”

If you are happy with the tentative ruling, you do not need to do anything. You won’t have to go to court unless ordered to appear in the tentative ruling or unless the opposing attorney or self-represented litigant calls you and the court between 2:00 p.m. and 4:00 p.m. the court day before your hearing date to request an oral argument in front of the judge. If that happens, you should go to the court hearing and be prepared to argue why you believe the case should be dismissed.

If you are not happy with the tentative ruling, and wish to present arguments in front of the judge, you must call all opposing counsel and/or self-represented parties, and the clerk for Department 53 ((916) 874-7858) or Department 54 ((916) 874-7848) no later than 4:00 p.m. the court day before your hearing and state that you are requesting oral argument on the motion. If neither you nor the opposing counsel or self-represented party requests oral argument, the court will simply make the tentative ruling the order of the court, and no oral argument will be permitted.

## FOR HELP

### ***Sacramento County Public Law Library Civil Self Help Center***

609 9th Street, Sacramento 95814

[www.saclaw.org/self-help/civil-self-help-center/](http://www.saclaw.org/self-help/civil-self-help-center/)

*Services Provided:* The Sacramento County Public Law Library Civil Self Help Center provides general information and basic assistance to self-represented litigants on a variety of civil legal issues. Appointments will be made beginning at 8:30 a.m. Patrons who are present at 8:30 a.m. will be entered into a random drawing to determine the order their case will be evaluated. If an appointment is appropriate, it will be made for later in the day. You are encouraged to arrive by 8:25 a.m. to participate in the appointment setting drawing.

*Eligibility:* Must be a Sacramento County resident or have a [qualifying](#) case in the Sacramento County Superior Court.

## FOR MORE INFORMATION

### ***At the Law Library:***

**California Civil Courtroom Handbook and Desktop Reference** [KFC 995 .Z9 T46](#)

§§ 20:26-20:41

**Electronic Access:** On the Law Library’s computers, using *WestlawNext*.

**California Civil Practice: Procedure** [KFC 995 .A65 B3](#) §§ 22:41-22:64

**Electronic Access:** On the Law Library’s computers, using *WestlawNext*.

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**California Forms of Pleading and Practice** [KFC 1010 .A65 C3](#) (Ready Reference)

§§ 212.120-212.149

**Electronic Access:** On the Law Library's computers, using *Lexis Advance*.

**California Practice Guide: Civil Procedure Before Trial** [KFC 995 .W45](#)

§§ 11:191 *et seq.*

**Electronic Access:** On the Law Library's computers, using *WestlawNext*.

**California Pretrial Civil Procedure** [KFC 995 .M38](#) Chap. 40

**Electronic Access:** On the Law Library's computers, using *Lexis Advance*.

<p>IF YOU HAVE QUESTIONS ABOUT THIS GUIDE, OR IF YOU NEED HELP FINDING OR USING THE MATERIALS LISTED, DON'T HESITATE TO ASK A REFERENCE LIBRARIAN.</p>
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813 update kf 9/16

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## ATTACHMENTS: FORMS AND INSTRUCTIONS

There is no Judicial Council form for this procedure. Instead, the relevant documents must be typed on 28-line pleading paper. Customizable templates may be downloaded from these links:

- *Motion to Dismiss for Failure to Bring to Trial*  
[saclaw.org/sbs-motion-for-mandatory-dismissal-motion.rtf](http://saclaw.org/sbs-motion-for-mandatory-dismissal-motion.rtf)
- *Proposed Order for Dismissal for Failure to Bring to Trial*  
[saclaw.org/sbs-motion-for-mandatory-dismissal-order.rtf](http://saclaw.org/sbs-motion-for-mandatory-dismissal-order.rtf)

Sample filled-in forms with instructions are available at the end of this Guide.



1 Name: **Doug Defendant**  
2 Address: **4679 Oak Drive**  
3 City, State, ZIP: **Sacramento, CA 95814**  
4 Phone: **916-555-9975**

**IMPORTANT:** RED boxes and arrows are instructions, and are not part of your completed document. Text that appears in BLUE is text you will change to fit your case.

6 **Doug Defendant**  
7 Defendant In Pro Per

9 SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO

11 **Peter Plaintiff**  
12 Plaintiff,  
13 vs.  
14 **Doug Defendant**  
15 Defendant

) Case No.: **34-2010-12345678**  
)  
) NOTICE OF MOTION AND MOTION TO  
) DISMISS FOR FAILURE TO BRING TO  
) TRIAL; POINTS AND AUTHORITIES;  
) DECLARATION OF **Doug Defendant**  
)  
) Date: **June 18, 2016**  
) Time: **9:00 a.m.**  
) Dept: **54**  
) Date Action Filed: **May 13, 2016**  
) Trial Date: **TBD**

Set your date, time and department for the motion. Be sure to read the detailed instructions (Step 1.3) on choosing a date.

If the plaintiff is unrepresented, remove this part of the sentence.

21 To plaintiff **Peter Plaintiff** and to **his** attorney of record **Larry Lawyer** :

22  
23 NOTICE IS HEREBY GIVEN that on **June 18, 2016** at **9:00 a.m.** or as soon thereafter as the  
24 matter may be heard, in Department **54** this court, located at **813 Sixth Street, Sacramento,**  
25 **California**, defendant **Doug Defendant** will, and hereby does, move for an order to dismiss the  
26 above-entitled action pursuant to Code of Civil Procedure Sections 583.310 and 583.360(a). The  
27  
28

1 motion is made on the ground that plaintiff has failed to prosecute the above-entitled action and  
2 to bring it to trial within five years after it was commenced against the defendant.

3  
4 The motion is based on this notice of motion, on the declaration(s) of **Doug Defendant** and the  
5 supporting memorandum served and filed with it, on the records and file in this action, and on  
6 any evidence that may be presented at the hearing of the motion.

7  
8 Pursuant to Local Rule 1.06 (A) the court will make a tentative ruling on the merits of this matter  
9 by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the  
10 department may be downloaded off the court's website. If the party does not have online access,  
11 they may call the dedicated phone number for the department as referenced in the local telephone  
12 directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and  
13 receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the  
14 court day before the hearing, no hearing will be held.  
15  
16

17  
18 Dated: **May 20, 2016**

19  
20 *Doug Defendant*

21 Defendant, In Pro Per  
22  
23  
24  
25  
26  
27  
28

The following points are relatively general. You may insert additional explanation after each point, as demonstrated after points C and E. There may be additional or different arguments based on the specifics of your case, depending on your specific circumstances.

1                   **Memorandum of Points and Authorities in Support of Motion to Dismiss**

2  
3 THE ACTION MUST BE DISMISSED PURSUANT TO SECTION 583.360 OF THE CODE  
4 OF CIVIL PROCEDURE BECAUSE IT WAS NOT BROUGHT TO TRIAL WITHIN THE  
5 TIME PERIOD SPECIFIED IN SECTION 583.310 OF THE CODE OF CIVIL PROCEDURE.

6  
7 **A. Statutory Requirements.** An action must be dismissed by the court on its own motion or the  
8 defendant’s motion, after notice to the parties, if it is not brought to trial within five years after it  
9 is commenced against the defendant (Code Civ. Proc. §§ 583.310, 583.360(a)).

10 **B. Dismissal Mandatory.** Dismissal of an action pursuant to Section 583.360 of the Code of  
11 Civil Procedure is mandatory in the sense that if the action is not brought to trial within the  
12 period provided in Section 583.310 of the Code of Civil Procedure, the court is without  
13 discretion to refuse dismissal unless the plaintiff can establish an extension, excuse, or exception  
14 expressly provided by statute (Code Civ. Proc. § 583.360(b); see Andersen v. Superior Court  
15 (1921) 187 Cal. 95, 97, 200 P. 963; Fannin Corp. v. Superior Court (1974) 36 Cal. App. 3d 745,  
16 749, 111 Cal. Rptr. 920).

17 **C. Beginning of Period for Bringing Action to Trial.** The statutory period described in Section  
18 583.310 of the Code of Civil Procedure runs from the date of filing of the original complaint  
19 against the defendant and is not affected by the filing of an amended complaint stating the same  
20 cause of action against the same defendant (see Davalos v. County of Los Angeles (1983) 142  
21 Cal. App. 3d 57, 63, 190 Cal. Rptr. 711).

22                   **In the present case, the original complaint against the defendant was filed on May**  
23 **13, 2010, more than five years ago.**

24  
25 **D. When Action Is Deemed to Have Been Brought to Trial.** The requirement that an action be  
26 brought to trial or new trial within a specified period of time is not satisfied unless a jury is  
27 impaneled, a witness is called who testifies, or there has otherwise been a determination of law  
28 or fact that brings the action to the stage of final disposition (see McDonough Power Equipment

1 Co. v. Superior Court (1972) 8 Cal. 3d 527, 531–532, 105 Cal. Rptr. 330, 503 P.2d 1338; Weeks  
2 v. Roberts (1968) 68 Cal. 2d 802, 805, 69 Cal. Rptr. 305, 442 P.2d 361).

3  
4 **E. Even When Tolled for Periods of Suspended Jurisdiction, Trial Was not Commenced In**  
5 **Time.** Exceptions to mandatory dismissal include written stipulations or oral agreements made in  
6 open court extending the five-year time period; exclusion from the computation of the five years  
7 any time period during which the jurisdiction of the court was suspended or the prosecution of  
8 the action was stayed; and bringing the action to trial was impossible, impracticable, or futile  
9 (Code Civ. Proc. §§ 583.330(a), (b), 583.340(a)–(c); Jordan v. Superstar Sandcars (2010) 182  
10 Cal. App. 4th 1416, 1420, 107 Cal. Rptr. 3d 5).

11 **In this case, the defendant filed for a Motion to Set Aside Default and Default**  
12 **Judgment and a Motion to Quash on March 23, 2011. The motions were granted on May 2,**  
13 **2011. Even if the court were to find that this period of default tolled the time to bring this**  
14 **case to trial, more than five years have passed since May 2, 2011.**

15 For the aforementioned reasons, this lawsuit is subject to mandatory dismissal and should be  
16 dismissed by the court for failure to bring to trial.

17 Dated: **May 20, 2016**

18  
19 *Doug Defendant*  
20 Defendant, In Pro Per

Start the declaration on a new page. The declaration is a statement sworn under penalty of perjury that you wish the court to consider when deciding your motion.

DECLARATION OF **DOUG DEFENDANT**

I, **Doug Defendant**, am the **Defendant** in this matter, and I declare the following:

1. **This lawsuit arises from a personal loan agreement which the plaintiff alleges I breached on April 18, 2008.**
2. **Plaintiff filed his case against me on May 13, 2010, and subsequently entered a default against me on September 16, 2010.**
3. **I subsequently filed a Motion to Set Aside the Default and Default Judgment and a Motion to Quash on March 23, 2011.**
4. **On May 2, 2011 my Motion to Set Aside the Default and Default Judgment was granted, and I was permitted to file an Answer to the Complaint.**
5. **I filed my Answer on May 13, 2011.**
6. **Since then, the plaintiff has taken no action in this case, no trial commenced trial or obtained an order extending its time to bring this matter to trial.**
7. **Five years expired on September 16, 2010, but even if the court were to start counting the five years from the date of the set aside order, that time would have lapsed on May 13, 2016.**
8. **As of today, May 20, 2016 trial on this matter has not commenced, and trial is not scheduled at this present time.**
9. **For these reasons, I am asking that the court dismiss this case.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: **May 20, 2016**

*Doug Defendant*  
Defendant, In Pro Per

The contents of the declaration will depend entirely on the specific facts of the case. Include all facts showing that the period for bringing the case to trial have elapsed, even when taking into account any extensions or tolled periods. Remember that you are explaining your circumstances to a judge that likely knows nothing about what is going on in your case. Be clear and concise.