**Tentative Rulings for October 11, 2023**
**Department 403**

**For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)**

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**There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)**
***The above rule also applies to cases listed in this "must appear" section.***

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**The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.**

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**(Tentative Rulings begin at the next page)**

# Tentative Rulings for Department 403

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(20) **Tentative Ruling**

Re: ***Lee v. Mouren et al.***
Superior Court Case No. 23CECG00399

Hearing Date: October 11, 2023 (Dept. 403)

Motion: For Order Requiring Plaintiff to Post Bond

**Tentative Ruling:**

To grant and order plaintiff to post a $50,000 bond within 20 days of service of the order by the clerk. (Corp. Code, § 17709.02, subd. (b).)

**If oral argument is timely requested, it will go forward Wednesday, October 18, 2023, at 3:30 p.m., in Dept. 403.**

**Explanation:**

Plaintiff filed this action including derivative claims on behalf of Williams & Doris Land & Energy and Oil City LLC (referred to collectively as the "WLDE Defendants"). WLDE Defendants move to require plaintiff to post a $50,000 bond pursuant to Corporations Code section 17709.02, subdivision (b).

Within 30 days after service of summons on a limited liability company, the company may move the court for an order requiring the plaintiff to furnish security. (Corp. Code, § 17709.02, subd. (b).) The security may not exceed $50,000. (Corp. Code, § 17709.02 subd. (c)(2).) The motion must be based on one or both of the following grounds:

> (1) That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the limited liability company or its members.
> (2) That the moving party, if other than the limited liability company did not participate in the transaction complained of in any capacity.

(Corp. Code, § 17709.02, subd. (b).)

This unopposed motion is brought on the ground that "there is no reasonable possibility" that litigating this action will benefit WDLE or Oil City. In other words, where a plaintiff's action has a slight chance of success and faces significant hurdles in order to prevail, an order requiring the plaintiff to post security is proper. (See *Olson v. Basin Oil Co.* (1955) 136 Cal.App.2d 543, 560 [no abuse of discretion in requiring plaintiff to post security where "the board acted in good faith and exercised its best business judgment in the interest" of the corporation].)

The unopposed motion makes a showing of slight chance of success and significant hurdles faced by plaintiff.

First, WLDE Defendants submit evidence that plaintiff received the distributions she is entitled to. The moving papers set forth the profits distribution provisions of the two LLCs,

and show that the K-1s for WDLE from 2017-2021 reflect distributions consistent with the 30% ownership interests of the members, including plaintiff. (Anderson Decl., ¶ 6, Ex. 1.) The K-1s for Oil City reflect distributions consistent with plaintiff's one-sixth ownership interest in the company. (Anderson Decl., ¶ 7, Ex. 2.)

Second, the First Amended Complaint ("FAC") does not comply with the derivative claim pleading requirements of Corporations Code section 17709.02, subdivision (a)(2), which required the plaintiff to:

> [A]llege in the complaint with particularity the plaintiff's efforts to secure from the managers the action the plaintiff desires or the reasons for not making that effort, and alleges further that the plaintiff has either informed the limited liability company or the managers in writing of the ultimate facts of each cause of action against each defendant or delivered to the limited liability company or the managers a true copy of the complaint that the plaintiff proposes to file.

In *Schrage v. Schrage* (2021) 69 Cal.App.5th 126, 158, the plaintiff lacked standing to bring a derivative claim where he did not "attempt to comply with the requirements . . . of [section 17709.02] to do so." Here, plaintiff simply alleges that her attorney "wrote to counsel" for WLDE Defendants "regarding the allegations contained" in the FAC and demanded that they "take corrective action and remedy these wrongs." (FAC ¶ 65.) Plaintiff further asserts that "it is futile to make any further effort to secure corrective action from [the WDLE Defendants] since these entities are controlled by [the Individual Defendants] who have conspired to engage in the wrongful conduct as alleged herein." (*Id*.) Plaintiff does not allege with particularity that she "informed the limited liability company or the manager" of the "ultimate facts of each cause of action" in the FAC.

Third, the motion contends that the complained-of actions fall within the scope of the business judgment rule. The FAC focuses, in part, on related-party transaction between the WDLE Defendants, on one hand, and Coalinga Feed Yard and Wheat Land, on the other. Plaintiff claims all defendants "diverted profits" from the WDLE Defendants to Coalinga Feed Yard and Wheat Land, through "fabricating labor and equipment invoices." (FAC ¶¶ 31, 33, 58.) Contradicting these allegations, on May 19, 2022, plaintiff received a list of related party transactions for the WDLE Defendants from 2017-2021, confirming that the charges by Coalinga Feed Yard and Wheat Land were for services actually performed for WDLE Defendants. (Anderson Decl., ¶ 10, Ex. 6.) Moreover, the WDLE Defendants' accountant, along with James Anderson, the key manager of such entities, confirms that the charges by Coalinga Feed Yard and Wheat Land were for services actually performed for the WDLE Defendants. (Id.) The integration among these family run businesses saves the WDLE Defendants from incurring unnecessary additional overhead in hiring office administrators to manage the entities. (Id. at ¶ 9.) Wheat Land and Coalinga Feed Yard provide administrative services to WDLE Defendants, saving the latter from incurring overhead in hiring office administrators to manage the entities. (Anderson Decl., ¶ 9.)

Accordingly, WDLE Defendants make a prima facie showing that the transactions fall under the business judgment rule, and plaintiff has produced no evidence to the contrary.

Finally, counsel estimates that the case will require multiple experts and at least 10 depositions. WDLE Defendants intend to demur to and move to strike the FAC, as well as likely file a motion for summary judgment if the case proceeds that far. Thus, counsel estimates that the attorney costs will exceed $50,000. (Marshall Decl., ¶ 6.) Accordingly, the court intends to require a bond in the sum of $50,000.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**
**Issued By: JS on 10/5/2023 .**
(Judge's initials) (Date)

(41)

**Tentative Ruling**

Re: ***Victor Alvaro Garcia v. Carmen Tharp***
Superior Court Case No. 23CECG01054

Hearing Date: October 11, 2023 (Dept. 403)

Motions: (1) Demurrer to complaint; (2) motion to strike.

**Tentative Ruling**:

To sustain the demurrer by defendant Carmen Elizabeth Tharp to the complaint with leave to amend. Plaintiff is granted leave of 10 days to file his first amended complaint, which will run from service by the clerk of the minute order. New language must be set in **boldface** type.

To grant the motion to strike without leave to amend.

**If oral argument is timely requested, it will go forward Wednesday, October 18, 2023, at 3:30 p.m., in Dept. 403.**

**Explanation:**

Self-represented plaintiff Victor M. Alvaro Garcia filed a three-page Judicial Council form complaint against defendant Carmen Elizabeth Tharp. The defendant demurs to the complaint on the ground that it lacks the necessary allegations to state a cause of action against her.

Meet and Confer

The express language of Code of Civil Procedure section 430.41, subdivision (a) provides that the demurring party must meet and confer "in person or by telephone" with the opposing party. Communicating by email first in English and in Spanish, as counsel did here, can be helpful to the process, but this does not satisfy the meet-and-confer requirement. The Legislature specified in-person or telephone contact.

The meet-and-confer declaration of the plaintiff's counsel fails to establish the requirement to meet and confer in person or by telephone. However, Code of Civil Procedure section 430.41, subdivision (a)(4) provides that this "shall not be grounds to overrule or sustain the demurrer." In light of the plaintiff's apparent limited ability to communicate in English, the court has considered the merits of the defendant's demurrer. However, in the future, the parties are advised to make an attempt to meet and confer in person or by telephone, as required by the statute.

Grounds for Demurrer

A general demurrer tests the legal sufficiency of a complaint, cross-complaint or answer. (Code Civ. Proc., § 589.) The court takes as true all properly pleaded material facts, but not conclusions of fact or law asserted in the pleading. (*Sheen v. Wells Fargo Bank, N.A* (2022) 12 Cal.5th 905, 916.) A defendant against whom a complaint has been filed may object to it by demurrer on the ground that it fails to state facts sufficient to constitute a cause of action where the ground for objection appears on the face of the complaint or from any matter of which the court must or may take judicial notice. (Code Civ. Proc., §§430.10, subd. (e), 430.30, subd (a); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

A demurrer admits material facts properly pleaded except contentions, deductions or conclusions of fact or law. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591; *Daar v. Yellow Cab Co*. (1967) 67 Cal.2d 695, 713.) A demurrer cannot admit facts not pleaded.

The Plaintiff's Complaint Contains No Factual Allegations to Support Any Cause of Action

The plaintiff has filed a three-page Judicial Council form complaint, which fails to include the necessary attachments to allege any facts to support the cause of action for motor vehicle negligence against the defendant, such as when, where, and what the defendant allegedly did to cause the accident. As the court explained in *People ex rel. Dept. of Transportation v. Superior Court* (1992) 5 Cal.App.4th 1480:

> Adoption of Official Forms for the most common civil actions has *not* changed the statutory requirement that the complaint contain *facts* constituting the cause of action. Thus, in order to be demurrer-proof, a form complaint must contain whatever *ultimate facts* are essential to state a cause of action under existing statutes or case law.

(*Id.* at p. 1484, italics original, internal quotation marks and citations omitted.) The plaintiff's complaint lacks the necessary factual allegations, therefore, it is subject to demurrer for failure to state a cause of action.

Leave to Amend

Generally, it is the opposing party's responsibility to request leave to amend, and to show how the pleading can be amended to cure its defects. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Although the plaintiff has failed to file an opposition, out of the abundance of caution given the court's liberal policy of amendment, the court grants leave to amend since this is the original complaint. (See *McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-304 ["Liberality in permitting amendment is the rule" unless complaint "shows on its face that it is incapable of amendment"].)

Motion to Strike

The defendant moves to strike the allegations of the form complaint seeking punitive damages because the plaintiff alleges no factual allegations to warrant the imposition of punitive damages against the defendant. (For the requirement to meet and confer, the same factual and legal considerations apply to the demurrer and the motion to strike.)

The court may strike out any irrelevant, false, or improper matter inserted in any pleading. "The law does not favor punitive damages and they should be granted with the greatest caution." (*Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal.App.3d 347, 355.) To recover punitive damages, Civil Code section 3294 requires a showing of oppression, fraud, or malice. The plaintiff fails to make the requisite showing and it is highly improbable that he can do so. Therefore, the court grants the motion to strike without leave to amend.

The court orders the following language stricken from the plaintiff's complaint:

1. Prayer for exemplary "punitive damages," paragraph 14.a.[box](2) located on page 3 of plaintiff's complaint;
2. Paragraph 13. handwritten "/punitive"; and
3. Any and all other references to punitive damages.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

**Tentative Ruling**
**Issued By:** JS **on** 10/6/2023 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Reyes v. Pitman Family Farms***
Superior Court Case No. 23CECG00240

Hearing Date: October 11, 2023 (Dept. 403)

Motion: Motion to Strike Punitive Damages From First Amended Complaint

**Tentative Ruling:**

To deny. (Code Civ. Proc., § 436.)

**If oral argument is timely requested, it will go forward Wednesday, October 18, 2023, at 3:30 p.m., in Dept. 403.**

**Explanation:**

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading, (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc., § 436.) A motion to strike may be used to remove a claim for punitive damages that is not adequately supported by the facts alleged in the complaint. (*Cryolife, Inc. v. Superior Court* (2003) 110 CalApp.4th 1145; *Kaiser Foundation Health Plan, Inc. v. Superior Court* (2012) 203 Cal.App.4th 696.)

Civil Code section 3294, subdivision (a) provides:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Here, the FAC alleges plaintiff became ill and was subsequently diagnosed with megaloblastic anemia, a disability that left him hospitalized and interfered with one or more major life activities, including working. (FAC ¶¶ 11, 14.) Plaintiff reported his disability to defendant and requested accommodations in the form of a medical leave of absence, which was approved. (FAC ¶ 15.) When plaintiff attempted to return to work a few months later, defendant terminated plaintiff for false, pretextual reasons. (FAC ¶¶ 16-18.) The true reason for his termination was due to his disability, request for accommodation, and age. (FAC ¶ 19.) Plaintiff alleges that in engaging in these actions, defendant "acted with oppression and malice, intending to injure Plaintiff." (FAC ¶¶ 29, 35, 43, 50, 59, 65.)

These allegations are substantially similar to the facts found sufficient to submit a punitive damages claim to a jury in *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912. Read

in light of the preceding factual allegations of the FAC (see *Clauson v. Superior Court* (1998) 67 Cal. App. 4th 1253, 1255), the allegations of paragraphs 29, 35, 43, 50, 59, 65 are sufficient. Accordingly, the court intends to overrule the demurrer.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**
**Issued By: JS on 10/6/2023 .**
(Judge's initials) (Date)

(35)

**Tentative Ruling**

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|---|---|
| Re: | ***Lacome v. Martinez et al.***<br>Superior Court Case No. 21CECG02914 |
| Hearing Date: | October 11, 2023 (Dept. 403) |
| Motion: | By Defendant Tabitha Loraine Lopez to Quash Service of Summons; and Set Aside Default |

**Tentative Ruling:**

To deny, without prejudice. Hearing is continued to October 19, 2023, at 3:30 p.m., in Department 403. Counsel of record for the parties are directed to personally appear.

**Explanation:**

Defendant Tabitha Loraine Lopez ("Defendant") seeks to quash service of summons of the First Amended Complaint ("FAC") pursuant to Code of Civil Procedure section 418.10, subdivision (a)(1). In the alternative, Defendant seeks to set aside the entry of default against her.[1]

Code of Civil Procedure section 418.10, subdivision (a)(1) provides that a defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion to quash service of summons on the ground of lack of jurisdiction of the court over him or her.

Generally, the court in which an action is pending has jurisdiction over a party from the time summons is served on him. (Code Civ. Proc. § 410.50, subd. (a).) Here, the proof of service of summons, filed November 9, 2021, shows personal service of summons on October 6, 2021. Accordingly, the court obtained jurisdiction over Defendant on October 6, 2021. Defendant further waived any challenge to jurisdiction when she filed a demurrer to the original complaint on December 6, 2021. (*Ibid.* ["A general appearance by a party is equivalent to personal service of summons on such party"]; *Fireman's Fund Ins. Co. v. Sparks Const., Inc.* (2004) 114 Cal.App.4th 1135, 1145 [finding that an appearance is general if the party contests the merits of the case or raises other than jurisdictional objections].)

Even had the challenge to jurisdiction not been waived by a general appearance, nothing in the moving papers addresses the proof of service of summons. Whether a proof of service is void does not depend on evidence outside the face of the

[1] Though the notice of motion states that Defendant seeks to set aside her default, Defendant cites to a statute regarding the quashing of service of summons. Only in the basis for seeking to quash service of summons is there reference to the statutes to set aside a default. The opposition is directed primarily at the quash statute. However, the opposition also addresses the default statutes. In other words, despite the unclear notice for the grounds of the motion, whether to quash service of summons, or to set aside default, both sides address both grounds. Accordingly, the court proceeds on both grounds.

record. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 182.) If such a defect can be shown on the face of the proof of service, the burden falls to the plaintiff to demonstrate effective service. (*Dill v. Berquist Const. Co.* (1994) 24 Cal.App.4th 1426, 1441.) Without such a defect, the filing of a proof of service creates a rebuttable presumption that service was proper. (*Id.* at pp. 1441-1442.) Here, Yani Andrade declared having effected personal service of the summons on Defendant on October 6, 2021.

For the above reasons, Defendant's motion, to the extent that it argues that the FAC was not competently served on Defendant, affords no relief under Code of Civil Procedure section 418.10, subdivision (a)(1), for lack of personal jurisdiction, as sought in the notice of motion. The motion to quash service of summons is denied.

Defendant further seeks relief from default based on inadvertence, surprise, mistake or excusable neglect under Code of Civil Procedure section 473, subdivision (b). Code of Civil Procedure section 473, subdivision (b) provides, in pertinent part:

> 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. (emphasis added)

Thus, under Code of Civil Procedure section 473, subdivision (b), the court is empowered to relieve a party "upon such terms as may be just . . . from a judgment, dismissal, order or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect." Relief under section 473, subdivision (b) can be based either on: an 'attorney affidavit of fault,' in which event, relief is mandatory; or declarations or other evidence showing 'mistake, inadvertence, surprise or excusable neglect,' in which event relief is discretionary.

Mandatory relief pursuant to section 473, subdivision (b) occurs where the entry of default was solely caused by the attorney, i.e., the party did not contribute in any way. (See *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248; *Todd v. Thrifty Corp*. (1995) 34 Cal.App.4th 986, 991.) Public policy dictates that disposition on the merits be favored

over judicial efficiency. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 392.) Thus, absent a straightforward admission of fault by the attorney, there can be no relief under the mandatory provision of section 473. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 609-610.) No explanation need be given for the existence of one of those circumstances. (*Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, 443.)

Here, counsel for Defendant makes no straightforward admission of fault in support of setting aside the entry of default, instead arguing in effect that a fraud had been perpetrated. Accordingly, a mandatory set aside of the entry of default is not warranted. The court turns to discretionary relief.

At most, counsel for Defendant attests to surprise within six months of the date of entry of default. (Voisenat Decl., ¶ 37.) The term 'surprise' as used in section 473, refers to some condition or situation in which a party is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 611.)

No grounds for relief have been established. Nothing in the moving papers addresses how or why ordinary prudence would not have guarded against the entry of default. Rather, as Defendant notes, the court sustained Defendant's demurrer to Plaintiff's original Complaint on July 12, 2022, with leave to amend. Plaintiff had 10 days from the service of the order adopting the ruling to amend. (Cal. Rules of Ct., rule 3.1320(g).) On November 17, 2022, Defendant attended a Case Management Conference in which she noted in her Case Management Statement that "defendant just received late filed amended complaint and case is not at issue." (Defendant Tabitha Loraine Lopez's Case Management Statement, filed November 3, 2022, ¶ 19(a).) This is consistent with the proof of service attesting to service of the FAC on October 27, 2022. In other words, Defendant was aware of the FAC as early as November 3, 2022, and ordinary prudence would have guarded against the entry of default entered six months later, on May 2, 2023. The motion to set aside the entry of default pursuant to Code of Civil Procedure section 473, subdivision (b) is denied, without prejudice.[2]

Next, Defendant seeks relief under Code of Civil Procedure section 473.5. Code of Civil Procedure section 473.5 provides, in pertinent part that:

> When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action.

[2] Defendant's alternative argument that the filing of the FAC was unauthorized is of no moment to the present motion. If Defendant took issue with Plaintiff's disregard of a court order, Defendant could have sought sanctions, including terminating sanctions, prior to the filing of the FAC to advance the issue, or timely sought to strike the FAC once it was filed. None of these issues are properly before the court in considering the presently noticed motion to set aside a default.

As above, service of summons was perfected on October 6, 2021. Defendant has since made a general appearance well before the entry of default on May 2, 2023, and therefore demonstrates actual notice. The motion to set aside the entry of default pursuant to Code of Civil Procedure section 473.5 is denied.

Finally, Defendant seeks relief under Code of Civil Procedure section 473, subdivision (d), arguing that the entry of default is void. Code of Civil Procedure section 473, subdivision (d) states, in pertinent part: "[t]he court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

Here, there is no facially apparent clerical mistake as to the entries of default, nor are there any identified by Defendant. The entry of default, dated May 2, 2023, facially satisfies the minimal statutory requirements. (Code Civ. Proc. § 585 *et seq*.; *id.* § 585 ["…the clerk, upon written application of the plaintiff, and proof of service of summons, shall enter the default of the defendant, or defendants, so served…"].) A proof of service was filed prior to the entry of default. Accordingly, there is no clerical mistake.

Just as stated above, an order is said to be void on its face when the invalidity is apparent upon inspection of the judgment-roll. (*Dill v. Berquist Construction Co.*, *supra*, 24 Cal.App.4th at p. 1441.) The judgment-roll in this case is limited to the summons, proof of service of the summons, the complaint, and the request for entry of default. (Code Civ. Proc. § 670, subd. (a).) Because any defect in service must appear on the face of the judgment-roll as delimited by the documents specified in section 670, the question becomes one of whether a jurisdictional defect can be shown by the proof of service. (*Dill*, *supra*, 24 Cal.App.4th at p. 1441.) Whether the proof of service is void does not depend on evidence outside the face of the record. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 182; *see also Dill*, *supra*, 24 Cal.App.4th at p. 1441 [requiring the jurisdictional defect to be shown by the proof of service].) If such a defect can be shown on the face of the proof of service, the burden falls to the plaintiff to demonstrate effective service. (*Dill*, *supra*, 24 Cal.App.4th at p. 1441.) Without such a defect, the filing of a proof of service creates a rebuttable presumption that service was proper. (*Id.* at pp. 1441-1442.)

Defendant argues that she had no notice "that Plaintiff contended the First Amended Verified Complaint was served" or that Defendant was served with a Request for Entry of Default, prior to May 10, 2023. (Voisenat Decl., ¶ 38.) The date in which a document is received does not change the date in which service was effected or when a proof of service is filed. As above, Defendant bears the burden to demonstrate any defect on the face of the proof of service.

Defendant fails her burden as to both the proof of service of the FAC, and the proof of service of the Request for Entry of Default. The court disregards all defective proofs of service. What remains are a proof of service, filed May 2, 2023, attesting to service of the FAC on October 27, 2022; and a proof of service, filed May 2, 2023, attesting to service of the Request for Entry of Default on April 27, 2023. Though Defendant submits that Plaintiff sought entry of default while Defendant was seeking to communicate with Plaintiff about the pleadings, this does not demonstrate a facial defect of the proofs of

service. Neither does it appear that, by April 27, 2023, the existence of the FAC was a surprise or was unknown due to excusable neglect. As above, Defendant references knowledge of the FAC as early as November 3, 2022, nearly six months prior to the entry of default. The motion on the grounds of Code of Civil Procedure section 473, subdivision (d) is denied, without prejudice.

Finally, as to Defendant's suggestion that Plaintiff improperly practices California law without a license, the court notes that to the extent that he is or may be, Plaintiff is entitled to represent himself in pro per. Representing oneself is not an unauthorized practice of law. Nevertheless, Defendant raises sufficient concerns as to contact information for counsel for Plaintiff. Though the present motion is denied without prejudice, counsels of record for the parties are directed to personally appear, on October 19, 2023, 3:30 p.m. in Department 403, to resolve these issues.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**
**Issued By: JS on 10/9/2023.**
(Judge's initials) (Date)