

RELIEF FROM DEFAULT JUDGMENT

How to Reopen a Case the Plaintiff Won Because You Did Not Respond

This Guide includes instructions and sample forms. The Guide and related forms may be downloaded from: www.saclaw.org/relief-default-judgment

BACKGROUND

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. If a defendant fails to respond, the plaintiff may ask the court to enter a “default judgment” against the defendant.

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.

GROUND FOR RELIEF

California Code of Civil Procedure (CCP) §§ [473\(b\)](#), [473\(d\)](#), [473.5](#) and [Civil Code \(Civ\) § 1788.61](#) 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 § 473\(b\)](#)):**

Under CCP § 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.

“Inadvertence” and “excusable neglect” are virtually synonymous (See [Barnes v. Witt, 207 Cal. App. 2d 441 \(1962\)](#)), 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:

Disclaimer: This Guide is intended as general information only. Your case may have factors requiring different procedures or forms. The information and instructions are provided for use in the Sacramento County Superior Court. Please keep in mind that each court may have different requirements. If you need further assistance consult a lawyer.

You may also need...

Related Step-by-Step Guides

- [Responding to a Breach of Contract Lawsuit](#)
- [Responding to a Lawsuit](#)

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- 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 “mistake” or “inadvertence” or “excusable neglect,” 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 § 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 § 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, 87 Cal. App. 3d 886 \(1978\)](#).

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

Similar to the grounds discussed above, Civ § 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 § 473(d)):

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.

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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., 273 Cal. App. 2d 176 \(1969\)](#)), 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 § 473(b) (see, e.g., [Wells Fargo & Co. v. City etc. of S.F., 25 Cal. 2d 37 \(1944\)](#)). Other courts have applied the two-year or 180-day period applicable to motions under CCP § 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 \(1989\)](#)). 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

Step 1: Collect Supporting Documentation

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](#) or a copy of a related police report if you are claiming identity theft (*NOTE*: If you are claiming identity theft under Civ § 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.

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Step 2: Prepare the Motion

2.1 Motions in General

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, supporting the motion.

The first two parts, the Notice of Motion and Motion, are typically combined together in the same document, while the Points and Authorities and Declaration are often separate documents. In many instances, however, they may be combined together into the same document, as in the case of the sample included in this Guide.

2.2 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:

- [Notice of Motion and Motion to Set Aside Default, Memorandum of Points and Authorities, and Declaration in Support of Motion](#)

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.

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In Sacramento, the Notice of Motion and Motion **must** include the paragraph from [Local Rule 1.06 \(D\)](#) informing the parties of the tentative ruling system. That language is included in the sample at the end of this Guide.

2.3 Setting the Date of the Motion

In Sacramento, the party requesting the default be set aside is responsible for setting the date for hearing the motion. There are two very important deadlines you must consider when setting the date of a motion: the **filing deadline** and the **service deadline**.

Filing Deadline: The motion must be filed with the court at least sixteen court days prior to the motion date ([CCP § 1005](#)). Court days are Monday through Friday, excluding court holidays. To determine whether a particular filing date will meet this deadline, start with your desired hearing date and count backward ([CCP § 12c](#)) sixteen court days. Day one is the court day prior to the hearing. The sixteenth court day prior to the hearing is the last possible date that the motion can be filed with the court.

MAY							JUNE						
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat
		1	2	3	4	5						1 Day 11	2
6	7	8	Day 5 falls on a weekend, so the last day for service by mail rolls over to the previous court day.			12	3	4 Day 10	5 Day 9	6 Day 8	7 Day 7	8 Day 6	9
13	14	15	16	17	18 Last day to serve by mail	19 Day 5	10	11 Day 5	12 Day 4	13 Day 3	14 Day 2	15 Day 1	16
20 Day 4	21 Day 3	22 Day 2	23 Day 1	24 Day 16 Last day to file	25 Day 15	26	17	18 Hearing Date	19	20	21	22	23
27	28 Holiday	29 Day 14	30 Day 13	31 Day 12			24	25	26	27	28	29	30

For example, suppose you wanted to have your motion heard on June 18, 2012. You would start counting backward using June 15, 2012 as day one. Do not count weekends or court holidays (there is only one court holiday in this example, which is Memorial Day, May 28). Your sixteenth court day before the hearing would be May 24, 2012, which would be the latest that the motion could be filed.

Service Deadline: Prior to filing the motion with the court, all other attorneys, or self-represented parties in a case must be served with a copy of the motion. This means that someone over the age of 18 who is not a party in the case must either personally deliver a copy of the motion and related documents to the attorney or self-represented party or mail a copy of the motion and related documents to the party by first class mail.

If the motion is personally served, the service must be at least sixteen court days prior to the date of the motion, the same as the minimum filing deadline.

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If the motion is served by first-class mail, additional time is added to the calculation, depending on where the mail originates and where it is sent ([CCP § 1005](#)). For example, if the documents are mailed from California to an address in California, five calendar days are added before the sixteen court days. Calendar days include weekends and holidays, but if the final day lands on a weekend or holiday, it is rolled over to the previous court day. So, if June 18, 2012 was the hearing date, the sixteenth court day before would be May 24, 2012, but counting back five more calendar days results in Saturday, May 19, 2012. Because the fifth day fell on a weekend (or holiday), the deadline for service rolls back to May 18, 2012, the last court day before the deadline.

When choosing the date of your motion, be sure that you have left enough time for the motion to be both served and filed in a timely fashion.

2.4 Determining the Department to Hear and the Time of the Motion

Motions to set aside a default are heard in Department 53 at 2:00 p.m. or Department 54 at 9:00 a.m., depending on your case number, Monday through Friday except for holidays. To determine whether your motion is in department 53 or 54:

- For NEW CASES filed after January 1, 2013: If your case number ends in an odd number, then your law and motion department is 53 at 2:00 p.m. If it ends in an even number, it is department 54 at 9:00 a.m.
- All Law and Motion matters for CASES filed prior to January 1, 2013 shall be heard by the Law and Motion department previously assigned.

Step 3: Prepare Your Proposed 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 on our website at www.saclaw.org/respond-to-lawsuit.

Step 4: Copy and Assemble Your Documents

Make four copies of your documents, including your motion, points and authorities, declaration, and exhibits. Your exhibits 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:

- Motion
- Points and authorities
- Declaration
- Exhibits

One packet should include all your original documents; the other three packets should include only photocopies. Staple each set of photocopies, but **leave the packet of originals unstapled.**

Attaching Exhibits

In Sacramento County, the exhibits in one set of photocopies must be separated by a rigid sheet of card stock with a tab identifying the letter of the exhibit on the bottom. The Law Library sells exhibit tabs at the Circulation Desk.

Exhibits for the original and other two copies should be separated by a blank piece of pleading paper with their exhibit letter or number typed or written at the bottom of the page.

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Step 5: Have the Motion Served

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 \(POS-030\)](#) or [Proof of Personal Service \(POS-020\)](#). For more information on these Proofs of Service, see the guides on our website at www.saclaw.org/mail-service, and www.saclaw.org/personal-service, respectively.

The proof of service form should be completely filled out, but not signed. **Make a copy of the unsigned proof of service before proceeding.**

The server must then personally deliver or mail a copy of the motion along with a copy of the unsigned proof of service form on other party's attorney (or the other party, if they do not have an attorney). The unsigned proof of service form can be attached as the last page of the motion.

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

Step 6: Copy the Signed Proof of Service

Make three (3) copies of the signed proof of service. It is not necessary to copy the instruction page.

Step 7: Filing/Fees

File your motion and proof of service 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.

If this is the first document that you have filed in this case, the court will assess a first appearance fee when you file your motion. This fee depends on the amount the plaintiff alleges is owed in the original Complaint. If the Complaint sought up to \$10,000, the first appearance fee is (as of the date of this guide) \$225. If the Complaint sought over \$10,000, but not over \$25,000, the first appearance fee is \$370. Cases seeking over \$25,000 have a first appearance fee of \$435. If you have already paid this first appearance fee, the fee for filing a motion is \$60. Current fees are available on the Sacramento County Superior Court's website (www.saccourt.ca.gov/fees/docs/fee-schedule.pdf), and are due at the time you file your motion unless you qualify for a waiver of your court fees. For more information, see the Step-by-Step guide on Fee Waivers on our website at www.saclaw.org/fee-waiver-guide.

Step 8: Opposition and Reply

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 § 1005](#). No fee is required to file a reply. The reply should carefully address any points made by the opposition, especially if that point was not originally addressed in your motion. See the Step-by-Step guide on Writing, Scheduling, and Opposing Motions on our website at www.saclaw.org/motions-general for more information.

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Step 9: Tentative Rulings

Pursuant to [Local Rule 1.06](#), the court will make a tentative ruling on the merits of your matter by 2:00 p.m. the court day **before the hearing**. You may read the tentative ruling online or may obtain the tentative ruling over the telephone by calling 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 Sacramento County Superior Court's website at www.saccourt.ca.gov/civil/motions-hearings-tentative.aspx.

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, and wish to present arguments in front of the judge, you must contact the court clerk (Department 53 (916-874-7858) or Department 54 (916-874-7848)) **and** all opposing counsel and/or self-represented parties before 4:00 p.m. the court day before the hearing to let each know that you are requesting oral argument on the motion. If you do not call the court and all opposing counsel and/or self-represented parties by 4:00 p.m. on the court day before the hearing, no hearing will be held. If neither you nor the opposing counsel or self-represented party requests oral argument, the court will simply make the tentative ruling the order of the court.

FOR HELP

Sacramento County Public Law Library Civil Self Help Center

609 9th Street, Sacramento 95814

<http://www.saclaw.org/self-help/civil-self-help-center/>

Services Provided: The Sacramento County Public Law Library Civil Self Help Center provides general information and basic assistance to self-represented litigants on a variety of civil legal issues. Appointments will be made beginning at 8:30 a.m. Patrons who are present at 8:30 a.m. will be entered into a random drawing to determine the order their case will be evaluated. If an appointment is appropriate, it will be made for later in the day. You are encouraged to arrive by 8:25 a.m. to participate in the appointment setting drawing.

Eligibility: Must be a Sacramento County resident or have a [qualifying](#) case in the Sacramento County Superior Court.

FOR MORE INFORMATION

On the Web:

For information about the Sacramento County Superior Court's motion requirements, visit www.saccourt.ca.gov/civil/motions-hearings-general.aspx.

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At the Law Library:

California Civil Procedure Before Trial [KFC 995 .C34](#) Vol. 2, Chap. 38.

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

California Practice Guide: Civil Procedure Before Trial [KFC 995 .W4](#) Vol. 1 Chap. 5.

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

California Forms of Pleading and Practice [KFC 1010 .A65 C3](#) Vol. 43, Chap. 489.

Electronic Access: On the Law Library's computers, using the *Matthew Bender CD*.

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

California Civil Practice: Procedure [KFC 995 .A65](#) Vol. 4, Chap. 29.

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

California Pretrial Civil Procedure [KFC 995 .M38](#) Vol. 3, Chap. 36.

Electronic Access: On the Law Library's computers, using the *Matthew Bender CD*.

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

California Points and Authorities [KFC 1010 .B4](#) (Ready Ref) Vol. 7, Chap. 70.

Electronic Access: On the Law Library's computers, using the *Matthew Bender CD*.

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

Younger on California Motions [KFC 1012 .C35](#) Chap. 26.

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

IF YOU HAVE QUESTIONS ABOUT THIS GUIDE, OR IF YOU NEED HELP FINDING OR USING THE MATERIALS LISTED, DON'T HESITATE TO ASK A REFERENCE LIBRARIAN.

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ATTACHMENTS: FORMS AND INSTRUCTIONS

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:

- [Notice of Motion and Motion to Set Aside Default, Memorandum of Points and Authorities, and Declaration in Support of Motion](#)

Sample filled-in forms with instructions are available at the end of this Guide.

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.

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Doug Defendant
123 Main Street
Sacramento, CA 95814
916-555-9876

Your name, address, phone number, and party designation.

Defendant In Pro Per

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

SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO

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

Peter Plaintiff,

Case No.: 34-2011-00012345

Plaintiff,

NOTICE OF MOTION AND MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT, IF ENTERED:

vs.

- CCP §473(b)
- CCP §473.5
- Civ. §1788.61
- CCP §473(d)

Doug Defendant,

AND QUASH SERVICE OF SUMMONS (CCP §418.10);
POINTS AND AUTHORITIES;
DECLARATION

Defendant

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

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

TO EACH PARTY AND TO THE COUNSEL OF RECORD FOR EACH PARTY:

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

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

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.)

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- Service of the Summons did not result in actual notice in time to defend action brought by a debt buyer (Civ. §1788.6)
- The judgment and/or default is void ()
- Other Grounds:

If you are arguing any other statutory basis for set aside, check the box and identify the basis of the set aside.

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

The name of the person making the declaration (most likely you) goes here.

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

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.

Dated: **October 1, 2011**

Doug Defendant
Defendant, In Pro Per

Date, sign, and print your name where indicated.

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.

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

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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.

Check or delete the checkbox and parenthetical if you are seeking set aside due to inadvertence, surprise, mistake or excusable neglect. (CCP § 473(b)). If you are not asserting this, either do not check the box, or delete the heading and paragraphs A to D.

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).

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.

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

5
6 **E. Motion for Relief From Default for Lack of Actual Notice.** When service of a summons has not
7 resulted in actual notice to a party in time to defend the action and a default or default judgment has
8 been entered against him or her in the action, the party may serve and file a notice of motion to set
9 aside the default or default judgment and for leave to defend the action (Code Civ. Proc. § 473.5(a)).

10
11 **F. Court May Grant Relief on Timely Motion if Defendant Not at Fault.** On a finding by the
12 court that the motion was made within the two year time period permitted by Code of Civil Procedure
13 Section 473.5(a) and that his or her lack of actual notice in time to defend the action was not caused
14 by his or her avoidance of service or inexcusable neglect, it may set aside the default or default
15 judgment on whatever terms as may be just and allow the party to defend the action (Code Civ. Proc.
16 § 473.5(c); *Goya v. P.E.R.U. Enterprises* (1978) 87 Cal. App. 3d 886, 890–891, 151 Cal. Rptr. 258).

17
18 **G. Granting of Relief Within Discretion of Trial Court.** Whether or not relief should be granted
19 under Code of Civil Procedure Section 473.5 is a matter within the discretion of the trial court
20 (*Brockman v. Wagenbach* (1957) 152 Cal. App. 2d 603, 611, 313 P.2d 659).

21
22 **H. Policy Favors Application for Relief.** Unless inexcusable neglect is clear, the policy favoring
23 trial on the merits prevails over the general rule of deference to the trial court’s exercise of discretion.
24 and doubts are resolved in favor of the defendant. (*Wright v. Wright* (1984) 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.

25
26 (If checked paragraphs I-K are argued) **The court should grant defendant’s motion for relief**
27 **pursuant to Civil Code § 1788.61 because he/she received no actual notice of the action in time**
28 **to defend against an action brought by a debt buyer, he/she has filed a timely motion for relief,**

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 of the party who appears on the proof of
18 service who appears on the proof of

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
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

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, the court should set aside the judgment because the default is void (CCP § 473(d)) because the Proof of Service was never filed,
8 its rendition and judgment is void because no sworn statement of venue (declaration or affidavit regarding the basis of
9 set it aside (*Smith v. Smith* (1992) 12 Cal. App. 4th 1000, 1005, 15 Cal. Rptr. 2d 800). (See CCP § 396a(a)). If you are not asserting this, either do not check the box, or delete
10 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)).

16
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

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 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.

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

9
10 **S. Motion to Quash Service of Summons.** On or before the last day of his or her time to plead, or
11 within such further time as the court may for good cause allow, a defendant may serve and file a
12 notice of motion to quash service of summons on the ground the court lacks jurisdiction over him or
13 her (Code Civ. Proc. § 418.10(a)(1)).

14
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)).

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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 default judgment 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, 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 I where substituted service allegedly took place, as described in the following paragraphs.
 Service of the Summons was invalid because:

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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 NEGLIGENCE
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.

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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:

- a. Exhibit A: Proposed Answer
- b. Exhibit B: Lease agreement showing my residence on date of service.
- c. Exhibit C: (describe)
- d. Exhibit D: (describe)
- e. 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