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9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
10 COURTHOUSE

11 GCFS, INC.,) CASE NO.: 07C
12)
13 Plaintiff)
14 vs.) **PLAINTIFF'S OPPOSITION TO**
15) **DEFENDANT'S MOTION TO SET ASIDE**
16 MATT) **DEFAULT JUDGMENT**
17)
18)
19 Defendant.) DATE 2009
20) TIME: 8:30 a.m.
21) DEPT:

22 Plaintiff GCFS, Inc., submits the following Memorandum of Points and Authorities in
23 Opposition to Defendant's Motion to Vacate Default Judgment.

24 **INTRODUCTION**

25 Defendant MATT ("Defendant") moves to vacate the default judgment
26 entered against him on 2007, pursuant to *Code of Civil Procedure*, section 473.5¹
27 and the equitable powers of the Court on the grounds that Plaintiff failed to properly serve and
28 obtain personal jurisdiction over Defendant. Plaintiff contends there was a valid personal service
of the summons and complaint of Defendant, the judgment is valid on its face, the motion is
untimely, the granting of the motion would be highly prejudicial to the Plaintiff, and therefore

¹ Unless otherwise stated, all further statutory references are to the *Code of Civil Procedure*.

1 should not be set aside.

2 **STATEMENT OF FACTS**

3 This Limited Civil action for common counts was filed on [redacted] 2007.

4 The *proof of service* on file with the Court declares that the summons and complaint were
5 personally served on September 19, 2007, at 6:05 p.m. on the Defendant at the address of
6 [redacted] Los Angeles, California. Plaintiff verified this address with
7 the Postmaster and Credit Bureau Reports prior to service.

8 On October 15, 2007, an employee of the Plaintiff spoke with the Defendant about the
9 impending Default, and to invite settlement.

10 On November 7, 2007, Plaintiff submitted a Default Packet to the court.

11 On November 13, 2007, a default judgment was entered against Defendant.

12 In May of 2008, Plaintiff was contacted by [redacted] representing
13 Defendant. Ms. [redacted] did contact Plaintiff to invite settlement on May 28, 2008 and then later
14 on June 9, 2008. Ms. [redacted] may have also filed a motion on behalf of Defendant to set aside
15 the judgment in this action. Any such motion was never served on Plaintiff and the motion set
16 for [redacted] 2008 was taken off calendar.

17 In March of 2008, Plaintiff obtained a Writ of Execution and levied on the wages of
18 Defendant. Plaintiff collected a sum in excess of \$2,000.00 since the levy was first served.
19 Despite having been in contact with Defendant previously, both via direct contact and by his
20 attorney, Defendant did not attempt to contact Plaintiff or dispute the levy. More than a year has
21 passed since then. In the interim, Plaintiff has continued to serve Memos of Cost at the address
22 listed. On October 6, 2009 Plaintiff changed the attorney of record from Brent D. Peterson to
23 Brighton Hushing-Kline and sent a notice to defendant at the address listed. Plaintiff received a
24 copy of the Motion to Vacate Default and Default Judgment by fax on October 9, 2009.
25 Defendant claims that he was never served with the summons and complaint and is filing this
26 motion almost two years after the judgment was entered.

27 Nevertheless, and as set forth more fully in Plaintiff's opposition, Defendant's motion is
28 insufficient to overcome the facts showing a good personal service of the summons and

1 complaint. Therefore, Defendant's motion should be denied.

2 **ARGUMENT**

3 **I**

4 **PLAINTIFF DOES NOT NEED TO PRODUCE THE ORIGINAL AGREEMENT FOR A**
5 **CHARGE OF COMMON COUNTS; DEFENDANT'S MOTION SHOULD,**
6 **THEREFORE, BE DENIED**

7 The complaint in this action seeks money damages under the common count of open
8 book account for recovery of a defaulted credit card obligation. The moving papers contend that
9 Plaintiff's judgment is void because Plaintiff did not sue on and produce the original application
10 for credit. In 5 Witkin Cal Proc. (4th Ed.) Pleading § 515, pages 605-606 it states:

11 "A common count is proper whenever the plaintiff claims a sum of money due, either as
12 an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished.
13 It makes no difference that the proof shows the original transaction to be an express contract, a
14 contract implied in fact, or a quasi-contract.

15 "The point was succinctly stated in *Castagnino v. Balletta* (1889) 82 C. 250, 258, 23 P.
16 127, quoting Greenleaf on Evidence: "So long as the contract continues *executory*, the plaintiff
17 must declare specially, but when it has been *executed* on his part, and nothing remains but the
18 payment of the price in money by the defendant, which is nothing more than the law would
19 imply against him, the plaintiff may declare generally, using the common counts, or may declare
20 specially on the original contract, at his election'"

21 In this case, the obligation underlying the judgment is an unpaid credit card account
22 owing to Chase Manhattan Bank. The credit card account was opened in 2002. The complaint
23 in this action alleges money damages on the common count of open book account. The default
24 judgment entered on _____), 2007, was proper based on the authorities cited above and
25 the procedure in place for California Courts. Many credit card accounts are 10 or more years old
26 before they are charge-off/bad debts; many credit card issuers have merged or been sold to other
27 banks or financial institutions. Defendant's argument for the court to cancel every original
28 application or agreement would virtually stop collection actions on credit card and many other

1 Motions, Briefs, or Declarations declare that the address listed is Plaintiff's "home address," they
2 instead state that Defendant was served there. To Plaintiff's knowledge, there is no code
3 preventing service at locations other than the respondent's "home address."

4 Accordingly, Defendant has failed to carry his burden of proving that he was never
5 served with the summons and complaint in this case. His motion to vacate the default judgment
6 rendered against him on November 13, 2007, must therefore be denied.

7 III

8 DEFENDANT HAD NOTICE OF SUIT, CONSEQUENTLY HIS MOTION IS 9 UNTIMELY AND SHOULD, THEREFORE, BE DENIED

10 Defendant was personally served with the summons and complaint on September 19,
11 2007. As a part of Plaintiff's regular procedure, Defendant in this action was contacted by Greg
12 Cross by telephone on October 15, 2007. Greg Cross discussed with the defendant to inquire
13 about the settlement of the lawsuit that was recently served. At that time Defendant was told that
14 the purpose of the call was to settle the lawsuit in exchange for a dismissal or other arrangement
15 to resolve the action. No settlement was reached at that time (See *Declaration of Greg Cross*).
16 Plaintiff submitted document to the court for a default judgment on November 8, 2007 (See
17 *Declaration of Carol McNellis*). Defendant subsequently retained an attorney to attempt to
18 overturn the Default and Default Judgment, but the attorney failed to appear at a hearing for the
19 motion, and the motion was taken off-calendar (See *Defendant's Motion to Overturn Default and*
20 *Default Judgment*). In July of 2008 Plaintiff levied on Defendant's wages. The Defendant failed
21 to contact Plaintiff, even after an Earnings Withholding Order was placed on his paycheck. The
22 silence from the Defendant continued for over a year, ending when the present motion was filed.

23 The remedy under § 473.5 allows for two maximum time limits:

- 24 (i) two years after entry of a default judgment against him or her;
- 25 or (ii) 180 days after service on him or her of a written notice that
- 26 the default or default judgment has been entered. (Code Civ. Proc.
- 27 § 473.5)

28 However, both time limits are informed by the statement that "The notice of motion shall be

1 served and filed within a reasonable time." This is further explained by *Benjamin v. Dalmo Mfg*
2 *Co.* (1948) 31 C.2d 423, 190 P.2d 593. The court stated that "Defendant has not cited, nor has
3 independent research disclosed, any case in which a court has set aside a default where, in
4 making application therefore, there has been an unexplained delay of anything approaching three
5 months after full knowledge of the entry of the default. On the contrary, the proper procedure
6 appears to involve the presentation of some explanation by affidavit or testimony of any
7 extended delay and the court they determines whether such explanation may be deemed
8 sufficient to justify the granting of the relief sought" (*Id.*, 31 C.2d 429). The court consequently
9 overturned the Motion to Vacate Default and Default Judgment. In the instant case there has not
10 been a delay of three months: There has been a delay of almost two years. There is no
11 attempted explanation for this delay, and only cursory reference to the Defendant's initial
12 attorney.

13 Due to Defendant's actual notice of the ongoing suit and subsequent judgment,
14 Defendant's failure to take adequate measures in response to his notice, and the complete
15 absence of explanation for the delay, Defendant's motion to vacate the default judgment
16 rendered against him on 007, should be denied.

17 IV

18 THE DEFENDANT'S MOTION IS PROCEDURALLY DEFECTIVE AND SHOULD, 19 THEREFORE, BE DENIED

20 Defendant seeks relief from the default judgment entered against him in this case
21 pursuant to Section 473.5. Yet Section 473.5 is the wrong mechanism for relief on the grounds
22 sought by Defendant. Relief from default based on an allegedly false return of service should be
23 sought under Section 473, subd. (d), or under the court's inherent equitable power to set aside a
24 judgment obtained by fraud. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249;
25 *In Re: Marriage of Smith* (1982) 135 Cal.App.3d 543, 546, 555; see also, *Munoz v. Lopez* (1969)
26 275 Cal App.2d 178.) As the court stated in *Smith, supra*, "We reiterate that section 473.5 does
27 not govern a default or a default judgment obtained through a fraudulent return of service of
28 summons." (*Smith, supra*, at p. 546.)

1 Defendant's motion should, therefore, be denied based on its procedural defects.

2 V

3 **PLAINTIFF WILL SUFFER PREJUDICE IF MOTION IS ALLOWED; DEFENDANT'S**
4 **MOTION SHOULD, THEREFORE, BE DENIED**

5 Plaintiff will be severely prejudiced if the judgment in this action is set aside. Plaintiff
6 took reasonable and prudent actions to verify a good address for service of the summons and
7 complaint prior to filing the complaint. The Postmaster confirmed the address of
8 Los Angeles, California for Defendant and denied confirmation
9 of the address of c, California for Defendant. The
10 summons and complaint were in fact served by a registered process server at the address.
11 Despite being in contact with Plaintiff as early as October 15, 2007, Defendant never provided
12 Plaintiff with any other address. At no time did Defendant, or Defendant's mother, return the
13 documents, or correct Plaintiff as to the address used.

14 The costs expended by Plaintiff to pursue enforcement of the judgment in this case,
15 coupled with the failure of Defendant to properly respond to the enforcement, has caused
16 Plaintiff to rely on the judgment and will consequently cause Plaintiff prejudice if the judgment
17 is vacated. Consequently, Defendant's motion should be denied.

18 VI

19 **DEFENDANT'S MOTION, IF ALLOWED, SHOULD BE PREMISED ON PAYMENT**
20 **OF PLAINTIFF'S COSTS IN ENFORCING JUDGMENT**

21 If the court is inclined to grant defendant's motion for relief, then Code of Civil
22 Procedure § 473(c)(1) grants the court authority to order defendant to pay plaintiff's costs. Code
23 of Civil Procedure § (c)(1) states in part:

24 Whenever the court grants relief from a default, default judgment or
25 dismissal based on any of the provisions of this section, the court may do
26 any of the following:...

27 (C) Grant other relief as is appropriate.

28 Plaintiff opposed this motion for many reasons, not the least of which is the effort

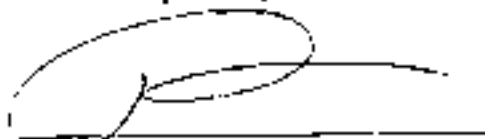
1 Plaintiff has gone to enforcing in what it believes, in good faith, is a valid judgment. Any order
2 to vacate the judgment should be conditioned upon defendant's payment to plaintiff's attorney
3 the cost of the pursuing this judgment, which amounts to the sum of \$625 (See *Declaration of*
4 *Brighton Hushing-Kline*). The Plaintiff has waived attorney's fees per the request for Default
5 and Default Judgment.

6 **CONCLUSION**

7 In light of the foregoing, Plaintiff submits that Defendant's Motion to Vacate Default
8 Judgment should be denied. If the Motion to Vacate Default Judgment is granted it should be
9 premised on the payment of \$625 to the Plaintiff.

10 DATED: 2009

Respectfully submitted,

11 
12 _____
13 Brighton Hushing-Kline
14 Attorney for Plaintiff, GCFS, INC.