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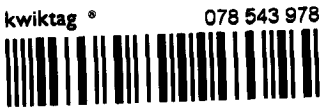

THE STATE BAR COURT

OF THE STATE BAR OF CALIFORNIA

HEARING DEPARTMENT- SAN FRANCISCO

In The Matter of)	Case No. 07-O- 15019
MATTANIAH EYTAN)	ANSWER OF MATTANIAH EYTAN TO NOTICE OF DISCIPLINARY CHARGES (NDC)
Member Number)	
A Member of the State Bar)	

Mattaniah Eytan ("Eytan") responds to the Notice of Disciplinary Charges as follows:

JURISDICTION

1. Admitted. However, Eytan had by June 7, 1976 been admitted in each of two out-of-state jurisdictions to practice law, and did practice law uninterruptedly, beginning in June, 1961.

COUNT ONE

2 Denied, in that Eytan did not seek, accept or continue employment knowing that the object of such employment was to take an appeal without probable cause; denied that, in the alternative, that if he did not know that the objective of such employment was to take an appeal without probable cause he should so have known. Denied also that work for the client was

forth in paragraphs 3-11 of the Notice of Disciplinary Charges or otherwise.

3. As to the first sentence, Eytan substituted in as counsel of record for Terry Kwong in Case No. 375239, *Gong v. Kwong*, on March 28, 2002. As to the second sentence, Eytan denies that "[a]t issue in the litigation was whether or not Kwong had satisfied his obligation for payment of past due child support pursuant to an order issued by the Court on or about March 1, 2001." The exclusive issue at the time in 2002 and for which Eytan substituted in as counsel for Kwong related to and concerned a claim by Gong for indemnity for attorney's fees which she claimed to have incurred by way of matter in defense in which she was a defendant in a separate litigation initiated by Elaine Yang in Case No. 412403, *Yang v. Gong*, Superior Court for the County of San Mateo. Eytan was not involved in any child support matter in Case No. 375239 until 2005 and then only when his associate filed a motion as recited in paragraph 5 of the Notice of Disciplinary Charges. Eytan's representational efforts for Kwong in 2002 and until 2005, related to an indemnity claim by Gong based upon a 1997 agreement, a supplemental judgment by stipulation, and an earlier promissory note that had no connection to child support matters. These are described in greater detail in **Exhibit A** appended to this answer.

4. Admitted. However, associate was an experienced attorney in his own right; and although Eytan consulted with associate, the work product associated with the opening brief on appeal was entirely that of the associate. Eytan takes responsibility for that work product as a generalized conclusion from the circumstance that associate was an employee of Eytan's.

5. Admitted.

6. Admitted. However, the denial by Judge Cretan took place at a trial call at which time both Kwong and Gong were prepared to submit evidence in support of their positions. Kwong had witnesses under subpoena and otherwise ready to testify.

7. Admitted.

8. Denied in that at the time Eytan did not believe that the appeal was frivolous; indeed Eytan believed the appeal had merit. The belief in the merit, objectively, of the appeal lay in these circumstances:

(i) Out of the total of approximately $45,000 at issue, as the difference between the

accounting put forward (in different versions) by Gong and the accounting put forward by Kwong, two-thirds or so related to the question when interest would begin to run. Eytan believed that when statutory provisions that determine when interest on a judgment begins to run and how they should be stated in the judgment were coupled with the language in the judgment, interest would begin to run from March 1, 2001. Gong had argued that interest should begin from August 29, 2000 when the statement of decision by Judge Dylina had been submitted. The Court of Appeal stated that interest should run from May 1, 2000. Ultimately, after remand from the decision of the Court of Appeal, the parties agreed that interest would run from June 1, 2000.

(ii) The issue concerning payments from Milpitas Greens for child support were bounded by the charging order that was part of the order after hearing entered by Judge Dylina on March 1, 2001. The statement in the order after hearing concerning the charging order did not extend to collection matters that reached back to the 1994 marital settlement agreement. Thus, Kwong was concerned with lifting the charging order in that if the terms of the order after hearing of March 1, 2001 were completely satisfied, Gong could not use the charging order to recover child support payments to implement a child support and college expense money reaching back to the 1994 agreement. The liability under that agreement would continue to apply, but Kwong's liability would not be enforced, if Kwong were in default, by way of the March 1, 2001 charging order.

(iii) Kwong had indeed made substantial additional payments directly to the children so that no equitable issue existed that Kwong was short-changing the children on support. When these sums were coupled with amounts paid by Milpitas Greens to Monica directly (by checks that Monica drew herself on Milpitas Greens), Kwong had completely satisfied all obligations and was current with Gong.

Denied that Eytan knew or should have known that "the objective of such employment was to take an appeal without probable cause and for the purpose of harassing or maliciously injuring another person, Monica Kwong (a.k.a. Monica Gong)." Eytan had no motive and no interest in harassing or maliciously injuring Gong. Nor did it appear to Eytan that Kwong had any objective of harassing or maliciously injuring Gong. On the contrary, it appeared to Eytan that Gong had in specific particulars attempted, with malice, to injure Kwong directly and substantially. Her motive

for undertaking initiatives in this regard (which initiatives were not directly implicated in the proceedings that Kwong initiated by motion in 2005) grew out of the circumstance that Kwong had a romantic relationship with Yang reaching back in time while Kwong and Gong were still married.

9. Admitted.

10. Denied in that as formulated the text in paragraph 10 implies that these were the only arguments put forward by Eytan. Eytan also argued at various times to the Court of Appeal that Code of Civil Procedure § 685.020(a) would begin to run from the date of entry of the judgment; that order after hearing of March 1, 2001 was a judgment (especially in family law, because of Family Code § 100 and its definitional text); that Code of Civil Procedure § 577.5 directed that every judgment be expressed in precise dollars and even in cents (so that this judgment of March 1, 2001 had to be read in its precise terms as comprising the total set forth therein, and no more, in the sum of $320,900.81. The terms written into the judgment by Gong's counsel "now" and "current" were consistent with these statutory provisions. Moreover, if Gong's counsel had intended that interest should run from an earlier date, it was well within her power to have so stated the date from which pre-judgment interest would run. In that event, the better practice (indeed, the necessary practice) would be to capitalize and include into the judgment all sums representing pre-judgment interest. As against certain of these arguments, Gong contended that Kwong was at fault in having interfered or hindered Gong's counsel in obtaining a final judgment; and it was that hindering activity that resulted in a delay in the entry of judgment of considerable length. Kwong disagreed that he had played any role whatever in delaying entry of judgment. (Indeed, after a statement of decision has been entered, the prevailing party that prepares the form of judgment does not need the approval for the text of the judgment from counsel for the losing party. There was no objectively justifiable reason for Gong to have blamed Kwong for the delay in entering judgment between August 29, 2000, the date the decision by Judge Dylina was first announced as to who was the prevailing party in the litigation, and March 1, 2001.)

11. Denied. The effect of having granted the motion would have been that the March 1, 2001 order would have been satisfied. If other money, reaching back to the 1994 judgment of marital dissolution still applied, as it did, Gong would still have a justifiable claim. As Kwong saw

marital dissolution still applied, as it did, Gong would still have a justifiable claim. As Kwong saw that matter, however, as soon as that issue would be raised, Kwong could show his direct supplemental payments to the children. These payments were part of the record on appeal and were argued both at the Superior Court and Court of Appeal levels. In total, these payments came to $35,000. The payments were made by Pacific Infinity Company, Inc. directly to the children over a period of years. Whether these payments were to be credited as contributions to college expenses when the children were adults or credited as child support payments was an issue not reached. A further issue concerning these payments related to a claim by Gong that these payments or portions thereof had been considered and rejected by Judge Dylina in proceedings before him in May 2000; Kwong believed that averment was incorrect and not true. An examination of the transcript of that proceeding left the matter in doubt, at least insofar as Kwong and Eytan were concerned.

12. Admitted.

13. Admitted.

14. Denied.

COUNT TWO

15. Denied. For further response, see **Exhibit B,** attached hereto and incorporated by reference.

16. See responses to paragraphs 2 through 14.

17. Denied. For further response, see **Exhibit B,** attached hereto and incorporated by reference.

COUNT THREE

18. Denied.

19. See responses to paragraphs 2 through 14 and 15 through 17.

20. Denied.

21. Denied.

Dated: February 9, 2010

JONATHAN I. ARONS
Attorney for Respondent

Exhibit A

Supplement to Answer to Paragraph 3 of the Notice of Disciplinary Charges

The following is a chronology of events related to a dispute between Elaine Yang, as lender and plaintiff in Case No. 412403, and Monica Gong and Terry Kwong:

1. On March 30, 1990, Terry Kwong and Monica Gong, then married and living together, filed petitions in bankruptcy seeking protection from their creditors. In their schedules, Kwong and Gong listed the IRS, among others, as a creditor; and in their statement of assets, they listed a one-third equity interest in a limited partnership identified as Milpitas Greens limited partnership. Milpitas Greens had acquired option rights to develop a shopping center in Milpitas, California; and the value of that asset at the time was problematic. Terry Kwong was a general partner and founder of Milpitas Greens, along with one Joric Pang.

2. In 1993 Kwong persuaded Elaine Yang, an individual who had previously lent funds to Terry and Monica, to fund, by making new loan funds available, a Chapter 11 buyout pursuant to which Kwong and Gong would pay off their creditors and regain those assets that had been placed at the disposal of creditors at the time the voluntary petition in bankruptcy had been initiated. The principal asset that Kwong wished to retrieve concerned their equity interest in Milpitas Greens. That interest had grown since 1990 to one-half. This increase resulted from the circumstance that Milpitas Greens had in the interim bought out minority limited partners. Kwong believed that Milpitas Greens would succeed.

3. In May, 1993, and again on November 1, 1993, Gong, Yang and Kwong entered into a written agreement pursuant to which Yang would make available $125,000 in new money to fund the Chapter 11 buyout. In exchange, Kwong and Gong would repay Yang the full principal of the loan, with interest. They would, in addition, also recognize $90,000 in prior debt owed to Yang. Yang would obtain a 12.5% interest in Milpitas Greens from the 50% equity in that partnership held jointly by Kwong and Gong. The agreement also provided that although Kwong and Gong would jointly be liable to Yang, Gong's liability would be limited to payment out of a designated fund. That designated fund would comprise profit distributions coming to Gong out of Milpitas Greens. If no profit distribution would come forward, Yang could not look to Gong

individually for payment. No such limitation attended Kwong's liability to Yang.

4. This agreement followed by six weeks an earlier agreement of August 20, 1993 between Pang, Yang and Kwong pursuant to which Yang would become a general partner in Milpitas Greens. Yang would lend funds to the partnership. She would also make personal funds available as security for the credit of the partnership in order to obtain loan funding to the partnership. She would obtain a 3% interest in profits from the partnership.

5. As a result of these various agreements, Yang acquired 12.5% equity interest in the partnership from Kwong and Gong and a 3% interest from the partnership. In exchange, she lent Kwong and Gong funds; and as a consequence thereof, Kwong, through bankruptcy counsel, was able to persuade creditors and the bankruptcy court to accept a $125,000 buyout in settlement of all of Kwong's and Gong's debts to creditors.

6. In 1994, Kwong and Gong entered into a marital settlement agreement which was then, by stipulation, incorporated into a judgment of marital dissolution (Case No. 375239). The marital settlement agreement noted that Kwong and Gong had divided their interest in Milpitas Greens such that Gong obtained, by way of her community interest, one-half of the couple's interest in Milpitas Greens, namely, a 25% interest. Kwong bore the full brunt of the 12.5% transfer to Yang so that he retained only a 12.5% interest in Milpitas Greens. As of the date of the dissolution, Kwong had ceased receiving any compensation for work that he had been performing as debtor in possession with a court order authorizing receipt of $3,500 per month. Gong, by contrast, remained employed with Kaiser at $40,000 per year.

7. Milpitas Greens obtained loan financing and built the shopping center.

8. In July, 1996, the partners in Milpitas Greens met and determined that Monica should take a part-time position with Milpitas Greens as a bookkeeper at a salary of $400 per month. Her job responsibilities would include, in addition to normal bookkeeping functions, to keep an eye out on the flow of funds so that Joric Pang, who was running the company, could be monitored. Monica would co-sign all checks along with Joric Pang. The shopping center had not opened and net revenues had not begun to flow. However, in late 1996, the shopping center was completed; and tenant's began paying rent.

9. As soon as that occurred, Elaine Yang began to demand that payments due her under the November 1, 1993 agreement should be made. She had received no payments whatever as against the obligations set forth in the loan agreement either from Gong. She had received modest payments from Kwong but no payments from Gong. Now that it appeared that first monies would be coming forward from Milpitas Greens, she demanded that those monies be routed to her until the 1993 debt had been discharged by Kwong and Gong. The first profit distributions were made by Milpitas Greens in February 1997. Those distributions were signed off on, by check, by Gong and Joric Pang. Gong refused to route funds from Milpitas Greens to Yang either as her share or for Kwong. At the same time Gong demanded that Kwong cure arrearages for child support that Kwong undertook in the marital settlement agreement. Kwong had no employment and was not earning funds from 1993 through 1996, and Gong was aware of that. Gong brought an order to show cause in late 1996 against Kwong to obtain an arrearage order, and the matter went to mediation. Kwong raised the question in mediation of the joint debt to Yang. Both Kwong and Gong were by then receiving profit distributions from Milpitas Greens. The parties entered into an agreement on April 30, 1997 that dealt both with arrearages owed by Kwong to Gong for child support as well as the matter of the debt that both Kwong and Gong owed to Yang. As to the latter, paragraph 7 of the agreement reaffirmed the obligation of both of them to Yang under the 1993 promissory note arrangement; and in paragraph 10 of the same agreement the parties referred to the circumstance that Kwong's liability to Yang would be limited to profit distributions emanating from Milpitas Greens (as to which Gong, as 25% equity owner would otherwise receive as payments). The agreement then added in the same paragraph that if Yang sued Gong directly (instead of looking to first monies coming out of Milpitas Greens as profit distributions), Gong would look to Kwong for indemnity as against any such claim.

10. When the profit distributions began in 1997, Yang obtained profit distributions consistent with her 12.5% interest that she had acquired as part of the underlying arrangement with Kwong and Gong in 1993, but she received no payment against the debt. Yang became restive and made repeated demands for payment. Kwong, while represented by prior counsel, unsuccessfully tried to persuade Joric Pang to re-route profit distributions to Yang and

unsuccessfully tried to persuade Gong to direct payments, in her capacity as a co-signer of checks along with Pang, to Yang in implementation of a prior agreement. Gong ignored Kwong's entreaties, as did Pang. In 2000, Yang filed suit against Gong individually claiming a right to payment under the 1993 agreement. Yang was represented by independent counsel. In response to Yang's complaint in Case No. 412403, Gong cross-complained against Kwong for indemnity. In her cross-complaint, Gong claimed that Yang's complaint violated paragraph 10 of the 1997 stipulated supplemental judgment. A year into the litigation and with a trial date already set, Kwong approached Eytan to review the matter. Eytan advised Kwong that Yang's formulation of her claim was indeed violative of the 1993 agreement; and since this was so, Gong had a claim for indemnity under the 1997 supplemental judgment. Nevertheless, Yang had a better claim that she had not adequately articulated: Gong had frustrated the 1993 agreement by refusing to allow her profit distributions from Milpitas Greens to be used to pay a pro rata portion of the 1993 debt to Yang. Eytan agreed to enter the proceedings in Case No. 412403 for Kwong. Upon substituting into that case, Eytan sought and obtained leave to file a cross-complaint in that case and did file a cross-complaint against both Gong and Pang. In that cross-complaint, Kwong argued that Gong had willfully refused to allow implementation of the 1993 agreement when she had power to implement it. As against Pang, Kwong argued that Pang was a necessary party to implement the 1993 agreement between Yang, Gong and Kwong.

11. Gong insisted that Kwong pay her attorney's fees in Case No. 412403; and when Kwong refused to do so Gong initiated proceedings in Case No. 375239 before the judge in the family law court, Steven L. Dylina. The trial court had in the 1994 marriage dissolution decree reserved jurisdiction to implement the judgment. Because the 1997 supplemental order was now attached to the judgment and had become part of it, all matters covered by the judgment remained in family law court.

12. Judge Dylina was the same judge who entered the March 1, 2001 order after hearing. This time, Judge Dylina denied Gong's request for indemnity. Gong then filed a notice of appeal. Kwong, through Eytan, moved the Court of Appeal to dismiss, and that motion was granted. The effect of this cycle in the family law court was to compel Gong to return to the civil case initiated

by Yang, Case No. 412403. Kwong thereafter entered into a settlement agreement in that case by way of a retraxit in the settlement conference before the Honorable Margaret J. Kemp. That settlement did not call for Kwong to reimburse or indemnify Gong for her attorney's fees.

13. Again: no portion of this work by Eytan dealt with issues of child support.

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Exhibit B

Supplement to Answer to Paragraphs15 and 17 of the Notice of Disciplinary Charges

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A. The Court of Appeal entertained each of two declarations submitted by Gong in support of her Code of Civil Procedure § 907 motion for sanctions for Kwong's frivolous appeal. In these declarations Gong brought into play her version of background facts by which she colored her relationship with Kwong. In doing so, Gong made allegations which Kwong believed and which Eytan also believed – and believes – were false. Because these background factual allegations were made at the appellate level, there simply was no opportunity to take discovery, by deposition or otherwise, to show that the allegations by Gong were false. Eytan believes that the appellate tribunal was affected by and believed Gong when the latter made, among others, the following three contentions:

1. That Kwong had owed Gong substantial sums as and for attorney's fees in connection with Gong's entitlement to indemnity under the 1997 supplemental judgment based upon a stipulated agreement. This allegation was expressly made by Gong and was not true.

2. That Gong had been burdened severely by having had to pay federal and state taxes for Kwong for various years including 1988, 1991, 1992 and 1993. Gong claimed her wages while employed with Kaiser full time were garnished, and she was called upon to defray taxes which under the 1994 marriage dissolution judgment should have been borne exclusively by Kwong. Kwong, however, paid taxes, plus penalties, from his own funds at least for all years except 1988 and 1991. For 1988, the taxes were paid out of the $125,000 put up by Yang, in behalf of both Kwong and Gong, as part of the reorganization Chapter 11 buyout arrangement with creditors, including the IRS. As for 1991, Gong made the same accusation in 1996 but then withdrew the accusation altogether.

3. That Gong had to borrow from a friend $200,000 to keep body and soul together because Kwong had not been paying child support. Kwong did not believe this statement was or is true. The principal lender, Gong's college classmate, lived abroad for many years. Kwong believes this classmate was in no position to lend funds in this range and did not do so.

Moreover, if this friend had done so, Kwong believes Gong would have so informed him at the time rather than raising the matter abruptly for the first time in a declaration in connection with an unrelated appeal matter.

Upon remand to the Superior Court following the remititur in Case No. 375239, Gong raised item numbers 1 and 2 above and filed claims with the Superior Court for damages/indemnity. After discovery and proof submitted by Kwong, Gong dropped these and other charges of a similar nature she had made against Kwong without payment or promise of payment by Kwong. These charges were dropped by her after Gong testified against Kwong and Yang in a case that went to trial in the Superior Court in Santa Clara County, *Pang v. Yang and Kwong*, Case No. 07-CV-095713, in July and August, 2009.

Eytan believes that if these background allegations by Gong, which Kwong believed on an objective basis were false, had been made at the trial court level and in sufficient time for Kwong to have dealt with them through discovery, motion practice at trial, Kwong would have prevailed on these items. But having been presented for the first time at the appellate level, that was not possible. These matters did, nevertheless, affect the view of the technical issues before the Court of Appeal and prejudiced the determination on the Code of Civil Procedure § 907 motion.

B. Gong did not inform the Court of Appeal in either declaration that:

(i) She and Pang had covertly agreed shortly after Gong began working as a bookkeeper for Milpitas Greens in July 1996 that Gong would act as a *de facto* general partner alongside Joric Pang.

(ii) Gong would receive a substantial management fee, payable quarterly beginning in 1997 and retroactive to 1996. This fee cumulatively was $350,426.50 by the time Gong submitted her declaration to the Court of Appeal. Moreover, Gong's profit distributions from Milpitas Greens for the same period (through mid-2006) exceeded $2,251,250.00.

(iii) As co-manager who wrote all checks, it was Gong and not Pang who had dispositive discretionary authority to agree to hold back the $45,000 at issue when Kwong requested a holdback from Pang in 2005.

PROOF OF SERVICE

I am a citizen of the United States of America, over eighteen (18) years of age, employed in the City and County of San Francisco, and not a party to this action. My business address is 221 Main Street, Suite 740, San Francisco, California 94105. On **February 9, 2010** I caused the attached:

ANSWER OF MATTANIAH EYTAN TO NOTICE OF DISCIPLINARY CHARGES (NDC)

To be served on the party or its attorney of record in this action by:

[ ] U.S. Mail, enclosing a copy in a sealed envelope, postage prepaid, Addressed as shown below and depositing the sealed envelope with the United States Postal Service.

[X] By Personal Delivery, serving or causing to be served each document by Hand Delivery to the address listed below.

[ ] By Overnight Service, enclosing a copy in a sealed envelope addressed as shown below and sending the envelope by overnight delivery service.

[ ] U.S. Mail, enclosing a copy in a sealed envelope, with first class, certified mail, return receipt requested, postage thereon fully prepaid, addressed as shown below and depositing the sealed envelope with the United States Postal Service.

Name and address of each individual to whom document was mailed or delivered:

Sherrie B. McLetchie
Office of the Chief Trial Counsel
State Bar of California
180 Howard Street
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed on **February 9, 2010** at San Francisco, California.

Andrea Gonzalez

ANDREA GONZALEZ