S277510

C092450

IN THE

SUPREME COURT OF CALIFORNIA

CALIFORNIA CAPITAL INSURANCE COMPANY, et al.,
Plaintiff and Respondent,

vs.

CORY MICHAEL HOEHN
Defendant and Appellant.

ON REVIEW OF DECISION OF THE THIRD DISTRICT COURT OF APPEAL, FOLLOWING APPEAL FROM A JUDGMENT OF
THE PLACER COUNTY SUPERIOR COURT
HON. MICHAEL JONES • CASE NO. SCV0026851

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The opinion below imperils one of the bedrock principles of our jurisprudence: notice is a basic requirement of due process, and therefore a judgment obtained without proper service is Constitutionally infirm. [*Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1985)]. The opinion below allows default judgments void for lack of proper service to retain validity, if the judgment is shown to be void by "extrinsic evidence," as opposed to on its face. This holding fosters an increasingly rampant problem of debt collectors who capitalize on collecting default judgments from defendants who never knew they were served in the first instance. This practice is known as "sewer service." [*See* Jake Harper, "A California Debt Collector has Sued Thousands of People—Some of Them Never Knew," *inewsource*, April 6, 2023 (last accessed June 13, 2023)]. In one recent study, a debt collection company filed nearly 2,800 lawsuits in California between April 2019 and 2023, and not a single defendant was delivered a summons directly. [*Id*]. Instead, the process service claimed the summons was left with another person at the defendant's residence, often identified as a John or Jane Doe. [*Id*]. These acts affect those who are most vulnerable in our population, and who can't afford to hire counsel to extricate them from these lawsuits, even if they were aware they had been sued in the first instance. And the problem is a big one: in San Diego alone, debt collection cases constituted over one-half of the 23,068 civil lawsuits in 2021, and one-third of the 29,790 lawsuits in 2022. [*Id.*].

This problem is exemplified by this case, in which a debt collector seeks to enforce over a half a million dollar judgment arising from a complaint that Petitioner Hoehn never received. An insurance company, not knowing who started the fire at Mr. Hoehn's

apartment, sued Mr. Hoehn but did not serve him, instead claiming it served his teenage girlfriend, who was not a member of his household. After obtaining a default judgment, the insurance company did exactly nothing for seven years. [PB18; *see also* AA152]. At that point, it assigned the judgment to debt collector Sequoia. Then, nine years after the default judgment was entered, Sequoia moved to garnish Mr. Hoehn's wages, which is when Mr. Hoehn first learned of the judgment against him. [AA24 at ¶ 10]. Sequoia used the passage of time to its advantage, and successfully argued to the trial court and the Court of Appeal that Mr. Hoehn was time-barred from moving to vacate the judgment, under a line of authority holding that there is a two-year time limit to vacate a concededly void judgment under California Code of Civil Procedure section 473(d)[1] where the judgment is shown to be void by extrinsic evidence, rather than on its face.

Despite the importance of this issue and the fact that debt collector Sequoia has greatly profited from precedent holding that there is a time limitation on moving to vacate a concededly void judgment under section 473(d), Sequoia's Respondent's Brief either has no answer to or concedes much of the issues presented,[2] revealing the startling lack of

[1] Unless otherwise noted, all section references are to the California Code of Civil Procedure.

[2] In addition to the issues presented, Sequoia also argues that there is an "issue" whether the trial court abused its discretion in overruling Plaintiff's evidentiary objections to the triple-hearsay as to an alleged telephone call from Mr. Hoehn to the attorney for the insurance company. [RB16]. This was not an issue presented for review by this Court. Sequoia conceded in its Respondent's Brief on Appeal that this evidence was "of no consequence or relevance." [AOB, citing Reply Br. at 17]. Additionally, Sequoia argues two points that Mr. Hoehn did not appeal in the first instance—the lack of service on Mr. Hoehn of the application for default judgment, and the amount awarded by the default judgment exceeded that plead in the complaint. [RB18-20].

justification for the Court of Appeal's Opinion below, and the line of appellate authority that it relies upon.

Issue No. 1: Is there a two-year time limitation for a defendant to move to vacate a judgment void for lack of proper service under section 473(d), depending on whether the judgment is shown to be void by extrinsic evidence or is void on its face?

Sequoia argues that the trial court did not "abuse[] its discretion" [RB8] for two reasons: (i) Mr. Hoehn's arguments were waived [RB16]; and (ii) *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180 is "well-settled precedent." [RB 14-15]. These arguments fail.

- First, the standard of review is de novo. The question presented is a matter of pure statutory interpretation: is there a time limit on moving to vacate a judgment void for lack of proper service under section 473(d), depending on the manner in which it was proven to be void? This Court considers questions of statutory interpretation de novo. [*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387].

- Second, Sequoia's waiver claim is demonstrably false, and was already rejected by the Court of Appeal below. Mr. Hoehn based on Motion to Vacate the Judgment on same issue presented here: Mr. Hoehn contended there are no time limits on moving to vacate a judgment under section 473(d). [AA10-22]. Sequoia responded by arguing that because Mr. Hoehn showed that service was proper by means of extrinsic evidence, he was time-barred from moving to vacate a void judgment under section 473(d). [AA204, citing *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114]. In his Reply Brief, Mr. Hoehn argued to the trial court that it ***should not follow*** *Rogers'* reasoning grafting the time limitations of a separate statute onto section 473(d) because it is contrary to the applicable statutory and Supreme Court authority) [AA221]. Having found that Mr. Hoehn did not waive the issue, the Court of Appeal issued an opinion resolving the legal issue in Sequoia's favor.

- Third, Sequoia argues without any analysis or justification that this Court "must" uphold the *Trackman/Rogers*[3] line of authority applying a two year limitation on

[3] [*Rogers v. Silverman* (1989) 216 Cal.App.3d 1114 ("*Rogers*"); *Trackman v. Kenney* (2010) 187 Cal.App.4th 175 ("*Trackman*")].

motions to vacate a void judgment under section 473(d) by applying section 473.5 "by analogy." But Sequoia does not recognize or even address Mr. Hoehn's argument that the plain language of section 473(d) does not include a time limitation, and grafting the time limitations of section 473.5 onto section 473(d) violates fundamental principles of statutory interpretation. [PB31-34]. Nor does Sequoia address the conflicting case law, including binding precedent from this Court and the Supreme Court that judgments void for lack of proper service must be vacated. [PB34-41].

Issue No. 2: Does proving "extrinsic fraud" when moving to vacate a judgment void for lack of proper service require proof not only of improper service, but also an additional showing of scienter involving "inequitable conduct" that "lulled [the defendant] into a state of false security?" [Slip. Op. Exh. A, at 8, n. 7].

Sequoia makes no argument in defense of the Court of Appeal's Opinion on this second, independent reason for reversal.

- Sequoia ***does not contest*** that (i) Mr. Hoehn has a meritorious defense; (ii) Mr. Hoehn had a satisfactory excuse for not appearing to defend in the case; and (iii) Mr. Hoehn showed diligence in seeking to vacate the judgment once it was discovered. [PB4-44]. Nor does Sequoia attempt to defend the Court of Appeal's sole reason for denying this ground for vacatur of the default judgment, which was that proof of extrinsic fraud requires showing the additional element of fraudulent conduct. [PB45-48].

Sequoia's silence as to any principled reason to continue to allow an artificial division holding that section 473(d) applies to some void judgments but not to other void judgments—as the Court of Appeal did in this case—reveals the fatal infirmities in this line of precedent. Our state is overwhelmed with debt collection actions, and those whom it affects are the most vulnerable among us. Placing a two-year time limit on moving to vacate a void judgment under section 473(d) only promotes an already rampant problem: any unscrupulous plaintiff or process server is rewarded for falsely attesting to proper

substituted service, and then waiting to enforce the judgment until just before the expiration of the 10-year time period. [Cal. Code Civ. Proc. § 415.20(b)]. At that point, the defendant's only remedy is the far more cumbersome proposition of a proceeding in equity, which includes proving a meritorious case after the passage of time has compromised witnesses and documents. It is time for this Court to reject the statutory interpretation of section 473(d) that places a time limit on vacating concededly void judgments, and thereby violates this Court's precedent both as to basic principles of statutory interpretation and fundamental Constitutional rights.

Petitioner requests reversal.

DISCUSSION

I. The Court of Appeal erred in applying a two year time limitation to section 473(d).

A. The standard of review for this issue of pure statutory interpretation is de novo.

Sequoia is incorrect that a discretionary standard of review is applicable to the issue as to whether two year statute of limitations applies to section 473(d) [RB13].

First, the question presented is whether when improper service is shown by means of extrinsic evidence, the statute of limitations from section 473.5 applies "by analogy" to section 473(d) to limit the time period in which a defendant may move to set aside a void judgment to two years. Because this issue of statutory interpretation is a pure question of law, the standard of review is *de novo*. [*Life Savings Bank v. Wilhelm* (2000) 84 Cal. App.4th 174, 177, *citing California Teachers Assn. v. San Diego Community College Dist*. (1981) 28 Cal.3d 692, 699 ("The sole issue on appeal is whether the three-month period

acts as a statute of limitations such that no relief can be had under section 473 for mistake, inadvertence or excusable neglect. This being a pure question of law, we review the trial court's decision de novo.")].

Second, while a trial court's order as to whether to set aside a void order is reviewed for abuse of discretion [*Nixon Peabody, LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822], this does not apply where the order is made based on a mistake of law. Specifically, both the trial court and the Court of Appeal held that the judgment could not be vacated under section 473(d) on the mistaken legal conclusion that section 473.5 applies "by analogy" to place a time limitation of two years on moving to vacate the judgment, if the judgment is shown to be void for lack of proper service by "extrinsic evidence." Rulings based on a mistake of law are by definition an abuse of discretion. [*Hernandez v. Amcord* (2013) 215 Cal.App.4th 659, 678]. Indeed, none of the authority upon which Sequoia relies holds that a trial court has discretion under section 473(d) to deny a motion to vacate a default judgment, once it has been determined that a judgment is void for lack of proper service. Instead, these cases analyze the court's determination as to whether a judgment is void in the first instance, and apply a de novo standard of review. [RB13, *citing Nixon Peabody, LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822 (holding that a voluntary dismissal of an action is not "void"); *see also Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc.* (2018) 23 Cal.App.5th 1013, 1018 (holding that a default judgment awarding damages in excess of the demand is void); *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496 (trial court erred in holding that service was improper and the

judgment was void where the plaintiff properly served the defendant corporation with the summons and complaint)].

B. The central basis of Mr. Hoehn's Motion to Vacate the Default Judgment was that section 473(d) has no time limit; Sequoia's "waiver" argument is meritless.

Debt collector Sequoia argues (repeatedly) that Mr. Hoehn did not preserve the issue as to whether the trial court can place a time limit on a motion to vacate a judgment void for lack of proper service under section 473(d). [RB at 8-9, *citing Mattco Forge Inc. v. Arthur Young* (1997) 52 Cal. App. 4th 820]. Notably, Sequoia made the same argument to the Court of Appeal. [RB Below at 15-16]. The Court of Appeal did not entertain this argument, and instead the Court of Appeal wrote a full opinion on the legal issue as to whether the *Trackman/Rogers* applies to place a time limitation on moving to vacate a judgment void for lack of proper service under section 473(d).

The doctrine that parties cannot adopt a "new and different theory on appeal" [*Mattco, supra*, 52 Cal.App.4th at 847] thus does not apply to this case. Whether section 473(d) has a time limitation was at the heart of the dispute between Mr. Hoehn and debt collector Sequoia. Petitioner Hoehn at all points argued that there is no time limitation in the plain language of section 473(d) (the issue this Court granted for review). Indeed, the lack of any time limitation in the plain statutory language of section 473(d) was the very premise of Mr. Hoehn's motion to vacate the concededly void judgment. As is readily apparent from the record, Mr. Hoehn's moving papers set forth that when service has not been properly affected (as is conceded here), the default judgment violates due process of law, and under section 473(d) may be set aside at any time. [AA10-22]. In defense, Sequoia

did not dispute that the service was improper. Instead, Sequoia countered that the *Trackman/Rogers* line of case law applied to limit the time, claiming that there was a time limitation to move to vacate a judgment under section 473(d). [AA201-206, *citing Rogers v. Silverman* (1989) 216 Cal. App.3d 1114]. In response to this argument, Mr. Hoehn's Reply brief expressly contended that the trial court ***should not follow*** *Rogers'* reasoning grafting the time limitations of a separate statute onto section 473(d) because it is contrary to the applicable statutory and Supreme Court authority. [AA221]. Therefore, Sequoia's argument that Mr. Hoehn never argued that the trial court is "not bound by existing controlling authority" [RB8] is incorrect.

Moreover, even if this issue were "waived" (which it most decidedly was not), where the question is a pure matter of law based on undisputed facts, the court of appeal may consider the legal issue whether or not it was raised below. [*U.S. Bank Nat'l Assoc. v. Yashouafar* (2014) 232 Cal.App.4th 639, 645 n. 4; *see also Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 178 (court of appeal chose to consider purely legal question although not raised in trial court below)].

Finally, Hoehn implies that absent oral argument on the trial court's tentative ruling, the Petitioners waived their issues on appeal. "The trial Court's Order was issued only after Appellant waived oral argument, and both parties submitted on the tentative ruling which became the Court's final ruling." [RB at 7]. But it is well-settled that an argument is preserved in a party's papers, there is no need to contest the tentative ruling to preserve the issue for appeal. [*Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406].

C. Sequoia offers no justification for placing a time limitation on motions to vacate a void judgment under section 473(d).

1. Sequoia has no response to Mr. Hoehn's argument that the *Trackman/Rogers* line of authority violates principles of due process and statutory interpretation.

The Court of Appeal erred as a matter of law in holding that Mr. Hoehn's motion to set aside the default and default judgment was untimely, because this holding—and reliance on the *Trackman/Rogers* line of authority—is contrary to governing Supreme Court, California Supreme Court, and statutory authority, which hold that a court lacks jurisdiction over the person if service of summons is not proper, and this may be set aside at any time. [*See* PB27-33]. Mr. Hoehn demonstrated that the *Trackman/Rogers* line of authority grafting the two year time limitations of section 473.5 onto section 473(d) conflicts with the plain language of the statute, and upends the overwhelming balance of authority that when a judgment is undisputedly void, then the court has no jurisdiction and it may be set aside at any time. [PB26-40; *Peralta v. Heights Medical Center, Inc*. (1988) 485 U.S. 80, 84 ("[A] judgment entered without notice or service is constitutionally infirm."), *see also* Weil, et al., Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter Group – June 2021) at ¶ 9:67.7b (United States Supreme Court opinions are binding authority)]. Sequoia has no rebuttal to any of the cases or statutory analysis discussed at length in Petitioner's Opening Brief.

Indeed, one of the authorities that Sequoia contends is "controlling"—*OC Interior Services, LLC v. Nationstar Mortgage, LLC* [RB14]—affirms Mr. Hoehn's position. *OC Interior Services* holds that "[w]hether the lack of jurisdiction appears on the face of the

judgment roll, or is shown by extrinsic evidence for a judgment that appears valid on its face, 'in either case the judgment is for all purposes a nullity—past, present and future.'" [*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1330-1331 (holding that a void default judgment is void without time limit), *quoting City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 732]. *OC Interior Services* explains that "if a party admits facts showing that a judgment is void, or allows such facts to be established without opposition, then as a question of law, a court must treat the judgment as void on its face**.**" [*OC Interior Services, supra,* 7 Cal.App.5th at 1328 (emphasis added)]. In such an instance, if the parties "fail to object to the evidence of the facts showing a lack of jurisdiction, it is then established that the judgment is void as effectively as shown by the record; and whenever such fact is brought to the attention of the court, it is the duty of the court to so declare as a matter of law." [*Id.* at 1329, *quoting Brockway etc. Co. v. County of Placer* (1954) 124 Cal.App.2d 371, 376]. Applying *OC Interior Services* to this case: Sequoia has allowed facts establishing that service was improper to be established without opposition, thus the judgment must be considered void on its face, and therefore it was the duty of the trial court to declare so as a matter of law. (Sequoia argues to this Court, but did not argue to raise to the trial court, that teenage girlfriend "Ms. Smith was inside his residence, over 18 years, ostensibly in charge of his residence . . ." [RB at 20]. But Sequoia did not present evidence or argument to the trial court that Ms. Smith had "ostensible control" of the residence such that she was a statutorily sufficient "competent member of the household." [Cal. Code Civ. P. § 415.20(b)]. And, therefore not surprisingly, Sequoia does not cite to anywhere in the trial record below where it made this argument). Second,

Sequoia offered no evidentiary objection to Mr. Hoehn's ***undisputed*** declaration that Ms. Smith was not an occupant of his household and that he lived with his roommate Kirk Haynes. [AA24 at ¶ 7].

Outside of *Rogers/Trackman,* Sequoia's remaining citations do not base their holdings on any time limits to challenge a concededly void judgment, and therefore any statements as to timeliness in these cases are *dicta* and have no bearing on this case. [*See, e.g,* RB14-17, *citing Pittman v. Beck Park Apartments Ltd* (2018) 20 Cal.App.5th 1009, 1024-1025 (holding that trial court retains jurisdiction to decide a vexatious litigant motion even after dismissal of the case because it is "an ancillary issue and has no bearing on the finality of the judgment or dismissal . . . A contrary rule would allow a litigant to strategically escape a vexatious litigant finding altogether by dismissing a party or an action prior to a ruling on the vexatious litigant motion and then refiling his or her claims in a later proceedings."); *Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97 (affirming trial court's ruling setting aside default judgment based on extrinsic mistake; no time limits to set aside based on extrinsic fraud or mistake); *Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 19 (no party objected to the challenge to judgment based on timeliness; Court of Appeal reversed the denial of a motion to vacate a stipulated judgment); *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1438 (affirming trial court's order setting aside a default and default judgment void on their face)].

2. There is no policy justification for differentiating between a judgment shown to be void on its face or by extrinsic evidence.

The Court of Appeal below offers no valid policy reason for distinguishing between judgments shown to be void on their face versus void by extrinsic evidence, apart from "stability in the law" and a suggestion that the Legislature somehow intervene to correct the already plain language of the statute. [Slip. Op. at 3 n. 5]. Nor does *Trackman* offer any rationale for the distinction which lead to the Court of Appeal to the puzzling holding in this case that: "We agree that a void judgment can be attacked at any time. But if a void judgment is valid on its face, it cannot be attacked via section 473, subdivision (d) at any time." [Slip. Op. at 6-7].

Sequoia argues that the difference between judgments void on their face versus judgment shown to be void by extrinsic evidence is "essential to the Court's determination as to the timing and procedural mechanism available to attack a judgment or order." [RB at 14, citing *OC Interior Services, supra,*7 Cal.App.5th at 1326]. But while *OC Interior Services* explains the "complicated" history of distinguishing between attacks on judgment void on the face of the record versus void as shown by extrinsic evidence [*id.* at 1327-1329], it does not explain the policy reasons for such a justification.

In fact, it makes no sense to apply a different standard under section 473(d) to judgments based on whether they are shown to be void on their face as opposed to by extrinsic evidence. In other contexts, such as the applicable standard of review, there is no such distinction. Thus, a trial court's order as to whether a judgment is void is reviewed de novo, regardless of whether the judgment is shown to be void on its face or by extrinsic

evidence. [*Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822]. This is consistent with this Court's holding that de novo standards of review apply to issues implicating federal constitutional rights. [*See, e.g., People v. Cromer* (2001) 24 Cal.4th 889, 892-894 (applying de novo standard of review to the "mixed question" of whether the prosecution had exercised sufficient diligence in trying to procure an absent witness, as relevant to protecting the defendant's state and federal constitutional right to confront that witness)]. The U.S. Supreme Court likewise holds that "appellate courts should use independent, de novo review, for the mixed question determinations that implicated these constitutional rights." [*Id.* at 894]. Similarly, "'[W]hether [a party is] constitutionally entitled to a jury trial ... is a pure question of law that we review de novo.' (Citations). Unwarranted denial of the right to a jury trial is in excess of the trial court's jurisdiction and constitutes reversible error per se. (Citation)" [*Brown v. Mortensen* (2019) 30 Cal.App.5th 931, 938]. But even though our Courts of Appeal seek to protect a party's right to proper service by means of a de novo standard of review as to whether a judgment is void—whether it is shown to be void on its face or extrinsic evidence—the Court of Appeal below and the *Trackman/Rogers* line of authority apply a different standard to these judgments under section 473(d), depending on whether the judgment is void on its face or as shown by extrinsic evidence. This paradox cannot be reconciled.

And if one reason for treating collateral attacks on judgments through extrinsic evidence differently is that the passage of time will harm a plaintiff's ability to counter extrinsic evidence, a policy assisting the plaintiff seeking enforcement of a default judgment is counter to well-settled precedent that appellate courts are "favorably disposed

toward orders excusing defaults and permitting controversies to be adjudicated upon their merits." [*Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1411-1412]. "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default. [Citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.'" [*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980, *quoting Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233]. Indeed, federal courts applying Federal Rule of Civil Procedure 60(b)(4)—which uses essentially the same language as California Code of Civil Procedure section 473(d)—place the burden on plaintiffs to establish that service was properly effected, unless the defendant is proven to have actual notice of the complaint but was delayed in making a motion until after the entry of the default judgment. [*SEC v. Internet Solutions for Business, Inc*., 509 F.3d 1161, 1165 (9th Cir. 2007)]. And even if a defendant proves by extrinsic evidence that it was improperly served, the judgment is void for all purposes, and the trial court must vacate the judgment.[4] [8 C. Wright & A. Miller, Federal Practice and Procedure, § 2862, Void Judgment (3d ed. 2022)].

The Court of Appeal below erred in denying Mr. Hoehn's motion to vacate default and default judgment as untimely under section 473(d) by applying section 473.5(a) "by analogy." Where, as here, the judgment is undisputedly void for lack of proper service, it

[4] *See* Letter in Support of Review from Professor David Freeman Engstrom, LSVF Professor in Law, Stanford Law School to Chief Justice Tani Cantil-Sakauye and Associate Justices (Dec. 28, 2022) at 2.

may be set aside at any time, whether the judgment is facially void or shown to be void by extrinsic evidence.

II. Sequoia offers no response to Petitioner's second issue as to extrinsic fraud, which independently requires reversal.

Alternatively, motions to vacate for extrinsic fraud or mistake are "not governed by any statutory time limit." [*Dept. of Indust. Relations v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560, 570].

Sequoia offers no argument whatsoever in response to Mr. Hoehn's second and wholly independent ground for reversal, which is that the trial court abused its discretion in not vacating the judgment based on extrinsic fraud or mistake, for which there is no time limit to set aside the judgment. Thus, Sequoia does not contest that (i) Mr. Hoehn has a meritorious defense; (ii) Mr. Hoehn had a satisfactory excuse for not appearing to defend in the case; and (iii) Mr. Hoehn showed diligence in seeking to vacate the judgment once it was discovered. [PB41-48]. Nor does Sequoia attempt to defend the Court of Appeal's sole reason for denying this ground for vacatur of the default judgment, which was the mistake of law that improper service does not constitute extrinsic fraud or mistake, and it was error to add a fourth requirement to extrinsic fraud such that the Plaintiff must prove some type of undefined "inequitable conduct." [Slip. Op. at 8 n.7]. Indeed, Sequoia itself cites to authority excusing the defendant from default judgment based on extrinsic fraud or mistake where the defendant did not receive *service* of default or default judgment. [*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97 (affirming trial court's ruling setting aside default judgment based on extrinsic mistake); *see also Rappleyea v. Campbell*

(1994) 8 Cal.4th 975, 981 (where plaintiff filed untimely motion for relief for default judgment, our Supreme Court concluded that the record mandated relief from the default and default judgment on the basis of equitable mistake)].].

As is set forth in Petitioner's Opening Brief, the Court of Appeal erred in applying a fourth criteria of undefined "inequitable conduct" to the test for extrinsic fraud [PB45-48], and there is no dispute that Mr. Hoehn met the three established criteria. Accordingly, this Court should also reverse on this separate, independent ground.

CONCLUSION

Petitioner prays that this Court reverse the holding of the Court of Appeal on both issues presented, and for such relief as to which Petitioner may be entitled.

DATED: June 15, 2023

KAZAN, McCLAIN, SATTERLEY & GREENWOOD
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By: DocuSigned by: Denyse Clancy 99B5571DD2304AE...
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, the foregoing is proportionally spaced and contains 4,759 words, according to the word processing program used to prepare it.

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PROOF OF SERVICE

California Capital Insurance Company, et al. v. Cory Michael Hoehn
SUPREME COURT CASE NO. S277510
Court of Appeal, Third Appellate District Case No. C092450
Placer County Superior Court Case No. SCV0026851

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is Jack London Market, 55 Harrison Street, Suite 400, Oakland, CA 94607.

On June 15, 2023 I served true copies of the following document(s) described as:

PETITIONER'S REPLY BRIEF ON THE MERITS

on the interested parties in this action as follows:

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BY TRUEFILING NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the True Filing system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on June 15, 2023 at Richmond, California.

Paula Katayanagi

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CALIFORNIA CAPITAL INSURANCE COMPANY v. HOEHN**
Case Number: **S277510**
Lower Court Case Number: **C092450**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **dclancy@kazanlaw.com**

3. I served by email a copy of the following document(s) indicated below:

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Date

/s/Denyse Clancy

Signature

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