

Motion to Set Aside (Relief from Default Judgment)

If a defendant does not respond to a civil lawsuit, the plaintiff may obtain a default and default judgment, winning the case without the defendant's participation. If the defendant has a valid reason for not responding, such as never being notified, they may file a motion asking the judge to set aside the default judgment. This is also called a motion for relief from default or a motion to vacate judgment. This guide gives the steps to write and file such a motion, and includes templates you can adapt to fit your situation.

Templates and Forms

- [Motion for Relief from Default Judgment Template ??? RTF](https://saclaw.org/wp-content/uploads/2023/04/sbs-relief-from-default-judgment-motion.rtf) (<https://saclaw.org/wp-content/uploads/2023/04/sbs-relief-from-default-judgment-motion.rtf>)

Related Guides:

[Responding to a Debt Collection Lawsuit \(Answer-Contract\)](https://saclaw.org/resource_library/answer-contract/) (https://saclaw.org/resource_library/answer-contract/)

[Responding to a Lawsuit \(Answering a Complaint\)](https://saclaw.org/resource_library/responding-to-a-lawsuit/) (https://saclaw.org/resource_library/responding-to-a-lawsuit/)

[Request a Default Judgment by Clerk](https://saclaw.org/resource_library/request-a-default-judgment-by-clerk-2/) (https://saclaw.org/resource_library/request-a-default-judgment-by-clerk-2/)

[Request a Default Judgment by Court](https://saclaw.org/resource_library/request-a-default-judgment-by-court/) (https://saclaw.org/resource_library/request-a-default-judgment-by-court/)

When a defendant is served with a Summons and Complaint, the defendant has a limited amount of time (typically 30 days) in which to respond to the lawsuit. The response must be a formal written response filed in court and served on the plaintiff. A letter or phone call will not protect the defendant.

If a defendant fails to respond, the plaintiff may ask the court to enter a default, cutting off the defendant's time to respond. The plaintiff can also file a request for default judgment for the amount they claim is owed.

In a breach of contract or collection case, the amount of the judgment is usually the amount requested by the plaintiff in the complaint. In a personal injury or property damage case, the amount awarded is limited to the amount of damages established by the evidence the plaintiff presents to the Court.

If the judgment is granted, the plaintiff can garnish the defendant's wages, levy their bank account, put a lien on their real estate, and use other collection methods to obtain the judgment amount.

Sometimes defendants are not actually notified of the lawsuits, often because they have moved. In that case, the defendant may only find out about it when their wages are garnished or their checks start bouncing because their bank account is empty. In those cases, the defendant may file a motion to vacate the judgment. If this motion is granted, the plaintiff must start over again, beginning by serving the defendant.

Grounds for Relief

California Code of Civil Procedure (CCP) Â§Â§ [473\(b\)](#)

(http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=473.), [473\(d\)](#)

(http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=473.), and [473.5](#)

(http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=473.5.) and [Civil Code \(Civ\) Â§ 1788.61](#)

(http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1788.61.&lawCode=CIV) specify the most common grounds upon which you can base a motion for relief from default or default judgment. These grounds include:

Inadvertence, surprise, mistake, or excusable neglect ([CCP Â§ 473\(b\)](#))

(http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=473.)

Under CCP Â§ 473(b), the court may set aside a default and default judgment if the defendant asking for the set aside presents enough evidence to the court to demonstrate that the default was entered by inadvertence, mistake, surprise, or excusable neglect. This motion must be filed within six months of the default being set aside.

â??Inadvertenceâ? and â??excusable neglectâ? are virtually synonymous (See [Barnes v. Witt, 207 Cal. App. 2d 441 \(1962\)](#) (https://scholar.google.com/scholar_case?case=5094354972251469523)), and are the most common reasons for a set aside. In addition to filing a timely motion, the defendant asking for the set aside must present sufficient evidence for the court to find that the inadvertence or neglect was excusable. To be excusable, the neglect must have been the act or omission of a reasonably prudent person under the circumstances. Forgetting about the lawsuit, being too busy to properly respond, or being unable to afford an attorney are not grounds for excusable neglect.

Examples of excusable neglect include:

- Illness that disables the party from responding or appearing in court
- Failure to respond because you relied on your attorney to do so
- Failure to appear at trial because you relied on misinformation provided by a court officer

A *mistake of fact* occurs when a person understands the facts to be other than they are. A *mistake of law* occurs when a person knows the facts as they are, but has a mistaken belief as to the legal consequences of those facts. Ignorance of the law or negligence in researching the law does not generally constitute an excusable mistake, and therefore is not usually grounds for relief from a default; however, the more confusing or obscure the critical fact or point of law that caused the default, the more likely it becomes the court will find the mistake to be excusable.

Surprise occurs when a party is placed in an injurious legal situation, through no fault or negligence of his or her own, that ordinary prudence would not have guarded against.

Typically, in the day-to-day handling of these motions, the court does not focus on whether a problem is a â??mistakeâ? or â??inadvertenceâ? or â??excusable neglect,â? but rather looks at what went wrong, and whether it is reasonable under the circumstances to relieve the requesting party from the judgment.

Party not given actual notice in time to defend (CCP Â§ 473.5

(http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=473.5.)

Even if service of the summons is proper, sometimes it does not result in “actual notice” to a party in time to defend their case. “Actual notice” means the party genuinely does not know of the litigation, so to show a lack of actual notice a defendant would need to demonstrate to the court that he or she lacked knowledge that the lawsuit existed. This lack of knowledge cannot be caused by the defendant’s inexcusable neglect or avoidance of service. Motions based on CCP Â§ 473.5 must be filed within a reasonable period of time, and that time must be within two years of the date of the judgment. [Goya v. P.E.R.U. Enterprises](https://scholar.google.com/scholar_case?case=14509758889642359421), 87 Cal. App. 3d 886 (1978) (https://scholar.google.com/scholar_case?case=14509758889642359421).

Party not given actual notice in time to defend action brought by a debt buyer (Civ Â§ 1788.61

(http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1788.61.&lawCode=CIV.)

Similar to the grounds discussed above, Civ Â§ 1788.61 permits a defendant to set aside a default or default judgment when service of a summons did not result in actual notice in time to defend cases brought by a debt buyer. This code section applies only if you were sued by debt buyer, such as a collection agency or law firm that purchased the debt from the original creditor. Motions brought under this code section must be filed within either 6 years after the entry of default, or 180 days of the first actual notice of the action, whichever is earlier.

If this default judgment occurred because you were the victim of identity theft, or this is a case of mistaken identity (e.g., the judgment should be against someone else who shares your name), you have 180 days from the first actual notice of the case to ask the court to set aside the default judgment.

Void judgments (CCP Â§ 473(d)

(http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=473.)

The court may, on its own motion or the motion of either party, set aside any void judgment or order. A judgment or order may be void if the issuing court lacked subject matter jurisdiction over the action, if the court lacked personal jurisdiction over the defendant, if the judgment or order granted relief that the court had no power to grant, or if the judgment was procured by fraud on the court. Although there are numerous ways in which a judgment may be void, a common way default judgments are found to be void is if the judgment was obtained after improper or fraudulent service, resulting in a lack of personal jurisdiction over the defendant.

A judgment may be *void on its face* if review of the court file reveals that the judgment was improperly entered, for example, if a default judgment is entered against a defendant less than 30 days have lapsed since the date of service shown on the Proof of Service of Summons. A judgment may be *void in fact* if the judgment appears to be properly entered in the court file, but evidence shows that the judgment was improperly entered, for example, if a defendant can establish that the Summons was never served.

A judgment void on its face is subject to set aside at any time, (see [Nagel v. P & M Distributors, Inc.](https://scholar.google.com/scholar_case?case=16809301927939555366), 273 Cal. App. 2d 176 (1969) (https://scholar.google.com/scholar_case?case=16809301927939555366)), however courts typically require that a motion to set aside a judgment that is void in fact to be filed within a reasonable period of time. In determining the outer limits of what constitutes a reasonable time, courts have referred by analogy to statutory limitation periods. Some courts have applied the six-month period applicable to motions under CCP Â§ 473(b) (see, e.g.,

[Wells Fargo & Co. v. City etc. of S.F., 25 Cal. 2d 37 \(1944\)](https://scholar.google.com/scholar_case?case=7544535344915269819) (https://scholar.google.com/scholar_case?case=7544535344915269819).

Other courts have applied the two-year or 180-day period applicable to motions under CCP Â§ 473.5, particularly when the judgment or order is void in fact due to an extrinsic defect in service (see, e.g., [Rogers v. Silverman, 216 Cal. App. 3d 1114 \(1989\)](https://scholar.google.com/scholar_case?case=797196198912525155) (https://scholar.google.com/scholar_case?case=797196198912525155)). Given the wide discretion of the court and the lack of consensus of what constitutes a reasonable period of time, it is typically best to promptly file any motion seeking to set aside a void judgment.

Step-by-Step Instructions

1.

Collect Supporting Evidence

Motions to set aside default judgments typically include one or more documents attached as exhibits, which provide the court with evidence supporting your claims. You may want to collect these documents ahead of time, so that you may accurately describe them in your pleadings. The documents you will attach vary depending on your situation, the grounds you are claiming, and what you are attempting to prove.

For example, you may want to collect:

- Evidence of your residential or business address on the purported date of service, if you are claiming that you did not receive actual notice because service occurred at an old address;
- Medical documentation if you claim excusable neglect based on a medical condition;
- Proof that you are not the party named in the judgment if you are claiming mistaken identity;
- [Identity Theft Victim's Complaint and Affidavit](https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/id_theft_affidavit.pdf) (https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/id_theft_affidavit.pdf) or a copy of a related police report if you are claiming identity theft (**NOTE:** If you are claiming identity theft under Civ Â§ 1788.61, one of these **must** be included with your motion);
- Documentation of any misinformation you received from a court officer, etc.

Remember, you are not trying to convince the court why you should win the lawsuit at this point. You are attaching only documents that prove why the default should be set aside. If your motion is granted, you will have an opportunity to present your defense to the lawsuit.

2.

Reserve Your Court Hearing and Determine Deadlines to File and Serve Motion

This information is for Sacramento. If your case is in a different county, do not follow these instructions. Instead, call the clerk or visit the court website in your county to find the correct information.

A motion to set aside a default is considered a “Law and Motion” matter and will be heard in either Department 53 (odd numbered cases) or Department 54 (even numbered cases). For details on how to select and reserve a date, visit [How to Schedule a Motion in Sacramento Civil Court](https://saclaw.org/resource_library/motions-part-1-scheduling-and-writing-your-motion/).
(https://saclaw.org/resource_library/motions-part-1-scheduling-and-writing-your-motion/)

3.

Prepare Your Motion and Proposed Response

Parts of a Motion

A request to set aside a default is made through a motion. A “motion” is a request made in a case asking the court to issue an order of some sort. Most motions are in writing. With few exceptions (such as in family law cases), there is no Judicial Council form for making a motion. Instead, the motion must be typed on 28-line pleading paper. A written motion consists of four parts:

1. Notice of Motion;
2. Motion;
3. Points and Authorities; and
4. Declaration

The Notice of Motion lets the opposing party know when and where the motion is scheduled to be heard, while the Motion lets the court and the opposing party know what is being requested. The Points and Authorities explains to the court and the opposing party the legal basis of the motion, while the Declaration provides evidence, sworn under penalty of [perjury](https://www.saclaw.org/glossary/perjury/) (<https://www.saclaw.org/glossary/perjury/>), supporting the motion.

The parts can be filed as separate documents or combined into one document, as in our template motion.

Modify the Template Motion

There is no Judicial Council form for this procedure. Instead, the relevant documents must be typed on 28-line pleading paper. A customizable template may be downloaded from this link:

- [Motion for Relief from Default Judgment Template .RTF](https://www.saclaw.org/wp-content/uploads/2023/04/sbs-relief-from-default-judgment-motion.rtf) (<https://www.saclaw.org/wp-content/uploads/2023/04/sbs-relief-from-default-judgment-motion.rtf>)

The template includes Points and Authorities for all the grounds listed above. The template also includes arguments to be used if you are seeking to quash the service of summons. These are used in instances where the service itself was improper (e.g., it never took place; substituted service was upon a minor child, etc.). In your case, you will likely not be making all of these arguments. You must read the template very carefully, and select only the grounds and arguments that fit your situation.

This sample includes a number of checkboxes that can be filled in by hand. Although you may use this form as is, it will be substantially shortened and look cleaner if you download the customizable template of the motion from the link listed above, and remove the instructions in parenthesis, checkboxes and associated text that are not appropriate to your case, and underlining (after filling in the underlined sections, of course).

Although the declaration (the last part of the motion) can be used as a checkbox form, it is generally preferable if you use your own words to explain the facts of your case. The checkbox form does not anticipate all possible facts that might arise, and is best used as a guideline for some of the points that should be made in your declaration. The declaration is the most important part of the motion, because the declaration presents to the court the evidence that you wish the court to consider when ruling on your motion. Because it is your responsibility as the moving party to prove the basis of your motion, the better your declaration, the more likely it is that your motion will be granted by the court.

Prepare Your Responsive Pleading

A copy of your proposed responsive pleading must be attached to your motion as an exhibit. Your responsive pleading is most likely an Answer, but other options are available. For more information, see the guide on [Responding to a Lawsuit](https://www.saclaw.org/resource_library/responding-to-a-lawsuit/) (https://www.saclaw.org/resource_library/responding-to-a-lawsuit/) or [Responding to a Debt Collection Lawsuit](https://www.saclaw.org/resource_library/answer-contract/) (https://www.saclaw.org/resource_library/answer-contract/).

4.

Copy and Assemble Your Documents

Make four (4) copies of your Motion. One of these copies is to be served on the other party's attorney (or the other party, if they do not have an attorney); the original and the other three copies are to be filed with the court. Staple each of the copies, but leave the original unstapled so the court can scan it.

Your exhibits, attached to your declaration, will include any documents you have that help prove your claims (see Step 1), as well as your proposed responsive pleading (see Step 3).

Assemble your copies into packets. Each packet will include, in this order:

- Notice of Motion and Motion
- Points and Authorities
- Declaration
- Exhibits

Attaching Exhibits

For each exhibit attached to your motion, you must place a page in front of the exhibit identifying it as Exhibit A, B, and so forth in alphabetical order.

4.

Have the Motion Served and Attach the Proof of Service to Remaining Copies

Your motion must be served by a person over the age of 18 who is not a party to the case. Your server must complete a proof of service form, either [Proof of Service by First Class Mail \(POS-030\)](http://www.courts.ca.gov/documents/pos030.pdf) (<http://www.courts.ca.gov/documents/pos030.pdf>) or [Proof of Personal Service \(POS-020\)](http://www.courts.ca.gov/documents/pos020.pdf) (<http://www.courts.ca.gov/documents/pos020.pdf>). For more information on these Proofs of Service, see our guides for [Serving Documents by Mail](https://www.saclaw.org/resource_library/serving-documents-by-mail/) (https://www.saclaw.org/resource_library/serving-documents-by-mail/) and [Service by Personal Delivery](https://www.saclaw.org/resource_library/personal-service/) (https://www.saclaw.org/resource_library/personal-service/).

The proof of service form should be completely filled out, but not signed. **Make a copy of the unsigned proof of service before proceeding and staple after the last page of the copy you will serve.**

The server must then personally deliver or mail the service copy on the other party's attorney (or the other party, if they do not have an attorney).

The server then signs the Proof of Service form, and gives the signed Proof of Service to you.

Make three (3) copies of the signed proof of service. It is not necessary to copy the instruction page. Attach the signed original to the original motion packet, and the copies to the copy packets, after the last page.

5.

File Your Motion in the Law and Motion Department

File your motion at the Law & Motion Civil Filing Window in Room 212 on the second floor of the Hall of Justice building, located at 813 6th Street in downtown Sacramento.

Filing Fee: There is a \$60 fee to file a motion.

First Appearance Fee: If this is the first document that you have filed in this case (which is likely if this is a motion to set aside default), the court will assess a first appearance fee when you file your motion. This fee depends on the amount the plaintiff claimed. (At the time of this article, \$225 for a complaint for up to \$10,000; \$370 for a complaint for \$10,000-\$25,000 (\$35,000 after Jan. 1 2024); \$435 for a complaint for over \$25,000 (\$35,000 after Jan. 1)). Check the [Sacramento Fee Schedule](https://www.saccourt.ca.gov/fees/docs/fee-schedule.pdf) (<https://www.saccourt.ca.gov/fees/docs/fee-schedule.pdf>) for current fees. are available on the Sacramento County Superior Court's website.

Fee Waiver: If you are receiving government benefits such as Medi-Cal or are otherwise qualified because of low income, you can apply for a fee waiver. Turn the fee waiver request forms in with the motion instead of a fee payment. For more information, see our [Step-by-Step guide on Fee Waivers](https://www.saclaw.org/resource_library/fee-) (https://www.saclaw.org/resource_library/fee-

[waiver/](#)).

6.

Opposition Papers and Your Optional Reply Papers

If any opposing counsel or self-represented party opposes your motion, he or she may serve and file an opposition at least **nine court days** prior to your motion. No fee is required to file an opposition. The opposition contains a memorandum of points and authorities and usually a declaration, but does not need the notice of motion or motion. Be sure to check your mail, and read any documents you receive carefully.

If the other attorney or party opposes your motion, you may choose to serve and file a reply to the opposition at least **five court days** prior to the motion. [CCP Â§ 1005](#) (http://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=1005). It must be served by overnight mail to reach the opposing party no more than one day after it is filed.

The reply is optional and is usually used to address new issues your opponent raised in the opposition. No fee is required to file a reply. See our guide on [Writing, Scheduling, and Opposing Motions](#) (https://www.saclaw.org/resource_library/motions-in-civil-cases/) for more information.

7.

Review the Tentative Ruling and Notify Court and Opponent if You Wish to Appear

Pursuant to [Local Rule 1.06](#) (<http://www.saccourt.ca.gov/local-rules/docs/chapter-01.pdf>), the judge will read your documents and will post a tentative ruling on the motion by 2:00 p.m. the court day **before the hearing**. (If you are not filing in Sacramento, check with your county court for their rules on tentative rulings. Most counties use a similar system.)

You may read the [tentative ruling online](#) (<https://www.saccourt.ca.gov/indexes/new-portal-info.aspx>) or call Department 53 (916-874-7858) or Department 54 (916-874-7848) to have a clerk read the ruling to you. For more information, see the [Tentative Ruling Information](#) (<https://www.saccourt.ca.gov/civil/self-help-services/tentative-ruling.aspx>) page on the Sacramento County Superior Court's website.

Closely review the tentative ruling. Since you are asking the court for to set aside the default, you are looking for your motion to be **GRANTED**. If the court does not grant your request, your motion will be **DENIED**. Even if your request is granted, be sure to read the tentative ruling very carefully, since it will likely contain other important information such as if and when you need to serve and file your proposed Answer (or other response).

If you are happy with the tentative ruling: you do not need to do anything. You won't have to go to court unless ordered to appear in the tentative ruling or unless the other side calls you and the court between 2:00 p.m. and 4:00 p.m. the court day before your hearing date to request an oral argument in front of the judge. If

that happens, you should go to the court hearing and be prepared to argue why your motion should be granted.

If you are not happy with the tentative ruling: You can present arguments in front of the judge. To do so, call the Law and Motion Oral Argument Request Line at (916) 874-2615 by 4:00 p.m. the Court day before the hearing. You must also contact all opposing counsel and/or self-represented parties before 4:00 p.m. to let them know that you are requesting oral argument on the motion.

8.

Attend the Hearing, If Necessary

If neither party calls the court and opposing party to request oral argument, the court will simply make the tentative ruling the order of the court.

If you or the other party request oral argument, you can attend in person or remotely by video or phone call using the Zoom app. The tentative ruling will explain how to connect if you choose to use Zoom.

Arrive or log onto Zoom early. There will probably be other cases scheduled at the same time. Go into the courtroom or Zoom waiting room and check in with the bailiff or clerk..

When your name is called, be ready to speak and to answer any questions the judge has. You will only have a few minutes. After both sides speak, the judge may make a decision right away, or may take it under consideration and mail out the decision in a few days.

9.

File Your Response

If the judge grants your motion, have your server serve your response on your opponent and sign the proof of service. Attach the signed proof of service to your signed original and file it, plus one copy, with the court.

For Help

SH@LL (Self-Help at the Law Library) (<https://saclaw.org/services/civil-self-help/>)

609 9th Street, Sacramento CA 95814

(916) 476-2731 (Appointment Request Line)

Services Provided: SH@LL provides general information and basic assistance to self-represented litigants on a variety of legal issues. All assistance is provided by telephone. Visit [What we can help with](https://saclaw.org/services/civil-self-help/#canhelp) (<https://saclaw.org/services/civil-self-help/#canhelp>) for a list of qualifying cases.

Eligibility: Must be a Sacramento County resident or have a [qualifying case](https://saclaw.org/services/civil-self-help/#who) (<https://saclaw.org/services/civil-self-help/#who>) in the Sacramento County Superior Court.

For More Information

On the Web:

For information about the Sacramento County Superior Court's motion requirements, visit [Motions and Hearings](https://www.saccourt.ca.gov/civil/motions-hearings-general.aspx) (<https://www.saccourt.ca.gov/civil/motions-hearings-general.aspx>).

At the Law Library:

California Civil Procedure Before Trial KFC 995 .C34 Chap. 38.

Electronic Access: On the Law Library's computers, using *OnLaw*.

California Practice Guide: Civil Procedure Before Trial KFC 995 .W45 Chap. 5.

California Forms of Pleading and Practice KFC 1010 .A65 C3 (Ready Ref) Chap. 489.

Electronic Access: On the Law Library's computers, using *Lexis Advance*.

California Civil Practice: Procedure KFC 995 .A65 B3 Chap. 29.

California Pretrial Civil Procedure KFC 995 .M38 Chap. 36.

Electronic Access: On the Law Library's computers, using *Lexis Advance*.

California Points and Authorities KFC 1010 .B4 (Ready Ref) Chap. 70.

Electronic Access: On the Law Library's computers, using *Lexis Advance*.

Younger on California Motions KFC 1012 .C35 Chap. 26.



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 Doug Defendant
2 123 Main Street
3 Sacramento, CA 95814
4 916-555-9876
5 Defendant In Pro Per
6
7
8 SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO
9
10 Identify the plaintiff(s), defendant(s), and case number.
11 Peter Plaintiff,
12 Plaintiff,
13 vs.
14 Doug Defendant,
15 Defendant
16
17 Insert the date, time and department of the hearing, as well as the date that the lawsuit was first filed.
18
19 Check this box or delete the checkbox if you are requesting that the court quash service of the Summons.
20
21 TO EACH PARTY AND TO THE COUNSEL OF RECORD FOR EACH PARTY:
22 YOU ARE HEREBY NOTIFIED THAT at the above-captioned date and time and
23 department in the courthouse located at 813 Sixth Street, Sacramento, California that Defendant will
24 move the court for an order requesting that the Default and, if entered, Default Judgment be set aside,
25 ☐ as well as an order quashing the service of the Summons due to lack of jurisdiction pursuant to
26 CCP § 418.10(a)(1). This motion is made on the following grounds:
27
28 ☐ Inadvertence, surprise, mistake, or excusable neglect (CCP §473(b));
29 ☐ Service of the Summons did not result in actual notice (CCP §473.5);
30
31 MOTION TO SET ASIDE- 1

Case No.: 34-2011-00012345

NOTICE OF MOTION AND MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT, IF ENTERED:
☐ CCP §473(b)
☐ CCP §473.5
☐ Civ. §1788.61
☐ CCP §473(d)
☐ AND QUASH SERVICE OF SUMMONS (CCP §418.10);
POINTS AND AUTHORITIES;
DECLARATION

Date: November 12, 2011
Dept/Time: ☐ Dept. 53 at 2:00 p.m.
☐ Dept. 54 at 9:00 a.m.
Date Complaint was filed: January 17, 2011

Check the box(es) that identify the basis for your motion. (Or delete the checkboxes and the selections that do not describe the basis for your motion.)

Motion to Set Aside (page 1)



1	<input type="checkbox"/> Service of the Summons did not result in actual notice in time to defend action	
2	brought by a debt buyer (Civ. §1788.4)	<div>If you are arguing any other statutory basis for set aside, check the box and identify the basis of the set aside.</div>
3	<input type="checkbox"/> The judgment and/or default is void (
4	<input type="checkbox"/> 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	<div>The name of the person making the declaration (most likely you) goes here.</div>
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.	
14		
15		
16		
17	<div>The local rules of the Sacramento Superior Court requires this notice about the tentative ruling system be included with each motion. Other courts have different requirements.</div>	Dated: <u>October 1, 2011</u>
18		
19		
20		
21		<u>Doug Defendant</u>
22		Defendant, In Pro Per
23	<div>Date, sign, and print your name where indicated.</div>	
24	<div>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.</div>	
25		
26		
27		
28		
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
2		I. Background
3		On <u>January 17, 2011</u> , Plaintiff filed a Complaint in this court. On <u>March 26, 2011</u> this court
4		entered a default, <input checked="" type="checkbox"/> and on <u>March 26, 2011</u> a judgment was entered against the Defendant. The
5		moving defendant is now asking for a set aside of that default and, if entered, default judgment <input type="checkbox"/> as
6		well as an order quashing service of the Summons for lack of jurisdiction.
7		
8		II. LEGAL ARGUMENT
9		<input type="checkbox"/> (If checked paragraphs A – D are argued) Pursuant to California Code of Civil Procedure
10		§473(b), the court should set aside this adverse judgment or ruling based on inadvertence,
11		surprise, or excusable neglect.
12		A. Grounds for Relief. On application
13		his or her legal representative from a ju
14		him or her through his or her mistake, inadvertence, surprise, or excusable neglect (Code Civ. Proc.
15		§ 473(b). This motion is filed within a reasonable period of time, not exceeding six months after entry
16		of the default.
17		B. Policy of Law Favors Trial on Merits. The policy of the law is that controversies should be
18		heard and disposed of on their merits (<i>Fasuyi v. Permatex, Inc.</i> (2008) 167 Cal. App. 4th 681, 694–
19		703, 84 Cal. Rptr. 3d 351; <i>Berman v. Klassman</i> (1971) 17 Cal. App. 3d 900, 909, 95 Cal. Rptr. 417).
20		
21		C. Court Has Wide Discretion in Granting Relief. A trial court has wide discretion to grant relief
22		under Code of Civil Procedure Section 473 (<i>Berman v. Klassman</i> (1971) 17 Cal. App. 3d 900, 909,
23		95 Cal. Rptr. 417).
24		
25		D. Liberal Construction of Statute. Code of Civil Procedure Section 473(b) is a remedial measure
26		to be liberally construed, and any doubts existing as to the propriety of setting aside a default
27		thereunder will be resolved in favor of a hearing on the merits (<i>Berman v. Klassman</i> (1971) 17 Cal.
28		App. 3d 900, 910, 95 Cal. Rptr. 417).
		MOTION TO SET ASIDE- 3
		Motion to Set Aside (page 3)



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	<div style="border: 1px solid red; padding: 5px; margin-bottom: 10px;">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.</div> <p><input type="checkbox"/> (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.</p> <p>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)).</p> <p>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); <i>Goya v. P.E.R.U. Enterprises</i> (1978) 87 Cal. App. 3d 886, 890–891, 151 Cal. Rptr. 258).</p> <p>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 (<i>Brockman v. Wagenbach</i> (1957) 152 Cal. App. 2d 603, 611, 313 P.2d 659).</p> <p>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 defendant. (184 Cal. App. 3d 1069, 1079, 229 Cal. Rptr. 258).</p> <div style="border: 1px solid red; padding: 5px; margin-top: 10px;">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.</div> <p><input type="checkbox"/> (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,</p>
	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)).

8

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

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

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

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.

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.

5
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 is made, the court has a duty to set aside the judgment if it is void on its face,
8 its rendition and if it is voidable. (See *Smith v. Smith* (1987) 196 Cal. App. 3d 1000, 1004, 202 Cal. Rptr. 251.)
9 set it aside (*Smith v. Smith* (1987) 196 Cal. App. 3d 1000, 1004, 202 Cal. Rptr. 251.)

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.

10
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

15 **O. Relief From Void Judgment or Order.** The court may, on motion of either party after notice to
16 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).

21
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).

26
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)

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

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.

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

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

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

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

MOTION TO SET ASIDE- 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.

For the reasons stated above, and if applicable, the default judgment should 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

MOTION TO SET ASIDE- 8

Motion to Set Aside (page 8)



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, 2011** 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:

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

5
6 ACTUAL KNOWLEDGE OF THE LAWSUIT

- 7
8 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.

- 12
13 9. ☒ I was not evading service, so my lack of actual notice of this case is not the result of
14 evasion of service. If you contend you did not respond due to a lack of actual notice of the lawsuit,
15 the lack of notice cannot be because you were evading service.

16 INADVERTANCE, SURPRISE, MISTAKE, EXCUSABLE NEGLIGENCE

17 OR LACK OF NOTICE

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

20 _____
21 State the facts that describe the reason you did not respond, and
22 how this lack of response was the result of inadvertence, surprise,
23 mistake, excusable neglect or lack of notice.
24 _____
25 _____
26 _____
27 _____
28 _____

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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.

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Proposed Answer Exhibit A

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