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: 07-18-24 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.

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: 07-18-24 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.)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV377860 Hearing: Order of Examination	George Jones vs Michael Liddle et al	All parties are to appear for the hearing. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 2	21CV377860 Hearing: Order of Examination	George Jones vs Michael Liddle et al	All parties are to appear for the hearing. If there is no appearance by the moving party, the matter will be ordered off calendar.
LINE 3	24CV430570 Hearing: Demurrer	AMES AVENUE, LLC, a California limited liability company vs UNITED RENTALS REALTY, LLC, a Delaware limited liability company	See Tentative Ruling. Court will prepare the final order.
LINE 4	22CV395368 Motion: Compel	Artemio Floresca et al vs Ruperto Arzadon et al	Notice appearing proper, Plaintiffs' motion to compel responses to RFP for power of attorney forms as requested in requests 9, 10, and 13, is GRANTED. Defendants are ordered to pay sanctions to Plaintiffs' counsel in the amount of $975 (3 hrs @ $325). The discovery and sanctions shall be due within 20 days of receipt of the final order. Plaintiffs shall submit the final order to the Court within 10 days of the hearing.

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: 07-18-24 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.)

LINE 5	23CV412325 Motion: Stay	Norman Chanoski et al vs Thor Motor Coach, Inc. et al	See Tentative Ruling. Defendants shall submit the final order within 10 days.
LINE 6	23CV425467 Motion: Set Aside	Pruneyard Office Investors LLC vs Edward Fields et al Patsy Heath vs HUDSON RIVER OPCO, LLC et al	See Tentative Ruling. Court will prepare the final order.
LINE 7	23CV426932 Motion: Compel	Patsy Heath vs HUDSON RIVER OPCO, LLC et al	Notice appearing proper, the unopposed motion to compel arbitration and stay the matter pending completion of the arbitration is GRANTED. Defendants shall submit the final order within 10 days of the hearing.
LINE 8	24CV430943 Motion: Consolidate	TRESSIA COLEMAN vs RAINTREE APTS et al	Off Calendar.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

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: 07-18-24 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.)

- oo0oo -

Calendar Line 3
Case Name: *Ames Avenue, LLC v. United Rentals Realty, LLC.*
Case No.: 24CV430570

According to the allegations of the complaint, on July 23, 2019, plaintiff Ames Avenue, LLC ("Plaintiff"), as successor to the Madruga Living Trust and defendant United Rentals Realty, LLC ("Defendant") entered into a Standard Industrial Lease, which was amended on March 29, 2021 ("Lease"), regarding the premises located at 1175-1199 Ames Avenue in Milpitas. (See complaint, ¶ 7.) The original lease had an expiration of July 23, 2021, and the second amendment to the lease was the exercise of a one year option to extend the lease commencing on July 24, 2021 and expiring on July 23, 2022. (See complaint, ¶ 8.) At the end of the term, Defendant vacated the subject premises; however, it failed to surrender the premises in the condition required by the lease and refused to make additional repairs necessary to comply with the surrender condition. (See complaint, ¶¶ 9-11.)

On February 7, 2024, Plaintiff filed a complaint against Defendant asserting a single cause of action for breach of contract.

Defendant demurs to the complaint, asserting that it fails to state sufficiently a cause of action because the "allegation of breach is vague and fails to include any specificity as to the acts or failure to act which constitutes the alleged breach. However, a complaint for breach of contract must include: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.) There is no particularity or specificity requirement for purposes of demurrer.

Defendant relies on *P. & J. Artukovich, Inc. v. Simpson* (1954) 128 Cal.App.2d 440, in which the court there affirmed a judgment in favor of the defendant because it found that the evidence presented at trial regarding an oral agreement for payment for the rental of trucks could not be used to demonstrate a breach of a written contract that contained no provision with reference to trucks. (*Id*. at pp.447-448 (stating that "Pacific agreed orally to get some trucks and relied upon plaintiff to pay for the rental of them…. [t]here was no provision in the written contract with reference to paying for trucks… [u]nder the circumstances here where Pacific undertook to furnish, and did furnish, trucks which under the contract were to be furnished by plaintiff, it cannot be said that plaintiff breached the written contract by failing to pay for the trucks according to the oral agreement… [t]he oral agreement was not a substitute for, or an addition to, any provision of the written agreement").) First, *P. & J. Artukovich, Inc.*, *supra*, does not concern a demurrer or whether the allegations of a complaint sufficiently allege a cause of action for breach of contract; rather, it concerns a decision after the presentation of evidence at trial. Second, *P. & J. Artukovich, Inc.*, *supra*, does not support Defendant's assertion that the "fail[ure] to include any specificity as to the acts or failure to act which constitutes the alleged breach… [demonstrates that] Ames Avenue has failed to state a cause of action for breach of contract." Defendant's argument is without basis. The demurrer is OVERRULED.

The Court will prepare the Order.

- oo0oo -

Calendar Line 5
Case Name: Chanoski v. Thor Motor Coach, et al.
Case No.: 23CV412325

Defendants Thor Motor Coach, Inc., joined by Defendant Taylormade Round Two, LLC dba See Grins RV (hereinafter "Defendants") move to stay the action pursuant to CCP § 410.30 based on the grounds of inconvenient forum.

Plaintiffs purchased a new 2021 Thor Vegas 24.1 recreational vehicle from See Grins RV in Gilroy on January 13, 2021. As part of that purchase, Plaintiffs signed a document entitled "Thor Motor Coach Product Warranty Registration Form" ("Warranty"), attached as Exhibit B to Decl. of Scianna.[1] Both sides agree that the Warranty contains a forum selection clause requiring legal disputes relating to warranties to be brought in Indiana.

Under that provision, Defendants move to stay this action pursuant to § 410.30 which states that when a court "finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismissed the action." Defendants argue that because the limited warranty provided to Plaintiffs contained a forum selection cause requiring any claims under the warranty to be brought in Indiana, this action must be pending the action in Indiana. Plaintiffs oppose the motion and argue that (1) the forum selection clause is unfair and unreasonable and therefore should not be enforced; (2) the forum selection clause is invalid because Plaintiffs "were inundated with information" at the time of purchase such that Plaintiffs did not agree to it; (3) Defendants' motion is unreasonable because it fails to meet the elements required for a forum non conveniens motion; and (4) the forum selection clause is unconscionable and violates public policy.

Evidentiary Objections

To the extent the Court relied on any evidence objected to by Plaintiffs, their objections are OVERRULED. To the extent the Court did not rely on the evidence, the Court need not rule on the objection. Defendants' objections to paragraphs 12-14 and 17-20 of Todd Chanoski's Declaration are SUSTAINED.

Law of Forum Selection Clause Enforcement

"California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable." *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495-496. "This favorable treatment is attributed to our law's devotion to the concept of one's free right to contract, and flows from the important practical effect such contractual rights have on commerce generally." *America Online, Inc. v. Superior Court* (2001) 90 Cal. App. 4th 1, 11. Forum selection clauses are "routinely" enforced "even where the chosen forum is far from the plaintiff's residence." *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 588.

Both sides agree that such a clause is generally given effect unless it is unfair or unreasonable. (See Defendants' Motion at p 5 and Opp. at p 5); see also *Berg v. MTC*

[1] Plaintiffs dispute that they signed the warranty, a claim that will be discussed later in this decision.

Electronics Technologies (1998) 61 Cal.App.4th 349, 358. Yet, it also true that the law favors such agreements "only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement." *America Online,* 90 Cal.App.4th at 12. "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." *Id*.

Plaintiffs' Claims that the Clause is Unfair, Unreasonable or Invalid

Plaintiffs claim that the forum selection clause is both unfair and unreasonable because it requires all California residents to travel to Indiana to assert their rights. This is not a basis to deny the motion. As stated in *Net2Phone*, these types of clauses are upheld even when the chosen forum is far from the Plaintiffs' home. *Net2phone*, 109 Cal.App. 4th at 588-589. The California Supreme Court has stated that "[m]ere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideration for these things." *Smith Valentino*, 17 Cal. 3d at p. 496. Nor does that fact that the contract may have been one of adhesion, not vigorously bargained for, or in the context of a consumer contract render the clause invalid or unenforceable. *Net2phone*, 109 Cal.App. 4th at 588-589. Here, one of the parties, the manufacturer, does have ties to Indiana. This claim is not sufficient to defeat the clause.

Plaintiffs also claim that the clause should not be enforced either because Plaintiffs did not know about clause or did not in fact sign the Warranty. Yes, as shown in Ex. B to the Scianna Decl., the purchaser signed the warranty. While Todd Chanoksi (Mr. Chanoski), the plaintiffs' son, claims not to recognize the signature, this does not mean it is not the signature of one of his parents. Notably, Mr. Chanoski does not actually attest to being present when the vehicle was purchased (and as such the Court sustains the objection to his statements regarding what happened at the time of purchase). But even if he were present, he claims only to not remember things, which does not prove that those things did not happen. The claim that the parents had neither the chance nor ability to negotiate the forum selection clause is not supported by any evidence. Mr. Chanoski's declaration that this parents would not have purchased the vehicle because of the forum selection clause or would have negotiated around it if they had been aware of it is rank speculation and not admissible. Moreover, as Defendants point out, Plaintiffs concede in the complaint that they received the warranties at the time of the sale. (Complaint, para. 9).

As to Plaintiffs' argument about the test for forum inconveniens, Defendants need not meet the test for forum inconveniens where there is an agreed upon mandatory forum selection clause. *Trident Labs, Inc. v. Merrill LynchCommercial Finance Corp.* (2011) 200 Cal.App.4th 147, held that a plaintiff contesting the application of a mandatory Forum Selection Clause bears the burden of proof and a traditional *forum non conveniens* analysis is not utilized: "'[T]he forum selection clause is presumed valid and will be enforced unless the plaintiff shows that enforcement of the clause would be unreasonable under the circumstances of the case.'" (*Id*. at 154 (citation omitted).

For the reasons argued by Defendants, Plaintiffs' other arguments regarding unfairness, unreasonableness, and invalidity are unavailing.

Plaintiffs' Claim that the Clause Violates Public Policy

Plaintiffs' best and most persuasive argument is that because there is also a choice of law provision, requiring application of Indiana law, having the case go to Indiana would deprive them of their statutory rights under the Song Beverly Act. Opp. pp 6-7. Defendants claim that this should not defeat the forum selection clause because they are willing to stipulate to the application of California's Song Beverly Act. On this point, Defendants bear the burden of proof. "Although a party opposing enforcement of a forum selection clause ordinarily bears the burden to show enforcement would be unreasonable or unfair, the burden is reversed when the underlying claims are based on statutory rights the Legislature has declared to be unwaivable. In that instance, the party seeking to enforce the forum selection clause has the burden to show enforcement would not diminish unwaivable California statutory rights, otherwise a forum selection clause could be used to force a plaintiff to litigate in another forum that may not apply California law." *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal. App. 4th 141, 144-145.

Defendants attempt to meet this burden by declaring that they will stipulate to the application of the Song Beverly. The *Verdugo* case makes clear that a stipulation to apply the law of forum desired by a plaintiff to protect plaintiffs' rights will suffice to allow for the enforcement of the forum selection clause. The *Verdugo* court specifically stated "Alliantgroup could have eliminated any doubt about which law would apply to Verdugo's claims by stipulating to have the Texas courts apply California law, but it did not do so." *Verdugo*, 237 Cal.App.4th at 145. Here, while the stipulation is not attached to the motion, Defendants state in their pleadings that they will stipulate that Song-Beverly will apply to Plaintiffs' claims against them. This is sufficient to allow the case to go forward in Indiana.

The motion for stay is GRANTED. Defendants shall submit the final order within 10 days.

- oo0oo -

Calendar Line 6
Case Name: *Pruneyard Office Investors LLC v. Fields, et al*.
Case No.: 23CV425467

I. BACKGROUND

A. FACTS

This is an action for breach of contract, among other things. According to the Complaint, Pruneyard Office Investors LLC ("Plaintiff,") acquired commercial real estate located in Campbell, California ("Subject Building,") from CFEP Pruneyard LLC ("CFEP") in 2019. (Complaint, ¶¶ 10-11.) Prior to the acquisition, Westfield Partner, LLC ("Westfield" or "Defendant") entered into a written lease agreement with CFEP ("Agreement,") and Edward Fields, a managing member of Westfield ("Fields,") executed a written Guaranty of Lease (the "Guaranty") (Complaint, ¶¶ 11-13.) As part of Plaintiff's acquisition, CFEP assigned its "rights, title, and interest," in both the Agreement and Guaranty, to Plaintiff. (Complaint, ¶ 14.) After Plaintiff became the landlord of the Subject Building, Westfield and Fields materially breached the Agreement by failing to pay rent. (Complaint, ¶ 18.)

B. PROCEDURAL

Plaintiff filed the original and still-operative complaint on November 1, 2023.

The Complaint states the following causes of action: (1) breach of contract (against Westfield); and (2) breach of guaranty (against Fields).

Defendant Westfield ("Defendant") was served with the summons and complaint ("S&C") on November 13, 2023. Defendant failed to answer the complaint or appear to defend the action within the time allotted by law, and default was entered on December 19, 2023.

Now before the Court is Defendant Westfield's motion to set aside default filed on April 18, 2024. Defendant argues that it complied with Code of Civil Procedure section 473, and consequently, the default against it should be set aside. Plaintiff filed an opposition on July 8, 2024, arguing that (1) Defendant's motion was not timely, (2) Defendant has failed to establish mistake, surprise, inadvertence or excusable neglect by a preponderance of the evidence; or, alternatively, (3) if Defendant's motion is granted, a bond or security should be posted as a condition for that relief. Defendant Westfield filed a reply on July 11, 2024.

A day later, on July 9, 2024, an amended request for entry of default against Defendant Westfield was entered.

II. PROCEDURAL VIOLATION

As a preliminary matter, the Court acknowledges Defendants' contention that Plaintiff's opposition is untimely filed and served. (See Defendant's Reply to Plaintiff's Opposition ("Opp.") to Defendant's Motion to Set Aside ("Reply,") p. 2-3:1-8; see also Declaration of Cedric Severino in Support of Reply, ¶ 3.) Code of Civil Procedure section 1005, subdivision (b) states, "[a]ll papers opposing a motion … shall be filed with the court and a copy served on each party at least nine court days … before the hearing." Based on a hearing date of July 18, 2024, Plaintiff's opposition had to be filed and served no later than

July 5, 2024. Plaintiff did not file and serve the opposition until three days later, on July 8, 2024.

California Rules of Court, rule 3.1300, subdivision (d) states, "[n]o paper may be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate." That said, the court has discretion to consider a late filed paper. Here, Defendant Westfield has already filed a substantive reply to Plaintiff's opposition, and thus, has not suffered prejudice from the late filing. Accordingly, to avoid the expenditure of any further judicial resources, the Court will look past this procedural violation and consider the opposition on its merits. However, Plaintiff is admonished for the procedural violation. Any future violation may result in the Court's refusal to consider the untimely filed papers.

III. DEFENDANT WESTFIELDS'S MOTION TO SET ASIDE DEFAULT JUDGMENT

A. LEGAL STANDARD

Code of Civil Procedure section 473, subdivision (b) provides:

> 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 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. . . The court shall, whenever relief is granted based on *an attorney's affidavit of fault*, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

(Code Civ. Proc. § 473, subd. (b), italics added.)

A motion under Code of Civil Procedure section 473, subdivision (b) must also be accompanied by a proposed responsive pleading, but in deference to the policy that matters should be decided on their merits, it has been held that substantial compliance with this requirement is sufficient. (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 401-403.)

Code of Civil Procedure section 473 is very specific in language and narrow in scope, authorizing a court only to relieve a party from a judgment taken through mistake, inadvertence, surprise or excusable neglect. (*In re Marriage of Adkins* (1982) 137 Cal.App.3d 68.) To obtain relief under this section, the moving party must show good cause for that relief by proving the existence of a satisfactory excuse for the occurrence of that mistake. (*Dill v. Berquist Construction Co.* (1994), 24 Cal.App.4th 1426 (*Dill*).) Where a party delays in seeking relief, the court properly denies the application. (*Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal.App.5th 267, 273 [dissolved corporation not entitled to relief

from a default and default judgment because motion filed more than six months after entry of default]; *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1183 [abuse of discretion to set aside default and default judgment where party did not take steps "within a reasonable time" to set aside its default and default judgment].)

B. ANALYSIS

Westfield asserts its motion should be granted because it provided both sufficient evidence of excusable mistake and/or neglect and attached a copy of its proposed answer to its motion as required by Code of Civil Procedure section 473 ("section 473"). (Defendant's Memorandum of Points and Authorities in Support of Motion to Set Aside Default ("MPA Mot.,") p. 6:1-4.)

1. THE MOTION TO SET ASIDE DEFAULT WAS TIMELY FILED UNDER CODE OF CIVIL PROCEDURE SECTION 473, SUBDIVISION (B).

As noted above, the motion to set aside must be filed within a reasonable time (not exceeding six months), of entry of default. (Code Civ. Proc., § 473, subd. (b).) Defendant points out that default was entered on December 19, 2023. Six months from December 19, 2023, is June 19, 2024. Defendant filed his motion to set aside default on April 18, 2024, which is well within the six-month window provided by section 473, subdivision (b). Although Plaintiff complains that Defendant demonstrated a "lack of diligence" by filing his motion a little over four months later, this Court does not discern any dilatory behavior on the part of Defendant in bringing this application. (See Opp., pp. 10-11.) Accordingly, this Court finds Defendant's motion to set aside default was timely filed.

2. DEFENDANT HAS FAILED TO ESTABLISH MISTAKE AND/OR EXCUSABLE NEGLECT.

Defendant has filed this motion to set aside default on the grounds of mistake and/or excusable neglect. (MPA Mot., p. 5:21-23-6:1-2.)

Here, Defendant Westfield attached a declaration of Fields in support of its motion, and provided the following reason for failing to file a timely response to the complaint: "Defendant Westfield did not file a timely answer due to Mr. Fields's lack of knowledge, mistake, and excusable neglect in not calendaring the answer's due date." (MPA Mot., p. 5:21-23; see also Declaration of Edward Fields, filed April 18, 2024 ("Fields Decl.,") ¶ 2.) As a result, Fields failed to "recall the exact date upon which his answer to the complaint was due." (MPA Mot., p. 3:6-8.) Defendant Westfield's counsel of record also filed a declaration in support of Defendant's motion, but counsel does not attest to any mistake or neglect. (See Severino Decl. in Support of ("iso") MPA Mot., ¶¶ 2-3.) As noted above, Defendant's motion was timely filed, and is accompanied by a proposed answer.

Having reviewed (1) Defendant Westfield's moving papers, including the two declarations in support of his motion to set aside, (2) Plaintiff's opposition, including the declaration of Plaintiff's counsel Bryan Silverman, and (3) Defendant's reply, including the declaration of Cedric Severino in support of reply, this Court DENIES the motion to set aside for the reasons set forth below.

i. FAILURE OF EVIDENCE

Defendant Westfield brings this motion under section 473, subdivision (b)'s discretionary provision. (MPA Mot., p. 4:3-11.)

> 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 made *within a reasonable time, in no case exceeding six months, after the judgment*, dismissal, order, or proceeding was taken.
>
> …
>
> *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.

(Code Civ. Proc. § 473, subd. (b), italics added.)

"To qualify for discretionary relief under section 473(b), the party seeking relief must show (1) a proper ground for relief, and (2) 'the party has raised that ground in a procedurally proper manner, within any applicable time limits. [citation omitted].' The party seeking relief under section 473 must be diligent, i.e., apply for relief within a reasonable time not to exceed six months after the judgment, dismissal, order, or proceeding was taken, and there must not be any prejudice to the opposing party if relief is granted. [Citation.]" (*Henderson v. Pacific Gas & Electric Co*. (2010) 187 Cal.App.4th 215, 229 (*Henderson*).)

Although Defendant Westfield brings this motion under the discretionary provision of section 473, subdivision (b), the declarations in support of its motion to set aside, and the motion itself, are vague and unpersuasive. Defendant Westfield provides its counsel's declaration in support of the motion to set aside, but, counsel neither attests to any fault nor provides specific details regarding Defendant's failure to timely file an answer[2] to the Complaint. (Severino Decl. iso MPA Mot., ¶¶ 2-3.)

Defendant also provides Fields's declaration in support of its motion, which *does,* to some extent, attest to fault and/or an inadvertent calendaring error, but it is devoid of any explanation for the error. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1407 [the moving party must submit affidavits or testimony demonstrating a *reasonable cause* for the default].) Here, Fields puts forth one reason for failing to file a timely response to the complaint: Fields failed to "recall the exact date upon which the Answer was due" because the response date was inadvertently "not calendared." (MPA Mot., p. 3:12-15, Fields Decl., ¶ 2.)

As noted in *Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 258 (*Zamora*), "'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable

---

[2] Defendant attempted to file an answer a week after it was due on December 21, 2023, but that answer was subsequently rejected because a default was entered two days earlier, on December 19, 2023. (See MPA Mot., p. 3:5-9; see also Clerk Rejection Letter, dated January 11, 2024.)

…’” “Neglect is excusable only if a reasonably prudent person in similar circumstances might have made the same error.” (*Ibid*.) “‘“The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief.”’” (*Henderson, supra,* 187 Cal.App.4th at p. 232.)

As Plaintiff argues in opposition, without more information, it is unlikely that a reasonable person in the same circumstances as Defendant would miscalculate the answer deadline given the risk of default. (See Opp., p. 12:15-19.) That is the case here. Defendant fails to offer any evidence to demonstrate the mistake was excusable. Notably, Fields fails to present *any excuse* for his failure to note down, and later recall, the answer filing deadline. As Plaintiff persuasively points out, Defendant could have avoided default “through the exercise of ordinary care” by carefully reviewing the S&C, which explicitly states the answer is due “within 30 days of service.” (Opp., p. 13:18-23.)

Further, it is not clear why Fields would have been responsible for calendaring or filing the answer. Notably, Fields is a managing member of Defendant Westfield. He is not Westfield’s attorney. As Defendant is a corporation, it must be represented by counsel. (See *Merco Const. Engineers, Inc. v. Mun. Court* (1978) 21 Cal.3d 724, 731[a corporation must be represented by counsel].) And, in fact, Defendant is represented by an attorney. As noted above, however, defendant’s counsel’s declaration in support of the motion neither attests to any fault nor provides specific details regarding the untimely filing of Defendant’s answer to the complaint. (Severino Decl., ¶¶ 2-3.) Neither declaration explained why Defendant’s counsel was not responsible for filing the answer. (See *Andrews v. Jacoby* (1919) 39 Cal.App.382, 383 [“the mere fact that the client is busy and occupied with other affairs is never held to constitute an excuse for his neglect to answer a summons”].)

In its reply, Defendant Westfield argues that California courts have granted motions to set aside under section 473, subdivision (b), due to answer calendaring mistakes, and relies on, inter alia, *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 234 (*Elston*), disapproved on other grounds by *Tackett v. City of Huntington Beach* (1994) 22 Cal. App. 4th 60. (Reply, p. 6:1-9.) However, *Elston* is distinguishable because the attorney in that case presented an explanation for his delay in responding to a request for admissions. (*Elston, supra,* at p. 234.) Specifically, in his affidavit, the attorney stated, “he was unaware of his duty to appear or answer because his employees misplaced papers or misinformed him as to the relevant date” and the firm was understaffed. (*Elston, supra,* at pp. 234-235.) Here, as noted above, Fields did not provide any reason or context for his calendaring mistake and merely stated that he forgot about the answer filing deadline.

Also, contrary to Defendant’s assertion, California courts have denied relief for parties attesting to response filing delays, without more explanation. For example, the court in *Henderson, supra,* 187 Cal.App.4th at p. 232 determined discretionary relief was not available to remedy an attorney’s negligence in failing to file a timely application for continuance to oppose a summary judgment motion. The court determined this conduct was inexcusable and did not involve the type of error a reasonably prudent person would make. (*Ibid*.) “Instead, the errors involved matters peculiar to the legal profession.” (*Ibid.*)

On this record, the Court finds that Defendant has not met its burden to show it is entitled to relief under Code of Civil Procedure section 473, subdivision (b). (See *Dill, supra,* 24 Cal.App.4th at p. 1426 [the moving party must show good cause for that relief by proving

the existence of a satisfactory excuse for the occurrence of that mistake].) Accordingly, Defendant's motion to set aside default must be DENIED.

III. CONCLUSION

Westfield's motion to set aside default is DENIED.

The Court will prepare the final order.

- oo0oo -