SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: January 11, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV419611	San Jose Towers, LLC et al. v. Urban Community Fund, LLC	OFF CALENDAR. Plaintiff has withdrawn the application for order of examination.
LINE 2	21CV389929	Tianqing Li v. Phillip Mummah	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 3	21CV389929	Tianqing Li v. Phillip Mummah	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 4	20CV369203	Jane Doe 1 et al. v. Don Adrian Garcia Francisco et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	21CV388533	YaVaughnie Wilkins v. Ashley Snow	Motion to compel deposition of defendant Ashley Snow: the court finds that Snow unduly delayed the taking of her deposition, which was largely the result of putting it off for *more than a year* to retain counsel. The court GRANTS the motion and orders Snow to appear for deposition within 30 days of notice of entry of this order. In addition, the court orders Snow to pay monetary sanctions of **$810** (2.5 hours of counsel's time plus the filing fee) to plaintiff Wilkins within that same timeframe.
LINE 6	22CV407294	Help & Care, LLC v. Earl F. Gil et al.	The moving party has withdrawn this motion at the very last minute (the afternoon of 1/9/24), after the court already prepared a tentative ruling. The court does not appreciate the parties' lack of consideration, but it will take this motion OFF CALENDAR.
LINE 7	20CV375017	Scott T. Urban v. Cindy F. Cheng	Click on LINE 7 or scroll down for ruling.
LINE 8	21CV390730	Patricia Yau v. Joe Eustice et al.	Click on LINE 8 or scroll down for ruling.

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LINE 9	22CV395808	Karla Ruiz v. Surinder Singh	Motion for leave to file amended answer: notice does not appear to be proper. Defendant filed this motion without a hearing date, and there is no amended notice of hearing on file, as required by local rule. The court has received no response to the motion. Parties to appear to address the notice defect.

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Calendar Lines 2-3
Case Name: *Tianqing Li v. Phillip Mummah*
Case No.: 21CV389929

I. BACKGROUND

This is an action for declaratory relief arising out of an alleged loan agreement between plaintiff Tianqing "Cindy" Li and defendant Phillip Mummah. Li initiated this action on December 22, 2020 by filing a verified complaint for declaratory relief in San Mateo County Superior Court. Pursuant to Code of Civil Procedure section 395, subdivision (a), the parties transferred the case to this county, as Santa Clara County is where Mummah resided at the outset of the action.

On April 22, 2022, Li filed the operative first amended complaint for declaratory relief ("FAC"). On September 2, 2022, Mummah filed an answer to the FAC and a cross-complaint alleging a violation of the federal and California Fair Debt Collection Practices Acts. On March 6, 2023, Li filed a motion for judgment on the pleadings ("JOP motion") versus the answer on two grounds: 1) that the answer could not defeat the declaratory relief claim, and 2) that equitable estoppel barred Mummah's assertion of the seventh affirmative defense for statute of frauds. On June 29, 2023, the court denied the JOP motion as to the first ground but granted it with 30 days' leave to amend as to the second ground. Mummah then filed an amended answer to the FAC (the "FAA") on July 31, 2023.

Currently before the court is Li's demurrer to the FAA, filed on August 9, 2023. It contends that many of the affirmative defenses are uncertain or fail to state facts sufficient to constitute a defense. Also before the court is Li's motion to strike the FAA, based on the fact that it is unverified, even though the FAC to which it responds is verified.

II. REQUESTS FOR JUDICIAL NOTICE

In support of the demurrer and motion to strike, Li submits the following exhibits for judicial notice:

1. Defendant's FAA;

2. Plaintiff's Verified FAC; and

3. Plaintiff's Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings.

The court GRANTS judicial notice of Exhibits A and B, as they are court records under Evidence Code section 452, subdivision (d).

Although the existence (but not the contents) of Exhibit C is potentially subject to judicial notice under Evidence Code section 452, subdivision (d), the court DENIES the request, as the existence of this document is not "necessary, helpful, or relevant" to the arguments on demurrer. (See *Aquila, Inc. v. Super. Ct. (City and County of San Francisco)* (2007) 148 Cal.App.4th 556, 569, [stating that "[a]lthough a court may judicially notice a variety of matters . . . only relevant material may be noticed . . . judicial notice . . . is always confined to those matters which are relevant to the issue at hand"].)

III. DEMURRER TO THE FAA

A. Legal Standard

"The answer to a complaint shall contain: [¶] (1) The general or specific denial of the material allegations of the complaint controverted by the defendant. [¶] (2) A statement of any new matter constituting a defense." (Code Civ. Proc., § 431.30, subd. (b).)

A general denial places at issue the material allegations of the complaint. (*Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 627; see also *FPI Development, Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 383 (*FPI Development*).) "A material allegation in a pleading is one essential to the claim or defense and which could not be stricken from the pleading without leaving it insufficient as to that claim or defense." (Code Civ. Proc., § 431.10, subd. (a).)

An affirmative defense is "new matter" not in issue under a general denial. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239 (*Harris*) ["if the onus of proof is thrown upon the defendant, the matter to be proved by him is [a] new matter"].) "New matter" must be specifically pled in the answer. (*Ibid*.) Thus, "affirmative defenses cannot be pled as mere legal conclusions but must instead be alleged with as much factual detail as the allegations of a complaint." (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813 (*Quantification Settlement*).)

B. Discussion

Li contends that all nine affirmative defenses are uncertain and fail to state facts sufficient to constitute a defense. In his opposition, Mummah responds solely to the arguments against the seventh and ninth affirmative defenses.

1. Uncertainty

As an initial matter, the court OVERRULES the demurrer to the FAA on the ground of uncertainty. Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 ("*Khoury*").) Demurrers for uncertainty cannot be sustained where the facts alleged are presumptively within the knowledge of the demurring party or ascertainable by invoking discovery procedures. (See *Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 822.) It is clear from Li's demurrer and arguments against the affirmative defenses that she understands what each defense attempts to assert. While there may be inconsistent theories pled in the FAA—which is allowed—there is no true uncertainty.

2. Sufficiency of the Pleadings

a) Defense Challenging the Sufficiency of the FAC

The court OVERRULES the demurrer to the first affirmative defense (insufficient facts to state causes of action). A defense based on the failure to state a cause of action does not require facts to be pled in support thereof; because it contradicts the material allegations of the

complaint, it does not raise new matter. (See Code Civ. Proc. § 430.20; *Harris, supra,* 56 Cal.4th at p. 239.)

b) Affirmative Defenses Raising New Matter

(1) Uncontested Affirmative Defenses

The court SUSTAINS Li's demurrer to the second (estoppel), third (waiver), fourth (unclean hands), fifth (statute of limitations), sixth (unjust enrichment), and eighth (laches) affirmative defenses without leave to amend. As to these affirmative defenses, which are merely conclusory, Mummah states in his opposition: "Mummah hereby withdraws the remaining affirmative defenses [*i.e.,* apart from the seventh and ninth affirmative defenses] and declines to amend his answer to state further facts in support thereof."

(2) Seventh Affirmative Defense: Statute of Frauds

The court SUSTAINS the demurrer to the seventh affirmative defense and grants Mummah 10 days' leave to amend. The seventh affirmative defense contends that the statute of frauds bars the causes of action in the FAC because the alleged loan agreements were not in writing.

Li concedes that the FAA provides additional facts in support of the seventh affirmative defense, but she maintains that the defense is still defective for failure to provide citations to legal authority and facts sufficient to constitute a defense. This is not the correct pleading standard; citations to legal authority are not required in a pleading. As noted above, an affirmative defense must "be alleged with as much factual detail as the allegations of a complaint." (*Quantification, supra,* 201 Cal.App.4th at p. 813.) The court therefore only evaluates the seventh affirmative defense for the sufficiency of the facts, not the legal authorities.

Civil Code section 1624 codifies in the statute of frauds and provides, in part:

> **(a)** The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
>
> > **(1)** An agreement that by its terms is not to be performed within a year from the making thereof.
> >
> > **(2)** A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

In the seventh affirmative defense, Mummah alleges that between January 2020 and August 2020, the parties negotiated a promissory note but failed to reach a final, written loan agreement. (FAA, p. 5:10-11; FAC, ¶ 12.) While the defense asserts that the loan agreement falls under both subdivisions (a)(1) and (a)(2) of Civil Code section 1624 (quoted above), it is unclear to which loan agreement these provisions allegedly apply. The FAA refers to (1) an original loan from 2015 to 2016; (2) a new loan agreement that commenced in December 2019; (3) negotiations for a promissory note between January 2020 and August 2020; and (4) a September 2020 attempt to document the unexecuted oral agreement. The FAA does not

provide sufficient information as to which agreements or promises fall under which of these provisions. For this reason, the court finds that the seventh affirmative defense is still insufficient, but it could be made sufficient with more elaboration.

At the same time, the court rejects Li's argument that because Mummah partially performed on the contract and attempted to perform the contract, the statute of frauds is necessarily no longer applicable. This argument relies on extrinsic evidence, goes to the merits of the seventh affirmative defense, and attempts to show that Mummah will not be able to prevail on it, which is not a proper basis for a demurrer. (Code Civ. Proc., § 430.20.) In addition, it ignores a defendant's ability to plead defenses in the alternative.

(3) Ninth Affirmative Defense: Law of Tender

The court OVERRULES the demurrer to the ninth affirmative defense.

The ninth affirmative defense asserts that Mummah has tendered full payment of all amounts due to Li pursuant to Civil Code section 1485, which provides: "An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the obligation." The FAA states that Mummah sent a check for the remaining balance of $122,022.57 in October 2021. (FAA, p. 2-4; FAC ¶ 24.)

Li contends that the affirmative defense is defective for failure to allege the exact date and method by which Mummah sent the check. The court disagrees: there is no authority for the proposition that the date or method of any tender must be specifically pled. Further, as Mummah points out, the allegations within the FAA are taken from the FAC, and Li is already aware of the specific date and method of the tender alleged in her own pleading. (See *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733 ["The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer."]) In the end, in reviewing a demurrer to the answer, the court asks whether a plaintiff has sufficient information to investigate and prepare against the defenses. (See *Harris, supra,* 56 Cal.4th at p. 240 ["The primary function of a pleading is to give the other party notice so that it may prepare its case."]) In this case, Li has sufficient information.

Li also objects to the merits of the ninth affirmative defense, citing "Mummah's conceit about the import of his '$122,022.47 check.'" (Demurrer at p. 8:18-19.) As noted above, this is not a proper ground for demurrer. (Code Civ. Proc., § 430.20.)

IV. MOTION TO STRIKE THE FAA

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (Code Civ. Proc., § 436, subd. (a).) A court may also strike out all or any part of a pleading not filed in conformity with the laws of the State of California. (Code Civ. Proc., § 436, subd. (b).)

In light of the court's ruling on the demurrer, the motion to strike is MOOT. Nevertheless, the court notes that the FAA does in fact violate Code of Civil Procedure section 446, subdivision (a), which provides, "When the complaint is verified, the answer shall be verified." The court expects that Mummah's second amended answer, as to which leave has now been granted, will cure this defect.

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Calendar Line 4
Case Name: *Jane Doe 1 et al. v. Don Adrian Garcia Francisco et al.*
Case No.: 20CV369203

I. BACKGROUND

This is a lawsuit arising from the alleged sexual abuse of plaintiff Jane Doe 1 by defendant Don Adrian Garcia Francisco ("Don")[1] while Jane Doe 1 was a minor. Jane Doe 1's mother (Jane Doe 2) and her minor brother (John Doe 1), are also plaintiffs.

Plaintiffs' original complaint, filed on August 7, 2020, stated three causes of action against Don only. The operative First Amended Complaint ("FAC"), filed on June 7, 2021, states four causes of action: (1) Assault and Battery (against Don only); (2) Intentional Infliction of Emotional Distress (against Don only); (3) Negligence and Negligence Per Se (against Don only); and (4) Negligent Supervision (against Glenna and Napoleon Francisco (Don's parents) and Kelly Ng (Don's girlfriend)).

The FAC alleges that Don sexually assaulted Jane Doe 1 "[f]or approximately four years" starting when she was 12 years old (approximately 2012-2016). (FAC, ¶ 2.) The FAC alleges that "some instances" of abuse or assault took place at Kelly Ng's home in San Jose and alleges, on information and belief, that Ng "had reason to know that" Don "should not have been allowed unsupervised time alone with children." (*Id.* at ¶¶ 6, 8.) The FAC further alleges that on occasion, Jane Doe 2 "entrusted" Don "to provide afterschool childcare services for her two children at Ng's home at 2321 Four Seasons Court, San Jose, CA 95131." (*Id.* at ¶ 20.) It also alleges that some acts of sexual abuse or assault took place while Ng was at home. (*Id.* at ¶ 24.) In paragraph 56, the FAC alleges that "by so carelessly and negligently supervising" Don, Ng "actually and proximately caused Plaintiffs' injuries." These constitute the material allegations against Ng in the FAC.[2]

Currently before the court is a motion for summary judgment filed by Ng on August 28, 2023. Plaintiffs filed their opposition to this motion on December 28, 2023.

II. REQUEST FOR JUDICIAL NOTICE

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the matter to be noticed be relevant to the material issue before the Court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

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[1] As several persons involved in this case share the same last name, the court will occasionally refer to them by their first names for purposes of clarity.
[2] The allegation in paragraph 56 that Ng "carelessly and negligently" managed her property does not support a negligent supervision claim, as no property-based claims (*e.g.*, premises liability) are alleged in the FAC.

With their opposition to this motion for summary judgment, plaintiffs have included a request for judicial notice of four documents, submitted as Exhibits 5, 6, 10, and 11 to the declaration of counsel Julie Fieber.[3]

Plaintiffs' request for judicial notice of Exhibit 5, a copy of a Milpitas Police Department Incident, is DENIED. Evidence Code section 452, subdivision (h) (facts not reasonably subject to dispute and capable of determination by resort to sources of reasonably indisputable accuracy), does not provide any basis for taking judicial notice of the contents of a police report. (See *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145 ["Judicial notice under Evidence Code section 452, subdivision (h), is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].) Regardless of whether the report may otherwise be admissible, it is not subject to judicial notice under subdivision (h).

Plaintiffs' request for judicial notice of Exhibit 6, a copy of the Felony Complaint Case Summary and Felony Complaint from the criminal case against Don, is DENIED. Evidence Code section 452, subdivision (e), cited by plaintiffs, provides for judicial notice of "[r]ules of court." This exhibit is plainly not that.

Plaintiffs' request for judicial notice of Exhibit 10, a copy of document prepared by the Santa Clara County District Attorney's Office and filed in the criminal action against Don, also requested pursuant to subdivision (e), is also DENIED for the same reasons. (Request at p. 1:19-20.)

Assuming that plaintiffs meant to seek judicial notice of Exhibits 5 and 6 pursuant to subdivision (d) (court records) instead of subdivision (e), judicial notice would still be denied. The mere existence of these records is not relevant to any material issue before the court. As for the contents of these records, they may not be judicially noticed under subdivision (d). (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 [truth of contents of court records cannot be judicially noticed].)

Finally, plaintiffs' request for judicial notice of Exhibit 11, copies of pages printed from the web site of the Rape, Abuse & Incest National Network (www.rainn.org), which is being made pursuant to Evidence Code sections 451(f) (facts and propositions of generalized knowledge that are universally known) and 452(h), is DENIED. Neither Evidence Code section applies to the contents of a private organization's web site. (See *Jolley v. Chase Home Finance LLC* (2013) 213 Cal.App.4th 872, 889 ["[W]e know of no 'official web site' provision for judicial notice in California."]; see also *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal App 4th 514, 519 [affirming denial of request to take notice of the truth of the contents of web site pages of the American Coal Foundation and the U.S. Department of Energy]; *Duronslet v. Kamps* (2012) 203 Cal App 4th 717, 737 [refusing to take judicial notice of information on the California Board of Registered Nursing web site];

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[3] As there is no authority for the submission of separate briefs in support of or in opposition to requests for judicial notice the court has not considered the "objections" to the request submitted by Ng with her reply.

Ragland v. U.S. Bank National Assn. (2012) 209 Cal.App.4th 182, 194 [noting that "[t]he contents of web sites and blogs are 'plainly subject to interpretation and for that reason not subject to judicial notice.'"].)

III. NG'S MOTION FOR SUMMARY JUDGMENT

A. General Authority

The pleadings limit the issues presented for summary judgment/adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion."].) "A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion." (*Jacobs v. Coldwell Banker Residential Brokerage Co*. (2017) 14 Cal.App.5th 438, 444.)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code of Civil Procedure ["CCP"] §437c(f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."])

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

"Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. (*Ibid*.) '[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 290, internal citation omitted.) See also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["[a] party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"].)

The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is

most prominent in the context of summary judgment motions . . ."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) Accordingly the court has not considered the second declaration of Johanna Carvajal, submitted with Ng's reply, or the exhibits attached thereto.

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, at 850.)

B. The Basis for Ng's Motion

Ng states that her motion for summary judgment is "made on the grounds that this action has no merit, there is no triable issue of material fact and [Ng] is entitled to judgment as a matter of law." (August 28, 2023 Notice of Motion at p. 2:7-8.) Again, as noted above, the fourth cause of action for negligent supervision is the only claim asserted against Ng in the FAC.

Ng's supporting memorandum states, more specifically, that she is "entitled to summary judgment because Jane Doe 1 cannot meet her burden of presenting any direct or circumstantial evidence from which the trier of fact could reasonably infer that Kelly Ng knew of Don Francisco's alleged assaultive propensities before he allegedly sexually assaulted her." (Ng Memo. at p. 1:22-25.) "Jane Doe 1's responses to written discovery and her deposition testimony establish the fatal defect in her claim against Kelly which is she has no evidence that Kelly knew that Don had alleged assaultive propensities . . . . Jane Doe 1's allegation that defendant Don had consensual sex when he was 17-years old with his then 14-year old girlfriend does not, as a matter of law, supply the necessary criminal conduct premise to establish that it was foreseeable that 10 years later he would sexually assault a minor." (*Id.* at p. 13:9-21.)

1. Negligent Supervision – General Principles

"'As a general rule, one owes no duty to control the conduct of another . . .' More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326, internal citations omitted [discussing aiding & abetting liability].) Negligent supervision is simply a variety of negligence. It is usually framed as an issue of whether a business/organization adequately supervised an adult employee or agent who intentionally or negligently injured someone else. Typically, in order for there to be liability for negligent supervision, the defendant must be the employer of the individual alleged to have been negligently supervised. (See CACI No. 426; *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1187-1188.) There are no allegations here that Don was an employee of Ng.

California courts have also held that "an adult who invites a minor into her home assumes a special relationship with the minor in light of the minor's vulnerability. But, despite

that special relationship, the existence of a duty still requires that the harm be reasonably foreseeable, which requires that the defendant have actual knowledge of the assaultive propensities of the assailant. Defendants cannot be liable under a negligent supervision theory for nonfeasance based solely on constructive knowledge or information they should have known. There is no per se rule of duty to every invitee, and there must be actual knowledge in addition to a special relationship." (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 153, internal citations omitted; see also *Hanouchian v. Steele* (2020) 51 Cal.App.5th 99, 111-113 [discussing *Margaret W.* and other cases] ["To establish heightened foreseeability for third party criminal conduct, our authorities have consistently required *actual* knowledge—not constructive, inferential, or knowledge by association—to impose a burdensome legal duty."] [Emphasis in original].)

The FAC does not actually allege that Ng invited the minor plaintiffs into her home or agreed to supervise them; instead, it alleges that Jane Doe 2 "entrusted" Don, an adult cohabitant at Ng's home, with "provid[ing] afterschool childcare services for her two children at Kelly Ng's home at 2321 Four Seasons Court, San Jose, CA 95131." (FAC, ¶ 20.) The FAC does not allege that Ng negligently supervised the minor plaintiffs; it alleges that she negligently supervised Don, her boyfriend. The allegation that Ng "had reason to know that" Don "should not have been allowed unsupervised time alone with children" is made solely on information and belief, and as a result, it does not adequately allege *actual knowledge* of any "assaultive propensities." (*Id.* at ¶ 8.) A plaintiff cannot, "by placing the incantation 'information and belief' in a pleading . . . insulate herself or himself" from the requirements of Code of Civil Procedure section 128.7, irrespective of whether the pleading is verified or unverified. (*Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596, fn. 9.) To plead an allegation on the basis of information and belief properly, a plaintiff must allege the facts or information that led him or her to infer or believe the truth of the ultimate factual allegation. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-59; see also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 100, 1106 ["where factual allegations are based on information and belief, the plaintiff must allege 'information that 'lead[s] [the plaintiff] to believe that the allegations are true.'"].) Plaintiffs are bound by the FAC on summary judgment, and responses to discovery or other material submitted in opposition to a summary judgment motion cannot function as amendments to the FAC.

2. Ng's Evidence

Ng's motion is supported by two declarations. The first is a declaration from Ng's counsel, Johanna Carvajal, who authenticates Exhibits 1-10. Of these, Ng primarily relies upon Exhibits 3-10. (See Ng's Undisputed Material Facts, Nos. 16-34.) Exhibit 3 is a copy of Jane Doe 1's verified November 18, 2022 "second amended" responses to special interrogatories propounded by Ng. In response to Interrogatory No. 1, Jane Doe 1 states that the basis for her allegations that Ng had "reason to know" that Don should not have been left unsupervised with minors were "prior allegations that he [Don] had unlawfully engaged in sexual intercourse with a minor at the Francisco family residence," and the "additional presence in the household [the Francisco residence] of his brother Glenn (aka 'Glennpol') Francisco, a registered sex offender."

Exhibit 5 consists of excerpts from the April 24, 2023 deposition of Jane Doe 1. In the course of questioning over her response to Form Interrogatory No. 17.1 (stating essentially the

same information regarding Ng as the response to Special Interrogatory No. 1), she was asked if "the accusation that you are referring to in your response is the accusation contained in the 2003 Jane Roe versus Glenn Pohl Francisco case." Jane Doe 1 responded "Yes." (Ex. 5 at p. 221:7-11.) She was also asked, "[W]hat evidence do you have that between 2012 and 2016, Kelly knew that in 2002 Don Francisco had a sexual relationship with a 14-year-old girl?" Jane Doe 1 responded, "I don't know if she knew." (Ex. 5 at p. 224:19-23.) When asked, "What evidence or what facts do you have that Kelly knew that Don Francisco had a propensity to molest children when she invited you into her home in 2015?" Jane Doe 1 testified, "I don't feel I have all – I don't know if I can say that I know that she knew." (Ex. 5 at p. 228:5-18.) When asked, "Before you reported the abuse to the police in January 2019, do you have any information that Kelly knew the Don Francisco was abusing you?" she testified, "I don't have specific information." When asked, "Before you reported the abuse to the police, did you have any information that Kelly knew that Don Francisco had a propensity to abuse you?" she again testified, "I don't have specific information." (Ex. 5 at pp. 282:17-283:3.)

Exhibit 6 consists of excerpts from the November 5, 2022 deposition testimony of Jane Doe 1. When asked if "during the time the alleged sexual abuse occurred, did you ever go to Kelly Ng and tell her about the abuse?" she responded "No." (Ex. 6 pp. 121:24-122:2.) Jane Doe 1 testified that Don stopped raping her in 2016 when she was 16 years old. (Ex. 6 at p. 175:13-23.) When asked, "Do you have any evidence that Kelly knew that Don was sexually abusing you at her home?" she testified, "I don't have evidence." (Ex. 6 at pp. 175:24-176:5.)

Exhibit 9 is a copy of Jane Doe 1's June 7, 2023 verified responses to requests for admission ("RFAs") propounded by Ng. In response to RFA No. 42 (asking Jane Doe 1 to admit that she had "no evidence that prior to the commencement of this action, Ng had actual knowledge of the allegation made in 2002 that Don Francisco had a sexual relationship with his then 14-year-old girlfriend") and RFA No. 43 (asking Plaintiff to admit that she had "no evidence that prior to the commencement of this action defendant Kelly Ng had actual knowledge that defendant Don Francisco had a propensity to engage in sexual abuse of minors"), Jane Doe 1 responded "Denied."

Exhibit 7 is a copy of Jane Doe 1's June 7, 2023 verified response to Form Interrogatory No. 17.1, asking her to "state all facts" in support of her denials of RFAs Nos. 42 and 43. The response states, in part: "Responsive facts include Defendant Kelly Ng testified that Don Francisco told her about the 2003 suit sometime after it settled and told her his ex-girlfriend accused his brother of rape, and the brother plead guilty and the family had to pay money as a result. She also admits discussing the lawsuit with Glennpol Francisco, knowing that he had been arrested and was a registered sex offender. She claimed not to recall whether Don Francsico told her at the time that he was also a defendant in the suit." (Ex. 7 at p. 3:21-27.)

Exhibit 10 consists of excerpts from Ng's October 20, 2022 deposition testimony. When asked about the 2003 lawsuit, Ng testified that she "[m]ost likely" heard about it from Don some time after it had settled, and that she remembered Don telling her "[t]hat his ex-girlfriend accused Glennpol of rape, I believe. And Glennpol pleaded guilty." She further testified that she knew "that Glennpol still has to pay off restitution," and that Glennpol "told me his side . . . . [H]e said that it was all a lie and that he needed the case over so he can help out his grandma." Ng also testified that she knew that Glennpol was "paying restitution, I know he has to go in annually to the police station." (Ex. 10 at pp. 38:5-41:9.) When asked if

she knew that Don was a defendant in that lawsuit, she testified, "No, I didn't know that." (Ex. 10 at pp. 41:23-42:3.) Ng also testified that at some unspecified point in time, Jane Doe 2 had stated that "[i]t's unnatural that Don and [Jane Doe 1] are close" and that "it was talked out and she was still okay with [Jane Doe 1] hanging out with Don." She also testified that Jane Doe 1's biological father "said that [Jane Doe 2] was crazy and he believes in Don." (Exhibit 10 at pp. 57:7-58:10.)

Exhibit 4 to Carvajal's declaration is a copy of the second amended complaint in the 2003 civil lawsuit mentioned in the deposition excerpts. This complaint alleged that Don was a minor at all relevant times, and the only cause of action alleged against him was a claim for negligence (the first cause of action).

The summary judgment motion is also supported by a declaration from Ng. Her declaration largely repeats her deposition testimony. Ng also states, "From 2010 through 2019, I did not observe any interaction between Jane Doe 1 and Don that caused me to believe that Don had a propensity to sexually abuse minors . . . . I never observed any conduct by Don that caused me to believe that he had propensities to sexually assault minors . . . . It was not until December 2015 when Don and I moved from Hillview to Four Seasons . . . . While Jane Doe 1 was visiting us, I did not observe any activity between Don and Jane Doe 1 that caused me to believe that Don was sexually abusing Jane Doe 1." (Ng Decl. at ¶¶ 13-15.) She also states (at ¶ 17): "I did not believe, and it never occurred to me, that because Glennpol Francisco pled guilty to statutory rape, that Don Francisco may also have propensities to sexually abuse minors."

C. Plaintiffs' Opposition

The opposition contends that Ng knowingly "facilitated" and "directly enabled" Don's alleged sexual abuse of Jane Doe 1. Not only is this *not* alleged in the FAC, such an accusation is incompatible with the negligent supervision cause of action that actually is in the FAC. "A negligent person has no desire to cause the harm that results from his carelessness . . . and he must be distinguished from a person guilty of willful misconduct, such as assault and battery, who intends to cause harm." (*Mahoney v. Corralejo* (1974) 36 Cal. App. 3d 966, 972.) "Willfulness and negligence are contradictory terms." (*Id*.) "If conduct is negligent, it is not willful; if it is willful, it is not negligent." (*Id*.) "'No amount of descriptive adjectives or epithets may turn a negligence action into an action for intentional or willful misconduct.'" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 413, quoting *Mahoney* at p. 973.)

The opposition's argument that Jane Doe 1 should not be bound by her sworn deposition testimony or her ratification of discovery responses, despite being an adult when deposed and when she certified the responses, is unsupported by any relevant authority. (Opp. at p. 7:1-22) Plaintiffs argue that a witness should not be expected to marshal all relevant evidence or respond to "legal contention questions." While those generic statements may well be true, as far as they go, they are inapplicable here. Jane Doe 1 was not asked "legal contention questions"; she was asked about her personal knowledge. And while no one can reasonably expect any lay witness to have an instantaneous grasp of all of the potentially relevant evidence in an entire case, the witness's personal knowledge of the evidence—or lack thereof—is still a relevant fact. It may not be dispositive in and of itself, but it is still a piece of the puzzle.

The opposition's further argument that summary judgment should be denied because Ng, by her acts, "increased the risk of molestation" is also not alleged in the FAC or supported by any of the relevant evidence. Ng's general knowledge of the 2003 lawsuit does not establish any actual knowledge of Don's assaultive propensities regarding Jane Doe 1.

In addition to the (denied) request for judicial notice, the opposition is supported by two declarations. The first is from Jane Doe 1's mother, Jane Doe 2. In paragraphs 7-8, she states that, after she mentioned her "concerns" about Jane Doe 1's interaction with Don, "Kelly set up a meeting with me, herself, and Don Francisco. We talked about my concern about her boyfriend's relationship with my daughter, and she assured me that everything was okay, that she was often in the same room with her boyfriend and my daughter and would never let anything happen to her. Both she and her boyfriend wanted to convince me not to limit his access to my daughter. After we had talked, I agreed not to make changes, trusting Kelly's representations."

This statement does not amend or alter the FAC's allegation at paragraph 20 that Jane Doe 2 "entrusted" Don, not Ng, "to provide afterschool childcare services for her two children at Kelly Ng's home at 2321 Four Seasons Court, San Jose, CA 95131." The FAC does not state any claim for false or negligent misrepresentation against Ng; the only claim alleged against her is for negligent supervision of Don.

The second declaration is from counsel Julie Fieber, which authenticates and attaches Exhibits 1-11. Exhibits 5, 6, 10 and 11 are the documents submitted for judicial notice and discussed above. Exhibit 1 consists of excerpts from Ng's deposition testimony, similar to the testimony submitted in Ng's Exhibit 10. Exhibit 2 consists of excerpts from the November 5, 2022 and April 24, 2023 depositions of Jane Doe 1, including her testimony about sexual abuse by Don and her testimony that she had no information or evidence that Ng was aware of it. Again, it is similar to, and overlaps largely with, the testimony submitted in Ng's Exhibits 5 and 6. Exhibit 3 is a copy of Jane Doe 1's November 18, 2022 amended responses to special interrogatories. The highlighted portion repeats language from the original response, characterizing Ng's deposition as admitting her "awareness" of "the 2003 child molestation incident." (More accurately, Ng testified as to her awareness of Glennpol Francisco's status as a sex offender and her awareness of the 2003 lawsuit against Glennpol.) The interrogatory response also characterizes Ng's alleged "awareness" of "grooming activities" by Don, although nothing in Ng's testimony actually refers to "grooming activities." Exhibit 4 is a copy of Jane Doe 1's November 18, 2022 amended response to Form Interrogatory No.17.1. To the extent the amended response refers to Ng, it repeats allegations from the FAC and the interrogatory response's characterizations of Ng's deposition testimony.[4]

Exhibits 7 and 8 consist of excerpts from the depositions of Napoleon and Glenna Francisco, respectively. Exhibit 9 consists of excerpts from the deposition of Glennpol

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[4] Plaintiffs argue that Ng testified that she did not "recall" whether Don was a defendant in the 2003 lawsuit, rather than that she did not "know." (Opposition at pp. 7:24-8:6.) The court disagrees and finds plaintiffs' characterization of this testimony to be misleading. In Ng's cited testimony on page 42, lines 7-13, of her deposition, she states that she does not "recall" what she was "*told*" about the lawsuit, not what she actually *knew* about the lawsuit. *Recalling* what someone tells you versus *knowing* it for a fact are two entirely different things.

Francisco. The testimony in these three exhibits has little relevance to the FAC's fourth cause of action against Ng.

D. Discussion

The court grants Ng's motion for summary judgment as to the FAC's fourth cause of action (the only claim alleged against her) for the reasons that follow.

First, Ng's evidence is sufficient to meet her initial burden of establishing that: (1) she did not have "actual knowledge of the assaultive propensities" of Don, and (2) plaintiffs have no evidence that she had such actual knowledge. Ng's deposition testimony (Exhibit 10 to the Carvajal declaration) and Ng's supporting declaration are sufficient to establish her lack of actual knowledge. As for the plaintiffs' lack of evidence, a defendant may move for summary judgment on the basis that the evidence establishes that a "plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar*, *supra*, 25 Cal.4th at pp. 854-855.) "Such evidence may consist of the deposition testimony of the plaintiff's witnesses, the plaintiff's factually devoid discovery responses, or admissions by the plaintiff in deposition or in response to requests for admission that he or she has not discovered anything that supports an essential element of the cause of action." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 110, citing *Aguilar*.) Exhibits 3 and 5-9 to the Carvajal declaration are sufficient to establish plaintiffs' lack of evidence to support the cause of action for negligent supervision as alleged against Ng.

The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint. A moving party need not refute liability on some theoretical possibility not included in the pleadings. A motion for summary judgment must be directed to the issues raised by the pleadings. The papers filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings. Declarations in opposition to a motion for summary judgment are no substitute for amended pleadings. (*County of Santa Clara v. Atlantic Richfield Co*. (2006) 136 Cal.App.4th 292, 332-333.)

Second, when the burden shifts to plaintiffs, they are unable to raise any triable issue of material fact as the FAC's fourth cause of action against Ng. Plaintiffs are bound by what they allege in the FAC and cannot raise any material issue by asserting theories absent from the pleading. Jane Doe 1 is also, contrary to the opposition's argument, bound by her sworn deposition testimony that she has no information that Ng had knowledge of the alleged abuse by Don before Jane Doe 1 reported him to the police. Jane Doe 1 is also bound by her verified discovery responses asserting that the "evidence" of Ng's "actual knowledge of the assaultive propensities" of Don was her general knowledge of the 2003 lawsuit. No finder of fact could reasonably infer from the knowledge expressed by Ng at her deposition regarding that lawsuit (or from any of Plaintiffs' other evidence) that Ng had "actual knowledge" of Don's "assaultive propensities." (See *McGrory v. Applied Signal Technology, Inc*. (2013) 212 Cal.App.4th 1510, 1530 ["a material triable controversy is not established unless the inference is reasonable"].)

Ultimately, the state of the evidence against Ng is that it does not sufficiently present a triable issue regarding negligent supervision. Not only did Jane Doe 1 herself not identify evidence demonstrating Ng's knowledge of Don's "assaultive propensities," either in her

deposition testimony or her written discovery responses, but so plaintiffs as a group have fallen short in the opposition to this motion and have been unable to identify such evidence. In the end, the notion that Ng had actual knowledge of Don's assaultive propensities is based on speculation, conjecture, suppositions, and assumptions.

The motion for summary judgment is GRANTED.

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Calendar Line 7
Case Name: *Scott T. Urban v. Cindy F. Cheng*
Case No.: 20CV375017

Defendant Cindy F. Cheng brings this motion to dismiss on the ground that plaintiff Scott T. Urban has failed to join other necessary parties. (Code Civ. Proc., § 389, subd. (a).) The court finds the motion to be wholly without merit and DENIES it.

Urban's complaint, filed more than three years ago, alleges that Cheng committed malpractice as the accountant for Urban Peripherals Inc. ("UPI"), the company that Urban and his brother, Craig Urban, co-founded and co-owned: the complaint sets forth two causes of action for professional negligence against Cheng. Cheng now argues—with no explanation as to why this argument is being raised here for the first time, nearly *two and a half years* after this court (Judge Kirwan) overruled her demurrer to the complaint—that Scott Urban should have named two other parties as defendants in his complaint: Craig Urban and CH Pension Services, Inc. ("CH Pension"), a third-party administrator of the pension plans for UPI.

Cheng fails to provide any *reasons* why these additional parties need to be a part of this case. She states conclusorily that "there is no complete relief to defendant Cheng if these indispensable parties are not joined" but then fails to elaborate on this assertion. (Memorandum at p. 5:3-4.) She claims that "there is no question that the allegations of accounting misconduct and wrongful removal of assets of the Plans would implicate the legal rights and liabilities of Craig Urban and CH Pension Services," but she fails to explain how. (*Id*. at p. 5:13-15.)

The court finds, based on the record before it, that Craig Urban and CH Pension are not indispensable parties. Neither Craig Urban nor CH Pension are accountants—only Cheng is the accountant. As a result, the allegations of professional negligence against Cheng in this case are necessarily based on purported duties owed by her that would be distinct from any purported duties owed by Craig Urban or CH Pension. As Scott Urban points out, the complaint in this case "does not seek recovery of a specific asset, common fund, commonly owned property, or an asset held by Craig or CH Pension." (Opposition at p. 8:17-18, emphasis omitted.) It simply seeks monetary damages against Cheng. As a result, the court does not see how any judgment against Cheng for professional negligence would impact or interfere in any way with any alleged potential liability of Craig Urban or CH Pension to Scott Urban. Certainly, Cheng's motion fails to show any such impact.[5]

The court finds no basis upon which either section 389, subdivision (a)(1), or section 389, subdivision (a)(2), would apply here.

DENIED.

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[5] The court notes that Cheng has submitted new evidence in reply, and Urban has responded to this evidence with a "surreply and objections" to the reply. The court disregards all of this new evidence and argument that is being submitted without leave of court. The court finds that Cheng's new evidence in reply is not "strictly responsive" to Urban's opposition, and there is no reason why it could not have been presented with the opening papers. (See *Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733, 774 [new evidence is not permitted in reply papers unless it is "strictly responsive" to arguments made for the first time in the opposition].)

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Calendar Line 8
Case Name: *Patricia Yau v. Joe Eustice et al.*
Case No.: 21CV390730

As the result of a series of mistakes and mistaken assumptions, counsel for plaintiff Patricia Yau failed to oppose a motion to quash filed by specially appearing defendants Hilton Worldwide Holdings, Inc. and Park Hotels & Resorts Inc. ("Defendants"), based on a purported lack of personal jurisdiction. Yau now moves under Code of Civil Procedure section 473, subdivision (b), to vacate the dismissal that ultimately issued from that motion. In the alternative, Yau requests reconsideration of the court's order granting the motion to quash under Code of Civil Procedure section 1008. The court GRANTS the motion under section 473(b) and sets a new hearing on Defendants' motion to quash for **February 29, 2024 at 9:00 a.m.** in Department 10.

Defendants argue that relief is unavailable under section 473 and that Yau's current motion is properly one for reconsideration only, but the court concludes instead that Yau is in fact entitled to mandatory relief under section 473, subdivision (b), based on *Pagnini v. Union Bank, N.A.* (2018) 28 Cal.App.5th 298, 301, 304-306 (*Pagnini*), which held that a demurrer "was effectively a 'dismissal motion'" and a "default" for purposes of the mandatory relief provisions of section 473(b). Under the same reasoning, a motion to quash for lack of personal jurisdiction under Code of Civil Procedure section 418.10, which is brought by a defendant who appears specially only for that motion, and which results in a dismissal if it is granted, is also the functional equivalent of a dismissal motion and default. The latter is what we have here.

Under section 473(b), if a party presents a sworn affidavit from counsel, "attesting to his or her mistake, inadvertence, surprise, or neglect," the court "shall" vacate the default or dismissal, unless the default or dismissal was "not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Code Civ. Proc., § 473, subd. (b).) This particular provision in subdivision (b) is mandatory rather than discretionary. In this case, Yau's counsel recounts various mistakes or acts of neglect, including: (1) being "severely sick at the time of the hearing" and mistakenly thinking that a deal had already "been struck between Plaintiff and Defendants" regarding a dismissal and tolling of the statute of limitations, (2) mistakenly believing that the filing of a declaration after the December 1, 2022 hearing would "reinstate" the hearing, (3) mistakenly believing the case would not be dismissed for lack of personal jurisdiction, (4) mistakenly believing that the case was still pending in May 2023, and (5) not being able to file this motion until close to six months after the dismissal. (Memorandum at p. 4:13-26.) All of these errors were counsel's alone, rather than the fault of the client.

In some ways, Yau's counsel's mistakes are similar to counsel's errors in *Pagnini*, *supra*, where the primary error was in failing to file a response to the "dismissal motion," and where counsel also failed to file a section 473(b) motion until right before the six-month deadline. (28 Cal.App.5th at pp. 301-302.) One notable difference, however, is that counsel in *Pagnini* did submit a proposed amended complaint to address the default, whereas counsel here has not submitted any papers (or arguments) to support the notion that Yau actually has a meritorious basis upon which to oppose the motion to quash (and therefore demonstrate the court's personal jurisdiction over the Defendants). Nevertheless, the court will not prejudge the motion to quash before providing Yau the opportunity to address the motion on the merits.

Given that Yau has shown the application of the mandatory relief provisions of section 473(b), the court will reset the matter for a hearing on February 29, 2024. The parties may file opposition or reply briefs per the deadlines set forth in the Code of Civil Procedure, based on this hearing date.

The motion for relief under section 473(b) is granted. The court declines to address any of the parties' arguments regarding the propriety of a motion for reconsideration under section 1008.

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