PROPOSED TENTATIVE

On August 30, 2023, in Case No. 23CV03778, plaintiffs Joe and Kim Dipadova filed a complaint against defendants Aaron and Nicole Hanel, alleging three causes of action - for breach of contract, unjust enrichment, and declaratory relief. Briefly, plaintiffs leased property located at 3680 Camino Arroyo, Santa Ynez, developing two successful, five-star rated "Airbnb/Vrbo/Expedia" rentals, requiring investment of "thousands of dollars and hundreds of work hours . . ." in updated floors, electrical work, lighting, plumbing, etc. Defendants expressly encouraged plaintiffs' efforts in this regard, and agreed to compensate them for their work and efforts, including "long-term benefits from the rentals. . . ." Defendants subsequently notified plaintiffs of their divorce and desire to sell the property, allegedly breaching their contract with plaintiffs. Meanwhile, on September 25, 2023, plaintiffs Aaron and Lorel Hanel filed an unlawful detainer complaint against defendants Joseph and Kimberly Dipadova, as well as Secret Pizzaracy, Inc., involving the same real property at issue above in Case No. 23CV07832. A notice of related case was filed on November 9, 2023. The Dipadovas answered the unlawful detainer complaint on December 1, 2023,

On January 31, 2024, following a stipulated order signed by the court, the two cases were consolidated, with Case No. 2303778 designated the lead case (the Dipadovas complaint) and Case No. 23CV07832 designated the cross-complaint, although by the time of consolidation possession of the property at issue was no longer an issue. On April 12, 2024, defendants/cross-complainant Hanels filed a cross complaint against cross-defendant, alleging breach of contract, attorney fees award in unlawful detainer proceedings, interference with economic advantage, and an accounting. They also filed an answer to the Dipadovas' complaint. On May 21, 2024, the clerk's office entered default on the Hanels' cross-complaint against Joseph Dipadova and Kimberly Dipadova, but *not* Secret Pizzaracy.

On August 20, 2024, the Hanels filed a motion to compel responses to the demand for production of documents, set one, with a request for sanctions of $5,066.25. On January 12, 2024, opposition to a motion for relief for default was filed by the Hanels, even though no motion for relief from default had been filed (at least successfully) by the Dipadovas. On January 7, 2025, the Dipadovas filed opposition to the request for sanctions associated with Hanels motion to compel further responses, as it appeared to have complied with the response to the production of documents. On February 18, 2025, the Hanels filed a reply to its motion to compel responses. On the same day, the Dipadovas filed a reply to the opposition to the motion to set aside default. It was brought to the attention of the parties that no motion had actually been filed; a motion to set aside default on the cross-complaint was filed on March 5, 2025, along with

a proposed answer to the cross-complaint. Both motions were continued by the court to April 22, 2025, for review.[1]

The only motion that will be addressed in this written tentative is cross-defendant Dipadovas' s motion to set aside entry of default on the cross-complaint. The court, based on its past practices, will determine whether monetary sanctions are appropriate on the Hanels' motion to compel further responses (after the Dipadovas have provided responses) orally, after listening to arguments from both parties at the hearing.

As relevant for this written order, and as noted above, the court entered default on the cross-complaint as to defendant Joseph Dipadova and Kimberly Dipadova (hereafter, cross-defendants) only on May 21, 2024. Cross-defendants ask the court to set aside default under the mandatory relief provision of Code of Civil Procedures section 473, subdivision (b), as they have attached an attorney affidavit of fault from Mathew Nash, who has submitted the following declaration as the reason why cross-defendants failed to submit an answer to the cross-complaint: "In the instant case, Plaintiffs failure to file an answer to Defendants' cross-complaint was a result of mistake, inadvertence, or excusable neglect on the part of counsel. . . ." Counsel explains that he has been "distracted and preoccupied with fighting to keep 50% custody of [his] two minor children" in San Luis Obispo County Family Superior Court. "Due to may frequent absences, my state of mind and preoccupation with keeping at the very least 50/50 custody of my 6-year old daughter and 8-year old son (who had never gone more than a week without seeing me) caused me significant hardship and as a result I neglected the present matter. I failed to enter a responsive pleading and did not respond to [plaintiff's] emails notifying me of the default. [¶] Had I filed the responsive pleading on time, prior to defaults being taken, the defaults would have been avoided. It is clear my mistake, inadvertence and neglect resulted in the entry of default against my clients." Cross-defendants have filed a proposed answer to the cross-complaint contemporaneously with the motion, raising 29 affirmative defenses.

Code of Civil Procedure section 473, subdivision (b) (all further statutory references are to this Code), which contains the mandatory relief provision at issue, provides as follows: ". . . . 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

[1] The record discloses the following sequence of events. It appears cross-defendant Dipadovas, then represented by attorney Mathew Nash, unsuccessfully filed a motion for relief from default to the cross-complaint on September 17, 2024, although it was rejected by the clerk's office. The cross-complainant Hanels filed opposition to the motion (for which they obviously were served, and thought had been filed) on December 12, 2024. On February 18, 2024, cross-defendant Dipadovas, with new counsel Brandon Murphy from Bice Murphy Law, filed a reply. The court alerted the parties to the fact that no motion had actually been filed. On March 5, 2025, the cross-defendant Dipadovas, with Matthew Nash as counsel (and presumably in an attempt to comport with what was intended to be filed on September 17, 2024), filed a "Motion to Set Aside Default Judgment" association with the cross-complaint, along with Mr. Nash's affidavit of fault. For the record, only ***entry*** of default has been made. Default judgment has not been entered.

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. 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 . . . ." (§ 473, subd. (9); *Talbott v. Ghadimi* (Mar. 18, 2025, No. B329889) ____ Cal.App.5th ____ [2025 WL 841513, at *5.] The California Supreme Court has described the mandatory provision as "a narrow exception to the discretionary relief provision for default judgments and dismissals" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257) that "covers only default judgments and defaults that will result in the entry of judgments." (*Even Zohar*, *supra*, 61 Cal.4th at p. 838; *Henderson v. Pacific Gas & Electric Co*. (2010) 187 Cal.App.4th 215, 228–229.)

An attorney attesting to his or her mistake, inadvertence, surprise or neglect provides a basis for mandatory relief. Accordingly, a party is entitled to mandatory relief under section 473(b), even when the attorney error is inexcusable, so long as the attorney affidavit of fault shows the error was the fault of the attorney rather than the client. (*Jimenez v. Chavez* (2023) 97 Cal.App.5th 50, 57–58; see *Hu v. Fant* (2002) 104 Cal.App.4th 61, 64.) More recent cases have held that mandatory provision does not require a showing of diligence. (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1147.) The mandatory provision requires that the mandatory motion be "in proper form," which encompasses the requirement that a proposed answer accompany the application. (*Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 401; see also *Rodriguez v. Brill* (2015) 234 Cal.App.4th 715, 728.) If no default judgment has been entered, as is the case here, there appears to be no time limit on a motion for relief from entry of default based on an attorney affidavit of fault. (See, e.g., Weil & Brown, *supra*, ¶ 5.305.2.)[2]

Cross-defendants have satisfied all requirements for mandatory relief under this provision. No default judgment has been entered, meaning the application is timely. Mr. Nash's declaration clearly takes full responsibility for the failure to file the answer to the cross-complaint, and as noted above, relief is mandatory even if the attorney's neglect was inexcusable. (*Carmel, supra,* 175 Cal.App.4th at p. 401.) There is nothing in the record that demonstrates any neglect or wrongdoing on the part of cross-defendants themselves. (*Solv–All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1011.)

Cross-complainants offer three arguments in its opposition as a bases to deny cross-defendants' motion. First, they argue that the court cannot grant the motion because attorney

[2] A motion for mandatory relief from default judgment based on an "attorney affidavit of fault," on the other hand, must be filed within (6) months after entry of judgment. (*Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 295.)

Nash did not provide an "attorney affidavit of merit," attesting to the merits of the defenses advanced in the answer. Second, they contend that the court cannot grant the motion because cross-defendants' answer fails to comply with sections 430.20, subdivision (a), 435, subdivision (b)(1), 436, 437, and *Canye v. Krempels* (1950) 36 Cal.2d 257. Finally, they claim the court cannot grant relief because "there is no proposed answer for Secret Pizzaracy, Inc. Relief from the default has not been requested as to this cross-defendant." None of these arguments has merit.

Taking the last argument first, no default has been entered against Secret Pizzaracy, Inc. It is not a party to the motion for relief from default. Its status is therefore irrelevant to resolution of the present motion.

Additionally, there is no requirement that counsel (here, Mr. Nash) provide an affidavit or declaration of merit. Not surprisingly, cross-complainants fail to cite to any authority requiring this in the present context; in fact, in light of the liberal interpretation this court is required to afford the statutory language at issue, no such requirement seems likely. As noted by Witkin, in detailing the requirements under the statute, "[i]f an application for relief is made no more than 6 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, the court *must* vacate: (a) any resulting default entered by the clerk against the attorney's client that will result in entry of a default judgment; or (b) any resulting default judgment or dismissal entered against the client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (8 Witkin, Cal. Proc. (6th ed. 2025), 198.) Cross-complainants' argument is no basis to deny the motion for relief from default. .

Finally, cross-complainants' reliance on sections 430, subdivision (b) , 430.20, subdivision (a), 435, subdivision (b), 436, and 437 is misplaced. Initially, section 430, subdivision (b) does not exist; defendant likely is referencing section 431.30, subdivision (b), which requires that any answer contain a general or specific denial or statement of any new matter. (See, e.g., 5 Witkin, Calif. Procedure (6th ed. 2025), § 1122 ["an affirmative defense must be pleaded in the same manner as if the facts were set forth in a complaint"].) And it is true that section 430.20, subdivision (a) and (b) allows ***a demurrer*** to an answer based on failure to state facts sufficient to constitute a defense; while section 435, subdivision (a) permits ***a motion to strike*** the whole or part of an answer when the answer contains irrelevant, false, or improper matter, or any part not drawn or filed in conformity with the laws of this state (§ 436), based on matters from the face of the pleading or through judicially noticed documents (§ 437). Indeed, it , has been long settled that if the pleadings are deficient, the defects may be raised by demurrer or motion to strike or a motion for judgment on the pleadings. (*Coyne, supra*, 36 Cal.2d at p. 262.) But none of these authorities addresses cross-complainants' argument that a motion for relief from default under the mandatory relief provisions as outlined in section 473, subdivision (b) can only be granted if the moving cross-defendant submits an answer that survives a demurrer and motion to strike (without the need to file such a challenge). Defendant provides no authority that

the proposed pleading, to be in proper form, has to survive a pretrial challenge before the proposed pleading can be filed in the first instance. Such authority likely does not exist, as our high court has made it clear that the provisions of section 473 are to be "liberally construed" to implement the policy that favors the determination on the merits. (*Zamora, supra*, 28 Cal.4th at p. 256.) Cross-complainants' argument is anathema to this liberal policy.

The court instead looks to rules that have developed and applied in an analogous context -- a motion for leave to file an amended pleading -- which also requires a liberal view in order to allow determinations on the merits. Ordinarily, trial courts will ***not*** consider the validity of a proposed amended pleading in deciding whether to grant leave to amend; grounds for demurrer or motion to strike are deemed premature. After leave to amend is granted, the opposing party will have the opportunity to attack the validity of the amended pleading. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048; *Atkinson v. Elk Corp*. (2003) 109 CA4th 739, 760 ["the better course of action would have been to allow [plaintiff] to amend the complaint and then let the parties test its legal sufficiency in other appropriate proceedings"].) These rules provide guidance in the present context.

For all of these reasons, the court grants cross-defendants' request to set aside entry of default and permit the filing of their answer. The court deems their answer, submitted on March 5, 2025, as filed on the date of the hearing.

The parties should be prepared to address separately at oral argument the defendants'/cross-complainants' request for monetary sanctions associated with their "Motion to Compel Responses to Production of Documents, Set One," given the fact Joseph and Kimberly Dipadova, and Secret Pizzaracy, Inc., filed their discovery responses after the motion was filed.