

# **UNLAWFUL DETAINER MOTION TO SET ASIDE DEFAULT JUDGMENT**



## **Forms**

### **Self-Help Legal Access Centers**

#### **Santa Monica**

1725 Main St.,  
Room 210  
Santa Monica, CA 90401

#### **Inglewood**

1 East Regent St.,  
Room 107  
Inglewood, CA 90301

#### **Torrance**

825 Maple Ave.,  
Room 160  
Torrance, CA 90503

#### **Long Beach**

275 Magnolia Ave.,  
Room 3101  
Long Beach, CA 90802

Dec. 2018

This guide is designed to help you fill out the forms yourself. It is not intended to provide legal advice nor strategy as to how to complete the case. The information provided in this packet only presents options and examples. This is not a substitute for professional legal advice from an

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Defendant in Pro Per

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

\_\_\_\_\_  
Plaintiff(s),  
vs.  
\_\_\_\_\_  
Defendant(s).

)  
) Case No.: \_\_\_\_\_  
)  
) **NOTICE OF MOTION AND MOTION TO  
SET ASIDE THE JUDGMENT AND ANY  
DEFAULT, AND TO QUASH ANY WRIT  
OF POSSESSION/EXECUTION. [CCP  
§§ 473(b), 473.5, 473(d), 128(a)(8), 86(b)(3)-  
(if a limited civil case)].**  
)  
) **ASSIGNED JUDGE:** \_\_\_\_\_  
) **DEPARTMENT:** \_\_\_\_\_  
) **HEARING DATE:** \_\_\_\_\_  
) **TIME:** \_\_\_\_\_  
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)  
)

**TO PLAINTIFF AND PLAINTIFF'S ATTORNEY OF RECORD, IF ANY:**

**NOTICE IS HEREBY GIVEN THAT** on \_\_\_\_/\_\_\_\_/20\_\_\_\_ at \_\_\_\_:\_\_\_\_am / pm , in  
Dept. \_\_\_\_\_ of the above-mentioned Court, located at, \_\_\_\_\_,  
California, Defendant will and hereby does move the Court to set aside the Judgment entered in  
this case, as well as any Default, and to quash any Writ of Possession and/or Execution.

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**CHECK ALL THAT APPLY BELOW:**

This Court should grant the relief requested based upon the following grounds and legal authority because the Judgment and any Default was/were:

- entered due to Defendant's surprise, mistake, excusable neglect or inadvertence.  
[CCP §473(b)]; and/or,
- entered despite the Defendant's lack of actual notice of the lawsuit in time to respond.  
[CCP §473.5]; and/or,
- void since the legal papers were not served on Defendant at all or were improperly served. [CCP §473(d)]; and/or,
- void since they were based (in whole or in part) on external fraud or mistake.  
[CCP §§ 128(a)(8), CCP 86(b)(3) (in limited civil cases)]
- invalid/void, therefore any Writ of Possession/Execution used to enforce the Judgment was improperly issued. [CCP §§ 128(a)(8), 86(b)(3) (in limited civil cases)]

This motion is based on this Notice of Motion and the Motion to Set Aside Judgment, the Memorandum of Points and Authorities, the Defendant's Declaration, the pleadings and papers on file and upon such other matters presented to the court at the hearing.

Date: \_\_\_\_\_

Signed by: \_\_\_\_\_

Defendant without Attorney

\_\_\_\_\_  
Print Name

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Defendant in Pro Per

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF LOS ANGELES**

11 \_\_\_\_\_

12 Plaintiff(s),

13 vs.

16 \_\_\_\_\_

17 Defendant(s).

Case No.: \_\_\_\_\_

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO SET ASIDE THE  
JUDGMENT AND ANY DEFAULT, AND  
TO QUASH ANY WRIT OF  
POSSESSION/EXECUTION. [CCP  
§§ 473(b), 473.5, 473(d), 128(a)(8), and  
86(b)(3)-(if a limited civil case)].**

**ASSIGNED JUDGE:** \_\_\_\_\_

**DEPARTMENT:** \_\_\_\_\_

**HEARING DATE:** \_\_\_\_\_

**TIME:** \_\_\_\_\_

20 **I. THE COURT MAY SET ASIDE A JUDGMENT PURSUANT TO CCP § 473(b)**  
21 **WHEN ENTERED AGAINST A DEFENDANT DUE TO HIS/HER MISTAKE,**  
22 **INADVERTENCE, SURPRISE OR EXCUSABLE NEGLIGENCE**

23 California's Code of Civil Procedure § 473(b) states:

24 The court may, upon any terms as may be just, relieve a party . . . from a  
25 judgment . . . taken against him or her through his or her mistake,  
26 inadvertence, surprise, or excusable neglect. Application for this relief . . .  
27 shall be made within a reasonable time, in no case exceeding six months.

28 CCP § 473(b) is a remedial statute and should be liberally construed to carry out the  
policy of permitting trials on their merits. *See Faasuyi v. Permatex, Inc.* (2008) 167

1 Cal.App.4th 681, 695 quoting *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d. 352  
2 (internal citations and quotations omitted). Absent prejudice to the Plaintiff and diligence by the  
3 Defendant, only “very slight” evidence is needed to set aside a default. *Id.* The standard is if  
4 the act or omission is one that a reasonably prudent person would commit under the same  
5 circumstances. *See Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275,  
6 279. Fraud by a third party, physical incapacity or death in the family can cause excusable  
7 neglect. *See Shapiro v. Clark* (2008) 164 Cal.App.4th 1128; *see also Gamet v. Blanchard* (2001)  
8 91 Cal.App.4th 1276 and *Sullivan v. Sullivan* (1967) 246 Cal.App.2d 301.

10 **II. THE COURT MAY SET ASIDE A DEFAULT AND DEFAULT JUDGMENT**  
11 **UNDER CCP § 473.5 WHEN PROPER SERVICE DOES NOT RESULT IN**  
12 **ACTUAL NOTICE IN TIME TO DEFEND THE LAWSUIT**

13 California Code of Civil Procedure § 473.5 states:

14 (a) When service of a summons has not resulted in actual notice to a party in time to  
15 defend an action . . . [Defendant] may serve and file a notice of motion to set aside the  
16 default . . . within a reasonable time, but in no event exceeding the earlier of: (i) two  
17 years after entry of a default judgment . . . (ii) 180 days after service on him or her of a  
18 written notice that the default or default judgment has been entered.

19 (b) A notice of motion to set aside a default . . . shall be accompanied by an affidavit  
20 showing . . . that the party's lack of actual notice . . . was not caused by his or her  
21 avoidance of service or inexcusable neglect.

22 Cal. Civ. Proc. § 473.5. The purpose of this law is to allow cases to be decided by trials on  
23 their merits. *Id.* The Defendant has not received “actual notice” unless he/she has personally  
24 received or personally viewed the Summons and Complaint by one of the service methods  
25 specified under Code of Civil Procedure sections 415.10 et. seq. *See Tunis v. Barrow* (1986)  
26 184 Cal.App.3d 1069, 1077.

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1 **III. THE COURT MUST SET ASIDE A JUDGMENT PURSUANT TO CCP § 473(d)**  
2 **AND THE COURT'S EQUITABLE POWERS UNDER CCP § § 128(a)(8) and**  
3 **86(b)(3) WHEN IT IS VOID FOR LACK OF JURISDICTION.**

4 If legal papers are not served in strict compliance with Code of Civil Procedure sections  
5 415.10 et. seq., a judgment is void as the Court lacks jurisdiction. *See Ellard v. Conway* (2001)  
6 94 Cal.App.4th 540; *see also Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th  
7 1228, 1239. One may file to set aside a judgment that appears void on its face by a review of the  
8 judgment roll at anytime. *See Cal. Civ. Proc. §§ 473(d), 128(a)(8), 86(b)(3); see also Hayashi v.*  
9 *Lorenz* (1957) 42 Cal.2d 848, 851. However, one must file to set aside a judgment within the  
10 two year limit specified under Cal. Civ. Proc. § 473.5 if the judgment appears valid on its face  
11 but is void for lack of jurisdiction. *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1121-1122.

12 **IV. THE COURT MAY SET ASIDE A JUDGMENT AT ANYTIME USING ITS**  
13 **EQUITABLE POWERS UNDER CCP § § 128(a)(8), 86(b)(3) WHEN A**  
14 **JUDGMENT IS ENTERED BASED ON EXTRINSIC FRAUD AND/OR**  
15 **MISTAKE, AND, IN LIMITED CIVIL CASES, INADVERTENCE AND/OR**  
16 **EXCUSABLE NEGLECT**

17 The Court has inherent equitable powers to set aside a judgment obtained by extrinsic  
18 fraud and/or mistake to ensure its orders conform to justice. *See Cal. Civ. Proc. §§ 128(a)(8).* In  
19 limited civil cases, the Court may also consider inadvertence and excusable neglect. *See Cal.*  
20 *Civ. Proc. §§ 86(b)(3).* Such fraud and/or mistake includes most external circumstances  
21 depriving a party of a fair trial, such as the other party filing a false proof of service. *In re*  
22 *Marriage of Park* (1980) 27 Cal.3d 337, 342; *see also Sullivan, supra*, 256 Cal.App.2d 304.

23 In default cases, there is a 3-part test for relief; whether there is/was: 1) a meritorious  
24 case--do the facts, if proven, create a possible different result (not required if not required if  
25 improper or lack of service); 2) a valid reason for not defending the original case; and, 3)  
26 diligence (ordinary care in the situation) used in requesting to set aside the default once  
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1 discovered. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975; *see also Shapiro v. Clark* (2008) 164  
2 Cal.App.4th 1128, 1144; *see also McCreadie v. Arques* (1967) 248 Cal.App.2d 39, 46. The  
3 Court also considers any possible prejudice that could result from the set aside. *Munoz v. Lopez*,  
4 (1969) 275 Cal.App.2d 178, 183.

5 **V. CONCLUSION**

6  
7 The Court should set aside the default and judgment and quash any writ of possession  
8 and/or execution in the interest of due process and fairness. Defendant should be able to  
9 properly defend the case and have it decided by a trial on its merits.  
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11  
12 Date: \_\_\_\_\_

Signed by: \_\_\_\_\_

Defendant without Attorney

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Defendant in Pro Per

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

Case No.: \_\_\_\_\_

**DECLARATION OF DEFENDANT**

\_\_\_\_\_

Plaintiff(s),

vs.

**IN SUPPORT OF MOTION TO SET  
ASIDE THE JUDGMENT AND ANY  
DEFAULT, AND TO QUASH ANY WRIT  
OF POSSESSION/EXECUTION. [CCP  
§§ 473(b), 473(d), 473.5, 128(a)(8), and  
86b(3)-(if a limited civil case)].**

\_\_\_\_\_

Defendant(s).

**ASSIGNED JUDGE:** \_\_\_\_\_  
**DEPARTMENT:** \_\_\_\_\_  
**HEARING DATE:** \_\_\_\_\_  
**TIME:** \_\_\_\_\_

**I, \_\_\_\_\_ declare as follows:**

I am the defendant in the above-entitled action.

2. I did not answer the Summons and Complaint and/or did not go to the trial because:

**CHECK ANY STATEMENTS BELOW THAT APPLY:**

I did not receive the Summons and Complaint in this case at all or did not receive them in the legally required way. \_\_\_\_\_

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I did not receive the Summons and Complaint in time to file an answer on time:  

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The Plaintiff, his/her attorney, or someone else lied, misled me or otherwise caused me to not file papers and/or attend the trial: \_\_\_\_\_  

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I did not receive a Notice of the Trial from the Court: \_\_\_\_\_  

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I was very sick/hospitalized which prevented me from filing my answer or going to court: \_\_\_\_\_  

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Other: \_\_\_\_\_

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3. I did not avoid service of the legal papers or do anything else that interfered with notice of the Summons and Complaint that was meant for me.

4. I discovered there was a default/judgment against me on: \_\_\_\_\_  
When I found out, I filed this Motion to Set Aside within a reasonable time and within the statutory period, if applicable.

5. If this Motion is granted, I believe I can win the case at trial.

6. If the Court does not grant this motion, it would be unfair and cause me harm because:

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7. If this is an eviction case, I request the Court give me additional time to find new housing so that I will not be homeless.

I declare under penalty under the laws of the State of California, that the foregoing is true and correct. Executed at: \_\_\_\_\_, California on date: \_\_\_\_\_.

Signed by: \_\_\_\_\_  
Defendant without Attorney

\_\_\_\_\_  
Printed Name

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Defendant in Pro Per

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

\_\_\_\_\_  
  
Plaintiff(s),  
  
vs.  
  
\_\_\_\_\_  
  
Defendant(s).

)  
) Case No.: \_\_\_\_\_  
)  
) **[PROPOSED] ORDER**  
)  
) **ASSIGNED JUDGE:** \_\_\_\_\_  
) **DEPARTMENT:** \_\_\_\_\_  
) **HEARING DATE:** \_\_\_\_\_  
) **TIME:** \_\_\_\_\_  
)  
)

After consideration of Defendant's motion, all other pleadings and papers, and any oral argument in this case, and upon good cause appearing, the Court orders Defendant's Motion to Set Aside be granted. The Judgment entered in this case, as well as any Default, is set aside. The Court also orders that any Writ of Possession and/or Execution issued is recalled and quashed.

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- Defendant's Proposed Answer is deemed filed as of this date.
- Defendant is ordered to file an Answer within \_\_\_\_\_ days from the date of this Order.
- Other: \_\_\_\_\_  
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\_\_\_\_\_.

**It is so Ordered.**

Date: \_\_\_\_\_

\_\_\_\_\_  
**JUDGE OF THE SUPERIOR COURT**