

**California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group** KFC 995 .W34 Chap. 59  
Electronic Access: On the Law Library's computers, using *Lexis Advance*.

## Samples

<p>1 Name: <b>Doug Defendant</b></p> <p>2 Address: <b>4679 Oak Drive</b></p> <p>3 City, State, ZIP: <b>Sacramento, CA 95814</b></p> <p>4 Phone: <b>916-555-9975</b></p> <p>5</p> <p>6 <b>Doug Defendant</b></p> <p>7 Defendant In Pro Per</p> <p>8</p> <p>9</p> <p>10 SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO</p> <p>11</p> <p>12 <b>Peter Plaintiff</b> )</p> <p>13 Plaintiff, )</p> <p>14 vs. )</p> <p>15 <b>Doug Defendant</b> )</p> <p>16 Defendant )</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21 To plaintiff <b>Peter Plaintiff</b> and to his attorney of record <b>Larry Lawyer</b> :</p> <p>22</p> <p>23 NOTICE IS HEREBY GIVEN that on <b>June 18, 2016</b> at <b>9:00 a.m.</b> or as soon thereafter as the</p> <p>24 matter may be heard, in Department <b>54</b> this court, located at <b>813 Sixth Street, Sacramento,</b></p> <p>25 <b>California,</b> defendant <b>Doug Defendant</b> will, and hereby does, move for an order to dismiss the</p> <p>26 above-entitled action pursuant to Code of Civil Procedure Sections 583.310 and 583.360(a). The</p> <p>27</p> <p>28</p> <p style="text-align: center;">Motion to Dismiss - 1</p>	<p><b>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.</b></p> <p>Case No.: <b>34-2010-12345678</b></p> <p>NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO BRING TO TRIAL; POINTS AND AUTHORITIES; DECLARATION OF <b>Doug Defendant</b></p> <p>Date: <b>June 18, 2016</b></p> <p>Time: <b>9:00 a.m.</b></p> <p>Dept: <b>54</b></p> <p>Date Action Filed: <b>May 13, 2016</b></p> <p>Trial Date: <b>TBD</b></p> <p>Set your date, time and department for the motion. Be sure to read the detailed instructions (Step 1.3) on choosing a date.</p> <p>If the plaintiff is unrepresented, remove this part of the sentence.</p>
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Motion to Dismiss for Failure to Bring to Trial within Five Years (page 1)



1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	<p>motion is made on the ground that plaintiff has failed to prosecute the above-entitled action and to bring it to trial within five years after it was commenced against the defendant.</p> <p>The motion is based on this notice of motion, on the declaration(s) of <i>Doug Defendant</i> and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.</p> <p>Pursuant to Local Rule 1.06 (A) the court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the department may be downloaded off the court's website. If the party does not have online access, they may call the dedicated phone number for the department as referenced in the local telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.</p> <p style="text-align: right;">Dated: May 20, 2016</p> <p style="text-align: right;"><i>Doug Defendant</i> Defendant, In Pro Per</p> <p style="text-align: center;">Motion to Dismiss - C</p>	
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Motion to Dismiss for Failure to Bring to Trial within Five Years (page 2)



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.

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

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

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

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

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

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

**D. When Action Is Deemed to Have Been Brought to Trial.** The requirement that an action be brought to trial or new trial within a specified period of time is not satisfied unless a jury is impaneled, a witness is called who testifies, or there has otherwise been a determination of law 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

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19 Doag Defendant,  
20 Defendant, In Pro Per

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Motion to Dismiss - 4

Motion to Dismiss for Failure to Bring to Trial within Five Years (page 4)



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.