

PARTIES/ATTORNEYS

Plaintiff	Financial Credit Network Inc	Brett T. Abbott
Defendant	Fabiola Montoya Etheridge Gustavo Estrada	Miriam Pieter

PROPOSED TENTATIVE

On November 7, 2024, plaintiff Financial Credit Network, Inc. (plaintiff), as assignee of the contractual debt,¹ filed a limited complaint on Judicial Council forms against Fabiola Montoya Etheridge (defendant) and Gustavo Estrada, advancing common count causes of action (open book account for money due, for work, labor, services and materials rendered at defendant’s request and promise to pay, and for failing to pay debt when due). According to the complaint, defendants owed \$1,737 from a preexisting debt. Parties were personally served (according to the proofs of service), but no answers were filed. On July 2, 2024, the court entered default and a clerk’s default judgment for the principal of \$1,737, interest of \$206.54, costs of \$261, and attorney fees of \$397.40, for a total judgment of \$2,601.94. Notices of entry of default and default judgment were mailed to defendant’s attorney on July 2, 2024.

On December 31, 2025, defendant filed a motion to set aside the entry of default and clerk’s default judgment, pursuant to Code of Civil Procedure section 473, subdivision (d). Defendant contends the entry of default and default judgment should be set aside because of a mistake of law, extrinsic mistake, excusable negligence, and extrinsic fraud.

Regarding mistake of law, defendant explains the debt at issue resulted from a medical procedure by Dr. Safarik, and defendant “reasonably believed, based on the creditor’s knowledge of claim-processing defects and Dr Safarik’s role in creating the billing problem,” that no default would be taken while the insurance issues were being corrected. Specifically, according to defendant, she reasonably relied on laws to “prevent creditors from collecting claims on which they know there is no basis for collection,” relying on Title 15 U.S.C. section 1692(e)(10).

As for extrinsic mistake, defendant argues that even if her actions constituted neglect, “the default judgment is unjust, and it should be set aside. Dr. Safarik’s office representatives not only caused this entire situation but also refused to correct their mistake . . .”

As to excusable neglect, defendant contends she “actively attempted to secure the necessary records from Dr. Safarik and reasonably believed the creditor would not proceed and seek a default while Dr. Safarik’s errors and noncooperation were being addressed.” Moreover,

¹ This assignment was made by the original creditor, Dr. Safarik.

during the “relevant time period, [defendant] was raising four children while working fulltime,” did not have funds “to retain an attorney,” and only after default was obtained did she obtain “pro bono counsel.” Defendant claims she “did not simply ignore the summons or rely blindly on the insurance company. Rather, she refrained from contesting the action while actively attempting to resolve the dispute . . .”

Finally, regarding extrinsic fraud, defendant contends Dr. Safarik’s office “unfairly cost [her] a hearing on the merits by pursuing collections when it was aware that its mistakes had caused this whole situation . . .”

Defendant relies on the discretionary provisions of Code of Civil Procedure section 473, subdivision (b), which provides in relevant part as follows: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment . . . 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*** . . .” (Emphasis added.) This section (via this highlighted language) requires the moving party to provide an answer or some other responsive pleading; otherwise the application “shall not” be granted. (*Austin v. Los Angeles Unified School district* (2016) 244 Cal.App.4th 918, 932; see *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1730 [court noted the moving party's failure to attach the proposed pleading to their motion, “as section 473 plainly requires” one].)²

The court will not address the merits of the motion because defendant has not submitted an answer or other responsive pleading with the motion to vacate, a fatal omission. The proof of service of the notice of motion, the memorandum of points and authorities, and the two declarations make no reference to a proposed answer, and no answer has been attached to any document submitted with the court. No responsive pleading is present in the register of actions. Because defendant did not file a proposed answer with the motion to vacate, relief is barred. (8 Witkin, *Calif. Procedure* (2025 6th ed.), *Motion for Relief from Judgment for Mistake, Inadvertence, Surprise or Neglect*, § 185 [copy of the proposed pleading must accompany the motion: “The requirement is clearly mandatory, and failure to comply necessarily results in a denial of relief”].) There is authority to suggest that relief from default may be granted when the proposed answer or other pleading is served and filed *separately* from the notice of motion (as long as it is filed before the motion hearing). (See *Puryear v. Stanley* (1985) 172 CA3d 291, 294)

² There is a mandatory relief provision within Code Civil Procedure section 473, subdivision (b), which is a narrow exception to discretionary relief and applies when an attorney’s sworn affidavit attests to his or her mistake, inadvertence, surprise or neglect. (See, e.g., *Henderson v. Pacific Gas & Electric Co.* (2020) 197 Cal.App.4th 215, 226 [].) There is no reason to believe defendant is relying on an attorney’s affidavit of fault, for which mandatory relief is required. Counsel Miriam Peters’ declaration is silent about any alleged mistake, inadvertence, surprise or neglect she may have suffered/committed.

Austin, supra, 244 Cal App.4th at p. 933; see Weil & Brown, Civil Procedure Before Trial (The Rutter Group 2025), § 5:386.) Defendant has not filed a responsive pleading as of the posting of this tentative.

The court denies the motion to vacate entry of default and default judgment for failure to provide a proposed answer with the motion.