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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO CIVIL DIVISION
OCT 28 2016
BY VERONICA GONZALEZ, DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

MOUNTAIN LION ACQUISITIONS, INC.,

Plaintiff,

vs.

ROSARIO MERCADO, an individual; and DOES 1 through 10, inclusive,

Defendant(s).

Case No.: CIVDS1514361

NOTICE OF MOTION AND MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT PURSUANT TO CALIF. CIV. CODE 1788.61 AND CALIF. CIV. CODE 473(d); MOTION TO QUASH SERVICE OF SUMMONS; MOTION TO DISMISS THE ACTION PURSUANT TO CALIF. CIV. CODE 1788.60(c); MEMORANDUM OF POINTS AND AUTHORITY; DECLARATION OF DEFENDANT ROSARIO MERCADO; PROPOSED ANSWER TO COMPLAINT; AND PROPOSED ORDER

Date: 12.06.16
Time: 8:30
Dept.: S17
San Bernardino Sup. Ct.
247 West Third St.
San Bernardino, CA 92415

TO: THE CLERK OF THE COURT, THE HONORABLE JUDGE, AND COUNSEL FOR THE PARTIES:

PLEASE TAKE NOTICE on the date and time indicated above, in the Department indicated above of the above-entitled Court, located at 247 West Third Street, San Bernardino, California, Defendant ROSARIO MERCADO (hereinafter "Ms. Mercado") will, and hereby does, move the court for an order setting aside the default entered June 20, 2016 and also the default judgment entered on October 19, 2016, to quash the purported proof of service of summons on file, and to dismiss this action or alternatively allow Defendant to file the proposed Answer to Complaint enclosed herein.

This motion will be based on the grounds that good cause exists to set aside the Default and Default Judgment because they are void due to the following: 1) the Complaint and Summons were never served on the Defendant, 2) Defendant did not obtain actual notice of this action until on or about October 10, 2016, 3) Defendant's lack of notice is not due to her own avoidance of service or inexcusable neglect, 4) the instant Motion is being filed within 180 days of Defendant's first actual notice of the action, 5) Defendant's purported due diligence in attempting to serve Defendant personally is not supported by true and lawful due diligence, and it appears that the methods claimed for the purported due diligence were intended to cause Defendant's default because there is a presumption .

This motion will be based upon the enclosed Memorandum of Points and Authorities, the attached Declaration of Defendant, the pleadings, records, and files herein, and upon such other evidence, both oral and documentary, as may be presented at the hearing of this motion.

Respectfully submitted

Dated: October 28, 2016

Babak Semnar, Esq.
SEMNAR & HARTMAN, LLP
Attorneys for Defendant

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I. INTRODUCTION AND STATEMENT OF FACTS.

In the instant matter, Plaintiff's purported declaration of reasonable diligence for substitute service (filed on the court docket February 1, 2016) shows that Plaintiff's process server only attempted to serve Ms. Mercado personally at a mailbox center called "Mail Box Plus". Plaintiff's purported declaration of reasonable diligence shows that Plaintiff's process server went to only this location and never to any other address in an attempt to serve Ms. Mercado. Plaintiff's process sever even acknowledges this location is a business address, and even indicates that the employee of the mailbox center refused to accept service and specifically informed the process server that she was not authorized to accept service for any of the mailbox renters. Ms. Mercado was never once informed by anyone who worked at this commercial mail box center about the purported service attempts, and she never once received any documents alleged to have been mailed to her at the location. *See* Decl. of Def., Pars. 5-9.

On or about October 10, 2016, Ms. Mercado decided to research her name in the San Bernardino Superior Court website, because an employee of the Human Resources Department where she has been employed (Fuji Film) for approximately 20 years (Jeanne Berrien) had just informed her that an attorney named "Marshall" called her to get information about Ms. Mercado and he informed Ms. Berrien that he is an attorney from the Law Offices of D. Scott Carruthers who is representing Mountain Lion Acquisitions, Inc. *See* Decl. of Def., Par. 1.

The Complaint that Plaintiff filed against Ms. Mercado on September 25, 2015 shows that Plaintiff had a last known address for Ms. Mercado of 8144 Garden Park Street in Chino, CA. *See* Compl., Par. 17. However, according to the purported declaration of reasonable diligence filed by Plaintiff, Plaintiff never attempted to serve Ms. Mercado personally at this address, which would have provided them with access to the landlord who could have given them her forwarding address.

Beginning July 1, 2015, Ms. Mercado began renting a residence in the City of

Alhrambra. This address is listed in Ms. Mercado's consumer credit file with the consumer credit reporting agencies as her current address. However, Plaintiff never attempted to serve Ms. Mercado personally at this address. Ms. Mercado is informed and believes that Plaintiff conducted a skip-trace of her personal information and therefore must have known that this was her current residence at the time that Plaintiff was purportedly trying to serve her personally. *See* Decl. of Def., Pars. 10-14.

Plaintiff's collection agent had numerous conversations with an employee of the Human Resources Department where Ms. Mercado is employed (Fuji Film). Plaintiff's collection agent spoke to HR employee Jean Berrien on or about October 30, 2015 and again on or about April 4, 2016. Ms. Mercado sat in Ms. Berrien's office during the October 2015 phone conversation on speaker phone wherein Ms. Berrien spoke to Plaintiff's collection agent about specific details regarding Ms. Mercado's financial circumstances, her work schedule, the fact that she is previously divorced, and also about the circumstances surrounding the underlying debt that Plaintiff sued her upon. These conversations did not involve any discussions about Plaintiff having filed a lawsuit against her. *See* Decl. of Def., Pars. 15-16.

The man with whom Ms. Berrien spoke did not identify himself or his company. Ms. Berrien refused to tell Ms. Mercado his name and company after she hung up the phone with him. Ms. Mercado only discovered he was with Plaintiff's employment when Ms. Berrien informed her about a phone call from "Marshall" in October 2016, at which time Ms. Berrien informed Ms. Mercado that "Marshall" was not the same person with whom she had previously spoken. The only reason Ms. Berrien informed Ms. Mercado who the collection agent was in October 2016 is because Ms. Mercado had already reported her to her supervisor for violating Ms. Mercado's rights to privacy by giving out personal information without Ms. Mercado's consent and Ms. Berrien now wanted to apologize in an attempt to rectify what she had done. *See* Decl. of Def., Pars. 17-21.

Ms. Mercado did not sit in during the April 2016 phone call. She only became aware of the phone call because Ms. Berrien asked her to sit in during the call, but Ms. Mercado refused because she had already informed Ms. Berrien in October 2015 that she did not consent to Ms. Berrien giving out her personal information to anyone. Ms. Mercado again informed Ms. Berrien that she did not agree to Ms. Berrien having conversations about her private affairs with anyone outside of their company. After the April 2016 phone call, Ms. Mercado reported Ms. Berrien to their corporate office for violating her rights to privacy. See Decl. of Def., Pars. 22-25.

Ms. Berrien admitted to Ms. Mercado that she had spoken to the collection agent on multiple occasions and was trying to help them by giving them information regarding Ms. Mercado's personal whereabouts and personal schedule. Ms. Mercado ultimately reported Ms. Berrien to their corporate office for violating her rights to privacy. Nevertheless, these facts show that Plaintiff knew where Ms. Mercado physically worked and knew her work schedule. However, Plaintiff never attempted to serve her personally at work. *See* Decl. of Def., Pars. 26-28.

The fact that Ms. Berrien admitted to Ms. Mercado that Plaintiff's collection agent knew very detailed information about Ms. Mercado's divorce and prior financial affairs shows that Plaintiff had conducted a skip-trace on Ms. Mercado by pulling her consumer credit file. Moreover, Mountain Lion has reported the account that it owns upon my personal credit report as well, and began reporting it in November 2014. Therefore, Plaintiff must have known her current residential address, yet never attempted to serve her personally at the residence location. *See* Decl. of Def., Pars. 29-31.

Based on the above, it seems clear that Plaintiff's goal in only attempting to serve Ms. Mercado personally at a commercial mail box center (despite knowing multiple locations where she could have been personally served) was to set her up for default. Ms. Mercado never once attempted to evade service. Her primary habit is to go from

home to work, where she has worked for approximately 20 years. Plaintiff could have located her at work in the daytime during the hours that Ms. Berrien provided to them, or they could have located her at home during the evening. However, Plaintiff never attempted to serve her at either location. *See* Decl. of Def., Pars. 32-36.

Ms. Mercado first discovered Plaintiff's surreptitious taking of her default on or about October 10, 2016, at which time she decided to research her name in the Superior Court website to see if Plaintiff had actually taken action against her. After she discovered that Plaintiff had filed the instant matter and had already obtained her default and default judgment, she promptly contacted the undersigned counsel and made arrangements for retention of counsel. *See* Decl. of Def., Pars. 1-4.

Ms. Mercado has a meritorious defense to this action, in that Plaintiff cannot prove proper chain of title of ownership of the alleged debt and also cannot prove that Ms. Mercado is actually liable upon the account since Plaintiff failed to attach to its Complaint a copy of her signature confirming that she is the one who agreed to be liable upon the account at issue and because Plaintiff has failed to sufficiently comply with the requirements of the California Fair Debt Buyer's Practices Act by failing to include mandatory information within its Complaint pursuant to Calif. Civ. Code 1788.58(a).

Plaintiff's pursuit of entry of default and briefs in support of default judgment fail to contain the items required by Calif. Civ. Code 1788.60(c) and Calif. Civ. Code 1788.58(a)(3)-(8), which supports Ms. Mercado's request for the Court to dismiss this action pursuant to Calif. Civ. Code 1788.60(c).

On August 31, 2016, this Court has already issued a ruling showing that Plaintiff has acted with oppression towards Ms. Mercado by its dilatory delay in pursuing action against her and allowing the shockingly high interest rate to accumulate to a staggering amount of alleged debt upon the small $5,000.00 loan that she obtained from the lender.

A copy of Ms. Mercado's proposed Answer is attached hereto, pursuant to Calif. Civ. Code 1788.61(b).

II. THIS COURT HAS THE POWER TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT, AND THE COURT MUST PROVIDE HER THIS RELIEF AS PLAINTIFF UTTERLY FAILED TO ATTEMPT TO SERVE HER PERSONALLY AT ANY OF THE PHYSICAL ADDRESSES FOR HER.

California Civil Code 1788.61 provides this Court with the power to provide Ms. Mercado the requested relief of setting aside Plaintiff's default and default judgment. Subdivision (a)(1) provides in pertinent part:

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

Subdivision (a)(2) requires that Ms. Mercado file this motion within one hundred eighty days of the first actual notice of the action.

Subdvision (c) of this section reads:

> Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that the person's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, the court may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action. If the validity of the judgment is not challenged, the court may select an appropriate remedy other than setting aside the default or default judgment.

While Plaintiff's declaration of counsel attempts to paint Ms. Mercado in a bad light by claiming she refused to cooperate with their attempts to collect from her pre-suit, there is nothing in any of the declarations or documents filed by Plaintiff that suggest she had any actual notice of the action pending against her. Counsel's declaration was only drafted in an attempt to justify its delay in this matter in response

to the Court's inquiry of why Plaintiff allowed the egregiously high interest to accumulate.

Instead, it is clear that Plaintiff deliberately set up Ms. Mercado's default by only attempting to serve her at a commercial mail box center.

Section 415.20(s) of the Code of Civil Procedure permits service by leaving a copy of the Complaint and Summons at a usual place of mailing *only if the Plaintiff does not know a physical address for the defendant*. Subdivision (a) requires this as follows: "a summons may be served by leaving a copy of the summons and complaint during usual office hours in his or her office ***or, if no physical address is known, at his or her usual mailing address*** ..." (emphasis added). Additionally, subdivision (b) of this section requires reasonable diligence for personal service before substitute service can be effectuated at a place of usual mailing.

Because Plaintiff in this matter clearly knew of Ms. Mercado's former residential address, knew the physical location of her work, knew her work schedule, and had clearly conducted a skip-trace of her consumer credit file, Plaintiff was required to exercise reasonable diligence to serve Plaintiff at any of these physical locations. Because Plaintiff utterly failed to do so, and only focused its efforts upon the commercial mail box center, Plaintiff clearly intended to set up her default as further efforts to oppress her.

A judgment shown by evidence to be invalid for want of jurisdiction is a void judgment or at all events has all attributes of a void judgment, City of Los Angeles v. Morgan, (1951) 234 P.2d 319. In the present case, the Default and Default Judgment obtained by the Plaintiff are void as the Court never obtained valid jurisdiction over Ms. Mercado.

A judgment may be set aside as being void as a matter of law if the court lacks personal jurisdiction over a relevant party. Strathvale Holdings v. E.B.H., (2005) 126 Cal. App. 4th 1241. Specifically, if a defendant has not been properly served with

summons, the court cannot exercise personal jurisdiction over that defendant. Yeung v. Soos, (2004) 119 Cal. App. 4th 576, 582.

Accordingly, under Cal. Code Civ. Proc. § 473(d), this Court may set aside the Entry of Default and any subsequent Default Judgment in this matter because they are void due to improper service of summons. Ellard v. Conway, et al., (2001) 94 Cal.App.4th 540, 544. See also Peralta v. Heights Med. Ctr., (1988) 485 U.S. 80, 84-84 (holding that a default judgment where there has been no valid service of summons is void and can be set aside at any time).

Service of summons that is not in accordance with statutory and constitutional requirements cannot be the basis for a court's personal jurisdiction over a party. Ziller Electronics Lab GmbH v. Superior Court, (1988) 206 Cal. App. 3d 1222.

Finally, the case law in support of equitable relief supports vacating of the Default and Default Judgment. The law does not favor "snap judgments." Berrie v. Rogerio (1914) 168 Cal. 736, 740. The policy of the law is to have every litigated case tried upon its merits. Id. In addition courts also have inherent equity power allowing them to grant relief from default judgments where there has been "extrinsic fraud or mistake." Weitz v. Yankosky (1966) 63 Cal.2d 849, 855. Therefore, trial courts are provided broad discretion in granting relief against default judgments. Berrie, 168 Cal. at 740.

Because Ms. Mercado for the first time obtained actual notice of this action on or about October 10, 2016 by researching her name in the Superior Court's website, she has timely complied with her requirement to file this motion within 180 days of actual notice of the action. Moreover, because Plaintiff utterly failed to attempt to serve her at any of the physical locations that Plaintiff clearly knew of, Plaintiff has failed to show that its purported service of summons pursuant to C.C.P. 415.20 was proper. As a result, the Court must set aside the entry of default and default judgment.

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III. BECAUSE MS. MERCADO WAS NOT SERVED PROPERLY AND THIS COURT NEVER ACQUIRED PERSONAL JURISDICTION OVER HER, THE ALLEGED PROOF OF SERVICE OF THE SUMMONS MUST BE QUASHED.

Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional. Absent such service, no jurisdiction is acquired by the court in the particular action." Sternbeck v. Buck (1957) 148 Cal.App.2d 829, 832.

California Code of Civil Procedure Section 418.10 provides in pertinent part:

> (a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes:
>
> (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her.

If a defendant has not been properly served with summons, the court cannot exercise personal jurisdiction over that defendant. Yeung v. Soos, (2004) 119 Cal. App. 4th 576, 582. A service of summons that is not in accordance with statutory and constitutional requirements cannot be the basis for a court's personal jurisdiction over a party. Ziller Electronics Lab GmbH v. Superior Court, (1988) 206 Cal. App. 3d 1222. Therefore, if a defendant has not been properly served with summons, a Motion to Quash Service of Summons is proper.

When a defendant argues that service of summons did not bring him or her within the trial court's jurisdiction, the plaintiff has "the burden of proving the facts that did give the court jurisdiction, that is the facts requisite to an effective service." Coulston v. Cooper (1966) 245 Cal.App.2d 866, 868. See also. School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal.App.4th 1126, 1131.

In fact, even if a defendant has knowledge of the action, such knowledge is insufficient to establish proper service of summons. Ruttenberg v. Ruttenberg (1997) 53

Ca.4th 801, 808. It is well-settled that actual notice of the action alone, however, is not a substitute for proper service and is not sufficient to confer jurisdiction. "[N]o California appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a complete failure to comply with the statutory requirements for service." Summers v. McClanahan (2006) 140 Cal.App.4th 403, 414.

As detailed above, Plaintiff failed to comply with C.C.P. 415.20 for service at a place of usual mailing by utterly failing to attempt to serve her at any of the physical locations that Plaintiff had knowledge of. This is required by both subdivisions (a) and (b) of this section. As such, Ms. Mercado was under absolutely no duty to respond in any manner to Plaintiff's improperly served summons and complaint. Kappel v. Bartlett, (1988) 200 Ca.3d 1457.

Since Ms. Mercado was never properly served a copy of Plaintiff's Summons and Complaint, her Motion to Set Aside Default Judgment and Motion to Quash Service of Summons should be granted.

IV. THE COURT SHOULD DISMISS THIS ACTION PURSUANT TO CALIF. CIV. CODE 1788.60(d).

Calif. Civ. Code 1788.60(c) states, "In any action on a consumer debt, if a debt buyer plaintiff seeks a default judgment and has not complied with the requirements of this title, the court shall not enter a default judgment for the plaintiff and may, in its discretion, dismiss the action."

The requirements of this title included Plaintiff's requirement to submit "business records, authenticated through sworn declaration … to establish the facts required to be alleged by paragraphs (3) to (8), inclusive, of subdivision (a) of Section 1788.58."

The referenced facts are as follows:

> (3) That the debt buyer is the sole owner of the debt at issue, or has authority to assert the rights of all owners of the debt.

(4) The debt balance at charge off and an explanation of the amount, nature, and reason for all post-charge-off interest and fees, if any, imposed by the charge-off creditor or any subsequent purchasers of the debt. This paragraph shall not be deemed to require a specific itemization, but the explanation shall identify separately the charge-off balance, the total of any post-charge-off interest, and the total of any post-charge-off fees.

(5) The date of default or the date of the last payment.

(6) The name and an address of the charge-off creditor at the time of charge off and the charge-off creditor's account number associated with the debt. The charge-off creditor's name and address shall be in sufficient form so as to reasonably identify the charge-off creditor.

(7) The name and last known address of the debtor as they appeared in the charge-off creditor's records prior to the sale of the debt. If the debt was sold prior to January 1, 2014, the debtor's name and last known address as they appeared in the debt owner's records on December 31, 2013, shall be sufficient.

(8) The names and addresses of all persons or entities that purchased the debt after charge off, including the plaintiff debt buyer. The names and addresses shall be in sufficient form so as to reasonably identify each such purchaser.

Calif. Civ. Code 1788.58(a)(3)-(8).

Subdivision (b) of Calif. Civ. Code 1788.60 also reads, "No default or other judgment may be entered against a debtor unless a copy of the contract or other document described in subdivision (b) of Section 1788.52, authenticated through a sworn declaration, has been submitted by the debt buyer to the court."

The contract or other document described in 1788.52(b) must be "a copy of a contract or other document evidencing the debtor's agreement to the debt."

The declarations and documents submitted by Plaintiff in support of its entry of

default and default judgment are primarily focused upon justifying its request for a staggering amount of interest upon the mere $5,000.00 loan. Instead, Plaintiff has utterly failed to submit any document "authenticated through a sworn declaration" with Ms. Mercado's signature showing that she agreed to the debt as required by Calif. Civ. Code 1788.60(b). Plaintiff has also utterly failed to submit any "business records, authenticated through sworn declaration" containing any of the foundational facts as required by Calif. Civ. Code 1788.60(c). As a result, Plaintiff has utterly failed to comply with its mandatory obligations pursuant to the Fair Debt Buyer Practices Act.

Because this Court has already found that Plaintiff has acted with gross oppressiveness towards Ms. Mercado, then the Court should be even more taken aback at Plaintiff's utter refusal to comply with its statutory obligations in this matter.

Additionally, because Plaintiff's collection agent disclosed highly sensitive personal information about Ms. Mercado to Ms. Berrien of the HR department at Ms. Mercado's employment, Plaintiff has clearly violated the Federal and State of California Fair Debt Collection Practices Acts. *See* 15 U.S.C. 1692c(b); Calif. Civ. Code 1788.12(a).

As a result, the concepts of fairness and equities mandate that Plaintiff be taught that it cannot treat consumers in this manner. The best method of teaching such a lesson to Plaintiff is by dismissing its action against Ms. Mercado with prejudice.

V. CONCLUSION

It would be wholly unjust to allow the Default and Default Judgment against Ms. Mercado stand, for the reasons set forth above.

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Accordingly, Ms. Mercado respectfully requests that the Court grant this Motion, set aside the Default and the Default Judgment as void, quash the service of summons on file by Plaintiff, and either dismiss this action or allow Ms. Mercado to file the Proposed Answer attached to this pleading.

Respectfully submitted,

Dated: October 28, 2016

Babak Semnar, Esq.
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Attorney for Defendant, ROSARIO MERCADO

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

MOUNTAIN LION ACQUISITIONS, INC., Plaintiff, vs. ROSARIO MERCADO, an individual; and DOES 1 through 10, inclusive, Defendant(s).	Case No.: CIVDS1514361 **[PROPOSED] ANSWER TO PLAINTIFF'S COMPLAINT**

TO: ALL ATTORNEYS OF RECORD AND CLERK OF THE COURT:

NOW COMES Defendant, ROSARIO MERCADO, herein after referred to as ("Defendant") for herself alone and for no other Defendant, hereby asserts the following Affirmative Defenses to MOUNTAIN LION ACQUISITIONS, INC.'s (herein after "Plaintiff") Complaint, (herein after "Complaint").

FIRST AFFIRMATIVE DEFENSE

(Statute of Limitations)

1. The Complaint and each cause of action therein, are barred by applicable statutes of limitations. To the extent that the Complaint relies on an oral agreement that

occurred over a year prior to the filing of the Complaint, it is barred by applicable statutes of limitation.

SECOND AFFIRMATIVE DEFENSE

(Estoppel)

2. Defendant alleges that the Complaint and each cause of action therein, are barred by the doctrine of estoppel. Based on equity and the facts to be identified in discovery, Plaintiff shall take nothing.

THIRD AFFIRMATIVE DEFENSE

(No Damages)

3. Defendant denies that Plaintiff has suffered any damages, whatsoever, and further denies that it is liable to Plaintiff for any of the damages claimed. Plaintiff has failed to allege the manner and cause of her alleged monetary damages.

FOURTH AFFIRMATIVE DEFENSE

(Defendant Acted In Good Faith)

4. Defendant is excused from any and all liability for the acts alleged in Plaintiff's claims for relief because at all material times, Defendant acted in good faith, conducted all material transactions, and did not directly or indirectly induce any acts constituting any violation for the causes of action in Plaintiff's Complaint. More specifically Defendant performed all requirements under the contracts at issue. Defendant represented the Plaintiffs' interest in all actions to the full extent of the law. Defendant represented Plaintiff for almost two years without any complaints or concerns about Defendants performance. Only after Defendant filed a claim for unpaid funds, did Plaintiff suddenly remember that she had these claims.

FIFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

5. Defendant alleges that the Complaint and each cause of action therein, are barred by Plaintiff's failure to exercise reasonable care and diligence in mitigating its damages, if any. Plaintiff had the duty and the contractual obligation to notify

Defendant if the billing or the work was not to the satisfaction of the Plaintiff, however she did not. Plaintiff utilized the Defendants' services for almost two years without proper compensation, and did not mitigate any of the funds she owed and did not pay any to Defendant.

SIXTH AFFIRMATIVE DEFENSE

(Consent by Plaintiff)

6. Defendant alleges that the Complaint and each cause of action therein, are barred by the consent of Plaintiff.

SEVENTH AFFIRMATIVE DEFENSE

(Justification)

7. Defendant asserts that any and all of its actions; which, Plaintiff alleges were wrongful, if they were done at all, were justified. As a result of the written contract as well as the requests by the Plaintiff to fully represent the Plaintiff all of Defendants actions were fully justified.

EIGHTH AFFIRMATIVE DEFENSE

(Unclean Hands)

8. Plaintiff's claims are barred by the doctrine of unclean hands. Plaintiff herself owes Defendant a significant amount of money, and only as a basis to negotiate that amount she is making these accusations. Her own actions of intentionally stringing Defendant along and not paying her bills knowing she had no intention of payment will bar her from any collection.

NINTH AFFIRMATIVE DEFENSE

(Intentional Acts)

9. The Complaint and each cause of action therein, are barred by Plaintiff's intentional acts. These acts include but are not limited to Plaintiffs own actions of intentionally stringing along Defendant with the promise of payment, while knowing all along that she did not intend to pay. Moreover, Plaintiffs actions of telling the Defendant to settle the case with regards to the water damage, since she had assigned

her rights; however now claiming she had no idea of the settlement.

TENTH AFFIRMATIVE DEFENSE

(Laches)

10. The Complaint and each cause of action therein, are barred by the doctrine of laches. Based on information that was known to the Plaintiff, as anticipated to be discovered in discovery, Plaintiff waited too long before pursuing the causes of actions alleged in the Complaint.

ELEVENTH AFFIRMATIVE DEFENSE

(Bad Faith in Filing Action)

11. The Complaint and each cause of action therein, are barred by a bad faith filing of an action. These acts include but are not limited to Plaintiffs own actions of intentionally stringing along Defendant with the promise of payment, while knowing all along that she did not intend to pay. Additionally Plaintiff only filed this claim months after she was served with Defendants complaint regarding moneys she owed to Defendant. Moreover, Plaintiffs actions of telling the Defendants to settle the case with regards to the water damage, since she had assigned her rights; however, now claiming she had no idea of the settlement.

TWELFTH AFFIRMATIVE DEFENSE

(Consent/Ratification of Acts)

12. The Complaint and each cause of action therein, are barred by Plaintiff's consent and ratification of acts. As a result of the written contract as well as the requests by the Plaintiff to fully represent the Plaintiff, all of Defendants actions were fully justified, by the consent of the Plaintiff.

THIRTEENTH AFFIRMATIVE DEFENSE

(Full or Partial Performance)

13. Defendant alleges that it fully or partially performed all obligations required of it and, therefore, is not liable to Plaintiff for damages, if any. All duties owed to Plaintiff were extinguished by this full or partial performance. Defendant fully

performed all its duties under the agreement as it represented Plaintiff in the actions as well as other matters during the entire term of the agreement.

FOURTEENTH AFFIRMATIVE DEFENSE

(Waiver)

14. Defendant alleges that the Complaint and each cause of action therein, are barred by the doctrine of waiver. As the time to object to the charges for the work performed has come and gone without any complaints by the Plaintiff. Thus the Plaintiff has waived those claims.

FIFTEENTH AFFIRMATIVE DEFENSE

(Breach of Contract)

15. Plaintiff's claims for damages are barred because Plaintiff breached the contract upon which she claims damages. Plaintiff has failed to pay for services performed by Defendant in this contract, as evident by the original complaint filed by Defendant that triggered these allegations.

SIXTEENTH AFFIRMATIVE DEFENSE

(Failure of Consideration)

16. The Complaint and each cause of action therein, are barred by the failure of consideration. Plaintiff has claimed rights in a lawsuit that she had no legal rights to, since she assigned those rights away. She has not provided any consideration for those legal services, nor the legal services on the original case where she failed to pay.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

17. Any recovery by Plaintiff would be unjust and inequitable. Plaintiff got the benefit of legal services for almost two years that she did not pay for. She will be unjustly enriched if she is to reap the benefits of such services without payment.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Speculation)

18. Plaintiff's complaint is barred as it seeks recovery for damages, which are based on speculation. Plaintiff makes claims and accusations of fraud and conspiracy based on pure speculation and without proof or evidence to support.

NINETEENTH AFFIRMATIVE DEFENSE

(Consent)

19. Plaintiff's claims are barred because it consented to Defendant's acts or omissions. Based on the contract as well as the directions of the Plaintiff to Defendant, Plaintiff had consented to all the services and reaped all the benefits.

TWENTIETH AFFIRMATIVE DEFENSE

(Prevention of Performance)

20. Plaintiff's claims are barred because they prevented Defendant from performing obligations of which Plaintiff complains in its complaint. Therefore, Plaintiff should be barred in whole or in part due to its express prevention of performance on the part of Defendant.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Excuse)

21. Plaintiff's claims are barred by its own prior breach of its agreement with Defendant; as evident by the original breach of contract claim filed prior to any claims by this Plaintiff. Defendant was justifiably excused from responsibility, if any, based on the instructions that were provided to it by Plaintiff.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Discharge)

22. Plaintiff failed to perform one or more of its obligations under any contract described in the complaint thus performance of each obligation was excused due to impossibility and/or impracticability in each instance. Plaintiff's failure to pay for the services it was receiving discharged Defendant from further performance.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Statute of Frauds)

23. The Complaint, and each cause of action therein, is barred under the Statute of Frauds. The claims that are being claimed by this Plaintiff are not in writing and thus are barred by the SOF.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Lack of Consideration)

24. The Complaint and each cause of action therein, are barred as the contract at issue herein lacked consideration. Plaintiff did not pay for the services she is claiming were not performed.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Unconscionability)

25. The Complaint, and each cause of action therein, is barred as the contract is unconscionable pursuant to Civil Code Section 1670.5.

WHEREFORE, Defendant prays for judgment as follows:

1. That Plaintiff takes nothing by way of the Complaint and that the Complaint be dismissed with prejudice;

2. That Defendant be awarded its costs of suit; and

3. That Defendant be awarded such other relief as the Court may deem just and proper.

Respectfully submitted,

SEMNAR & HARTMAN, LLP

Dated: October 28, 2016

Babak Semnar, Esq.
SEMNAR & HARTMAN, LLP
Attorneys for Defendant

SEMNAR & HARTMAN, LLP
Babak Semnar, Esq. (SBN 224890)
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Attorneys for Defendant, ROSARIO MERCADO

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

MOUNTAIN LION ACQUISITIONS, INC., Plaintiff, vs. ROSARIO MERCADO, an individual; and DOES 1 through 10, inclusive, Defendant(s).	Case No.: CIVDS1514361 **DECLARATION OF ROSARIO MERCADO IN SUPPORT OF MOTION TO SET ASIDE THE DEFAULT AND DEFAULT JUDGEMENT, TO QUASH SERVICE OF SUMMONS, AND TO DISMISS THE ACTION**

DECLARATION OF ROSARIO MERCADO

I, **ROSARIO MERCADO**, declare as follows:

1. On or about October 10, 2016, I decided to research my name in the San Bernardino Superior Court website, because an employee of the Human Resources Department where I have been employed (Fuji Film) for approximately 20 years (Jeanne Berrien) had just informed me that an attorney named "Marshall" called her to get information about me and he informed her that he is an attorney from the Law Offices of D. Scott Carruthers who is representing Mountain Lion Acquisitions, Inc.

2. This was the first time that I discovered Plaintiff had filed a lawsuit against

me and had already obtained entry of default and default judgment.

3. I immediately researched attorneys who had filed lawsuits against Plaintiff in the past and found my current counsel of record.

4. I promptly reached out to my attorneys of record to seek retention of their services to defend me in this matter.

5. I have reviewed the alleged proof of substitute service filed by Plaintiff on February 1, 2016.

6. I have never lived at this location.

7. This location is a commercial mail box center.

8. No-one from the commercial mail box center has ever once informed me that a process server attempted to serve me a complaint and summons at their location.

9. I never once received in the mail a copy of a complaint and summons from Plaintiff.

10. Beginning July 1, 2015, I began renting a residence in the City of Alhrambra.

11. This address is listed in my consumer credit file with the consumer credit reporting agencies as my current address.

12. Plaintiff never attempted to serve me personally at this address.

13. I am informed and believe that Plaintiff conducted a skip-trace of my personal information and therefore must have known that this was my current residence at the time that Plaintiff was purportedly trying to serve me personally.

14. I am informed and believe that Plaintiff conducted a skip-trace of my personal information, because a collection agent for Mountain Lion Acquisitions had previously engaged in numerous conversations with Ms. Berrien, the employee of the Human Resources Department.

15. Plaintiff's collection agent spoke to HR employee Jean Berrien on or about October 30, 2015 and again on or about April 4, 2016.

16. I sat in Ms. Berrien's office during the October 2015 phone conversation

on speaker phone wherein Ms. Berrien spoke to Plaintiff's collection agent about specific details regarding my financial circumstances, my work schedule, the fact that I am previously divorced, and also about the circumstances surrounding the underlying debt that Plaintiff sued me upon. These conversations did not involve any discussions about Plaintiff having filed a lawsuit against me.

17. The man with whom Ms. Berrien spoke did not identify himself or his company.

18. Ms. Berrien refused to tell me his name and company after she hung up the phone with him.

19. I only discovered he was with Plaintiff's employment when Ms. Berrien informed me about the phone call from "Marshall" in October 2016, and she informed me that "Marshall" was not the same person with whom she had previously spoken.

20. The only reason she informed me who the collection agent was in October 2016 is because I had already reported her to her supervisor for violating my rights to privacy by giving out my personal information without my consent and she now wanted to apologize in an attempt to make up with me.

21. After the phone call in October 2015 was completed, I informed Ms. Berrien that I did not agree to her having these conversations about me with Plaintiff's collection agent.

22. I did not sit in during the April 2016 phone call.

23. I am aware of the phone call because Ms. Berrien asked me to sit in during the call, but I refused because I had already informed her in October 2015 that I did not consent to her giving out my personal information to anyone.

24. I again informed Ms. Berrien that I did not agree to her having conversations about my private affairs with anyone outside of our company.

25. After the April 2016 phone call, I reported Ms. Berrien to our corporate office for violating my rights to privacy.

26. Ms. Berrien admitted to me that she had spoken to the collection agent on

multiple occasions and was trying to help them by giving them information regarding my personal whereabouts and personal schedule.

27. Nevertheless, these facts show that Plaintiff knew where I physically worked and knew my work schedule.

28. However, Plaintiff never attempted to serve me personally at work.

29. The fact that Ms. Berrien admitted to me that Plaintiff's collection agent knew very detailed information about my divorce and prior financial affairs shows that Plaintiff had conducted a skip-trace on me by pulling my consumer credit file.

30. Moreover, Mountain Lion has reported the account that it owns upon my personal credit report as well, and began reporting it in November 2014.

31. Therefore, Plaintiff must have known my current residential address, yet never attempted to serve me personally at the residence location, which clearly shows Mountain Lion has had access to my personal credit file since November 2014.

32. Based on the above, it seems clear that Plaintiff's goal in only attempting to serve me personally at a commercial mail box center (despite knowing multiple locations where I could have been personally served) was to set me up for default.

33. I never once attempted to evade service.

34. My primary habit is to go from home to work, where I have worked for approximately 20 years.

35. Plaintiff could have located me at work in the daytime during the hours that Ms. Berrien provided to them, or they could have located me at home during the evening.

36. However, Plaintiff never once attempted to serve me at either location.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: 10/18/2016

ROSARIO MERCADO

PROOF OF SERVICE

State of California,
County of San Bernardino.

Case No.: CIVDS1514361

I am employed in the County of San Diego, State of California. I am over the age of 18 and am not a party to the within action; my business address is 400 South Melrose Drive, Suite 209, Vista, California 92081. On the date provided below, I served the foregoing document described below on the interested parties in this action by placing same in a sealed envelope.
DEFENDANT'S MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT, TO QUASH SERVICE OF SUMMONS, AND TO DISMISS THE ACTION OR ALLOW DEFENDANT TO FILE ANSWER TO COMPLAINT; PROPOSED ANSWER TO COMPLAINT; DECLARATION OF DEFENDANT
was served on:

D. Scott Carruthers, Esq. D. Scott Carruthers, APLC 8448 Katella Avenue/PO Box 228 Stanton, California 90680 Email: dsclawoff@aol.com Fax: (714) 761-1754 Attorneys for Plaintiff	

☒ **(BY MAIL)** – I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail in Temecula, California.
I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid at Vista, California, in the ordinary course of business. I am fully aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

☐ **(BY FACSIMILE)** – I caused the above described document(s) to be transmitted to the offices of the interested parties at the facsimile number(s) indicated above and the activity report(s) generated by facsimile number (888) 819-8230 indicating on all pages that they were transmitted.

☐ **(BY PERSONAL SERVICE)** – I caused such envelope(s) to be delivered by hand to the office(s) of the addressee(s).

☒ **(STATE)** – I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ **(FEDERAL)** – I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Dated: October 28, 2016

Jared M. Hartman, Esq.

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

MOUNTAIN LION ACQUISITIONS, INC.,

Plaintiff,

vs.

ROSARIO MERCADO, an individual; and DOES 1 through 10, inclusive,

Defendant(s).

Case No.: CIVDS1514361

[PROPOSED] ORDER SETTING ASIDE DEFAULT AND DEFAULT JUDGMENT, QUASHING PROOF OF SERVICE ON FILE, AND DISMISSING THE ACTION, OR IN THE ALTERNATIVE ALLOWING FILING OF DEFENDANT'S ANSWER TO COMPLAINT

The motion of Defendant ROSARIO MERCADO for an order setting aside default and default judgment, to quash the proof of service of summons, and to dismiss the action or in the alternative allowing the filing of Defendant's Answer to Complaint came on regularly for hearing in the above-entitled court.

Having considered the pleadings, declarations in support, and any argument and comments of counsel, and having been fully informed, and good cause appearing therefor:

IT IS ORDERED THAT the motion is GRANTED and the default entered on June 20, 2016 and default judgment entered on October 19, 2016 by Plaintiff MOUNTAIN LION ACQUISITIONS, INC. against Defendant ROSARIO MERCADO, are set aside. The proof of service of summons on file in this matter is quashed.

This action is also dismissed, with prejudice, pursuant to Calif Civ Code 1788.60(c).

(Alternatively, Defendant may file her Answer to the Complaint forthwith.)

Dated: _____

_____

Honorable Judge of The Superior Court

PROOF OF SERVICE

State of California,
County of San Bernardino.

Case No.: CIVDS1514361

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PROPOSED ORDER UPON DEFENDANT'S MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT, TO QUASH SERVICE OF SUMMONS, AND TO DISMISS THE ACTION OR ALLOW DEFENDANT TO FILE ANSWER TO COMPLAINT
was served on:

D. Scott Carruthers, Esq. D. Scott Carruthers, APLC 8448 Katella Avenue/PO Box 228 Stanton, California 90680 Email: dsclawoff@aol.com Fax: (714) 761-1754 Attorneys for Plaintiff	

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☒ **(STATE)** – I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ **(FEDERAL)** – I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Dated: October 28, 2016

Jared M. Hartman, Esq.