

UNLAWFUL DETAINER

Motion to Set Aside



How to Guide

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

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 attorney.

March 2019

INFORMATION AND INSTRUCTIONS

What is a Default Judgment?

A “Judgment” is the final Court order which states who won the case and what they won. If you did not file a response (answer) or appear at trial, the Court enters a “Default Judgment”. The Default prevents you from filing a response. Also, if you filed your answer, but did not appear at court, then a default judgment (or “prove up”) was entered against you. If you have a Default Judgment against you, it means:

- a. You lost your unlawful detainer/eviction case automatically.
- b. A money judgment is entered against you for 7 to 10 years and can be renewed indefinitely.
- c. In eviction cases, the court record is sealed until Judgment is entered against the Tenant. After the Default Judgment, the court record may become unsealed (or available to the public) even if a Judgment is entered for a zero (\$0) dollar amount:
 - 1) Your name and the case name will be entered onto a “Tenant Registry,” and will stay there for 7 years. Future landlords can check this registry to help them decide whether to rent to you.
 - 2) The Judgment shows up on your credit report for 7 years. Your wages or bank accounts may be garnished or levied.
 - 3) The Judgment may also negatively impact your credit score making it difficult to borrow money or even get certain jobs.
- d. The Plaintiff enforces the Judgment by obtaining a “Writ of Possession,” which is the Court’s order allowing the Sheriff to post a Five (5) Day Notice to Vacate and evict you from your home.

Can you Vacate (“Cancel”) the Judgment Against You?

You must show that something *beyond your control* prevented you from filing a timely Answer to the Summons and Complaint or something beyond your control prevented you from attending your trial. You must meet one of the following legal requirements to set aside a default and vacate a Judgment, so not everyone qualifies:

- a. You Were Not Served the Summons and Complaint or were not served properly. It does not matter if you had actual notice (somehow got the papers) or if you avoided service. Proper service does not require that a defendant sign for papers.
- b. Mistake, Surprise, Inadvertence, and/or Excusable Neglect-You must show a mistake, surprise (something unexpected happened that was not your fault), or inadvertence or excusable neglect (you failed to do something but have a reasonable excuse). For example, you did not respond in time to the Court papers because the Plaintiff tricked you into not filing an answer or you failed to go to court because you became sick and were in the hospital. The Court may also consider fraud as a reason if it caused you to make a mistake or caused surprise, inadvertence or excusable neglect. Your acts have to be those that a reasonable person in your position would have done and could not have been reasonably avoided;
- c. Judgment is Unjust or does not comply with the Law due to Fraud or Mistake- The Court has power on its own to correct or change its orders if they do not comply with the law or are unjust. You must show: 1) someone committed fraud against you or caused your mistake, either of which caused you to not respond and/or go to Court; or 2) the Court clerk made a mistake.
- d. Papers Were Properly Served by Law, But Not Received or Seen in Time to Defend the Case-The initial papers (the “Summons and Complaint”) were served as required by law, but you did not have actual notice of them meaning you did not receive them or see them yourself in time to file a response. For example, they were given to someone else at your home but that person never gave them to you and you did not get a copy by mail or another way. This reason to set aside a judgment is only available for Defaults and Default Judgments. You must show that you did not avoid service or otherwise cause the lack of notice;

HOW TO FILE A MOTION TO SET ASIDE A JUDGMENT AND HAVE THE COURT HEAR YOUR CASE!

(1) Obtain and Review Court Documents

- Summons and Complaint
- Proof of Service of Summons
- Notice of Entry of Default
- Judgment

(2) Prepare the Required Court Papers

- Ex Parte Application for Stay of Execution – See Companion Packet

See the instructions for how to fill out the Ex Parte Application for Stay of Execution.

- Motion to Set Aside a Judgment

1. Notice of Motion and Motion-This tells the other party the date, time and courtroom in which the motion will be heard, as well as the reason(s) you are filing the Motion.
2. Memorandum of Points and Authorities-This document explains the laws in your case and how the facts of your case meet the requirements of the laws.
3. Declaration-The declaration explains the facts of your case, specifically the reason(s) you did not respond to the complaint and/or did not attend the court trial and why you meet the legal requirements of the Motion.
4. Proposed Order-This is the order for the Judge to fill out and sign if your motion is granted. You only need to fill out the 1st page, **the 2nd page is for the Judge**.

- Proposed Answer to the Unlawful Detainer (If not filed already)

- If you are filing the Ex Parte Stay application and the Motion to Set Aside because you missed your court date, you do not have to file a proposed Answer at the same time.
- If you are filing based on another reason, you must file a Proposed Answer, and the Court will consider whether you have any defenses to the Complaint and a reasonable chance of prevailing at trial. The general idea is that even if something happened that prevented you from filing your Answer or attending your trial, there's no point in granting your motions if you have no chance of winning at trial.
- See the instructions for how to fill out the Answer (UD 105/Attached 3k) – See Companion Packet

- Fee Waiver. Forms FW-001 and FW-003. (If not filed already)

- The court will charge a filing fee unless you qualify and file a fee waiver.

(3) Make Copies

- Make 2 copies of the both the Ex Parte Application and Motion to Set Aside papers (and copies of the Proposed Answer if required to file one.) You should then have 3 sets: 1 set of Originals and 2 sets of copies, one for you and one set for the Plaintiff.

(4) Filing the Motion to Set Aside with the Court:

- File the original Ex Parte Application and the Motion to Set Aside (including Proposed Answer attached) with the 2 copies with the Court Clerk.
- The Court keeps the original documents, stamps your copies with the date and time and returns the two copies to you.
- Keep in mind the filing & court hearing times. THESE TIMES MAY BE DIFFERENT FOR EACH COURTHOUSE IN THE COUNTY.

(5) Service of the Landlord's copies

You may serve the copies in Court when you appear for your hearing ***unless the Judge orders you to serve them in another manner.***

(6) Hearings on Motions

- Be on time for your hearing! If you arrive late, the Court may have already called your case and made a decision without you. Bring copies of all your documents! When you arrive, check in with the Court clerk inside the courtroom and wait for your case to be called.
- You may consider speaking with the other side before the hearing to work out an agreement or settlement that makes sense to you before the matter is called.
- The Court may choose to combine your hearings on the Ex Parte Application for the Stay and on the Motion to Set Aside on the day you file them or may choose to grant your Ex Parte Application for a Stay but set the hearing on the Motion to Set Aside on another date.
- The Court usually makes a decision by reviewing the papers filed in the case.
- You probably will not be able to speak unless the judge asks you questions, but be ready to explain your request anyway.
- Just in case the Judge wants to hear from you, prepare some notes or index cards of topics that you want to talk about. Keep it clear, short and concise. NO RAMBLING ON.
- If public speaking makes you uncomfortable, consider writing out what you want to say on a note pad so that you can refer to your notes in case you get nervous.
- Bring three (3) copies of anything that you want to present to the court in addition to your papers. (A copy for the Judge, the other side, and yourself.)
- If the Court grants your Motion, this does not mean that you have won the case. You are put back in the same position you would have been in if the Default had not been entered, which means that you will now have an opportunity to defend yourself. The Court will accept your proposed Answer (if applicable) and then schedule a trial date or other court date depending on your case.
- The Landlord or Landlord's attorney will vigorously oppose your motion to set aside. Be ready to explain and oppose their points as to why the default should be entered against you and the automatic win go to the landlord.
- If your motion is granted, do not leave the courtroom without an order to cancel (Quash) the sheriff lock out and/or a new trial date for your case.

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3 PRINT YOUR PHONE NUMBER

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5 Defendant in Pro Per

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **FOR THE COUNTY OF LOS ANGELES**

10 **PRINT THE CASE #**

11 **PRINT PLAINTIFF'S
NAME AS STATED
ON COMPLAINT**

Case No.: _____

12 Plaintiff(s),

13 vs.

14 **PRINT DEFENDANT'S
NAME(S) AS STATED
ON COMPLAINT**

**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)].**

15 Defendant(s).

16 **ASSIGNED JUDGE:** _____

17 **DEPARTMENT:** _____

18 **HEARING DATE:** _____

TIME: _____

19 **LEAVE THESE SECTIONS BLANK**

20
21 **TO PLAINTIFF AND PLAINTIFF'S ATTORNEY OF RECORD, IF ANY:**

22 **NOTICE IS HEREBY GIVEN THAT** on _____ / _____ / **20** _____ at _____ : _____ **am / pm** , in Dept.

23 _____ of the above-mentioned Court, located at, _____, California,

24 Defendant will and hereby does move the Court _____ as

25 any Default, and to quash any Writ of Possess

26 **PRINT THE ADDRESS OF THE COURT**

Check off the grounds on which you are seeking relief

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: **PRINT THE DATE** _____

SIGN YOUR NAME _____
Defendant without Attorney

PRINT YOUR NAME _____

Instructions for the Declaration

- In your declaration you are telling the judge the reasons why the default judgment should be set aside
- Review the declaration before you start writing.
 - You will notice that you will need to check off the statements that apply to your case.
- There are several blank lines after each statement.
 - Write what happened on the blank lines
 - i.e. if you were unable to file your answer or attend the trial because you were in the hospital, you should state so and attach proof you have of that.
- The most common reason Defendants do not file an answer is because they never received a copy of the Summons and Complaint.
 - You will need to obtain a copy of the Proof of Service of Summons from the Clerk's office to see when the Plaintiff claims you were served with the Summons and Complaint and explain why the statements in the proof of service are wrong.
 - i.e. If the proof of service stated that you were served at your home on a date and time when you know you were not there, you will have to state you were not there, where you in fact were, and attach whatever proof you may have of where you were.
 - If you were at work, you should get your time card, and if possible another declaration from your employer confirming you were at work

1 PRINT YOUR NAME

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3 PRINT YOUR PHONE NUMBER

4 Defendant in Pro Per

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6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

7 **FOR THE COUNTY OF LOS ANGELES**

8 **PRINT PLAINTIFF'S NAME**

CASE NUMBER

9 Case No.: _____

10 **DECLARATION OF DEFENDANT**

PRINT YOUR NAME

11 Plaintiff(s),

12 vs.

13 **PRINT DEFENDANT'S NAME(S)
AS STATED ON COMPLAINT**

14 **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)].**

15 **ASSIGNED JUDGE:**

16 **DEPARTMENT:**

17 **HEARING DATE:**

TIME:

Leave this area blank

18 Defendant(s).

19 **PRINT YOUR NAME**

20 **declare as follows:**

21 I am the defendant in the above-entitled action.

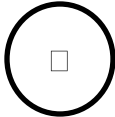
22 I did not answer the Summons and Complaint and/or did not go to the trial because:

CHECK ANY STATEMENTS BELOW THAT APPLY:

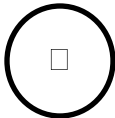
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I did not receive the Summons and Complaint in this case at all or did not receive them in the legally required way. _____

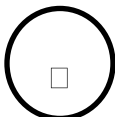
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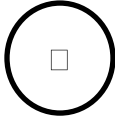
I did not receive the Summons and Complaint in time to file an answer on time:



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



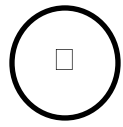
I did not receive a Notice of the Trial from the Court: _____



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

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Other: _____

_____.

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

Print date you learned of default/judgment

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:

HERE IS WHERE YOU TELL THE COURT THE HARDSHIP YOU WILL SUFFER IF THE COURT DOESN'T GRANT YOUR MOTION.

- IF YOU WERE NOT PROPERLY SERVED THE SUMMONS & COMPLAINT OR NEVER RECEIVED NOTICE OF TRIAL, YOU MAY HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW.
- YOU MAY ALSO WRITE THAT YOU WOULD HAVE NO PLACE TO GO OR WILL BE HOMELESS

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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: PRINT CITY WHERE, California on date: PRINT DATE.

**YOU SIGNED THIS
FORM**

SIGN YOUR NAME
Defendant

PRINT YOUR NAME

1 **PRINT YOUR NAME**

2 **PRINT YOUR ADDRESS**

3 **PRINT YOUR PHONE NUMBER**

4 Defendant in Pro Per

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6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

7 **FOR THE COUNTY OF LOS ANGELES**

8 **PRINT THE CASE
NUMBER**

9 **PRINT PLAINTIFF'S NAME AS
STATED ON THE COMPLAINT**

10 Case No.: _____

11 Plaintiff(s),

12 **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)].**

13 vs.

14 **PRINT DEFENDANT'S NAME AS
STATED ON THE COMPLAINT**

15 **ASSIGNED JUDGE:** _____

16 Defendant(s).

17 **DEPARTMENT:** _____

18 **HEARING DATE:** _____

19 **TIME:** _____

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

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

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

26 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

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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.
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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**

California Code of Civil Procedure § 473.5 states:

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

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

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

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 Date: PRINT DATE

Signed by: SIGN YOUR NAME
Defendant without Attorney

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PRINT YOUR NAME

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Defendant in Pro Per

SUPERIOR CVOURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PLAINTIFF'S NAME

PRINT THE CASE NUMBER

Case No.: _____

[PROPOSED] ORDER

Plaintiff(s),

vs.

**DEFENDANT'S
NAME**

ASSIGNED JUDGE:

DEPARTMENT:

HEARING DATE:

TIME:

**LEAVE THIS AREA
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Defendant(s).

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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1 Defendant's Proposed Answer is deemed filed as of this date.

2 Defendant is ordered to file an Answer within _____ days from the date of this Order.

3 Other: _____

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8 It is so Order

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10 Date: _____

**LEAVE THIS PAGE BLANK IT IS
FOR THE JUDGE TO SIGN**

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