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 8 **UNITED STATES DISTRICT COURT**
 9 **EASTERN DISTRICT OF CALIFORNIA**

10 DANIEL HERNANDEZ OLVERA,) Case No: 1:13-CV-00515 JTL
 11)
 Plaintiff,)
 12) FIRST AMENDED COMPLAINT
 vs.) FOR REVIEW OF
 13) FINAL DECISION OF THE
) COMMISSIONER OF SOCIAL
 14 CAROLYN W. COLVIN, Acting) SECURITY
 Commissioner of Social Security,)
 15)
 Defendant.)
 16)
 17)

18 Plaintiff Daniel Hernandez Olvera hereby alleges a claim for relief as
19 follows:

- 20 1. Daniel Hernandez Olvera is a competent adult residing within the
 21 jurisdictional boundaries of this Court in Bakersfield, CA.
 22 2. Plaintiff's Social Security Number is XXX-XX-7835.
 23 3. This action arises under the provisions of the Social Security Act, Title II.

24 This court has jurisdiction to review the decision of defendant herein pursuant to
25 42 U.S.C. §§ 405(g) and 1383(c).

26

1 4. The Social Security Act provides that an individual should be considered
2 disabled if that person is unable to engage in any substantial gainful activity by
3 reason of any medically determinable physical or mental impairment which can be
4 expected to result in death or which has lasted or can be expected to last for a
5 continuous period of not less than twelve months.

6 5. Daniel Hernandez Olvera is, and at all times relevant to this action,
7 disabled as that term is defined in the Social Security Act.

8 6. Daniel Hernandez Olvera filed concurrent applications for disability
9 insurance benefits and supplemental security income alleging disability in
10 accordance with the legal requirements of the Social Security Act. The
11 Commissioner denied the applications initially and upon reconsideration.

12 7. Daniel Hernandez Olvera timely requested and participated in a hearing
13 before an administrative law judge. The ALJ issued a decision denying plaintiff's
14 claim for benefits.

15 8. Thereafter, Daniel Hernandez Olvera timely filed a request for review of
16 the ALJ's decision with the Appeals Council. On January 25, 2013, the Appeals
17 Council denied the request for review, at which time the ALJ's decision became the
18 final decision of the Commissioner. On March 14, 2013, plaintiff's counsel
19 requested an extension of time in which to commence a civil action, Exhibit 1.

20 9. A party may obtain judicial review of the Commissioner's final decision
21 by commencing a civil action in federal court "within sixty days after the mailing
22 to him of notice of such decision or within such further time as the Secretary may
23 allow." 42 U.S.C. § 405(g); 20 C.F.R. § 404.981.

24 10. Although the Appeals Council has yet to act on the request for an
25 extension, this court has jurisdiction because the sixty-day time limit is not
26 jurisdictional, but is instead a statute of limitation which the Secretary may waive.

1 *Banta v. Sullivan*, 925 F.2d 343, 345 (9th Cir.1991) *citing Weinberger v. Salfi*, 422
2 U.S. 749, 763-64, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522, 537-38 (1975).

3 11. The Appeals Council has not indicated whether the it will grant the
4 request for an extension, however, the failure to file within the sixty-day time limit
5 is an affirmative defense, which "is properly raised in a responsive pleading."
6 *Vernon v. Heckler*, 811 F.2d 1274, 1278 (9th Cir.1987) (*citing* Federal Rule of
7 Civil Procedure 8(c)), therefore, this complaint is properly before the Court.

8 11. Pursuant to Social Security Act, Daniel Hernandez Olvera files this
9 action to seek judicial review of the Commissioner's decision and requests that this
10 court reverse that decision, or in the alternative, to remand this matter for a new
11 hearing on the following grounds:

12 (a) There is no substantial medical or vocational evidence in the record to
13 support the legal conclusion of plaintiff is not disabled within the meaning of the
14 Act;

15 (b) There is no substantial evidence in the record to support the
16 Commissioner's finding that plaintiff could perform any substantial gainful
17 activity;

18 (c) The evidence in the record supports only the finding that plaintiff is
19 disabled and has been continuously disabled as that term is defined in the Social
20 Security Act at all times relevant to plaintiff's application;

21 (d) New and material evidence for which good cause exists for failure to
22 submit earlier exists and warrants a remand of this matter for further proceedings.

23 WHEREFORE, plaintiff Daniel Hernandez Olvera prays for judgment
24 against the Commissioner of Social Security as follows:

25 1. That this court reverse and set aside the decision of defendant denying
26 Daniel Hernandez Olvera's claim for disability benefits;

1 2. That this court find that plaintiff Daniel Hernandez Olvera has been
2 disabled at all times relevant to the application for a period of disability and
3 disability insurance and Supplemental Security Income benefits;

4 3. In the alternative, that this court remand the matter for a new hearing or
5 new proceedings as appropriate;

6 4. For all costs of suit incurred herein;

7 5. For reasonable attorney's fees under the Equal Access to Justice Act; and

8 6. For such other and further relief as the court may deem just and proper.

9 DATE: May 9, 2013

Respectfully submitted,

10 LAW OFFICES OF LAWRENCE D. ROHLFING

11 /s/ *Brian C. Shapiro*

12 BY: _____
13 Brian C. Shapiro
14 Attorney for plaintiff DANIEL HERNANDEZ
15 OLVERA

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**PLEASE RESPOND TO
SANTA FE SPRINGS**

Appeals Council, Branch 3
Office of Disability Adjudication and Review
5107 Leesburg Pike, Suite 1305
Falls Church, VA 22041-3255

SENT BY FACSIMILE TRANSMISSION TO (703)605-7011

Re: Daniel Hernandez Olvera
SSN: [REDACTED]-7835

Dear Appeals Council, Branch 3:

This letter serves to request a 30 day extension of the time in which to commence a civil action in the United States District Court for the above matter. I just received the referral of this case and Mr. Olvera is in the process of retaining me. I need additional time to review Mr. Olvera's claim and prepare the appropriate documents. Please grant me an additional 30 days in which to review and prepare the appropriate documentation.

Thank you for your attention and cooperation. Should you have any questions, please do not hesitate to contact me.

Very truly yours,
Brian C. Shapiro
Brian C. Shapiro
Attorney at Law

BCS:sf

Cc: Daniel Hernandez Olvera