



Samples

You may print the template and fill in the blanks by hand, or you may type the document using the form motion as a template. If you are typing the document, you may delete the checkboxes and accompanying text for anything that you are not asserting.

1
2 Doug Defendant
3 123 Main Street
4 Sacramento, CA 95814
5 916-555-9876
6 Defendant In Pro Per

7 Identify the basis of the motion. These checkboxes correspond to the checkboxes in the Points and Authorities (the second section).

8 SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO

9 Identify the plaintiff(s), defendant(s), and case number.

10 Peter Plaintiff,
11 Plaintiff,
12 vs.,
13 Doug Defendant,
14 Defendant

15 Insert the date, time and department of the hearing, as well as the date that the lawsuit was first filed

16 Date: November 12, 2011
17 Dept/Time: Dept. 53 at 2:00 p.m.
 Dept. 54 at 9:00 a.m.

18 Check this box or delete the checkbox if you are requesting that the court quash service of the Summons

19 Date Complaint was filed: January 17, 2011

20 TO EACH PARTY AND TO THE COUNSEL OF RECORD FOR EACH PARTY:
21 YOU ARE HEREBY NOTIFIED THAT at the above-captioned date and time and
22 department in the courthouse located at 813 Sixth Street, Sacramento, California that Defendant will
23 move the court for an order requesting that the Default and, if entered, Default Judgment be set aside,
24 as well as an order quashing the service of the Summons due to lack of jurisdiction pursuant to
25 CCP § 418.10(a)(1). This motion is made on the following grounds:

26 Inadvertence, surprise, mistake, or excusable neglect (CCP §473(b));
 Service of the Summons did not result in actual notice (CCP §473.5);

27 MOTION TO SET ASIDE- 1

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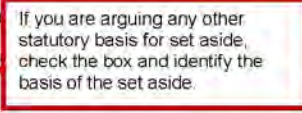
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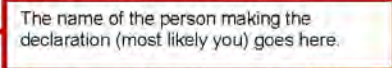
Motion to Set Aside (page 1)



1 Service of the Summons did not result in actual notice in time to defend action
2 brought by a debt buyer (Civ. §1788.4)

3 The judgment and/or default is void (

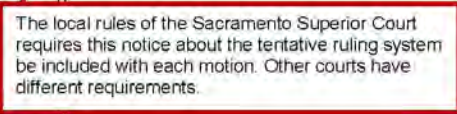
4 Other Grounds: 

5 This motion will be based upon this notice, the attached points and authorities and declaration of
6 Doug Defendant, and the records and files in this action. 

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

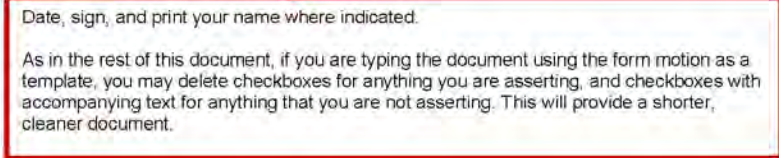
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15

16  Dated: October 1, 2011

20

21 _____
22 Doug Defendant
23 Defendant, In Pro Per

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MOTION TO SET ASIDE- 2

Motion to Set Aside (page 2)



The Points and Authorities explains the legal basis for your motion.

The background explains how the default came about. Either fill in the blanks and check the appropriate boxes, or write your own description.

Memorandum of Points and Authorities in Support of Motion for Set Aside

I. Background

On ~~January 17, 2011~~, Plaintiff filed a Complaint in this court. On ~~March 26, 2011~~ this court entered a default and on ~~March 26, 2011~~ a judgment was entered against the Defendant. The moving defendant is now asking for a set aside of that default and, if entered, default judgment as well as an order quashing service of the Summons for lack of jurisdiction.

II. LEGAL ARGUMENT

~~(If checked paragraphs A – D are argued) Pursuant to California Code of Civil Procedure §473(b), the court should set aside this adverse judgment or ruling based on inadvertence, surprise, or excusable neglect.~~

A. Grounds for Relief. On application of the party or his or her legal representative from a judgment entered against him or her through his or her mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc. § 473(b)). This motion is filed within a reasonable period of time, not exceeding six months after entry of the default.

B. Policy of Law Favors Trial on Merits. The policy of the law is that controversies should be heard and disposed of on their merits (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal. App. 4th 681, 694–703, 84 Cal. Rptr. 3d 351; *Berman v. Klassman* (1971) 17 Cal. App. 3d 900, 909, 95 Cal. Rptr. 417).

C. Court Has Wide Discretion in Granting Relief. A trial court has wide discretion to grant relief under Code of Civil Procedure Section 473 (*Berman v. Klassman* (1971) 17 Cal. App. 3d 900, 909, 95 Cal. Rptr. 417).

D. Liberal Construction of Statute. Code of Civil Procedure Section 473(b) is a remedial measure to be liberally construed, and any doubts existing as to the propriety of setting aside a default thereunder will be resolved in favor of a hearing on the merits (*Berman v. Klassman* (1971) 17 Cal. App. 3d 900, 910, 95 Cal. Rptr. 417).

MOTION TO SET ASIDE- 3

Motion to Set Aside (page 3)

Check or delete the checkbox and parenthetical if you are seeking set aside the default due service not resulting in actual notice. (CCP § 473.5). If you are not asserting this, either do not check the box, or delete the heading and paragraphs E to H.

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(If checked paragraphs E–H are argued) **The court should grant defendant’s motion for relief pursuant to CCP §473.5 because he/she received no actual notice of the action in time to defend, he/she has filed a timely motion for relief, and the default and default judgment was not caused by the plaintiff’s avoidance of service or inexcusable neglect.**

E. Motion for Relief From Default for Lack of Actual Notice. When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, the party may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action (Code Civ. Proc. § 473.5(a)).

F. Court May Grant Relief on Timely Motion if Defendant Not at Fault. On a finding by the court that the motion was made within the two year time period permitted by Code of Civil Procedure Section 473.5(a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action (Code Civ. Proc. § 473.5(c); *Goya v. P.E.R.U. Enterprises* (1978) 87 Cal. App. 3d 886, 890–891, 151 Cal. Rptr. 258).

G. Granting of Relief Within Discretion of Trial Court. Whether or not relief should be granted under Code of Civil Procedure Section 473.5 is a matter within the discretion of the trial court (*Brockman v. Wagenbach* (1957) 152 Cal. App. 2d 603, 611, 313 P.2d 659).

H. Policy Favors Application for Relief. Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails over the general rule of deference to the trial court’s exercise of discretion and doubts are resolved in favor of the party seeking relief (184 Cal. App. 3d 1069, 1079, 229 Cal. Rptr. 258).

Check or delete the checkbox and parenthetical if you are seeking set aside the default due service not resulting in actual notice in time to defend a case brought by a debt buyer. (Civ. Code § 1788.61). If you are not asserting this, either do not check the box, or delete the heading and paragraphs I to K.

(If checked paragraphs I-K are argued) **The court should grant defendant’s motion for relief pursuant to Civil Code § 1788.61 because he/she received no actual notice of the action in time to defend against an action brought by a debt buyer, he/she has filed a timely motion for relief,**

MOTION TO SET ASIDE- 4

Motion to Set Aside (page 4)



1 and the default and default judgment was not caused by the plaintiff's avoidance of service or
2 inexcusable neglect.

3 **I. Motion for Relief From Default for Lack of Actual Notice.** When service of a summons has not
4 resulted in actual notice to a party in time to defend an action brought by a debt buyer and a default or
5 default judgment has been entered against him or her in the action, the party may serve and file a
6 notice of motion to set aside the default or default judgment and for leave to defend the action (Civ.
7 Code § 1788.61(a)(1)).

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9 **J. Court May Grant Relief on Timely Motion if Defendant Not at Fault.** On a finding by the
10 court that the motion was made within the time period(s) permitted by Civ. Code § 1788.61(a)(2)(A),
11 Civ. Code § 1788.61(a)(2)(B) and/or Civ. Code § 1788.61(a)(3)(A), and that his or her lack of actual
12 notice in time to defend the action was not caused by his or her avoidance of service or inexcusable
13 neglect, it may set aside the default or default judgment on whatever terms as may be just and allow
14 the party to defend the action (Civ. Code § 1788.61(c)).

15
16 **K. Court may consider evidence presented by either party.** Either party may introduce, and the
17 court may consider, evidence in support of its motion to set aside the default or default judgment of a
18 server who appears on the proof of service.

Check or delete the checkbox and parenthetical if you are seeking set aside the default because the judgment is void due to a lack of service (CCP § 473(d)). If you are not asserting this, either do not check the box, or delete the heading and paragraphs L to N.

19 (If checked paragraphs L – N are argued) **The court should grant defendant's motion to set
20 aside the default and default judgment, if entered on the ground that it is void because,
21 although its invalidity may not appear from an examination of the judgment roll, it is
22 nonetheless void in fact in that the summons and complaint were never validly served on the
23 defendant, and the defendant lacked actual notice of this lawsuit**

24 **L. Statutory Power to Set Aside Void Judgment.** The court may, on motion of either party after
25 notice to the other party, set aside any void judgment or order (Code Civ. Proc. § 473(d)).

26 **M. Inherent Power to Set Aside Judgment Not Void on Its Face but Void in Fact.** The law is
27 settled that courts of record have inherent power to set aside a void judgment whether or not it is void
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MOTION TO SET ASIDE- 5

Motion to Set Aside (page 5)



1 on its face (*Rogers v. Silverman* (1989) 216 Cal. App. 3d 1114, 1122, 265 Cal. Rptr. 286). As
2 described in the attached Declaration, the service of the Summons was improper, depriving the court
3 of jurisdiction as to the defendant. Furthermore, the defendant is filing this motion within a
4 reasonable period of time within six months of learning of the existence of this lawsuit.

6 **N. Court Has Duty to Set Aside Judgment.** It is well settled that when an application to vacate and
7 set aside a judgment

8 its rendition and i
9 set it aside (*Smith*

Check or delete the checkbox and parenthetical if you are seeking set aside the default because the default is void (CCP § 473(d)) because the Proof of Service was never filed, or because no sworn statement of venue (declaration or affidavit regarding the basis of jurisdiction facts) was filed and the complaint was not verified in a consumer credit case (See CCP § 396a(a)). If you are not asserting this, either do not check the box, or delete the heading and paragraphs O to R.

11 (If checked paragraphs O – R are argued) The court should set aside the default and, if
12 entered, default judgment in this action as void on its face because no proof of service was
13 filed this is a consumer credit debt, however no declaration of venue has been filed and the
14 complaint is not verified.

Choose reason the judgment is void

14 **O. Relief From Void Judgment or Order.** The court may, on motion of either party after notice to
15 the other party, set aside any void judgment or order (Code Civ. Proc. § 473(d)).

17 **P. Inherent Power to Set Aside Judgment Void on Its Face.** A court has inherent power,
18 independent of statute, to set aside a judgment or order that is void on its face (*People v. Greene*
19 (1887) 74 Cal. 400, 405–406, 16 P. 197; *Hendrix v. Hendrix* (1955) 130 Cal. App. 2d 379, 383, 279
20 P.2d 58).

22 **Q. Test for Establishing That Judgment Is Void on Its Face.** A judgment or order is void on its
23 face when its invalidity appears from an examination of the judgment roll (*People v. Davis* (1904)
24 143 Cal. 673, 676, 77 P. 651; *Carrasco v. Craft* (1985) 164 Cal. App. 3d 796, 808, 210 Cal. Rptr.
25 599).

27 **R. Judgment Roll When Complaint Not Answered.** If the complaint is not answered by any
28 defendant, the following papers, without being attached together, constitute the judgment roll: the

MOTION TO SET ASIDE- 6

Motion to Set Aside (page 6)



1 summons, with the affidavit or proof of service; the complaint; the request for entry of default with a
2 memorandum endorsed thereon that the default of the defendant in not answering was entered, and a
3 copy of the judgment; if defendant has appeared by demurrer, and the demurrer has been overruled,
4 then notice of the overruling thereof served on defendant's attorney, together with proof of the
5 service; and in case the service is made by publication, the affidavit for publication of summons, and
6 the order directing service by publication.

Check or delete the checkbox and parenthetical if you are also asking that the court quash service of the Summons because the service was invalid. If you are not asserting this, either do not check the box, or delete the heading and paragraphs S to V

7 (If checked paragraphs S-V are argued) **The court should quash service of the summons due to**
8 **lack of jurisdiction.**

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11 **S. Motion to Quash Service of Summons.** On or before the last day of his or her time to plead, or
12 within such further time as the court may for good cause allow, a defendant may serve and file a
13 notice of motion to quash service of summons on the ground the court lacks jurisdiction over him or
14 her (Code Civ. Proc. § 418.10(a)(1)).

15 **T. Compliance With Statutory Provisions Governing Service of Process Is Required.** Service of
16 summons in conformance with the mode prescribed by statute is deemed jurisdictional, and, absent
17 such service, no jurisdiction is acquired by the court in the particular action (*Renoir v. Redstar Corp.*
18 (2004) 123 Cal. App. 4th 1145, 1150, 20 Cal. Rptr. 3d 603; *Schering Corp. v. Superior Court* (1975)
19 52 Cal. App. 3d 737, 741, 125 Cal. Rptr. 337; *Sternbeck v. Buck* (1957) 148 Cal. App. 2d 829, 832,
20 307 P.2d 970).

21
22 **U. Strict Compliance Necessary for Substituted or Constructive Service.** A court has no authority
23 to render judgment on the basis of substituted or constructive service of the summons when statutory
24 requirements have not been strictly complied with (*Summers v. McClanahan* (2006) 140 Cal. App.
25 4th 403, 412, 44 Cal. Rptr. 3d 338 (improper service on personal manager); *Zirbes v. Stratton* (1986)
26 187 Cal. App. 3d 1407, 1416, 232 Cal. Rptr. 653 (substituted service); *Eagle Electric Mfg. Co. v.*
27 *Keener* (1966) 247 Cal. App. 2d 246, 251, 55 Cal. Rptr. 444 (same); *Bank of America v. Carr* (1956)
28 138 Cal. App. 2d 727, 737, 292 P.2d 587 (constructive service)).

MOTION TO SET ASIDE- 7

Motion to Set Aside (page 7)



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V. General Appearance After Default Judgment Does Not Validate Defective Service. The general appearance after entry of a default judgment by a defendant who was defectively served with summons does not make the defective service retroactively valid (*In re Marriage of Smith* (1982) 135 Cal. App. 3d 543, 545, 547-552, 185 Cal. Rptr. 411).

THE DEFENDANT ADDITIONALLY ARGUES:

This section is provided for you to argue any additional legal basis for your motion to set aside. Either check the box and write your additional points and authorities in the lines provided, or delete the check box and type your points and authorities. If you are making no other arguments, leave the box unchecked, or delete the entire section.

and if applicable, summons be set aside for lack of jurisdiction.

Date, sign, and print your name where indicated, and enter your party designation.

As in the rest of this document, if you are typing the document using the form motion as a template, you may delete checkboxes for anything you are asserting, and checkboxes with accompanying text for anything that you are not asserting. This will provide a shorter, cleaner document.

Dated: October 1, 2011

Doug Defendant
Defendant, In Pro Per



The declaration contains the evidence that supports your motion. It is the most important part of the motion. Because your facts are unique to your case it is preferable that the declaration be written specifically to your circumstances, using this template only as a rough guide to the types of facts you might include.

DECLARATION

Enter the name and party designation of person making the declaration.

I, Doug Defendant, am the Defendant in this matter, and I declare the following in support of my motion to set aside the default in my case:

CONTENTS OF THE PROOF OF SERVICE OF SUMMONS

This section identifies whether there was a Proof of Service of Summons in the file, and what it stated

1. I have reviewed the court file, and there is there is not a Proof of Service of Summons filed in this case. (If there is not a Proof of Service of Summons filed, paragraphs 2-7 below are not asserted as part of this declaration).
2. The Plaintiff's Proof of Service of Summons states that I was personally served, I was served by substituted service.
3. Service allegedly took place on January 21, 2014 at 2:15 pm at 3579 Oak Ave., Sacramento,
4. The Proof of Service of Summons describes the person served as being named John Doe, and having the following physical description: white male, 5'10", 195 pounds, brown hair and brown eyes.
 - There was no physical description provided.
5. The Proof of Service of Summons identifies the server as a registered process server a Sheriff's Department employee, a private individual.
6. As to the service of the Summons: (check only one):
 - I do not contest the manner of service. I was served as described in the Proof of Service of Summons. (If checked, paragraph 7, below, is not asserted or claimed.)
 - Although the Proof of Service of Summons claims that I was personally served, I was not served with the Summons and Complaint for the reasons described in the following paragraphs.
 - Although the Proof of Service of Summons claims that I was served by substituted service, I did not live or work at the address where substituted service allegedly took place, as described in the following paragraphs.
 - Service of the Summons was invalid because:

MOTION TO SET ASIDE- 9

Motion to Set Aside (page 9)



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7. The following facts support my contention in paragraph 6: The address shown on the Proof of Service is a former address. I moved from that address to my current residence at 123 Main Street, Sacramento, in August 2010. A copy of my rental agreement for this residence is attached as Exhibit B.

ACTUAL KNOWLEDGE OF THE LAWSUIT

8. I first learned about this lawsuit on or around September 15, 2011. The way I first learned about this lawsuit was being served with the Summons and Complaint; or as follows:
In early September, I was denied a loan to purchase a vehicle. I requested a copy of my credit report, and was surprised to see a judgment against me for this case. Finding the judgment listed on my credit report was the first I had ever heard of this lawsuit.

This section describes when and how you learned about the lawsuit.

9. I was not evading service, so my lack of actual notice of this case is not the result of evasion of service. If you contend you did not respond due to a lack of actual notice of the lawsuit, the lack of notice cannot be because you were evading service.

INADVERTANCE, SURPRISE, MISTAKE, EXCUSABLE NEGLECT
OR LACK OF NOTICE

10. I contend that my failure to respond was the result of inadvertence, surprise, mistake, or excusable neglect or lack of notice for the following reasons: _____

State the facts that describe the reason you did not respond, and how this lack of response was the result of inadvertence, surprise, mistake, excusable neglect or lack of notice.



11. But for the above facts, I would have filed the Proposed Answer, attached as Exhibit A.

12. I additionally wish the court to consider the following when evaluating my request to set aside the default:

Remember- the declaration is your explanation and your evidence as to why the set aside motion should be granted. If you can, you should write the declaration portion of the motion on your own, in your own words, rather than using the language of this template. The resulting declaration will likely be shorter, and will hopefully better convey the reasons for your motion. When writing, there are several tips you should keep in mind:

- This declaration is being read by a judge that has no knowledge of you or the facts of your case. It should be written in a way that quickly and clearly explains your position to a complete stranger. You may benefit by having someone else read your declaration to see if he or she understands the points that you are attempting to make.
- It is your responsibility to present enough evidence to convince the court to grant your motion. If, for example, you contend that service of the Summons and Complaint was invalid, what evidence can you present to support this? Remember to present facts that apply to your reasons for set aside. For example, if the Proof of Service of Summons alleges that you were served by substituted service (i.e. service was on an adult in your home or place of work), proving that you weren't at home or work at the time does not invalidate the service, but showing that it wasn't your home or work would.

13. I have attached the following exhibits to this declaration in support of my motion to set aside the default:

- Exhibit A: Proposed Answer
- Exhibit B: Lease agreement showing my residence on date of service.
- Exhibit C: (describe)
- Exhibit D: (describe)
- Exhibit E: (describe)

Your motion must have the responsive pleading (typically an Answer, but it could also be a demurrer, motion to quash, motion to transfer or other valid initial pleading) that you would have filed in this case attached as an exhibit. You may also attach other exhibits to support the points that you have made in your declaration. Be sure to refer to them in the section to which they are relevant.

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

Dated: _____

This language is what allows the declaration to be considered as evidence. Without this language, none of your facts can be considered by the court.

Doug Defendant
Defendant, In Pro Per

Date, sign, and print your name where indicated.

MOTION TO SET ASIDE- 11

Motion to Set Aside (page 11)



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Proposed Answer Exhibit A

MOTION TO SET ASIDE- 12

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