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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MARIA GUADALUPE BELK,	)	1:09cv74 GSA
	)	
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANT’S
	)	MOTION TO DISMISS
v.	)	(Document 10)
	)	
COMMISSIONER OF SOCIAL	)	
SECURITY,	)	
	)	
Defendant.	)	

Plaintiff Maria Guadalupe Belk (“Plaintiff”) filed the instant action on January 9, 2009. On July 21, 2009, Defendant filed a Motion to Dismiss the Complaint pursuant to [Federal Rules of Civil Procedure 12\(b\)](#). Defendant argues that the Complaint is untimely. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Gary S. Austin, United States Magistrate Judge. <sup>1</sup>

**BACKGROUND**

On November 30, 2007, an Administrative Law Judge issued a decision denying Plaintiff’s claim for benefits under Titles II and XVI of the Social Security Act. Declaration of Errol Sperling (“Sperling Dec.”), ¶ 3, Exh. 1. Plaintiff appealed the action. On October 30, 2008, the Appeals Council denied her request for review. [Id.](#) In the Notice of Action, the Appeals

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<sup>1</sup> The parties consented to the jurisdiction of the United States Magistrate Judge. Plaintiff filed her consent on January 26, 2009. Defendant filed its consent on March 23, 2009.

1 Council notified Plaintiff that she had 60 days to file a civil action, and the 60 days start to run  
2 the day after she receives the Notice. Using these dates, Plaintiff had until January 5, 2009, to  
3 file her civil action.<sup>2</sup> Plaintiff did not request an extension of time to file a civil action. Plaintiff  
4 filed this action on January 9, 2009.

5 Defendant filed the instant motion to dismiss on July 21, 2009. Plaintiff filed an  
6 opposition on July 27, 2009. Defendant did not file a reply. On October 8, 2009, this Court  
7 issued an order requiring that Plaintiff file additional briefing and supplemental documentation  
8 within five (5) days. Plaintiff did not respond to the Court's order.

## 9 DISCUSSION

### 10 A. Motion To Dismiss Standards

11 [Fed. R. Civ. P. 12\(b\)\(1\)](#) authorizes a motion to dismiss for lack of subject matter  
12 jurisdiction. Limits upon federal jurisdiction must not be disregarded or evaded. [Owen Equip. &  
13 Erection Co. v. Kroger, 437 U.S. 365, 374 \(1978\)](#). A plaintiff has the burden to establish that  
14 subject matter jurisdiction is proper. [Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377  
15 \(1994\)](#). When a defendant challenges jurisdiction "facially," all material allegations in the  
16 complaint are assumed true, and the question for the Court is whether the lack of federal  
17 jurisdiction appears from the face of the pleading. [Thornhill Publ'g Co. v. Gen. Tel. & Elecs.,  
18 594 F.2d 730, 733 \(9th Cir. 1979\)](#); [Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884,  
19 891 \(3d Cir. 1977\)](#); [Cervantez v. Sullivan, 719 F.Supp. 899, 903 \(E.D. Cal. 1989\), rev'd on other  
20 grounds, 963 F.2d 229 \(9th Cir. 1992\)](#).

21 [A Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss is a challenge to the sufficiency of the  
22 pleadings set forth in the complaint. A motion to dismiss for failure to state a claim should not

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23  
24 <sup>2</sup> Pursuant to [42 U.S.C. § 405](#), the only permitted civil action on a claim arising under Title II or Title XVI  
25 of the Social Security Act is to review the "final decision of the [Commissioner] made after a hearing" and which  
26 must be "commenced within 60 days after mailing to [the claimant] notice of such decision." [20 C.F.R. § 422.210](#)  
27 further provides that a civil action, such as the instant action, "must be instituted **within 60 days** after the Appeals  
28 Council's notice of denial of request for review of the administrative law judge's decision or notice of the decision  
by the Appeals Council is received by the individual . . ." (Emphasis added.) The regulation further provides "the  
date of receipt of the presiding officer's decision or notice of the decision by the Appeals Council shall be presumed  
to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary." *McCall v. Bowen*,  
832 F.2d 862 (5<sup>th</sup> Cir. 1987) (Citing 20 C.F.R. § 422.210©).

1 be granted unless it appears beyond doubt that plaintiff can prove no set of facts to support the  
2 claim to entitle him to relief. See [Hishon v. King & Spalding, 467 U.S. 69, 73 \(1984\)](#) (citing  
3 [Conley v. Gibson, 355 U.S. 41, 45-46 \(1957\)](#)); see also [Palmer v. Roosevelt Lake Log Owners](#)  
4 [Ass'n, 651 F.2d 1289, 1294 \(9th Cir. 1981\)](#). When a federal court reviews the sufficiency of a  
5 complaint, before the reception of any evidence, either by affidavit or admissions, its task is  
6 necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether  
7 the claimant is entitled to offer evidence to support the claims. [Gilligan v. Jamco Dev. Corp.,](#)  
8 [108 F.3d 246, 249 \(9th Cir. 1997\)](#).

9 B. Analysis

10 *1. Untimely Complaint*

11 Judicial review of the Commissioner's administrative decisions is governed by Section  
12 405(g) and (h) of the Social Security Act, which reads in relevant part:

13 (g) Any individual, after any final decision of the Commissioner of Social  
14 Security made after a hearing to which he was a party, irrespective of the amount  
15 in controversy, may obtain a review of such decision by a civil action commenced  
16 within sixty days after the mailing to him of notice of such decision or within such  
17 further time as the Commissioner of Social Security may allow.

18 (h) The findings and decision of the Commissioner after a hearing shall be  
19 binding upon all individuals who were parties to such hearing. No findings of  
20 facts or decision of the Commissioner shall be reviewed by any person, tribunal,  
21 or governmental agency except as herein provided. No action against the United  
22 States, the Commissioner, or any officer or employee thereof shall be brought  
23 under section 1331 or 1346 of Title 28 to recover on any claim arising under this  
24 subchapter.

25 [42 U.S.C. § 405\(g\)](#). Section 405(g) and (h) therefore operates as a statute of limitations setting  
26 the time period in which a claimant may appeal a final decision of the Commissioner. [Bowen v.](#)  
27 [City of New York, 476 U.S. 467, 479 \(1986\)](#); [Vernon v. Heckler, 811 F.2d 1274, 1277 \(9th](#)  
28 [Cir.1987\)](#). Because the time limit set forth in [42 U.S.C. § 405\(g\)](#) is a condition on the waiver of  
sovereign immunity it must be strictly construed. [Bowen v. City of New York, 476 U.S. at 479](#).  
See also, See [Fletcher v. Apfel, 210 F.3d 510 \(5<sup>th</sup> Cir. 2000\)](#) (affirming summary judgment in  
favor of commissioner for untimely filing of one day).

In opposition to the Motion to Dismiss, Plaintiff argues that the Court should excuse the  
untimeliness based an excusable neglect. Specifically, Plaintiff's counsel argues that the

1 Complaint was prepared and filed well in advance of the filing date, but that it was not filed  
2 electronically. In support of the opposition, Plaintiff's counsel has submitted the declaration of  
3 Evelyn Ulloa, an employee at the attorney's office.<sup>3</sup> Declaration of Evelyn Ulloa dated July 23,  
4 2009, attached as Exhibit A to "Plaintiff's Opposition to Motion to Dismiss." Doc. 11. In the  
5 declaration, Ms. Ulloa indicates that she attempted to file the Complaint on December 31, 2008,  
6 but had erroneously sent it to the United States District Court, Central Division in Los Angeles,  
7 California ("the Los Angeles District Court") rather than the United States District Court, Eastern  
8 District of California, in Fresno, California ("Fresno District Court"). *Id.* Ms. Ulloa indicates that  
9 the Los Angeles District Court would not file the Summons and Complaint in and the documents  
10 were returned to the attorney's office on January 2, 2009. However, the law office was closed on  
11 January 2, 2009, which delayed the submission of the Summons and Complaint. *Id.*

12 Ms. Ulloa indicates that she did not attempt to file the Summons and Complaint again  
13 until January 6, 2009, when she served a Summons and Complaint and a declaration on the  
14 Fresno District Court requesting that the filing be accepted nunc pro tunc. *Id.* Ms. Ulloa  
15 indicates that on January 7, 2009, she received a phone call from the Fresno District Court  
16 indicating that the Complaint was being rejected because it was not filed electronically. *Id.* Ms.  
17 Ulloa indicates that she was told that the Court would file it but that the attorney may face a  
18 sanction for doing so. *Id.* On January 8, 2009, Ms. Ulloa stated that she attempted to file the  
19 Summons and Complaint electronically but had difficulty doing so and she got very little help  
20 from the Fresno's Clerk's office. *Id.* She was finally able to file the Summons and Complaint  
21 electronically on January 9, 2009, four days after the filing deadline.

22 The Court determined that the declaration submitted raised more questions than it  
23 answered. For example, Ms. Ulloa indicated that the server attempted to return the documents  
24 that were erroneously submitted to the Los Angeles District Court to the attorney's office on  
25 January 2, 2009, but the attorney's office was closed. It is unclear from the declaration when  
26 Ms. Ulloa received the documents back from the Central District of California. It is also unclear

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28 <sup>3</sup> It is not clear what position Ms. Ulloa holds at the law firm as this information is not contained in the  
declaration.

1 why Ms. Ulloa did not attempt to file the documents again until January 6, 2009. Moreover,  
2 although Ms. Ulloa submitted a declaration, she did not attach any supporting documentation  
3 either from the various courts where the documents were purportedly filed and rejected, or any  
4 evidence from the server that attempts were made to file the documents at the courts as alleged.

5 Accordingly, the Court ordered that Plaintiff provide additional documentation including  
6 another declaration from Ms. Ulloa addressing the concerns outlined above. The Court also  
7 noted that Plaintiff had not cited to any cases in support of her claims that the court should  
8 excuse the late filing based on excusable neglect. The Court gave Plaintiff an additional five  
9 days to submit the supplemental information and briefing. To date, Plaintiff has not responded to  
10 the Court's order, nor has she requested an extension of time to do so.

## 11 2. *Equitable Tolling*

12 Section 405(g) has been strictly construed to permit extensions of time only by the  
13 Commissioner pursuant to [20 C.F.R. §§ 404.911](#) and 416.1411, or by a Court applying traditional  
14 equitable tolling principles in cases where the equities in favor of tolling the limitations period  
15 are so great that deference to the agency's judgment is inappropriate. [Bowen v. City of New York,](#)  
16 [476 U.S. at 479-482](#). In *Bowen*, the Plaintiffs were prevented from filing because of "the  
17 Government's secretive conduct." [Bowen v. City of New York, 476 U.S. at 481](#). In *Vernon*,  
18 Plaintiff had allegedly been told by an employee of the Social Security Administration that the  
19 deadline would be extended. [Vernon v. Heckler, 811 F. 2d at 1275](#).

20 Plaintiff has not made any arguments based on equitable tolling, nor does this case  
21 present circumstances that meet the equitable tolling requirements. Here, the circumstances  
22 surrounding the submission of the Complaint to the Los Angeles District Court are unclear.  
23 Similarly, there is no explanation why Ms. Ulloa waited to file the Complaint after she was  
24 notified by the Los Angeles District Court on December 31, 2008, that the Court would not accept  
25 the Complaint. Although Ms. Ulloa indicates that she attempted to file the Complaint in Fresno,  
26 she did not do so until January 6, 2009, which is still one day past the January 5, 2009 filing  
27 deadline. Hence, Plaintiff's attorney's representation that the Complaint was not timely filed  
28 because it was not electronically filed is not accurate.

1 A review of the facts demonstrates this is not one of the “rare” cases such as *Bowen v.*  
2 *City of New York*, “in which the equities of tolling are compelling.” [\*Bowen v. City of New York\*](#),  
3 [476 U.S. at 480-481](#). Additionally, there is no evidence of misleading conduct by the  
4 Commissioner that interfered with Plaintiff’s attempt to exercise her right of appeal. *Vernon v.*  
5 *Heckler*, 811 F. 2d at 1278. Accordingly, this Court rejects Plaintiffs arguments that the Court  
6 should excuse the untimely filing based on excusable neglect. Inasmuch as the instant Complaint  
7 was filed more than sixty days after the receipt of the Secretary’s final determination, the action  
8 is barred by the sixty-day statute of limitations set forth in [42 U.S.C. § 405\(g\)](#).

9 **CONCLUSION**

10 For the reasons discussed above, Defendant’s Motion to Dismiss is GRANTED. The  
11 Clerk is DIRECTED to close this action.

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15 IT IS SO ORDERED.

16 Dated: November 5, 2009

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE