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 9, 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	23CV423501	Allen Child Development, Ltd. v. Devinder Singh et al.	Click on LINE 1 or scroll down for ruling.
LINE 2	23CV411991	Carlos A. Lemos v. Bank of America, N.A.	OFF CALENDAR. Plaintiff filed a dismissal on January 3, 2024.
LINE 3	21CV381712	Feridon Ahmadkhani v. Costco Wholesale Corporation	Click on LINE 3 or scroll down for ruling.
LINE 4	17CV310864	QTV Enterprise, LLC v. Hieu Minh Nguyen	Click on LINE 4 or scroll down for ruling in lines 4-7.
LINE 5	17CV310864	QTV Enterprise, LLC v. Hieu Minh Nguyen	Click on LINE 4 or scroll down for ruling in lines 4-7.
LINE 6	18CV326638	Quang Luong v. Hieu Minh Nguyen	Click on LINE 4 or scroll down for ruling in lines 4-7.
LINE 7	18CV334671	Vector Fabrication, Inc. et al v. Hieu Minh Nguyen et al.	Click on LINE 4 or scroll down for ruling in lines 4-7.
LINE 8	21CV391899	Axis Surplus Insurance Company v. Acer America Corporation	Motion of Francis H. Brown for admission *pro hac vice*: parties to appear.
LINE 9	18CV337541	Debt Resolve LLC v. Maria Reis	Claim of exemption: parties to appear. Notice of the hearing is apparently proper, but the court does not have a copy of the judgment debtor's claim of exemption, only the judgment creditor's opposition. It is the court's understanding that it is the levying officer's responsibility to file the claim of exemption with the court. (CCP § 703.550.)

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Calendar Line 1
Case Name: *Allen Child Development, Ltd. v. Devinder Singh et al.*
Case No.: 23CV423501

I. BACKGROUND

This is a breach of contract action by plaintiff Allen Child Development, Ltd. ("Allen") against defendants Amazing Stars Montessori ("Amazing Stars"), Devinder Singh, and Anoma Singh. The Singhs represent themselves in this case and purport to represent Amazing Stars, as well, even though they are not lawyers.

Allen filed the original, operative complaint on September 26, 2023. The complaint attaches a January 2019 asset purchase agreement that governs the sale of "A Special Place Schools" by Allen to Devinder and Anoma Singh for $285,000.00 (the "Agreement"). (See Complaint, ¶¶ 8-10, Exhibit 1.) According to the complaint, the Agreement provided that Amazing Stars would tender $185,000.00 in cash to Allen and pay the remaining $100,000.00 through monthly installments over a 36-month period at a seven percent annual interest rate (the "Carryback Note"). (*Id*. at ¶ 11.) Despite this allegation in the complaint, the Agreement itself does not mention Amazing Stars. The only parties to the agreement are Allen and the Singhs. (Exh. 1.)

The complaint sets forth the following causes of action: (1) breach of contract (against all defendants); (2) common count (against all defendants); and (3) against surety on continuing guaranty (against the Singhs).

Currently before the court are defendants' motion to quash service of summons and defendants' demurrer to the complaint, filed as a single motion.

II. THE SINGHS' MOTION TO QUASH SERVICE OF SUMMONS

A. Legal Standard

Code of Civil Procedure section 418.10, subdivision (a)(1), authorizes a defendant to file a motion to quash service of summons "on the ground of lack of jurisdiction of the court over him or her." (Code Civ. Proc., § 418.10, subd. (a)(1).) "When a defendant argues that service of summons did not bring him or her within the trial court's jurisdiction, the plaintiff has 'the burden of proving the facts that did give the court jurisdiction, that is the facts requisite to an effective service.'" (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 387 (*Zara*) [citing *Coulston v. Cooper* (1966) 245 Cal.App.2d 866, 868].)

B. Discussion

The Singhs claim that service of the complaint and summons was improper on two grounds: (1) Allen failed to file the proofs of service, and (2) Allen failed to meet the requirements for substitute service.[1]

[1] Defendants also allege misjoinder and "the fact that the parties on the Complaint do not match the parties on the business service agreement" as grounds for the motion to quash. (Defs' Memo. at p. 4:15-16.) But a demurrer, not a motion to quash, is the proper procedural vehicle to object based on an alleged misjoinder, and so this is addressed below. (Compare Code Civ. Proc., § 430.10, subd. (d), with Code Civ. Proc., § 418.10, subd. (a).)

1. Filed Proofs of Service

Allen filed separate proofs of service for each defendant on December 4, 2023, shortly after defendants filed the motion to quash service of summons on November 29, 2023. (Opp., Exhs. 1-3.) According to the proofs of service, the legal process server, Luis Arturo Mendez, left copies of the summons, complaint, and ADR information packet with "Jane Doe," the mother of Devinder Singh, on October 14, 2023 at 862 San Mateo Court, Sunnyvale, CA 94085. Defendants' moving papers later identify Jane Doe as Gurmit Singh. (Defs' Memo. at p. 9:23.)

As such, Allen has set forth sufficient evidence to create a rebuttable presumption that service was proper. (See *Zara, supra,* 199 Cal.App.4th at p. 390 ["Evidence Code section 647 provides that a registered process server's declaration of service establishes a presumption affecting the burden of producing evidence of the facts stated in the declaration."].)

2. Substitute Service

The Singhs claim that substitute service was improper because Devinder Singh no longer resides at 862 San Mateo Court, Sunnyvale, CA 94085, and so his mother could not accept service on his behalf.[2] (Defs' Memo. at p. 10:1-2.)

California Code of Civil Procedure section 415.20, subdivision (b), permits substitute service when "a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served." The Court of Appeal has found reasonable diligence where a plaintiff makes two or three attempts to serve a defendant personally. (See *Zara, supra,* 199 Cal.App.4th at p. 389.)

Allen claims that its legal process server attempted to serve the Singhs with reasonable diligence, as evidenced by the filed proofs of service and accompanying affidavits of diligence. The affidavits describe four unsuccessful attempts of service on the Singhs at their listed address on October 5, 6, 8, and 11, 2023. Thus, the substitute service on Devinder Singh's mother at this residence address was presumptively proper. (See Code Civ. Proc., § 415.20, subd. (b); see also *Zara, supra,* 199 Cal.App.4th at 389.)

Allen further notes that service was proper because Devinder Singh, as the agent for service of process for Amazing Stars, provided his residence address on Amazing Stars' statement of information filed with the California Secretary of State on January 3, 2022. (Opp., Exh. 4.) Corporations Code section 1502, subdivision (b), provides that where an agent for service of process is a natural person, "the statement of information shall set forth that person's complete business or residence street address." Code of Civil Procedure section 415.20, subdivision (b), permits substitute service on a "person's dwelling house, usual place of abode, usual place of business . . . in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business." Thus, given that the address listed in the statement of information was a residence street address, substitute service on Gurmit Singh was proper. Moreover, the legal process server noted within the affidavit of diligence that an occupant of the residence said, "[N]either one of the subjects are [*sic*] *home* at this time, [Devinder] will be in tomorrow and [Anoma] is out of town." (Opp., Exh. 2, p. 4

[2] Anoma Singh does not appear to contest service on the same grounds.

[emphasis added].) This sets forth sufficient evidence to create a rebuttable presumption that service was proper. The Singhs have failed to rebut this presumption.

The court DENIES the Singhs' motion to quash service of summons.

III. THE SINGHS' DEMURRER

A. Legal Standards

"'A general demurrer searches the complaint for all defects going to the existence of a cause of action and places at issue the legal merits of the action on assumed facts.'" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 528 [quoting *Carman v. Alvord* (1982) 31 Cal.3d 318, 324].) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

The court cannot consider extrinsic evidence in ruling on a demurrer; therefore, the court has not considered any of the exhibits attached to the Singhs' opening memorandum or any arguments based on those exhibits.

Furthermore, while the Singhs are proceeding in propria persona, they are still bound to same restrictive rules of procedure as any attorney. (See *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1413 ["One who voluntarily represents himself 'is not, for that reason, entitled to any more (or less) consideration than a lawyer'"]; see also *Goodson v. The Bogerts, Inc.* (1967) 252 Cal.App.2d 32, 40.)

B. Discussion

The Singhs generally demur on three grounds: (1) the court lacks subject matter jurisdiction, (2) the complaint joins improper parties, and (3) the complaint fails to state facts sufficient to constitute a cause of action.[3]

1. Subject Matter Jurisdiction

The Singhs argue that this court lacks subject matter jurisdiction because the Agreement's "mandatory mediation clause" bars Allen from commencing this action. This is incorrect as a matter of law.

"'A provision for arbitration does not divest the court of jurisdiction to hear the controversy . . . . But lacking a request for arbitration, the courts stand ready, willing and able to decide controversies between the parties even though a provision for arbitration exists.'" (*Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 768-769 (emphasis removed) (*Sargon*) [quoting *Spence v. Omnibus Industries* (1975) 44 Cal.App.3d 970, 975 (*Spence*)]; see also *Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 44 (*Dial 800*) [holding a contract provision regarding the right to mediation or arbitration does not "oust the superior court of jurisdiction."]) "*As a result, there is nothing to prevent one of the parties to a*

[3] The notice also asserts a lack of personal jurisdiction as a further ground for demurrer; however, a motion to quash, not a demurrer, is the proper procedural vehicle for this objection, and this argument is addressed above. (Defs' Memo. at p. 4:23-26.)

contractual arbitration provision from resorting initially to an action at law." (*Sargon, supra,* 15 Cal.App.5th at p. 768 (emphasis in original) [citing *Spence, supra,* 44 Cal.App.3d at p. 975].) A contractual arbitration provision merely permits a party to move to compel arbitration and stay court proceedings. (See *Dial 800, supra,* 118 Cal.App.4th at p. 45.) Nevertheless, even when such a motion is made and granted, the court still retains jurisdiction to confirm the arbitration award and hear any portion of the lawsuit not fully resolved through arbitration. (*Ibid.*) Therefore, the failure to comply with a contractual ADR provision does not necessarily raise a question of subject matter jurisdiction.

In this case, Section 18 of the Agreement does not mandate arbitration, but it does set forth mediation as a "condition precedent" to the "initiation of any legal action." At the same time, Section 18 also states: "Should either party fail to participate timely and in good faith in the selection process for the mediator, *or in the mediation process*, such party will be deemed to have refused mediation, and that party shall not be entitled to attorney fees that might be otherwise available to it in any subsequent court action or arbitration." Allen argues that this means that the Agreement only bars the recovery of attorneys' fees when a party fails to participate in the mediation process before initiating litigation; it does not bar the litigation itself. The court agrees. (See *Lange v. Schilling* (2008) 163 Cal.App.4th 1412, 1418 [upholding similar clause barring recovery of attorney's fees where the prevailing party failed to start with mediation]; see also *Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1508 ["The new provision barring recovery of attorney fees by a prevailing party who refuses a request for mediation means what it says and will be enforced."].)

The court therefore OVERRULES the Singhs' demurrer to the complaint on the ground of subject matter jurisdiction. (Code Civ. Proc., § 430.10, subd. (a).)

2. Misjoinder

The Singhs also argue that complaint suffers from a "misjoinder," because the Agreement "defines parties that are not joined to this civil action and/or names parties not subject to the Agreement." (Defs' Memo. p. 5:10-11.)

Code of Civil Procedure section 430.10, subdivision (d), permits a demurrer where "[t]here is a defect or misjoinder of the parties." A defect or "nonjoinder" of parties exists where some third person is a "necessary" or "indispensable" party to the action and must be joined before the action may proceed (see Code Civ. Proc., § 389), while a "misjoinder" of parties exists when there is no common question of law or fact as to the defendants who have been named together in the complaint (see Code Civ. Proc., § 379).

As an initial matter, California courts have generally held that nonjoinder is only grounds for a demurrer if the moving party can show prejudice from the nonjoinder. (See *Royal Surplus Lines Ins. Co. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193, 198; see also *Anaya v. Superior Court* (1984) 160 Cal.App.3d 228, 231, fn.1.) Here, the Singhs have failed to identify any prejudice arising out of any alleged nonjoinder; even more critically, they have failed to identify any necessary or indispensable party to the action who was allegedly named in the Agreement but who has not been joined. As a result, there is no basis for sustaining a demurrer grounded on nonjoinder of parties.

As for misjoinder, Code of Civil Procedure section 379, subdivision (a)(1) provides:

> **(a)** All persons may be joined in one action as defendants if there is asserted against them: [¶] **(1)** Any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Here, Allen seeks relief against the Singhs from a single transaction or occurrence—the alleged breach of the Agreement. The signatories to the Agreement include Dev Singh and Anoma Singh, in addition to Mehran Madani on behalf of Allen. (Complaint, Exh. 1, p. 6.) To the extent that the Singhs take issue with the Agreement naming "Dev Singh" as a party rather than "Devinder Singh," the moving papers provide no basis for concluding that these are two different people. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 ["We treat the demurrer as admitting all material facts properly pleaded [in a complaint], but not contentions, deductions or conclusions of fact or law."]; see also *Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [same].)

The complaint also alleges that the Singhs are signatories for defendant Amazing Stars, and that they guaranteed Amazing Stars' performance of the Agreement. (*Id*. at ¶ 12.) Moreover, the complaint alleges: "Devinder and Anoma made, executed, and delivered to Plaintiff an instrument designated [sic] a personal guaranty, incorporated into the Asset Purchase Agreement." (*Id*. at ¶ 28.) Again, for purposes of a demurrer, these factual allegations must be accepted as true.

The court OVERRULES the Singhs's demurrer to the complaint on the ground of defect or misjoinder of parties. (Code Civ. Proc., § 430.10, subd. (d).)

3. Failure to State Sufficient Facts

The Singhs broadly claim without any factual or legal support that the complaint fails to state facts sufficient to constitute a cause of action.

a) Breach of Contract

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Here, the complaint alleges the existence of the contract (*i.e.*, the Agreement) and attaches it as Exhibit 1, and it alleges Allen's performance on the contract through delivery of the Business Sale (*i.e.*, A Special Place Schools). (Complaint, ¶¶ 9, 18; Exh. 1.) The complaint alleges that defendants breached the contract by failing to pay the monthly installments required under the Carryback Note. (*Id*. at ¶¶ 15-16, 19.) Section 3(g) of the Agreement incorporates the terms of the Carryback Note in writing. (See Exh. 1, p. 1.) Finally, the complaint alleges that because of defendants' breach of a material provision of the contract, Allen suffered damages for the remaining principal on the Carryback Note, in addition to any accrued interest at the 7% annual rate. (*Id.* at ¶ 20.) These allegations are sufficient to set forth a breach of contract cause of action.

The court OVERRULES the Singhs' demurrer to the first cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

b) Common Counts

In its opposition, Allen clarifies the second cause of action as one for common count: account stated.

"'The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due.'" (*Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491 [citations omitted].)

Here, the complaint alleges that defendants owed Allen money on the Carryback Note as part of the Asset Purchase Agreement. (Complaint, ¶ 11.) The Agreement expressly integrates the terms of the Carryback Note (*e.g.*, amount due, payment schedule) under Section 3(g), and the complaint alleges that defendants promised to repay the balance on the Carryback Note. (*Id*. at ¶ 9, 15; Exh. 1, p. 1.)

These allegations are sufficient to set forth the elements of an account stated cause of action, and the court OVERRULES the Singhs' demurrer to the second cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

c) Against Surety on Continuing Guaranty

The third cause of action appears to allege a claim for breach of a suretyship obligation on a continuing guaranty.

California law defines a surety as "one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefore." (Civ. Code, § 2787.) Suretyship law requires that such an obligation "be in writing, and signed by the surety." (Civ. Code, § 2793.) Civil Code section 2814 defines a continuing guaranty as "A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied."

The complaint alleges that pursuant to Section 23 of the Agreement, the Singhs agreed to guarantee obligations due under the Agreement on behalf of Amazing Stars. (Complaint, ¶¶ 28-29.) Section 23, entitled "ACKNOWLEDGEMENT AND PERSONAL GUARANTEE" provides:

> By signing below, Buyer and Seller each acknowledge that they have carefully read and fully understand this Agreement and have received a copy of it. The undersigned warrant that their signatures are legally sufficient to bind Buyer and Seller. If Buyer and/or Seller is a corporation or other entity, the undersigned personally guarantee the performance of this Agreement and any other agreements necessary to complete the purchase.

The Agreement defines Buyer as "Dev Singh and Anoma Singh" and Seller as "Mehran Medani" on behalf of the corporation (Allen). *Nowhere in the agreement is there any reference to Amazing Stars*. The complaint's reliance on Section 23 of the Agreement as necessarily creating a suretyship in the Singhs as to Amazing Stars is at odds with the plain language of the Agreement. Without further factual support, this

allegation of the complaint is an improper conclusion that cannot automatically be accepted on a demurrer. (See *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."].)

Accordingly, the court SUSTAINS the Singhs' demurrer to the third cause of action on the ground of insufficient facts, with 10 days' leave to amend. (Code Civ. Proc., § 430.10, subd. (e).)

IV. AMAZING STARS' MOTION TO QUASH AND DEMURRER

California courts have long held that a corporation "cannot represent itself before courts of record in propria persona, nor can it represent itself through a corporate officer, director or other employee who is not an attorney. It must be represented by licensed counsel in proceedings before courts of record." (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145 [citing *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd*. (2002) 99 Cal.App.4th 1094, 1101-1103]; see also *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal. 3d 724, 727; *Van Gundy v. Camelot Resorts, Inc.* (1983) 152 Cal. App. 3d Supp. 29, 31.)

As noted above, Amazing Stars, a California corporation, is currently unrepresented by counsel, as the Singhs are not licensed attorneys. Accordingly, the court STRIKES the demurrer on its own motion. (See *CLD Construction, supra,* 120 Cal.App.4th at p. 1145; see also Code Civ. Proc., § 435, subd. (a)(2) and § 436 [court may strike a demurrer not in conformity with the law].) In addition, the court DENIES Amazing Stars' motion to quash.

Finally, the court notes that even if Amazing Stars had been properly represented by counsel on these motions, the court would have denied the motion to quash and overruled the demurrer to the first and second causes of action for the same reasons set forth above as to the Singhs.

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Calendar Line 3
Case Name: *Feridon Ahmadkhani v. Costco Wholesale Corporation*
Case No.: 21CV381712

Motion to compel deposition of plaintiff: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion and orders plaintiff to appear for deposition within 20 days of notice of entry of the court's order.

In addition, the court orders plaintiff to pay monetary sanctions of **$500** to defendant within 20 days of notice of entry of this order. Although the caption of defendant's motion refers to a "request for monetary sanctions of $1,246.45 against plaintiff Feridon Amadkhani and his counsel Robert Klein," the court finds no support for this specific amount anywhere in defendant's papers, including the declaration of defendant's counsel. Nevertheless, in view of the (at least) eight no-shows or last-minute cancellations of plaintiff's deposition, the court finds that $500 is an appropriate amount to reimburse defendant for the cost of bringing this simple and straightforward motion.

IT IS SO ORDERED.

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Calendar Lines 4-5
Case Name: *QTV Enterprise, LLC v. Hieu Minh Nguyen*
Case No: 17CV310864

Calendar Line 6
Case Name: *Quang Luong v. Hieu Minh Nguyen*
Case No: 18CV326638

Calendar Line 7
Case Name: *Vector Fabrication, Inc. et al v. Hieu Minh Nguyen et al.*
Case No: 18CV334671

I. BACKGROUND

In these three cases, which remain unconsolidated even after many years, the plaintiffs and defendants are essentially the same. The plaintiffs are Quang Luong ("Luong") and/or one of his companies (QTV Enterprise, LLC ("QTV") and Vector Fabrication, Inc. ("Vector")), and the defendant is Hieu Minh Nguyen ("Nguyen"), either by himself or along with one or more of his family members: Qui Ngoc Thi Nguyen (Nguyen's wife) and Nguyen Thi Ngoc Qui (Nguyen's daughter). In addition, these cases include cross-complaints involving several of the same parties, as well as Little Saigon Plaza Sacramento LLC ("Little Saigon"), a former "partnership" between Luong and Nguyen that Luong apparently now controls.

In each of these cases, Nguyen previously filed a "Motion to Set Aside Default, Default Judgment, Summary Adjudications, Charging Orders, and Discovery Sanctions" on March 17, 2022, a filing that was virtually identical in each case. In addition, in the earliest-filed case (No. 17CV310864), QTV and Luong filed a motion for summary adjudication as to both Luong's cross-complaint and Nguyen's cross-complaint. Those four motions were originally scheduled to be heard in different courtrooms on the same date and at the same time (April 11, 2023 at 9:00 a.m.). On April 7, 2023 the court reassigned the cases to a single courtroom (Department 10), and it informed the parties that it would continue the motions to July 11, 2023, so that a single judge could review the files in all the cases. At the request of counsel, that date was pushed back further to August 1, 2023.

On August 1, 2023, the court heard the four motions described above. The court granted plaintiffs' motion for summary adjudication in Case No. 17CV310864, and it denied Nguyen's motions to set aside various events in all three cases. Rather than repeat the long recitation of the background of those three cases here, the court incorporates by reference its August 1, 2023 order. The court likewise takes judicial notice of the August 1, 2023 order on its own motion under Evidence Code section 452, subdivision (d).

Currently before the court are three motions for "reconsideration under code of civil procedure §1008 and/or code of civil procedure §473," filed by Nguyen on the evening of August 14, 2023.[4] QTV, Luong, Trang Do, Little Saigon, and Vector filed oppositions to the motions in each of the three cases on September 6, 2023.

[4] Nguyen filed Exhibit C in support of each motion several days later, on August 22, 2023.

Also before the court is an ex parte application for entry of judgment filed by QTV, Luong, Vector, Little Saigon, and Trang Do on September 19, 2023 in Case No. 17CV310864. Nguyen filed an opposition to the ex parte application that same day. On September 20, 2023, the court ordered that the application would be considered and addressed with the pending motions for reconsideration.

II. MOTIONS FOR RECONSIDERATION

A. General Standards

Code of Civil Procedure section 1008 represents the Legislature's attempt to regulate what the Supreme Court has referred to as "repetitive motions." (See *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 885 [disapproved on other grounds in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830].) Motions for reconsideration are regulated by section 1008, subdivision (a), which states that such motions may be brought by "any party affected by" a prior order. The statute requires that any such motion be: (1) filed within 10 days after service upon the party of written notice of the entry of the order of which reconsideration is sought, (2) supported by new or different facts, circumstances or law, and (3) accompanied by an affidavit detailing the circumstances of the previous motion, and the respects in which the new motion differs from it. Reconsideration cannot be granted based on a claim that the court misinterpreted the law in the prior ruling; such a claim is not a "new" or "different" matter. (See *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500 (*Gilberd*).)

Reconsideration is properly restricted to circumstances in which a party offers the court some fact or circumstance not previously considered, as well as some valid reason for not offering it earlier. The burden under section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212-213.)

B. Timeliness

Under Code of Civil Procedure section 1008(a), a motion for reconsideration must be filed within 10 days of service of "notice of entry" of the order sought to be reconsidered. In this case, the court issued its order on August 1, 2023, and Nguyen did not file his motions for reconsideration until August 14, 2023, more than 10 days later. But because the court's file does not contain any "notice of entry" of the August 1, 2023 order, the 10-day time limit is not applicable. (See *Novak v. Fay* (2015) 236 Cal.App.4th 329, 335-336 [10-day time limit did not apply where no notice of entry of order was served].) The court will therefore consider the motions for reconsideration.

C. Discussion

1. Relief Under Code of Civil Procedure Section 1008

Nguyen argues that the court should grant reconsideration of the August 1, 2023 order because the court: (1) failed to consider evidence submitted with his reply papers in Case No. 18CV334671 in connection with the motion "to Set Aside Default, Default Judgment, Summary Adjudications, Charging Orders, and Discovery Sanctions" filed in that case, and (2)

failed to consider Nguyen's submission of English translations of Vietnamese documents, even though Nguyen had submitted these translations without the original Vietnamese documents and without any certifications from a translator, as required by Evidence Code sections 751 and 753 and California Rule of Court 3.1110(g). (Memorandum at pp. 4:13-5:22.)

The court finds these arguments to be both legally and factually incorrect and therefore denies Nguyen's motions for reconsideration, for the reasons that follow.

First, Nguyen had no right to submit new evidence with his reply briefs without prior leave of court. Courts will generally not consider evidence submitted for the first time in reply for the obvious reason that the opposing party has not had an opportunity to respond to it. (See *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["[A] court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."]; *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252 [evidence submitted with a reply is not generally allowed]; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 [considering evidence in connection with a reply violated the opposing parties due process rights because the opposing party was "not informed what issues it was to meet in order to oppose the motion"].) It is for this reason that the court's August 1, 2023 order says that the ruling is based on evidence submitted in "Nguyen's moving papers," rather than in his reply papers. (August 1, 2023 Order at p. 8:7-12.) It is also for this reason that the case relied upon by Nguyen, *Johnston v. Corrigan* (2005) 127 Cal.App.4th 553, is inapplicable. (See Memorandum at p. 7:7-24.) That case had nothing to do with evidence submitted for the first time in reply.

Second, Nguyen is simply wrong that the court did not consider the material submitted with his reply papers, notwithstanding the absence of any obligation to do so. As plaintiffs point out (and as the court's own recollection confirms), the court did in fact review the new material attached to Nguyen's reply declaration. During the August 1, 2023 hearing, the court made it clear that it had seen the reply declaration and "saw the deposition testimony" that was attached. (Opposition, Exhibit 2, at pp. 6:9-12 & 13:17-22.) The court discussed that evidence with Nguyen's counsel at length during the hearing (*id*. at pp. 4:18-12:3; 13:1-14:2), and then the court noted that even if this evidence had been properly submitted, "[u]ltimately it doesn't really change the outcome here, [because] there are multiple reasons why the motion to set aside should not be granted." (*Id.* at pp. 13:24-14:2.)[5]

Third, because the new materials submitted with the reply brief on the prior motions, as well as the purported English translations submitted on the prior motions, were in front of the court *during* the August 1, 2023 hearing, they cannot constitute "new or different" matter for purposes of Code of Civil Procedure section 1008. Nguyen's mistaken belief that it was

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[5] At the hearing, Nguyen's counsel indicated his belief that he had filed the reply declaration and attached deposition transcripts in only one of the three cases—18CV334671—as well as his belief "that the court did not consider and may not have seen . . . the reply to the opposition to the motion to set aside that we filed on April 4th, 2023 at 12:57 p.m., in case number 18CV334671 which I had assumed maybe mistakenly would be considered for all the cases." (Opposition, Exhibit 2, at p. 4:18-23.) The court has no independent knowledge of whether these reply papers were actually submitted by counsel in only one of the three cases, but the court notes that the case files currently reflect this same reply declaration of Nguyen (and attached deposition transcripts) as bearing file stamps on April 4, 2023 *in all three cases.*

permissible to submit evidence for the first time with a reply brief or that it was permissible to submit uncertified translations of Vietnamese documents without the originals and without complying with the Evidence Code is not a basis for reconsideration. (See *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670 [counsel's mistake based on ignorance of the law is not a proper basis for reconsideration].)

Fourth, and finally, the court's August 1, 2023 order expressly concludes that even if all of Nguyen's incompetent evidence had been taken into full consideration, it would not have changed the outcome at all:

> Based on the foregoing, the court concludes that even if it is 100% true (*notwithstanding the lack of sufficient evidence*) that Nguyen was unable to leave Vietnam, that his passport was confiscated, that he was repeatedly interrogated by police and investigated for tax and financial crimes, that he was physically mistreated, and that he had to be hospitalized four times, the court still cannot accept the proposition that during these three years, he was unable to communicate with the outside world and get in touch with his U.S. lawyers or his family, even if only sporadically. There is no explanation as to why Nguyen would not have been able to communicate by letter, text, or phone—if not with his own phone and computer, then with someone else's phone or computer, such as the phones and computers of his two Vietnamese attorneys. As Judge Folan noted in a July 14, 2020 minute order attached to her August 5, 2020 order: "the Court finds it difficult to believe counsel cannot communicate with Mr. Nguyen by telephone, text, videoconferencing, email, written correspondence, WhatsApp or any other number of communication options if it was needed in connection with this motion. Counsel's declaration in connection with the Notice of Unavailability was rather vague on why communications were restricted." Just as Judge Folan found Nguyen's attorneys' explanations about his inability to communicate with them to be "difficult to believe" three years ago, so the court finds Nguyen's own explanations to be even more far-fetched in the present day.

(August 1, 2023 Order at pp. 11:17-12:8, italics added [other italics omitted].) Thus, even if reconsideration were granted in order to admit the evidence that Nguyen now seeks to admit, it would not yield a different outcome here. The motions to set aside in the three cases would still be denied. Nguyen fails to show in his motions for reconsideration how his reply evidence for the previous motions, plus his alleged translations of Vietnamese documents showing that he was subject to criminal and civil legal proceedings in Vietnam, necessarily establish that he is entitled to a set-aside of the court's prior rulings. The court already concluded that they did not.

2. Relief Under Code of Civil Procedure Section 473(b)

Nguyen's motion also seeks relief under Code of Civil Procedure section 473, subdivision (b). "[T]he reply to the opposition was filed timely on April 4, 2023, but it was filed in case no. 18CV334671, not necessarily in the companion cases of 17CV310864 and 18CV326638. The attorney assumed that a reply filed in one of the cases would be read for all three cases, but instead it appears that the reply was not read for any of the cases. To the extent that was a mistake or neglect, it was excusable." (Nguyen memorandum at p. 7:27-8:4,

internal citation omitted.) As already noted above, the court *did* consider the reply declaration and attached exhibits filed on April 4, 2023. In addition, as far as the court is aware, these papers were filed *in all three cases*, and so the factual premise of this request under section 473(b) is simply incorrect.

The motion also states that Nguyen "attached all of the Vietnam documents in translation but not the originals. To the extent that that was a mistake, that also should be excused." (Memorandum at p. 8:5-6.) Again, as noted above, this motion under section 473(b) is moot, because the court already determined that even if the evidence had been admitted, it would not change the outcome.

The court DENIES Nguyen's motions for reconsideration under section 1008, as well as his motions for relief under section 473(b).

III. EX PARTE APPLICATION FOR ENTRY OF JUDGMENT

The court DENIES the ex parte application by QTV, Luong, Vector, Little Saigon, and Trang Do for entry of judgment.

The application is largely based on this court's August 1, 2023 order and Judge Folan's August 5, 2020 order granting QTV's motion for summary adjudication in Case No. 17CV310864. Orders granting motions for summary adjudication are not themselves judgments (see *Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 11-14.) Accordingly, plaintiffs have requested entry of judgment in accordance with the prior rulings on these dispositive motions.

Nguyen disputes the amount(s) that might ultimately be owed in these cases and argues strenuously that granting the application may result in duplicative monetary recovery between these unconsolidated cases. This disagreement was the subject of considerable discussion at the August 1, 2023 hearing. The court finds that the parties have not adequately explained the intersection of the amounts at issue between the three cases (plus the fourth case in this court that is not the subject of these motions today), and the court does share some of Nguyen's concerns about the possibility of overlapping or duplicative recovery, given that the prior summary adjudication orders were either based on a complete absence of any response by Nguyen (Judge Folan's order) or the absence of any ability to present a substantive response, given the admissions that were deemed admitted in Judge Takaichi's prior discovery orders. These prior decisions were apparently made without taking into account the possibility of overlapping claims between the unconsolidated cases.

In any event, the court finds that an *ex parte application* is not the appropriate way to resolve this issue. The court urges the parties to meet and confer—again, just as it did at the August 1, 2023 hearing—regarding the best way to address this issue. It is an issue that appears to be purely the product of the failure (by either the parties or the court, or both) to consolidate these interrelated and intertwined cases many years ago.

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