

1  
2 Walnut Creek, CA 94597  
3 (415) 990-8381

4 Defendant, in pro per

5  
6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
7 **FOR THE COUNTY OF CONTRA COSTA**

9 EU( [A B  
10 PE ,  
11 Plaintiffs,  
12 vs.  
13  
14 C , DOES  
15 1-10,  
16 Defendants.

No. CIVMS

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION FOR  
AN ORDER TO SET ASIDE DEFAULT AND  
DEFAULT JUDGMENT, QUASH SERVICE OF  
SUMMONS AND COMPLAINT AND BENCH  
WARRANT AND DISMISS THE OCTOBER 21,  
2021, HEARING FOR AN ORDER OF  
EXAMINATION

Hearing: October 21, 2021

17  
18 **I. INTRODUCTION**

19 This motion arises from defective service of the Summons and Complaint resulting in receipt  
20 of the Summons and Complaint being received eight years after the action was filed on August 24,  
21 2021. Defendants were forced to bring this Ex Parte application to avoid irreparable harm caused on  
22 numerous and ongoing violations of the rules of the court.

23 **II. LEGAL ARGUMENT**

24 **Code of Civil Procedure CCP §473(a) states:**

25 Motion for Relief from Default for Lack of Actual Notice. When service of a summons has not  
26 resulted in actual notice to a party in time to defend the action and a default or default judgment has  
27  
28

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER ORDER TO SET  
ASIDE DEFAULT AND DEFAULT JUDGMENT, QUASH SERVICE OF SUMMONS AND COMPLAINT AND  
BENCH WARRANT AND DISMISS THE OCTOBER 21, 2021, HEARING FOR AN ORDER OF EXAMINATION

1 been entered against him or her in the action, the party may serve and file a notice of motion to set  
2 aside the default or default judgment and for leave to defend the action (Code Civ. Proc. § 473.5(a)).

3 **Code of Civil Procedure CCP §473(b) states:**

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

6       Inherent Power to Set Aside Judgment Not Void on Its Face but Void in Fact. The law is  
7 settled that courts of record have inherent power to set aside a void judgment whether or not it is void  
8 on its face (Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1122, 265 Cal. Rptr. 286). As  
9 described in the attached Declaration, the service of the Summons was improper, depriving the court  
10 of jurisdiction as to the defendant. Furthermore, the defendant is filing this motion within a  
11 reasonable period of time within six months of learning of the existence of this lawsuit.

12       “The court should set aside this adverse judgment or ruling based on inadvertence, surprise, or  
13 excusable neglect.

14       A. Grounds for Relief. On application, the court may, on any terms as may be just, relieve a  
15 party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken  
16 against him or her through his or her mistake, inadvertence, surprise, or excusable neglect (Code Civ.  
17 Proc. § 473(b)). In this matter, the defendant learned about the lawsuit on August 24, 2021, due  
18 plaintiff sub-serving an unknown person and the defendant’s old office. This mistake was not made  
19 by the defendants; however, this error subject the defendant to irreparable harm.

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

24       C. Policy of Law Favors Trial on Merits. The policy of the law is that controversies should be  
25 heard and disposed of on their merits (Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 694–  
26 703, 84 Cal. Rptr. 3d 351; Berman v. Klassman (1971) 17 Cal. App. 3d 900, 909, 95 Cal. Rptr. 417).

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

4 E. Relief from Void Judgment or Order. The court may, on motion of either party after notice  
5 to the other party, set aside any void judgment or order (Code Civ. Proc. § 473(d)).

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

8 G. Inherent Power to Set Aside Judgment Not Void on Its Face but Void in Fact. The law is  
9 settled that courts of record have inherent power to set aside a void judgment whether or not it is void  
10 on its face (Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1122, 265 Cal. Rptr. 286). As  
11 described in the attached Declaration, the service of the Summons was improper, depriving the court  
12 of jurisdiction as to the defendant. Furthermore, the defendant is filing this motion within a  
13 reasonable period of time within six months of learning of the existence of this lawsuit.

14 Power to Set Aside Void Judgment. 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 **Code of Civil Procedure CCP §473.5, states:**

17 The court should grant defendant's motion for relief pursuant to CCP §473.5 because he/she  
18 received no actual notice of the action in time to defend, he/she has filed a timely motion for relief,  
19 and the default and default judgment was not caused by the plaintiff's avoidance of service or  
20 inexcusable neglect.

21 **Code of Civil Procedure CCP §128(a)8 , states:**

22 Every court shall have the power to do all of the following: To amend and control its process  
23 and orders so as to make them conform to law. In this matter violations of the Rules of the Court  
24 have forced the defendants to see an Ex Parte Order so that the orders conform to the law. Due  
25 process has been violated exposing the defendants to irreparable harm upon learning of this lawsuit  
26 eight years after the complaint was filed. Plaintiff sub-served an unknown party and the defendant's  
27 old business address.

28 **Code of Civil Procedure CCP §473.5, states:**

1 ONLY "VERY SLIGHT" EVIDENCE WILL BE REQUIRED TO JUSTIFY SETTING  
2 ASIDE THE DEFAULT. In the Supreme Court of California case of SHAMBLIN v.  
3 BRATTAIN (1988) 44 Cal.3d 474, the same principal was expounded: "[1] It is the policy of the law  
4 to favor, whenever possible, a hearing on the merits...Therefore, when a party in default moves  
5 promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a  
6 default..."

7 The court should grant defendant's motion for relief pursuant to CCP §473.5 because he/she  
8 received no actual notice of the action in time to defend, he/she has filed a timely motion for relief,  
9 and the default and default judgment was not caused by the plaintiff's avoidance of service or  
10 inexcusable neglect.

11 **Code of Civil Procedure CCP §473.7, states:**

12 INEXCUSABLE NEGLIGENCE MUST BE CLEAR IN ORDER TO DENY A MOTION FROM  
13 RELIEF FROM DEFAULT. Elston v. City of Turlock (1985) 38 Cal.3d 227 states that:"[6] ..Unless  
14 inexcusable neglect is clear, the policy favoring trial on the merits prevails. (Ibid.) Doubts are  
15 resolved in favor of the application for relief from default...and reversal of an order denying relief  
16 results... Reversal is particularly appropriate where relieving the default will not seriously prejudice  
17 the opposing party..."

18 "[7] Reversal of an order denying relief is appropriate where the effect of the order is to  
19 "defeat, rather than to advance the ends of justice."..."

20 **C.C.P. §1008 Is directory, not jurisdictional and the court retains complete power and broad**  
21 **discretion to change its decision as the court may determine.**

22 Gailing v. Rose, Klein & Marias (1996) 43 Cal.App.4th 1570:

23 "The provisions of section 1008 are not jurisdictional. The trial court has broad discretion to  
24 hear a renewed motion, even if prerequisites of the section are not met. "

25 People v. Castello (1998) 65 Cal.App.4th 1242, 1249-1250:

26 "Therefore, if the language of section 1008 imports anything further, fn. 7 it must be treated as  
27 directory only...At most, therefore, section 1008 requires courts to exercise due consideration before  
28 modifying, amending or revoking prior orders...This is consistent with the doctrine of separation of

1 powers, whereby the Legislature may regulate the exercise of the court's inherent power, but its  
2 regulations must not "defeat or materially impair" the constitutional powers of the courts... “

3 **Code of Civil Procedure §1788.61, states:**

4 If service of a summons has not resulted in actual notice to a person in time to defend an  
5 action brought by a debt buyer and a default or default judgment has been entered against the person  
6 in the action, the person may serve and file a notice of motion and motion to set aside the default or  
7 default judgment and for leave to defend the action.

8 (a) (1) Notwithstanding Section 473.5 of the Code of Civil Procedure, if service of a  
9 summons has not resulted in actual notice to a person in time to defend an action brought by a debt  
10 buyer and a default or default judgment has been entered against the person in the action, the person  
11 may serve and file a notice of motion and motion to set aside the default or default judgment and for  
12 leave to defend the action.

13 (2) Except as provided in paragraph (3), the notice of motion shall be served and filed within  
14 a reasonable time, but in no event exceeding the earlier of:

15 (A) Six years after entry of the default or default judgment against the person.

16 (B) One hundred eighty days of the first actual notice of the action.

17 (3) (A) Notwithstanding paragraph (2), in the case of identity theft or mistaken identity, the  
18 notice of motion shall be served and filed within a reasonable time, but in no event exceeding 180  
19 days of the first actual notice of the action.

20 In this matter actual notice was received on August 24, 2021, which is within the 180-day  
21 period of the first actual notice. The default was entered five year ago on May 12, 2014.

22 **Code of Civil Procedure §1788.61(d), states:**

23 Court may consider evidence presented by either party. Either party may introduce, and the  
24 court may consider, evidence in support of its motion, including evidence relating to the process  
25 server who appears on the proof of service of the summons and complaint. (Civ. Code § 1788.61(b))

26 The court should grant defendant’s motion to set aside the default and default judgment, if  
27 entered on the ground that it is void because, although its invalidity may not appear from an  
28

1 examination of the judgment roll, it is nonetheless void in fact in that the summons and complaint  
2 were never validly served on the defendant, and the defendant lacked actual notice of this lawsuit

3         The court should grant defendant’s motion for relief pursuant to Civil Code § 1788.61  
4 because he/she received no actual notice of the action in time to defend against an action brought by a  
5 debt buyer, he/she has filed a timely motion for relief, and the default and default judgment was not  
6 caused by the plaintiff’s avoidance of service or inexcusable neglect.

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

12 **Code of Civil Procedure §418.10.**

13         (a) A defendant, on or before the last day of his or her time to plead or within any further time  
14 that the court may for good cause allow, may serve and file a notice of motion for one or more of the  
15 following purposes:

16             (1) To quash service of summons on the ground of lack of jurisdiction of the court over him  
17 or her.

18             (2) To stay or dismiss the action on the ground of inconvenient forum.

19         In this matter actual notice was received on August 24, 2021, which is within the 180-day  
20 period of the first actual notice. The default was entered five year ago on May 12, 2014.

21 **Code of Civil Procedure § 708.1709(a)**

22         An Order of Examination should be served by a sheriff, marshal, a person specially appointed  
23 by the court, or a registered process server.

24 **Pursuant to the California Rules of the Court, Rule. 2.30,**

25         Sanctions are permitted by law for rule violations, which unfortunately plagues this case.  
26  
27  
28

1  
2 **Pursuant to the Rules of the Court, 3.110 (b)**

3 The complaint must be served on all named defendants and proofs of service on those  
4 defendants must be filed with the court within 60 days after the filing of the complaint. Opposing  
5 counsel filed two proofs of service on November 27, 2013. The plaintiff filed the proofs of service  
6 outside of the time prescribed by law, in addition to defective service.  
7

8 **Pursuant to Rule 2.251(b)(1)**

9 Electronic service, there is no agreement between the parties allowing service by email.  
10

11 **III. CONCLUSION**

12 In view of the foregoing, it is respectfully submitted that the Ex Parte application be granted,  
13 and that the court should order to set aside the default and default judgement, quash the service of  
14 summons and complaint and bench warrant, and dismissal the October 21, 2021, Order of  
15 Examination hearing.

16  
17 Respectfully submitted,  
18  
19  
20

21 Dated: October 19, 2021

22 \_\_\_\_\_  
23 Defendant, In Pro Per  
24  
25  
26  
27  
28