

FILED

APR 25 2016

SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **(Oakland/SF Division)**

10 **TIMOTHY A. DeWITT, on behalf**
11 **of himself and others similarly situated,**

12 **Plaintiff,**

13 **vs.**

Case No. 3:15-cv-5261 WHA

THREE-JUDGE CASE (28 U.S.C. §2284)

**PLAINTIFF'S NOTICE OF NON-SERVICE
AND NON-RECEIPT OF COURT'S ORDER OF
APRIL 15, 2016, AND RESPONSE TO ORDER**

Due: April 22, 2016
Time: Noon/ 12:00 p.m.
Place: Clerk's Office/Courtroom 8

14 **CALIFORNIA CITIZENS REDISTRICTING**
15 **COMMISSION, a California agency;**
16 **SECRETARY OF STATE OF THE STATE**
17 **OF CALIFORNIA, Alex Padilla;**

18 **And DOES 1 through 100, Defendants.**

19 **//**

NOTICE AND RESPONSE TO COURT'S ORDER DATED APRIL 15, 2016

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2
3 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD,
4 please take notice that Plaintiff apparently was not served with, and in any event never received
5 timely service of, the Court's Order in this action, dated April 15, 2016, concerning whether the
6 Court may rule on Defendants' Motion to Dismiss sitting as a single judge, and requiring a written
7 response (from all parties) by Noon, April 22, 2016. Nonetheless, it should be plain from
8 Plaintiff's previous filings in this action Plaintiff's position that the Court may not rule on
9 Defendants' Motion to Dismiss as a single judge, and Plaintiff offers the following additional
10 response re same.

11 This Court, still sitting as a single judge, simply lacks jurisdiction to enter any
12 (especially any finally dispositive, and appealable) judgment "on the merits" of this action,
13 including the proper application of the Supreme Court's recent decision in *Evenwel v. Abbott*
14 (April 4, 2016) to Plaintiff's remaining Sixth Claim for Relief, and the Defendants' Motion to
15 Dismiss here. (See 28 U.S.C. §2284(b)(3) ("A single judge shall not... *enter judgment on the*
16 *merits.*" (emp. added.)); and *Shapiro v. McManus*, 577 U.S. __ (2015) (unanimous, per Scalia J).)

1 just governmental defendants), in the first place.

2 Thus, Section 2284(b)(3) expressly provides: “Any action of a single judge may be
3 reviewed by the full court at any time before final judgment.” (*Id.*) Notably, this continuing
4 plenary jurisdiction to review any of the single-judge’s actions, held exclusively by the Three-
5 Judge Court itself, applies automatically, whether any party/ the plaintiff ever requests the Three-
6 Judge Court actually exercise it or not. Plaintiff, however, in fact does intend to request that they
7 exercise it (perhaps even *sua sponte* even if only to preserve aesthetic symmetry in the action)
8 especially because many of the Court’s January 12, 2016, interlocutory dismissals were plainly
9 entered “on the merits”, and Plaintiff believes they were erroneously entered, both procedurally
10 and substantively. (Again, see 28 U.S.C. §2284(b)(3) (no “judgment on the merits” by single
11 judge), Appellate Jurisdiction Clause of U.S. Const.; Separation of Powers doctrine (Art. III vs.
12 Art. I); Due Process/ three-judge avoidance by single-judge results in impermissible one-way
13 ratchet against challenging plaintiffs’ substantive claims; Appellate Due Process/steering of
14 plaintiffs’ appeals to court preferred by single-judge, away from court specified by
15 Congress/federal statute.)

16 Concerning Plaintiff’s original First Claim for Relief in this action (over which the
17 required Three-Judge Court also has continuing plenary jurisdiction in this action), please see
18 *Hinds’ Precedents of the House of Representatives*, Vol. 1, §310, Report of the Committee on
19 Elections, March 15, 1844 (fully conceding Congress has no constitutional authority to direct or
20 instruct state legislatures to draw single-member districting plans under Elections Clause of U.S.
21 Constitution; report in fact followed by full House of Representatives; members of four separate
22 state congressional delegations elected at-large in violation of first federal “single-member
23 districts” statute in fact recognized and seated as full members of Congress as required by U.S.
24 Constitution; no involvement by any Art. III court requested or required.)

CONCLUSION

The Three-Judge Court that has yet to be convened in this case retains full continuing jurisdiction (under 28 U.S.C. §2284(b)(3)) over this entire action, including the Court’s entire January 12, 2016, Order in the case, the question of the proper application of the *Evenwel* decision to Plaintiff’s “remaining” Sixth Claim for Relief, and Defendants’ Motion to Dismiss here. Further, the question of the proper application of the *Evenwel* decision to Plaintiff’s “remaining” claim for relief, and the substantive issues raised by Defendants’ Motion to Dismiss, at a minimum, clearly pass the expressly “low bar” of “constitutional []substantiality” established by the Supreme Court in *Shapiro v. McManus, supra* (slip opin., at p. 7) (per Scalia, J.).

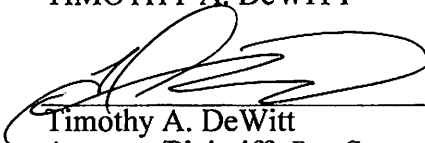
Thus, as Congress has made excruciatingly plain (and the Supreme Court cited approvingly in *Shapiro*) (which was itself cited approvingly by the Court in *Evenwel*) “[a] single judge shall not ... enter judgment on the merits.” (28 U.S.C. §2284(b)(3) (emp. added).) And this is fully consistent with Congress’ other clear mandate, under both the Appellate Jurisdiction Clause and the Separation of Powers doctrine, to Article III courts in three-judge cases: “Any action of a single judge may be reviewed by the full [three-judge] court at any time before final judgment.” (*Id.* (emp. added).)

Dated: April 23, 2016.

Respectfully submitted,

TIMOTHY A. DeWITT (CA 150631)

By:


Timothy A. DeWitt
Attorney/Plaintiff, *Pro Se*

CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the State of California. I am over the age of 18 and the attorney/plaintiff in the within action. My address is 2729 Dwight Way, No. 402, Berkeley, CA 94704-3100.

I am familiar with the business practices of this office for collection and processing of mail with the United States Postal Service, whereby official mail is attached with the appropriate postage and placed in a designated area. Mail so collected and processed is deposited with the United States Postal Service that same day and in the ordinary course of business. On the below date, I served a true and correct copy of the accompanying

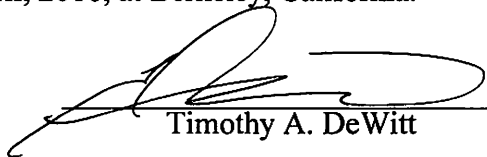
PLAINTIFF'S NOTICE OF NON-SERVICE AND NON-RECEIPT OF COURT'S ORDER OF APRIL 15, 2016, AND RESPONSE TO ORDER

by placing a true copy thereof in a sealed envelope in the designated area for outgoing mail addressed as follows:

**George Waters
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(Also by email to: George.Waters@doj.ca.gov)**

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

Executed this 23rd day of April, 2016, at Berkeley, California.


Timothy A. DeWitt