SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 04-09-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV395433 Motion: Quash	Mehrvash Riahi vs Charlie Bailon et al	Off calendar
LINE 2	22CV408628 Motion: Quash	Lili Quiroz vs Edward Yanez, Jr. et al	The unopposed motion is GRANTED. Plaintiff shall submit the final order.
LINE 3	23CV418633 Hearing: Demurrer	MOISES MARTINEZ MONSIVAIS, an Individual vs PETERSON TRUCKS, INC. et al	See Tentative Ruling. Court will issue the final order.
LINE 4	21CV389678 Motion: Compel	Isaac Anjejo vs Daniel Nelson et al	Plaintiff's motion and reply ignores the opposition filed by Defendants Nelson and Hoberg Historical Society on December 11, 2023, attaching the responses to Plaintiff's written discovery requests. The opposition shows that verified responses were served September 21, 2023 for both defendants. As such, Defendants are correct that Plaintiff is required to file a motion to compel further responses with separate statements and meet-and-confer declarations. Accordingly, the motion is DENIED. Court will issue the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 5	21CV389678 Motion: Admissions Deemed Admitted	Isaac Anjejo vs Daniel Nelson et al	Plaintiff's motion ignores the opposition filed by Defendants Nelson and Hoberg Historical Society of December 11, 2023, attaching the responses to Plaintiff's written discovery requests. The opposition shows that verified responses were served September 21, 2023 for both defendants. As such, Defendants are correct that Plaintiff is required to file a motion to compel further responses with separate statements and meet-and-confer declarations. Accordingly, the motion is DENIED. Court will issue the final order.
LINE 6	22CV405531 Motion: Compel	Duy Nguyen vs Fred Meeske et al	Parties are required to come to the hearing. The Court will either order the parties to participate in the discovery facilitator program or an IDC.
LINE 7	21CV384705 Motion: Set Aside Default/Judgment	Varick Partners, LLC vs Rana Rekhi et al	See Tentative Ruling. Plaintiff shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 8	21CV385112 Motion: Protective Order	Quintara Biosciences, Inc. vs Gangyou Wang et al	Notice appears proper, although there is no POS for the amended notice. If notice is proper, the unopposed motion will be GRANTED. Parties should appear to present proof that notice was proper. If notice is not proper, then the hearing may be continued to allow for proper notice. If Defendant Chen fails to appear and notice is deemed not proper the motion will go off calendar.
LINE 9	21CV387650 Motion: Order for order substitution & discharge	ITRIA VENTURES LLC, a Delaware limited liability company et al vs WINE GLOBE HOLDINGS LLC et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 10	21CV387650 Motion: Vacate default	ITRIA VENTURES LLC, a Delaware limited liability company et al vs WINE GLOBE HOLDINGS LLC et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 11	22CV403072 Motion: Vacate set aside entry of judgment	Wells Fargo Bank, N.A. vs ANN TAORMINA	Notice appearing proper and good cause appearing, Plaintiff's motion to dismiss and vacate the judgment is GRANTED. Plaintiff shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 12	22CV403486 Hearing Motion for response to further ADR	Michael Nikitas vs Financial Indemnity Company	Plaintiff has filed a motion for response for further ADR. Defendant has filed an opposition demonstrating that the case settled, Plaintiff signed a release, Defendant paid Plaintiff the settlement amount, and that Plaintiff cashed the settlement check. Plaintiff has offered no evidence or legal authority to contradict Defendant's opposition. As such, the motion is DENIED and the case is DISMISSED with prejudice. Defendant shall submit the final order.
LINE 13	24CV429454 Order hearing on petition to release mechanic lien	Carl Bertelsen et al vs Norcal Pool Construction, Inc.	Notice appearing proper and good cause appearing, the petition is GRANTED. Petitioner shall submit the final order.
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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Calendar Line 3
Case Name: *Monsivais v. Peterson Trucks, Inc., et al.*
Case No.: 23CV418633

This negligence action arises from an alleged vehicle accident. Moises I. Martinez Monsivais, an individual, ("Plaintiff") demurs to the operative first amended answer ("FAA") to Plaintiff's First Amended Complaint[1] ("FAC") filed by Peterson Trucks, Inc., a corporation, Ossie B. Holt, an individual, and Sysco San Francisco, Inc., a corporation (erroneously sued as Sysco Corporation) (collectively, "Defendants.")

I. Background

A. Factual

On July 14, 2021, Plaintiff was lawfully driving his car eastbound on El Camino Real in Mountain View, California ("Subject Location") when Defendant Ossie B. Holt ("Holt" or "Defendant"), while operating a vehicle, caused an automobile collision. (FAC, ¶¶ 10, 15.) Prior to the collision, Defendant Holt, while driving at high speed behind Plaintiff, failed to stop and "violently" rear-ended Plaintiff's car, resulting in Plaintiff's injuries. (FAC, ¶ 15.) Immediately after the accident, Defendant Holt did not stop and fled the scene of the incident. (*Ibid.*) As a result of the crash, Plaintiff has suffered physical injury, emotional distress, pain and suffering, general damages, and medical expenses. (FAC, ¶¶ 17, 18.)

B. Procedural

Plaintiff initiated the instant action on June 30, 2023, by filing a complaint. On July 12, 2023, Plaintiff filed the operative FAC. Plaintiff alleges the following causes of action:

(1) General Negligence; and
(2) Motor Vehicle Negligence

Defendants filed an FAA on December 12, 2023, to which Plaintiff demurred on December 22, 2023. Defendants filed an opposition on March 19, 2024. Plaintiff filed his reply on April 2, 2024.

II. Meet and Confer Requirements

Before filing a demurrer, a demurring party must "meet and confer in person or by telephone" with the opposing party to determine "whether an agreement can be reached that would resolve the objections to be raised in the demurrer." (Code Civ. Proc., § 430.41, subd. (a).) When filing the demurrer, the demurring party must include a declaration stating either "the means by which the demurring party met and conferred with [the other party] and that the party did not reach an agreement resolving the objections raised in the demurrer" or "[the other party] failed to respond to the meet and confer request of the demurring party or otherwise failed to meet in good faith." (Code of Civil Procedure, § 430.41, subdivision (a)(3).) A court's

[1] Defendants repeatedly address Plaintiff's FAC as the "complaint." (See FAA, p. 1.) The Court will assume Defendants are referring to Plaintiff's FAC given that their original Answer filed on December 7, 2023, addressed the Plaintiff's FAC.

determination that the meet and confer process was insufficient is not a ground to sustain or overrule a demurrer. (Code of Civil Procedure, § 430.41, subdivision (a)(4).)

Counsel for Plaintiff has filed a meet and confer declaration regarding the arguments to be raised in the demurrer. (Parham Nikfarjam Meet and Confer Declaration in Support of Plaintiff's Demurrer ("Dem.") (Nikfarjam Decl.,") ¶¶ 2-5.) In opposition, Defendants' attorney contends that Plaintiff's meet and confer efforts fell short as counsel for plaintiff "did not follow the basic and important requirements" of Code of Civil Procedure section 430.41 by merely sending an email. (Defendants' Opposition to Plaintiff's Demurrer (Opp.,), p. 2:1-14; Nikfarjam Decl., ¶¶ 2-5.) Defendants urge the court to overrule the demurrer on that ground. Inadequate meet and confer efforts are not a basis for overruling a demurrer. (See Code Civ. Proc. § 430.41, subd. (a)(4) ["A determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer"].) Further, Plaintiff has provided the email his counsel sent to Defendants' counsel. But, Defendants have not provided anything to suggest that Defendants' counsel responded to Plaintiff's counsel's email or, alternatively, telephoned Plaintiff's counsel with the number provided in the meet and confer letter. Consequently, the court will accept Plaintiff's assertion that Defendants' counsel failed to timely respond to their meet and confer email request. Given the above, it does not appear that the parties met and conferred at all.

Nonetheless, the court will not order the parties to meet and confer because it does not appear that meet and confer efforts would be fruitful at this time. The parties are admonished to comply with all further statutory meet and confer requirements in the future. The court will consider the merits of Plaintiff's demurrer.

III. Plaintiff's Noncompliance with California Rules of Court, Rule 3.1320(a)

Defendants argue that Plaintiff "failed to distinguish between which ground, either insufficient facts or uncertainty, on which he objects to for each affirmative defense" in violation of California Rules of Court, Rule 3.1320(a). (Opp., pp. 2:15-27:1-16.) Although Defendants are correct in that Rule 3.1320(a) requires "separate paragraphs and distinction between what defenses Plaintiff objects to" the Court will consider the demurrer's merits. The court notes Plaintiff's Notice of Demurrer and Demurrer to the FAA were filed with the Memorandum of Points and Authorities. Consequently, Defendants are apprised of Plaintiff's grounds for demurrer from the Memorandum.

IV. Merits of Plaintiff's Demurrer to Answer

In his demurrer, Plaintiff argues "factual support" for the challenged fourteen affirmative defenses "cannot be logically derived from the general denial of all factual allegations" made in Plaintiff's FAC. (Dem., p. 3.) Additionally, Plaintiff contends, Defendants' FAA and affirmative defenses fail to allege facts sufficient to support the defenses, they are improperly pled, uncertain, and consequently, subject to demurrer. (Dem., pp. 4-5.)

A. Plaintiff's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the

action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citations and quotation mark omitted.)

Plaintiff's request for judicial notice of his FAC and Defendants' FAA is presented in improper format, i.e., request made by a footnote in Plaintiff's counsel declaration. (See Cal. Rules of Court, rule 3.1113(l) ["Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with rule 3.1306 (c)"].) That said, Plaintiff's request as to the FAC is GRANTED because the court needs to consider the Complaint to properly rule on the demurrer. (See *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733 (*South Shore*) [when ruling on a demurrer to an answer, the court must also examine the complaint because the sufficiency of the answer depends, in part, on the complaint to which it responds].) However, as Defendants' FAA is the pleading under review, that request is DENIED as unnecessary. (See *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn. 1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer].)

Accordingly, the court GRANTS Plaintiff's request for judicial notice of the FAC. The court DENIES Plaintiff's request for Defendants' FAA.

B. Legal Standard

Section 430.30 of the Code of Civil Procedure allows a plaintiff to demur to a defendant's answer. (Code Civ. Proc. § 430.30, subd. (a) ["When any ground for objection to a[n] … answer appears on the fact thereof, or from any manner of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading."].) A party against whom an answer has been filed may demur to that answer upon any one or more of the following grounds: (a) the answer does not state facts sufficient to constitute a defense; (b) the answer is uncertain; (c) where the answer pleads a contract, it cannot be ascertained from the answer whether the contract was written or oral. (Code Civ. Proc. § 430.20, formatting omitted.)

The demurrer may be to the whole answer or to any one or more of the several defenses set up in the answer. (Code Civ. Proc., § 430.50 subd. (b).) The Plaintiff may not, however, demur to part of a defense. (*South Shore, supra,* 226 Cal.App.2d at p. 733.) Each defense must be considered separately without regard to any other defense, and one defense does not become insufficient because it is inconsistent with any other parts of the answer. (*Ibid*.) The critical inquiry when a plaintiff demurs to an answer is whether the answer raises a defense to plaintiff's stated cause of action. (*Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 880.) Affirmative defenses presented in an answer must plead ultimate facts to the same extent as required in a complaint. (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Affirmative defenses consisting of legal conclusions will not survive demurrer nor motion for judgment on the pleadings. (*Westly v. Board of Administration* (2003) 105 Cal.App.4th 1095, 1117 (*Westly*).)

"The determination whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action." (*South Shore, supra*, 226 Cal.App.2d at p. 732.) "[T]he demurrer to the answer admits all issuable facts pleaded therein and eliminated all allegations of the complaint denied by the answer." (*Id*. at 733.) Unlike a demurrer to a complaint, "the defect in question need not appear on the face

of the answer" as "[t]he 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." (*Ibid.*)

C. Affirmative Defenses: Failure to State Facts Sufficient to Constitute a Defense

In their FAA, Defendants generally deny each and every allegation of Plaintiff's FAC pursuant to Code of Civil Procedure section 431.30. Defendants further deny that Plaintiff has sustained or will sustain any loss or damage. (FAA, p. 1.)

Defendants list sixteen affirmative defenses and reserve additional affirmative defenses in the event "discovery indicates they would be appropriate." (FAA, ¶ 16.)

Plaintiff demurs to the second through fourteenth and sixteenth affirmative defenses in Defendants' FAA on the ground that they fail to state sufficient facts because they are "boilerplate" and devoid of facts to support each defense. Plaintiff further alleges the affirmative defenses are conclusory. (Dem., pp. 4-5, 7.) Plaintiff contends that without a well-pled answer, he has no notice of the basis of the fourteen challenged affirmative defenses and "improperly" forces Plaintiff to guess what affirmative defenses Defendants plan to raise at trial. (Dem., p. 8.) In opposition, Defendants argue the affirmative defenses are supported by the facts they denied in Plaintiff's FAC. (Opp., p. 3:17-27.) Defendants further argue the court may consider all of the denied facts in the complaint as "supporting and being the factual basis for each affirmative defense." (Opp., p. 4:1-8.)

While the determination whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause, some vagueness may exist in a defendant's answer because most defendants do not have the ability to prove their defenses at the initial answering phase, which usually occurs before discovery. In addition, a defendant has a significant incentive to plead every affirmative defense because a party waives defenses that are not pleaded. Even where a defense is defectively pled it may be allowed if the defendant's pleading gives sufficient notice to enable the plaintiff to prepare to meet the defense, in part because un-pled defenses are waived. (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 240.) It also is settled law in California that a defendant may plead as many inconsistent defenses in an answer as her or she may desire and that such defenses may not be considered as admissions against interest in the action in which the answer was filed. *(Id*. at 241.) Plaintiff asserts that Defendants have failed to state sufficient facts to support the subject affirmative defenses. However, Plaintiff does not point to any law that imposes such a specificity requirement. Defendants' answer provides a clear list of affirmative defenses in 2-14, and alleges ultimate facts. Plaintiff can obtain the specifics through discovery. The demurrer to the second through fourteenth affirmative defenses is OVERRULED.

The sixteenth affirmative defense (reservation), which states, "[a]nswering Defendants reserve[] herein the right to assert additional defenses in the event that the discovery indicates they would be appropriate," need not allege ultimate facts. (FAA, ¶ 16.) There does not appear to be any prejudice to Plaintiff in allowing such a reservation to be made as an affirmative defense. Furthermore, there are no factual allegations which are necessary to raise this objection and so this defense would appear to be properly pled.

The demurrer is, therefore, OVERRULED.

D. Affirmative Defenses: Uncertainty

Plaintiff asserts the Defendants' FAA is uncertain because it "fails to plead any facts" that support their affirmative defenses "with specificity." (Dem., p. 9.) Plaintiff does not specify the uncertain aspects of Defendants' FAA. (See *Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 809 ["the failure to specify the uncertain aspects of a complaint will defeat a demurrer based on the grounds of uncertainty"], disapproved on another ground in *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328, fn. 30.)

Accordingly, Plaintiff's demurrer to affirmative defenses two through fourteen, and sixteen, on the ground of uncertainty, are OVERRULED.

V. Conclusion

The demurrer to Defendants' answer is OVERRULED.

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Calendar Line 7
Case Name: Varick Partners v. Rana Rekhi et al.
Case No: 21CV384705

Defendant Mark Gibbs ("Defendant") moves to set aside the default against him on the grounds of extrinsic fraud or mistake. The Complaint in this action was filed on June 25, 2021 2021. Plaintiff filed a proof of service on December 21, 2021 showing that it personally served Defendant with the summons and complaint on November 18, 2021. On December 21, 2021, default was entered against Defendant.

Absent extraordinary circumstances, a defendant must bring a motion to vacate and set aside default within six months of the date the default was entered. Code of Civil Proc. § 473(b) provides, in pertinent part, that:

> (b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken...Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

Defendant admits that his motion is untimely, as any motion to set aside the default should have been filed no later than May 21, 2022 —nearly two years ago. Accordingly, this Court lacks jurisdiction to grant Defendant's motion to set aside the default. *Rappleyea v. Campbell*, 8 Cal.4th 975, 980-981 (1994) (citing *Aldrich v. San Fernando Valley Lumber Co.*, 170 Cal.App.3d 725, 735, fn.3 for the proposition that granting statutory relief under Code of Civil Proc. §473 is jurisdictional; *see also Manson, Iver & York v. Black*, 176 Cal.App.4th 36, 42 (2009) (stating "[t]he six-month time limit for granting statutory relief from default and default judgment is jurisdictional and the court may not consider a motion for relief made after that period has elapsed.") Citing *Rappleyea*, 8 Cal.4th at 981, Gibbs asserts that "[a]fter six months from entry of a default, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable." *See* Motion at p. 9. Invoking the court's equitable powers, Gibbs asserts that "statutory time limits are not applicable to a motion to set aside [a default due to] extrinsic fraud or mistake." Motion at p. 9 (citing *Moghaddam v. Bone*, 142 Cal.App.4th 283, 289 fn.5.) While true, Defendant's reliance on these authorities is misplaced. In *Rappleyea*, for example, the Supreme Court further reasoned that "equitable relief may be given only in exceptional circumstances." 8 Cal.4th at 982. One such circumstance is due to a

court's extrinsic mistake ("a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits"). *Id.* at 981. In *Moghaddam*, the appellate court noted that "Extrinsic mistake involves the excusable neglect of a party" that "results in an unjust judgment, without a fair adversary hearing, and the basis for equitable relief is present." *Moghaddam*, 142 Cal.App.4th at 608 (noting that reliance on an attorney who becomes incapacitated or incompetence of the party without appointment of a guardian ad litem are examples of extrinsic mistake.") Extrinsic fraud occurs "when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding." *Id.* at 607 (noting that extrinsic fraud "only arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense.") None of those examples applies to the facts in this case so as to justify setting aside the default against Defedant Gibbs. On the contrary, Defendant's claims of fraud and mistake relate to the underlying case, not to why he was not able to file an answer or responsive pleading in the case. All of the issues he now raises go to the merits of his case, but they have no bearing on why he failed to file a responsive pleading.

Accordingly, the motion to set aside the default is DENIED. Plaintiff shall submit the final order.

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Calendar line 9
Case Name: Itria Ventures v. Wine Globe Holdings, et al.
Case No.: 21CV387650

Defendant Mark Gibbs ("Defendant") moves for an order for substitution and discharge of Defendants. A default was entered against Defendant Gibbs on November 3, 2022. Because a defendant has been entered, Defendant is not able to file this motion. See *Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1301 ("'The clerk's entry of default cuts off the defendant's right to take further affirmative steps such as filing a pleading or motion, and the defendant is not entitled to notices or service of pleadings or papers.'") (citation omitted). While Defendant has also moved to set aside the default, that motion was denied. As such, the motion for an order for substitution and discharge of Defendants is DENIED. Plaintiff shall submit the final order.

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Calendar line 10
Case Name: Itria Ventures v. Wine Globe Holdings, et al.
Case No.: 21CV387650

Defendant Mark Gibbs ("Defendant") moves to set aside the default against him on the grounds of extrinsic fraud or mistake. The Complaint in this action was filed on August 24, 2021. Plaintiff alleges that it first served Defendant with the summons and complaint on January 21, 2022. However, this service was not proper. There is no statutory provision allowing for service of a summons and complaint where a defendant is served by email and the Plaintiff asserts that Defendant has agreed to such service. The proof of service form specifically required Plaintiff to provide the authorizing code section for its method of service and unsurprisingly, Plaintiff offered none. Moreover, the Court Clerk indicated that service was not proper when it rejected the request for entry of default on March 2, 2022, noting that service was not proper. Plaintiff claims it then served the complaint and summons, under CCP section 1015, on September 22, 2022 when Defendant appeared in court for a case management conference. However, CCP Section 1016 specifically states that "the foregoing provisions of this chapter [which includes Section 1015] do not apply to the service of a summons. . ." A general appearance by Defendant is equivalent to personal service of summons, however. CCP section 410.50(a). Here, Defendant has made a general appearance. See *Mansour v. Superior Court (Eidem)* (1995) 38 Cal.App.4th 1750, 1757 (participating in case management conference without objecting to jurisdiction is a general appearance). Default was thus properly entered against Defendant on November 3, 2022.

Absent extraordinary circumstances, a defendant must bring a motion to vacate and set aside default within six months of the date the default was entered. Code of Civil Proc. § 473(b) provides, in pertinent part, that:

> (b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken...Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

Because it has been more than six months, this Court lacks jurisdiction to grant Defendant's motion to set aside the default. *Rappleyea v. Campbell*, 8 Cal.4th 975, 980-981 (1994) (citing *Aldrich v. San Fernando Valley Lumber Co.*, 170 Cal.App.3d 725, 735, fn.3 for the proposition

that granting statutory relief under Code of Civil Proc. §473 is jurisdictional; *see also Manson, Iver & York v. Black*, 176 Cal.App.4th 36, 42 (2009) (stating "[t]he six-month time limit for granting statutory relief from default and default judgment is jurisdictional and the court may not consider a motion for relief made after that period has elapsed.") Defendant argues that due to equitable grounds and the fact that there was extrinsic fraud, the statutory time limits do not apply. Citing *Rappleyea,* 8 Cal.4th at 981, Gibbs asserts that "[a]fter six months from entry of a default, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable." *See* Motion at p. 9. Invoking the court's equitable powers, Gibbs asserts that "statutory time limits are not applicable to a motion to set aside [a default due to] extrinsic fraud or mistake." Motion at p. 9 (citing *Moghaddam v. Bone*, 142 Cal.App.4th 283, 289 fn.5.) While true, Defendant's reliance on these authorities is misplaced. In *Rappleyea,* for example, the Supreme Court further reasoned that "equitable relief may be given only in exceptional circumstances." 8 Cal.4th at 982. One such circumstance is due to a court's extrinsic mistake ("a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits"). *Id.* at 981. In *Moghaddam,* the appellate court noted that "Extrinsic mistake involves the excusable neglect of a party" that "results in an unjust judgment, without a fair adversary hearing, and the basis for equitable relief is present." *Moghaddam*, 142 Cal.App.4th at 608 (noting that reliance on an attorney who becomes incapacitated or incompetence of the party without appointment of a guardian ad litem are examples of extrinsic mistake.") Extrinsic fraud occurs "when a party is deprived of the opportunity to present his claim or defense to the court; where he was kept ignorant or, other than from his own negligence, fraudulently prevented from fully participating in the proceeding." *Id.* at 607 (noting that extrinsic fraud "only arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense.") None of these circumstances applies to the facts in this case so as to justify setting aside the default as to Gibbs. On the contrary, Defendant's claims of fraud and mistake relate to the underlying case, not to why he was not able to file an answer or responsive pleading in the case. None of the facts asserted occurred after September 2022 when he was deemed served with the summons. All of the issues he now raises go the merits of his case, but they have no bearing on why he failed to file a responsive pleading.

Accordingly, the motion to set aside the default is DENIED. Plaintiff shall submit the final order.

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