

1 DAVE
2
3 LA JOLLA, CA 92037

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5 TENANT, PRO SE
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7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
8
9 STATE OF CALIFORNIA, UNLIMITED CIVIL,
10
11 CENTRAL DIVISION

11	TRUST,)	CASE NO. 2
12)	
13	PLAINTIFFS,)	EX PARTE MOTION TO STAY
14)	LOCKOUT
14	and)	
15)	DATE: 4/12/2022
15	DAVE 1 , ET AL)	TIME: 8:30 AM
16)	DEPT: C-73
17	DEFENDANTS)	
18)	

19 Please take notice that on , 2022, at 8:30 am or as soon as the matter
20 may be heard, the defendants will move this court for an ex parte order to recall
21 and quash the writ of possession and motion to stay eviction pending appeal which
22 issued in this action on March 17, 2022, and to void all orders for the plaintiffs in
23 this case. Defendants are also moving to add defendant to this
24 case as he is an occupant of the subject property.

25 The reason for this hearing is about Assembly Bill No. 2179, CHAPTER 13,
26 and other case law discussed in the accompanying Memorandum of Points and
27 Authorities, the request to recall and quash the Writ of Possession and stay eviction
28

1 pending appeal is based upon the grounds that it is unlawful and the court lacked
2 jurisdiction or statutory authority to issue it under Code of Civil Procedure section
3 5 712.010 and C.C.P. section 1174(d), since the Writ of Possession was not based
4 on a valid “judgment for possession” under Code of Civil section 1174(a) after a
5 proper unlawful detainer action. Marquez—Luque v. Marquez (1987) 192
6 Cal.App.3d 1513 absent service of a Summons and Unlawful Complaint on the
7 tenant, an opportunity to file a response to the Unlawful Complaint, a Jury Trial,
8 and entry of a valid Judgment for Possession]; Bedi v. McMullan (1984) 160
9 Cal .App.3d 272 [A court should grant a motion to recall and quash a Writ of
10 Possession that is not based on a valid Judgment for Possession]; Glass v. Najafi
11 (2000) 78 Cal. App. 45 [A Writ of Possession must be based on a valid Judgment
12 for Possession].

13
14 Under Code of Civil Procedure section 473(d), the Motion Will
15 also request the court to vacate the Orders regarding possession of the property
16 located at _____, La Jolla, CA 92037 that were entered on March 17,
17 2022, on the grounds those Orders are void, because the court lacked jurisdiction
18 to issue those Orders. Marquez—Luque v. Marquez (1987) 192 Cal.App.3d 1513;
19 Marteney v. Elementis Chemicals, Inc. Decision (2018) 28 Cal.App.5th 862, 870.

20 This Motion is based on this Notice of Motion; the attached Memorandum
21 of Points and Authorities; the attached Declarations and Exhibits. It will also be
22 based on such additional evidence and legal argument as may be offered in the
23 Reply to be filed by moving parties, and in oral argument on the Motion.

24 April 11, 2022
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2 **MEMO OF POINTS AND AUTHORITIES**

3 **I. ARGUMENT**

4 **A. THE LOCK OUT NEEDS TO BE VACATED BECAUSE**
5 **OF THE MORATORIUM AGAINST EVICTIONS**

6
7 A copy of Assembly Bill No. 2179, CHAPTER 13, is attached showing this
8 court “Existing law, the COVID-19 Tenant Relief Act, until October 1, 2025,
9 establishes procedural requirements and limitations on evictions for nonpayment of rent
10 due to COVID-19 rental debt, as defined. The act, among other things, requires that a
11 notice that demands payment of COVID-19 rental debt served pursuant to specified law
12 be modified, as provided. The act requires that a notice that demands payment of rent that
13 came due during the transition time period, as defined, comply with certain requirements,
14 including that the notice include certain text which varies depending on the date that the
15 notice is served. A copy of the full text of this is attached as Exhibit 1.

16 It goes on to read, “This bill would require the modifications to a notice that is
17 described above to be made only for notices served before April 1, 2022, and would
18 specify new modifications for notices served on or after April 1, 2022, and before July 1,
19 2022. The act prohibits a court from issuing a summons on a complaint unless the
20 plaintiff also files, for tenancies initially established before October 1, 2021, a statement,
21 under penalty of perjury, as specified, verifying certain information related to
22 applications for government rental assistance to cover the rental debt demanded from the
23 defendants in the case. Existing law prohibits a judgment or default judgment from being
24 issued in favor of the plaintiff unless the court finds that the plaintiff completed an
25 application to the pertinent government rental assistance program to cover the rental debt
26 demanded in the complaint and the application was denied, as specified.”
27
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1 The plaintiffs did not do as this Bill required, which makes the order for default and
2 the lockout order on this case also void – and it should be vacated and/or a stay granted
3 while this case is in appeal.

4 B. , AN OCCUPANT OF THE SUBJECT PROPERTY HAS
5 FILED A CHAPTER 7 BANKRUPTCY TODAY 4/11/22 AND
6 THEREFORE SHOULD HAVE A STAY ISSUED OF THE LOCKOUT

7 , who has been a tenant of the subject property since 2009, has filed
8 a Chapter 7 Bankruptcy with the Southern District of California court, and a copy
9 of this petition, and the related stay of eviction will be provided this court as soon
10 as possible, or by the time of the hearing on 4/12/22.

11 C. THE WRIT OF POSSESSION SHOULD BE RECALLED AND
12 QUASHED BECAUSE THE COURT LACKED JURISDICTION TO
13 ISSUE IT AND IT IS NOT BASED ON A VALID JUDGMENT FOR
14 POSSESSION

15 Under the California Constitution and relevant statutes, the Superior Court,
16 only has jurisdiction to evict persons qualifying as tenants from real property that
17 is the subject of an action before the court after going through the unlawful
18 detainer action procedure, which begins with the service of a 3-day, 30-day, or
19 60-day Notice of Termination (as appropriate to the case), filing and service of a
20 Summons and Unlawful Detainer Complaint after the 3-day, 30-day, or 60-day
21 notice period; followed by the tenant's right to file a response to the Complaint
22 including a Demurrer or Motion to Strike; the tenant's opportunity to conduct
23 discovery; a Jury Trial in which the landlord prevails on entitlement to possession;
24 entry of a Judgment for Possession under C.C.P. section 1746(a) and issuance and
25 service of a Writ of Possession based upon the Judgment for Possession, under
26 C.C.P. sections 712.010 and 1746(d). Marquez—Luque v. Marquez (1987)
27 192 Cal.App.3d 1513 [holding that a probate court lacks jurisdiction to render a
28

1 Judgment for Possession, or issue a writ of possession, or to evict a beneficiary-
2 tenant from residential property that is the subject of an action, absent service of a
3 Summons and Unlawful Complaint On the tenant, an opportunity to file a response
4 to the Unlawful Complaint, a Jury Trial, and entry of a valid Judgment for
5 Possession]; an unlawful detainer action is the only procedure a landlord may use
6 to evict a tenant from residential real property, even if the property is part of a
7 trust estate. Marquez-Luque v. Marquez, supra, 192 Cal.App.3d 1513. The Court
8 only has jurisdiction to issue a valid Judgment for Possession after the landlord
9 complies with the unlawful detainer procedure. Id. A Writ of Possession that is not
10 based on a Judgment for Possession is subject to a Motion to Recall and Quash the
11 Writ of Possession. Bedi v. McMullan (1984) 160 Cal.App.3d 272 [A court should
12 grant a motion to recall and quash a Writ of Possession that is not based on a valid
13 Judgment for Possession]; Glass v. Najafi (2000) 78 Cal.App.4th 45 [A Writ of
14 Possession must be based on a valid Judgment for Possession]. In this case,
15 plaintiffs are attempting to evict from his business by execution of a unlawful
16 detainer action.
17

18
19 D. WRIT OF POSSESSION THAT WAS ISSUED BY THIS COURT
20 WITHOUT JURISDICTION OR STATUTORY AUTHORIZATION,
21 SINCE THE WRIT OF POSSESSION IS NOT BASED UPON A VALID
22 JUDGMENT FOR POSSESSION ISSUED UNDER C.C.P. SECTIONS
712.010 AND 1746(D).

23 Instead of a Judgment for Possession, plaintiffs obtained issuance of the
24 Writ of Possession based upon this court's Order entered March 17, 2022, and they
25 improperly obtained a follow up Order that directed the Los Angeles Sheriff's
26 Department to serve and execute the Writ of Possession, notwithstanding its
27 invalidity. Neither of these orders qualifies as a valid Judgment for Possession,
28

1 since they were not preceded by a proper filing, service, and prosecution of a
2 proper unlawful detainer action against any defendants. In any event, this court
3 lacked jurisdiction to enter a valid Judgment for Proceeding, because no Summons
4 and Unlawful Detainer Action was never properly served on defendants, and each
5 of them. This court lacked Constitutional authority to enter a valid Judgment for
6 Proceeding because defendants were not provided with a jury trial, as guaranteed
7 by the California Constitution. Marquez—Luque v. Marquez, supra, 192 Cal. App.
8 3d at 1519; Guttman v. Chiazor (2017) 15 Cal.App.5th Supp. 57. See Maldonado
9 v. Superior Court (1984) 162 Cal. App. 3d 1259, 1263; Code Civ. Proc., § 592.
10 The fact that this court proceeded anyway to enter a default on 3/17/22, plaintiffs
11 did not cure the jurisdictional, constitutional, and statutory deficiencies.

12 Marquez—Luque v. Marquez, supra, 192 Cal. App. 3d at 1519. As pointed out to
13 this court in prior Memoranda filed in opposition to plaintiffs’ effort to evict
14 defendants, Chapter Two of the Civil Code, “Hiring of Real Property,” Civil Code
15 section 1940, et seq., accords statutory due process rights to tenants such as each
16 defendant prior to evicting them from their property where they are conducting
17 business. It provides in part:

18 (d) Nothing in this section shall be construed to limit the application
19 of any provision of this chapter to tenancy in a dwelling unit unless
20 the provision is so limited by its specific terms.

21 Defendants clearly qualify for tenant due process rights and protections
22 under Chapter Two of the Civil Code, as “persons hiring real property” and
23 tenants. As stated in the accompanying Second Declarations of [redacted] and
24 Dave [redacted], they have both qualify as “tenants,” rather than “tenants at Will,” as
25 both have paid rent. As tenants, defendants are entitled to receive a 60 -
26 Day Notice in compliance.
27
28

1 With Civil Code section 1946.1 before an unlawful detainer action can even
2 be commenced against them. The 60—Day Notice must contain the precise
3 wording specified by section 1946.1 and the 60-Day Notice must be served on
4 defendants in strict compliance With 1946.1. Plaintiffs’ attorney was well aware
5 of this when they asked this court to issue a Writ Of Possession t0 evict
6 defendants. Yet, no defendant was ever served a 60-Day Notice nor personally
7 served a Summons and Unlawful Detainer Complaint on them. If plaintiffs were
8 to properly serve a compliant 60—Day Notice now, 60 days would have t0 elapse
9 before plaintiffs could commence an unlawful detainer action against them.
10 Defendants would have a right t0 respond to the wrongful detainer action by an
11 answer Or demurrer Or motion t0 strike, just like any other civil complaint.
12 *Butenschoen v. Flaker* (2017) 16 Cal.App.5th Supp. 10.

14 Then, defendants would have a right t0 conduct discovery, and a right to
15 jury trial protected by the California Constitution. *Guttman v. Chiazor*, supra, 15
16 Cal.App.5th Supp. 57. The Writ Of Possession should be recalled and quashed,
17 since this court did not have jurisdiction Or statutory authority t0 issue it, because
18 the Writ of Possession was not preceded by service Of a Summons On defendants,
19 and the Writ of Possession is not based upon a valid Judgment for Possession.
20 Moving parties anticipate that defendants may attempt t0 object t0 the Writ of
21 Possession being quashed because it will purportedly cause a delay in giving
22 plaintiffs exclusive possession Of the subject property. This is not a valid
23 consideration for several reasons. First, a court’s lack of jurisdiction to issue a Writ
24 Of Possession can be raised at any time. *Bedz' v. McMullan*, supra 160 Cal .App.3d
25 272. Second, moving parties waited until now t0 bring this motion because they
26 were only able to obtain all of the papers in this case yesterday, March 21, 2022.

1
2 E. UNDER 473(D), THIS COURT SHOULD VACATE THE MARCH
3 17, 2022, ORDERS, WHICH ARE VOID, BECAUSE THIS COURT LACKED
4 JURISDICTION TO ISSUE THEM.

5 C.C.P. section 473(d) authorizes defendants to move to vacate void orders.
6 An order issued Without jurisdiction is a void order. Marteney v. Elementis
7 Chemicals, Inc. Decision (2018) 28 Cal.App.5th 862, 870. In order to demonstrate
8 that a judgment is void, a party may file a motion to vacate the judgment in the
9 pertinent action or an independent action in equity. (Preston v. Wyoming Pac. Oil
10 CO. (1961) 197 Cal.App.2d 517, 527.) Here, Elementis chose to attack the 2017
11 judgment by means of a motion under section 473, subdivision (d), which
12 provides in pertinent part: "The court may, on motion of either party after notice to
13 the other party, set aside any void judgment or order."

14 Under subdivision (d) of section 473, a party may challenge judgments that
15 are ""absolutely void."" (Tearlach Resources Limited v. Western States Internet,
16 Inc. (2013) 219 Cal.App.4th 773, 779 (Tearlach), quoting Andrews v. Superior
17 Court (1946) 29 Cal.2d 208, 214-215.) That defect occurs when the trial court
18 rendering the judgment lacked jurisdiction in the "fundamental sense," that is,
19 lacked authority over the subject matter or parties. (OC Interior Services, LLC v.
20 Nationstar Mortgage, LLC (2017) 7 Cal.App.5th 1318, 1330.) Such a judgment
21 ""is, in legal effect, no judgment... Being worthless in itself, all proceedings
22 founded upon it are equally worthless..." [Citation.]" [Citation.]" (Rochin v. Pat
23 Johnson Manufacturing CO. (1998) 67 Cal.App.4th 1228, 1240, quoting Bennett v.
24 Wilson (1898) 122 Cal. 509, 513-514.) Because an absolutely void judgment is a
25 nullity, it ""may be attacked anywhere whenever it presents itself." (Andrews,
26 supra, 29 Cal.2d at p. 214, quoting Estate of Pusey (1919) 180 Cal. 368, 374.)
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1 Marteney v. Elementis Chemicals, Inc. Decision, supra, 28 Ca1.App.5th at 870.
2 For the reasons discussed above, this court did not have jurisdiction to issue the
3 March 17, 2022, Order, since it was intended to function as a Judgment for
4 Possession under C.C.P. section 1746(a) and issuance and service of a Writ of
5 Possession based upon the Judgment for Possession, under C.C.P. sections 712.010
6 and 1746(a). Marquez-Luque v. Marquez, supra, 192 Ca1.App.3d 1513. Since the
7 March 17, Order was void, this court should exercise its authority under C.C.P.
8 section 473(d) to vacate it. This court also did not have jurisdiction or statutory
9 authority to issue the March 17, 2022, order.
10

11 F. THE STAY IS MANDATORY

12 Stay is mandatory based on the moratorium this case falls within, and by the
13 express language of Section 1176 under the circumstances present here. It may be
14 argued “[c]ourts are not required to grant relief simply on a mere showing of
15 hardship,” because then “every unlawful detainer judgment would have to be
16 stayed upon mere application, and this is clearly not the intent of the Legislature or
17 the statute in question. Instead, courts must balance the equities on both sides,
18 weighing the alleged hardship to the tenant if the forfeiture is declared against the
19 likely prejudice to the landlord if it is not.” (Oppo. p. 4, ln. 3-11.) In support of this
20 argument, Landlord cites Olympic Auditorium, Inc. v. Superior Court, 81 Cal.
21 App. 283, 285 (1927) and Hignell v. Gebala, 90 Cal. App. 2d 61, 70-71 (1949).
22 Prior to 1985, Section 1176(a) was discretionary and provided “[a]n
23 appeal taken by the defendant shall not stay proceedings upon the judgment
24 unless the judge before whom the same was rendered so directs.” Cal. Civ.
25 Proc. Code § 1176 (statutory history). In 1985, however, this language was deleted
26 and replaced with the current, mandatory language of Section 1176(a), which
27 provides, in relevant part, “[s]tay of judgment shall be granted when the court finds
28 that the moving party will suffer extreme hardship in the absence of a stay and that
the nonmoving party will not be irreparably injured by its issuance.” Id. (Emphasis
added). Both Olympic Auditorium, Inc. and Hignell were decided long before the
1985 amendment, and to the extent either suggests that the stay is not mandatory

1 under circumstances similar to those present here, both were impliedly overruled
2 by the 1985 amendment.

3 G. DEFENDANTS WILL PROVE CASE WITH APPEAL
4

5 Defendants have Covid. This proof will be presented, along with evidence
6 of the repairs, installations, and upgrades made to the subject property in the
7 appeal. Since the government closure orders were lifted, defendants have
8 repeatedly informed Landlord that it is ready, willing and able to commence
9 paying rent. (Alexander Dep.3 49:3-15; Exs. 7, 8; Cohen Dep.4 73:11-76:15.).
10 Any argument that Landlord would be harmed because of a delay is a
11 red-herring because under the Lease, defendants pays the same rent over the term
12 of the Lease whether continuing in possession or not. Given the uncertainty caused
13 by the once-a-century global pandemic and related government closure orders, and
14 the fact that rental payments to Landlord would be better because they're unlikely
15 to rent it immediately if the defendants vacate now, a stay would mitigate harm if
16 the defendants do not prevail on appeal, which eliminates any harm to Landlord.
17 Moreover, the stay on appeal will also limit Landlord's liability for restitution if
18 the judgment is ultimately reversed on appeal. See, e.g., Beach Break Equities,
19 LLC v. Lowell, 6 Cal. App. 5th 847, 852 (2016) (when a judgment is
20 reversed on appeal, the appellant is entitled to restitution for all things lost by
21 reason of the judgment) (emphasis added). Defendants agree that "[t]rial
22 courts are more apt to grant a § 1176 stay where the case turned on a close,
23 controversial or novel issue. Therefore, where applicable, appellant should
24 argue that the case raises important legal issues that demand appellate
25 resolution." (Oppo. p. 7, Ins. 8-14 (citing Rutter Guide: I. Appeals and Stays,
26 Cal. Prac. Guide Landlord-Tenant Ch. 9-I - 9:465).)
27
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1 It is hard to imagine a more novel set of facts than to evict someone after
2 years during a pandemic when the defendants are sick with COVID: what
3 is the impact of a once-a-century pandemic and related government closure.
4 Defendants were not given an opportunity to present any argument to
5 arguments made by Landlord in its complaint.

6 It is hard to imagine a better candidate for a stay pending appeal.
7

8 H. A STAY GIVES THE DEFENDANTS TIME TO MAKE SURE
9 THE LANDLORD IS PAID ANY RENT DUE NOW AND FOR
10 THE TIME PERIOD OF THE STAY ON APPEAL

11 The defendants have the right to “file a petition for an extraordinary writ
12 with the appropriate appeals court,” as it has a right to do under Section 1176.
13 A stay will give the defendants time to set up a payment system to the
14 plaintiffs’.

15 **II. CONCLUSION**

16 For the foregoing reasons, this court should stay the lockout;

17 Recall and vacate the facially defective Writ Of Possession.
18

19 And this court should exercise its authority under C.C.P. section 473(d) to
20 vacate the March 17, 2022 Orders.

21 Further, the Court must stay enforcement of the judgment pending appeal
22 pursuant to Section 1176 under the circumstances here, and defendants
23 further requests the Court provide it with sufficient time to deposit any
24 required funds with the Court pending appeal. In the alternative, if the Court
25 does not grant the stay pending appeal, the Court must stay enforcement of
26 the judgment long enough so that defendants have an opportunity to seek an
27

1 extraordinary writ from the court of appeal.

2 April 11, 2022

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9 **DECLARATION OF EX PARTE AND NEW DEFENDANT**

10 My name is _____ . I am an individual who has been a tenant of the
11 property at _____ , La Jolla, CA 92037 as long as Dave _____ has
12 been operating _____ p, LLC at this address.

13
14 I was never served with the summons and complaint in this action. No one
15 was personally served with this action. We never received any notice of this case
16 until the plaintiffs attempted to file a default.

17 Dave filed his answer in time before the default was entered. Despite having
18 this Answer in on time, the court refused to file it and instead filed for a default.

19 They've denied his previous applications for a stay despite him having the
20 grounds to win this case on appeal and despite the moratorium on evictions just
21 like this one qualifies to fall under.

22 In order to try and stop myself from being evicted before we can get a proper
23 trial about what is an illegal eviction about to take place because these people
24 know they sold the property without compensating us for the upgrades we did to
25 their property that increased its value before they sold it without giving us the right
26 of first refusal they were obligated to, I've filed a Chapter 7 bankruptcy with the
27 court on Friday, April 8, 2022. I should be getting proof of this sometime today
28

1 which I will provide this court with which should grant me an automatic stay.

2 Because I'm worried I may not get the stay to the sheriffs before the lockout
3 scheduled for 4/13/22, I'm requesting this hearing be held ex parte. I have emailed
4 the plaintiffs attorney before 10 am today my notice of this hearing, along with a
5 copy of this motion, which I also filed with this court before noon today in
6 compliance with all local rules so this case can be heard.

7 I declare this to be true to the best of my ability under penalty of perjury
8 pursuant to the laws of the state of California.

9 Dated April 11, 2022

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