

1 _____
(NAME)

2 _____
(ADDRESS)

3 _____
(CITY, STATE, ZIP)

4 _____
(TELEPHONE)

5 Defendant *Pro Se*

6 **EIGHTH JUDICIAL DISTRICT COURT**

7 **CLARK COUNTY, NEVADA**

8)
9 Plaintiff,)

Case No.:

Dept. No.:

10 vs.)

11 Defendant,)

HEARING REQUESTED

12 _____)
13 **DEFENDANT’S RULE 60(c) MOTION TO SET ASIDE DEFAULT AND**
14 **DEFAULT JUDGMENT, AND WRIT PURSUANT THERETO**

15 **AND**

16 **DEFENDANT’S REQUEST FOR**
17 **EVIDENTIARY HEARING AND/OR DISCOVERY RE SERVICE**

18 **AND**

19 **RULE 62 (b) MOTION TO STAY OF EXECUTION OF JUDGMENT PENDING**
20 **HEARING**

21 Defendant, _____, in proper person, pursuant to NRC
22 60(c), hereby moves the Court for an order vacating the Default and the Default Judgment
23 entered herein for the reason that Defendant was never served with Summons and Complaint
24 herein and based upon the authorities set forth below. Defendant requests an evidentiary hearing
25 on this matter to present evidence and to cross examine the person who allegedly served
26 Defendant with Summons and Complaint herein, and/or the opportunity to depose *duces tecum*
27 the person who allegedly served Defendant with Summons and Complaint. Defendant further
28

1 requests that the Writ of Execution and/or Writ of Garnishment entered herein be quashed, and
2 that all wages garnished from Defendant, if any, be returned to Defendant, for the reasons set
3 forth below. Defendant further respectfully requests pursuant to NRCP 62(b) that this Court
4 stay the execution of said Judgment until such time as this motion can be heard.

5 DATED this ____ day of _____, 20__.

6
7 Respectfully Submitted,

8 _____
9 Defendant *Pro Se*
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **POINTS AND AUTHORITIES**

2 **I. BACKGROUND**

3
4 The Complaint herein was filed on _____, 20____. Return of
5 service of the summons and complaint was executed by _____
6 stating that same were served on Defendant on _____, 20____ at
7 _____.

8
9 However, Defendant was never served with a summons and complaint. (*See*: Affidavit
10 attached hereto). Default and Default Judgment were entered herein on _____,
11 20____. Defendant first learned of these proceedings on _____,
12 20____ when Defendant learned (his/her) wages were about to be garnished.

13 Nevada Rule of Civil Procedure 60(c) provides in pertinent part as follows:

14
15 When a default judgment shall have been taken against any party
16 who was not personally served with summons and complaint, either
17 in the State of Nevada or in any other jurisdiction, and who has not
18 entered a general appearance in the action, the court, after notice
19 to the adverse party, upon motion made within 6 months after the
20 date of service of written notice of entry of such judgment, may
21 vacate such judgment and allow the party or the party's legal
22 representatives to answer to the merits of the original action.

23
24 The default judgment in this case must be vacated as the Defendant satisfies the Rule's
25 requirements. Additionally, although a meritorious defense is not required, *see Epstein v.*
26 *Epstein*, 950 P.2d 771 (Nev. 1997), Defendant has the following meritorious defense(s):

27 _____ . Strong policy considerations exist in favor of a trial on the merits. *Price v*
28 *Dunn*, 106 Nev. 100, 787 P.2d 785 (Nev. 1990).

1 With conflicting affidavits before the Court concerning the crucial issue of service of
2 process, the Court should set this matter for evidentiary hearing and/or give Defendant the
3 opportunity to depose the process server as supported by the authorities cited below.

4 **II. CONSTITUTIONAL DUE PROCESS REQUIRES NOTICE**

5 It is axiomatic that notice of a lawsuit and opportunity to defend is fundamental due
6 process of law as required by the Constitution.
7

8 An elementary and fundamental requirement of due process in any
9 proceeding which is to be accorded finality is notice reasonably
10 calculated, under all the circumstances, to apprise interested parties
11 of the pendency of the action and afford them an opportunity to
12 present their objections.

13 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652
14 (1950). Further, personal service must be obtained in order for a court to exercise personal
15 jurisdiction over a party; a judgment rendered without personal jurisdiction over a defendant is
16 void. *Community Ins. Co. v. Sullivan*, 1997 Ohio App. LEXIS 2836 (Ohio Ct.App., 1997).

17 **III. A HEARING IS REQUIRED**

18 In *Casmey v. Smith*, 2004 Wash.App. LEXIS 2406 (Wash.App., 2004), the parties were
19 involved in an automobile accident and the trial court entered a default judgment against
20 appellant Smith. A Florida process server had provided a declaration of service stating that he
21 personally served Smith on September 23, 1997 at 7:55 p.m. at 20837 Rain Dance Lane in Boca
22 Raton by delivering to Smith copies of the summons and complaint. Smith provided a
23 declaration denying personal service. The trial court denied Smith's motion without an
24 evidentiary hearing. On appeal, the Court of Appeals of Washington vacated the judgment,
25 stating that the conflicting declarations on whether Smith was personally served and thus subject
26 to the jurisdiction of the courts required an evidentiary hearing to resolve the credibility of
27

1 witnesses on that point. The affidavits and conflicting declaration of service presented an issue of
2 fact that could only be resolved by determining the credibility of the witnesses. The Court of
3 Appeals of Washington said: “A court may abuse its discretion by failing to hold an evidentiary
4 hearing when affidavits present an issue of fact whose resolution requires a determination of
5 witness credibility.” *Casmey, supra.*, 2004 Wash.App. LEXIS at *5.
6

7 In *Moore v. Baker*, 982 S.W.2d 286 (Mo.App., 1998), Baker was named as a defendant in
8 a suit initiated by Moore after the parties were involved in a car accident. Service of process was
9 made by leaving the papers at a fraternity house. According to a deputy sheriff’s return, the
10 deputy served Baker on August 24, 1997, at a fraternity house near the University of Missouri-
11 Kansas City. A default judgment was entered, and Baker subsequently filed a motion to set aside
12 the default judgment based on a claim of insufficient service of process, alleging that he did not
13 live at the fraternity house on the alleged date of service. The circuit court overruled the motion
14 to set aside without conducting an evidentiary hearing. The Missouri Court of Appeals found that
15 the lower court erred in failing to conduct an evidentiary hearing on Baker’s motion, saying:

16 When a party avers a *prima facie* basis under Rule 74.05(d) for
17 setting aside a default judgment, the circuit court is obligated to
18 convene an evidentiary hearing to give the moving party an
19 opportunity to establish good cause. *Boatmen's First National*
20 *Bank v. Krider*, 802 S.W.2d 531, 532 (Mo. App. 1991). Because
21 the circuit court did not understand its obligation and summarily
22 overruled Baker's motion without an evidentiary hearing, we
23 remand the case to the circuit court so that it can convene a hearing
24 to receive evidence concerning Baker's averments.

25 *Moore, supra.*, 982 S.W.2d at 288. Accord: *Stan Katz Real Estate, Inc. v. Chavez*, 565 P.2d
26 1142, 1143 (Utah, 1977) (on issue involving service of process and whether defendant's usual
27 place of abode was with his mother, the Supreme Court of Utah said “...when no depositions
28 have been taken and disputed material facts are alleged in opposing affidavits, there should be an
evidentiary hearing to aid in the resolution of those facts.”); *TCC Management, Inc. v. Clapp*,

1 2005 Ohio 4357, 2005 OhioApp LEXIS 3946 (Ohio Ct.App., 2005) (hearing required on issue of
2 validity of service of process); *Booker v. Greenville Gravel Co.*, 249 Ark. 330, 459 S.W.2d 408,
3 1970 Ark. LEXIS 1102 (Ark., 1970) (same).

4 **IV. JUDICIAL OVERSIGHT IS NECESSARY IN VIEW OF KNOWN USE**
5 **OF “SEWER SERVICE” AND THE “SUPERMAN” SYNDROME**

6 In *New York City Housing Authority v. Fountain*, 172 Misc.2d 784, 660 N.Y.S.2d 247,
7 253 (N.Y.Civ.Ct., 1997), the court in stating its concern about “sewer service,” footnoted the
8 following:

9
10 The New York State Attorney-General and two City agencies have
11 investigated service of process cases and found that 95% of the
12 process servers reviewed had engaged in "sewer service", while
13 40% of the cases examined involved the "Superman" syndrome--
14 process servers claiming three or more services at different
15 locations at the exact same time. (A Joint Investigative Report Into
16 the Practice of Sewer Service in New York City by the NYS
17 Attorney General, NYC Dept of Consumer Affairs, & NYC Dept
18 of Investigation, at 2 [Apr. 1986].) Further, they found that default
19 judgments were entered in at least one out of every five cases of
20 sewer service they uncovered. (*Ibid.*) Judges have recognized that
21 questionable service practices occur. (*See, e.g., Leader House*
22 *Assocs. v Reyes*, NYLJ, Feb. 16, 1983, at 13, col 3 [Civ Ct, NY
23 County] [the court questioned the sufficiency of the service of
24 process in 341 out of 524 default judgment applications].)

25 *See also: U.S. v. Brand Jewelers, Inc.*, 318 F.Supp. 1293 (D.C.N.Y., 1970), granting injunction
26 against a defendant who systematically was securing default judgments against economically
27 disadvantaged people by using sewer service.

28 Further, Nevada Rule of Civil Procedure 62(b) states in pertinent part:

In its discretion and on such conditions for the security of the
adverse party as are proper, the court may stay the execution of or
any proceedings to enforce a judgment pending the disposition of a
motion . . .relief from a judgment or order made pursuant to Rule
60. NRCP 62(b).

1 Pursuant to the terms of Rule 62(b), Defendant respectfully requests that the execution of the
2 Judgment be stayed, pending the hearing for the motion, as the amount of money being withheld
3 pursuant to the Writ, are beyond what the Defendant can reasonably afford, and are limiting the
4 Defendant's overall ability to pay for life necessities. Thus, the Defendant requests a stay of
5 execution pending the evidentiary hearing before this court.
6

7 **CONCLUSION**
8

9 Defendant is accordingly entitled to an order vacating the Default and the Default
10 Judgment entered herein for the reason that Defendant was never served with Summons and
11 Complaint herein. Defendant requests an evidentiary hearing on this matter to present evidence
12 and to cross examine the person who allegedly served Defendant with Summons and Complaint
13 herein, and/or the opportunity to depose *duces tecum* the person who allegedly served Defendant
14 with Summons and Complaint herein. Defendant also requests the Execution of the Judgement
15 be stayed pending the disposition of the Motion. Defendant further requests that the Writ of
16 Execution and/or Writ of Garnishment entered herein be quashed, and that all wages garnished
17 from Defendant, if any, be returned to Defendant.

18 DATED this _____ day of _____, 20__

19 Respectfully submitted,

20 _____
21 Signature

22 _____
23 Name

24 _____
25 Address

26 _____
27 Telephone
28 Defendant *Pro Se*

1 _____
(NAME)

2 _____
(ADDRESS)

3 _____
(CITY, STATE, ZIP)

4 _____
(TELEPHONE)

5 Defendant *Pro Se*

6 **EIGHTH JUDICIAL DISTRICT COURT**
7 **CLARK COUNTY, NEVADA**

8)
9 Plaintiff,)

Case No.:

Dept. No.:

10 vs.)

11 Defendant,)
12 _____)

13 **AFFIDAVIT OF**

14 The Affiant, _____, being first duly sworn, testifies as follows:

15 1. I was never served with a Summons and Complaint in the above-titled case.

16 2. _____
17 _____
18 _____
19 _____

20 Further, the Affiant sayeth naught.

21 _____
22 STATE OF NEVADA)
23) ss.
24 COUNTY OF CLARK)

25 This instrument was acknowledged before me on
26 the _____ day of _____, 20____
27 by _____.

28 _____
NOTARY PUBLIC in and for said county and state

1 _____
(NAME)

2 _____
(ADDRESS)

3 _____
(CITY, STATE, ZIP)

4 _____
(TELEPHONE)

5 Defendant *Pro Se*

6 **EIGHTH JUDICIAL DISTRICT COURT**

7 **CLARK COUNTY, NEVADA**

8)
9 Plaintiff,)

Case No.:

Dept. No.:

10 vs.)

11 Defendant,)

12 _____)

13 **CERTIFICATE OF U.S. MAILING**

14 I HEREBY CERTIFY that on the ___ day of _____, 20___, I placed a true
15 and correct copy of the foregoing **MOTION TO SET ASIDE DEFAULT AND DEFAULT**
16 **JUDGMENT, AND TO STOP GARNISHMENT, AND REQUEST FOR EVIDENTIARY**
17 **HEARING AND/OR DISCOVERY** in the United States Mail in Las Vegas, Nevada with first-
18 class postage prepaid, addressed to the following:

19 _____
20 _____
21 _____
22 _____

23 _____
24 Defendant *Pro Se*
25
26
27