

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

|             |   |                       |
|-------------|---|-----------------------|
| PFF LCC,    | : |                       |
|             | : |                       |
| Plaintiff,  | : |                       |
|             | : | CASE NO. CL-2026-4863 |
| v.          | : |                       |
|             | : |                       |
| Kuog, Inc., | : |                       |
|             | : |                       |
|             | : |                       |
| Defendant.  | : |                       |

MEMORANDUM OPINION AND ORDER SETTING ASIDE CONFESSION OF  
JUDGMENT AND DIRECTING THAT CASE BE PLACED ON THE COURT'S ACTIVE  
TRIAL DOCKET

This matter came before the Court for hearing on June 26, 2026, upon Defendant Kuog, Inc.'s Motion to Set Aside Confession of Judgment ("Motion to Set Aside"). In short, Defendant contends it has a right to a "mulligan" under Va. Code § 8.01-433.<sup>1</sup> Under that statute, a party may be relieved of the consequences of a confessed judgment, and the matter set down for trial, if the party files a motion setting forth "any ground which would have been an adequate defense or setoff." The issue before the Court is: what level of detail is required to comply with the statute and escape the most summary of judgments known to Virginia civil law?

BACKGROUND

A full recitation of the facts underlying the present dispute is unnecessary. Suffice it to say that "on or around September 27, 2022," Defendant executed a confessed judgment note to induce Plaintiff to advance considerable credit. Things did not turn out as the parties hoped, and Plaintiff caused judgment to be confessed in the Clerk's Office of this Court in

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<sup>1</sup> In golf, a "mulligan" is a term used when a golfer hits a poor shot and wants a "do-over."

the amount of \$9,019,551.12 (the "Confession of Judgment").

Defendant timely invoked Va. Code § 8.01-433 by way of its Motion to Set Aside.

The statute provides as follows:

Any judgment confessed under the provisions of § 8.01-432 may be set aside or reduced upon motion of the judgment debtor made within twenty-one days following notice to him that such judgment has been entered against him, and after twenty-one days notice to the judgment creditor or creditors for whom the judgment was confessed, *on any ground which would have been an adequate defense or setoff* in an action at law instituted upon the judgment creditor's note, bond or other evidence of debt upon which such judgment was confessed. Whenever any such judgment is set aside or modified the case shall be placed on the trial docket of the court, and the proceedings thereon shall thereafter be the same as if an action at law had been instituted upon the bond, note or other evidence of debt upon which judgment was confessed. *After such case is so docketed the court shall make such order as to the pleadings, future proceedings and costs as to the court may seem just.* [Emphasis added]

Defendant proffered the following grounds of defense in its Motion to Set Aside:

1. No Event of Default has occurred under the terms of the Loan and Security Agreement and Promissory Note, as amended.
2. Defendant has not received all or a portion of the loan proceeds and other funds that PFF allegedly advanced to Defendant in the amounts set forth in the Confession of Judgment.
3. Defendant has repaid all or a portion of the amounts loaned to it prior to the maturity date of the obligation.
4. The alleged debts identified in the Confession of Judgment have not yet matured and are therefore not due and owing.

Defendant contended that each of the foregoing defenses was "facially adequate" and, thus, the Confession of Judgment should be set aside and the case placed on the trial docket. Plaintiff, citing Circuit Court caselaw, argued in response that Defendant had to do

more than posit a “mere allegation of a defense.” Rather, it had to “present an allegation of facts to support the defense.” Plaintiff further argued that Defendant was in default *for numerous additional reasons* and set forth arguments why resistance would be futile.

Defendant countered that “Rule 1:4 requires only that a defensive pleading, to be sufficient, ‘clearly inform the opposing party of the true nature of the claim or defense’ . . . . [T]here is no requirement that claims be pled with specificity, like that found in a fraud suit.”

On June 12, 2026, former Chief Judge Azcarate granted leave to amend so Defendant could add more facts to support its proffered defenses.<sup>2</sup> The Court’s order from the hearing does not explain its reasoning.

On June 18, 2026, Defendant filed a Supplement to Motion to Set Aside Confession of Judgment (the “Supplement”). The Supplement elaborated upon the four grounds of defense set forth above and also responded to Plaintiff’s roster of additional reasons default had been proper.

On June 24, 2026, Plaintiff countered that each assertion by Defendant was still not adequately supported. Plaintiff then proceeded to explain why each defense lacked merit, noting that “none withstand scrutiny.” Plaintiff concluded its argument by stating that “there are no facts supporting any defenses. Consequently, there is no basis to reconsider this Court’s ruling denying the motions to set aside.”

On June 26, 2026, the undersigned heard oral argument and requested supplemental briefing. The Court now rules as follows.

#### DISCUSSION

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<sup>2</sup> The undersigned does not pass upon the adequacy of the original four grounds of defense listed by Defendant.

The Virginia Supreme Court has never addressed what constitutes a “ground which would have been an adequate defense or setoff” under Va. Code § 8.01-433. In *Catjen, LLC v. Hunter Mill West, L.C.*, 295 Va. 625, 633 (2018), it stated that “a motion to set aside or reduce a confessed judgment under [the statute] initiates a proceeding where the only issue to be determined is whether the judgment debtor’s pleadings assert a facially adequate defense or setoff. At this initial stage, there is no requirement that the judgment debtor prove the merits of the asserted defense or setoff.” If a “ground” setting forth a “facially adequate” defense or setoff is alleged, the case moves to the trial docket. Va. Code § 8.01-433.

This all sounds fine, but the devil is in the details. Under Rule 3:2, normal law cases on the trial docket are initiated by filing a complaint, not a confessed judgment. The complaint must contain numbered paragraphs setting forth the basis for the relief sought. Rules 1:4(d); 3:8. If the complaint fails to plead facts sufficient to state a claim upon which relief may be granted, a party may file a demurrer under Va. Code § 8.01-273. If the complaint states a claim upon which relief may be granted, an answer must be filed (if one is not already in the record) that admits or denies the plaintiff’s allegations. Rule 3:8. Until that time, the parties are not “at issue” regarding the merits of the plaintiff’s claims. *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 6 (1954) (“when the defendant filed its grounds of defense the parties were ‘at issue’”).<sup>3</sup> It is only when the parties are “at issue” that a court may

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<sup>3</sup> “Grounds of defense” was the name used for an “answer” filed on the law side of the court before the merger of law and equity.

properly address the factual merits of a case and render a merits-based judgment under Rule 3:20 or at trial.<sup>4</sup>

The process that is supposed to occur under Va. Code § 8.01-433 must be seen in this context. When a party files a motion under Va. Code § 8.01-433, the parties are not at issue. Indeed, the case is not even on the trial docket. Thus, *Catjen*'s injunction against merits litigation under Va. Code § 8.01-433 is wholly consistent with the mechanics of the trial process in Virginia. The Court's role at this juncture is very limited and it is only authorized to determine whether the moving party has articulated a "ground" that would constitute an "*adequate* defense or setoff" (emphasis added). Common meanings of "adequate" include "sufficient for a specific need or requirement" and "good enough: of a quality that is good or acceptable." *Adequate*, Merriam-Webster.com Dictionary, [www.merriamwebster.com/dictionary/adequate](http://www.merriamwebster.com/dictionary/adequate) (last visited July 23, 2026). An alternative definition is "lawfully and reasonably sufficient, *adequate grounds for a lawsuit*." *Id.* This understanding suggests that the level of detail required is basic. *Catjen* confirms this when it casts the requirement as simply filing a "facially adequate" defense or set-off. *Catjen*, 295 Va. at 633. Determining if a defense is "facially" adequate does not require the Court to do *anything* other than look at the *face* of the asserted defense.

Reference to other sources supports this conclusion. Before law and equity merged, the "answer" at law was called a "grounds of defense." See *Monahan v. Obici Med. Mgmt. Servs.*, 271 Va. 621, 632 (2006). The Supreme Court of Virginia noted that the primary purpose of a

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<sup>4</sup> At first blush, it may appear that a plea in bar is an exception to this rule. However, a plea in bar adjudicates a discrete issue that is collateral from the factual merits but which may dispose of a claim or case. *Nelms v. Nelms*, 236 Va. 281, 289 (1988) (a plea in bar "does not address the merits of the issues raised by the bill of complaint or the motion for judgment"). Classic non-merits issues which may be raised by a plea in bar include "the statute of limitations; absence of proper parties (where this does not appear from the [pleading] itself); *res judicata*; usury; a release; an award; infancy; bankruptcy; denial of partnership; *bona fide* purchaser; denial of an essential jurisdictional fact alleged in the [pleadings], etc." *Id.*

grounds of defense is to provide reasonable notice to the plaintiff of the specific defenses being asserted so the plaintiff is not surprised at trial. *Id.*

The term “grounds” is also used in connection with demurrers. Va. Code § 8.01-273 states as follows:

All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court.

As with a plaintiff’s complaint, it has long been the case that the purpose of stating “grounds” in demurrers is notice. *See McMenamin v. S. R. Co.*, 115 Va. 822, 828-29 (1914).

Here, the Supplement addresses Defendant’s alleged insolvency, the only default noted in Plaintiff’s original notice of default:

At the time of [the notice of default, Defendant] was not insolvent. It owned property, including accounts receivable and other assets, the fair value of which was greater than the amounts required to pay all of its indebtedness as such debts became due, it owned property, the present fair salable value of which, was greater than the amount that would have been required to pay its probable liabilities as they became due, it was able to pay all of its indebtedness as it matured, and it had capital sufficient to carry on its then existing business. . . . At no time had [Defendant] made an assignment for the benefit of its creditors, there was never a meeting of creditors to obtain a general financial accommodation, there was no suspension of business, no commencement of an insolvency or bankruptcy proceeding and no appointment of a receiver or trustee. . . . On the contrary, at the time of the alleged insolvency, [Defendant] had approximately \$41 million in awarded government contracts and expected receivables under those agreements. These receivables were more than sufficient to keep [Defendant] solvent, per the loan agreement.

Plaintiffs took issue with these assertions and resorted to evidence to explain why they lack merit: “in its opposition to the motion to set aside, [Plaintiff] explained that [Defendant] was in default due to insolvency *based on [Defendant’s] September 30, 2025 balance sheet*. A defendant seeking to establish an adequate defense might submit evidence showing the balance sheet is wrong” (emphasis added).

The Court concludes that while Defendant might have chosen to submit evidence in support of the Motion to Set Aside, evidence was not required and it is not the Court's job to engage in *any* merits-based analysis at this time. First, *Catjen* forbids it. Second, the parties are not at issue.<sup>5</sup> Third, engaging in any inquiry other than inspecting a defendant's assertions for apparent *facial* adequacy (regardless of merit) runs the grave risk of a summary disposition utilizing sources of proof or materials not even authorized under Rule 3:20 (summary judgment). A perfect example is Defendant's assertion that it was not insolvent when Plaintiff declared a default. Plaintiff's rebuttal relies on evidence (a balance sheet) that cannot be considered on summary judgment absent a stipulation. *See* Rule 3:20; *Andrews v. Ring*, 266 Va. 311, 318 (2003) (interpreting Rule 3:20). It certainly cannot be considered before the parties are at issue.

The same reasoning applies to Plaintiff's other attempts to refute or rebut Defendant's other grounds to set aside the Confession of Judgment. For example, Defendant argues that it was relieved from payment due to a first material breach (a recognized affirmative defense) resulting from Plaintiff's refusal to fund Defendant's line of credit. While Plaintiff seemingly shows it had "sole discretion" as to whether or not to do so, denying the Motion to Set Aside on this ground effectively grants summary judgment before the parties are at issue. Ignoring this reality "short-circuits" the due process to which civil litigants in Virginia are entitled. *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 618 (2005). Plaintiff's remaining arguments suffer from the same defect.

Plaintiff argues that a confessed judgment is a salutary tool and that allowing a debtor to escape the consequences of providing one to a creditor simply by articulating a facially adequate ground of defense defeats its purpose. That may or may not be true, but the Court's only job is to

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<sup>5</sup> These first two points are intertwined.

construe statutes with fidelity to their plain meaning and in light of precedent from the Virginia Supreme Court. For the foregoing reasons, this means the Court is limited to determining whether Defendant has articulated intelligible grounds of defense. On the necessarily limited record before the Court, the undersigned concludes that Defendant has done so. Defendant may lose on summary judgment, it may lose at trial, and its positions may even prove to be sanctionable. However, the procedural mechanisms that may lead to such outcomes must be honored and right now Plaintiff's arguments are premature.

For the foregoing reasons, the Motion to Set Aside Confession of Judgment is GRANTED. Plaintiff shall file a complaint within 21 days of the date of this Order, and Defendant shall file its responsive pleadings within 21 days after service of the complaint on its counsel of record. The parties shall thereafter schedule this matter for term day and obtain a trial date and a scheduling order.

THIS MATTER IS CONTINUED.

August 4, 2026  
Fairfax, Virginia



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Timothy J. McEvoy, Circuit Court Judge

SIGNATURES OF COUNSEL ARE DISPENSED WITH UNDER RULE 1:13, EXCEPTIONS  
MAY BE FILED WITHIN 14 DAYS OF THE DATE HEREOF WITH A COPY TO  
CHAMBERS