# S255262

## In the Supreme Court of the State of California

Deborah Sass,

Plaintiff and Respondent and Petitioner,

v.

Theodore L. Cohen,

Defendant and Appellant.

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Court of Appeal, Second Appellate District,
Division Two, Case No. B283122

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On Appeal from the Superior Court of the State of California,
County of Los Angeles; Case No. BC554035
Honorable Frederick Shaller

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## Answer to Petition for Review

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SNELL & WILMER L.L.P.
*Todd E. Lundell (#250813)
600 Anton Blvd., Suite 1400
Costa Mesa, California 92626
Tel: 714-427-7000
Fax: 714-427-7799
e-mail: tlundell@swlaw.com

SNELL & WILMER L.L.P.
Keith M. Gregory (#117837)
Daniel G. Seabolt (#322704)
350 South Grand Avenue
Suite 3100
Two California Plaza
Los Angeles, California 90071
Tel: 213.929.2500 Fax: 213.929.2525
e-mail: kgregory@swlaw.com
dseabolt@swlaw.com

Attorneys for Defendant and Appellant
Theodore L. Cohen

## Table of Contents

**Page**

## Table of Authorities

**Page**

### Cases

## Table of Authorities
## (continued)

**Page**

### Statutes



### Rules

## Introduction

Petitioner Deborah Sass asks this court to grant review to determine whether she can recover a default judgment that exceeds the amount demanded in her complaint. The problem for Sass is that the Legislature has already unambiguously answered this question. Code of Civil Procedure section 580 explicitly states that a default judgment "cannot exceed that which [plaintiff] shall have demanded in his complaint;" section 585(a) limits a trial court's authority to enter default judgment only up to "the principal amount demanded in the complaint;" and section 585(b) also provides that a default judgment shall "not exceed[] the amount stated in the complaint . . . ."

Moreover, as Sass is forced to acknowledge in her petition, this court has repeatedly held that these statutes "must be strictly construed in order to ensure respect for the due process rights of defaulting defendants to reasonable notice of the maximum for which they may be held liable." [Petition at 7.] See also, e.g., *In re Marriage of Lippel* (1990) 51 Cal.3. 1160, 1166 ("*Lippel*") ("We have long interpreted section 580 in accordance with its plain language. Section 580, we have repeatedly stated, means what it says and says what it means: that a plaintiff cannot be granted more relief than is asked for in the complaint."); *Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 ("a default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction."); *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493 ("a court has no power to enter a default judgment other than in conformity with [CCP]

section 580"); *accord Burtnett v. King* (1949) 33 Cal.2d 805, 807 ("the court's jurisdiction to render default judgments can be *exercised only in the way authorized by statute*." (emphasis in original)).

This court has recognized a single narrow exception to this statutory mandate in marital dissolution actions where the statutorily required form complaint does not provide the ability for the petitioner to indicate the value of the property at issue. *In re Marriage of Lippel*, *supra*, 51 Cal.3d 1160, 1169-70; see also *In re Marriage of Andresen* (1994) 258 Cal.App.4th 873, 883. But that exception does not apply to Sass's breach of contract action here. Sass was the master of her complaint, and nothing precluded Sass from providing notice to Respondent Theodore Cohen of the damages she ultimately claimed at the default prove up stage of the proceedings.

In an attempt to create an issue that might warrant this court's review, Sass cites *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157 ("*Cassel*"), and asserts that courts of appeal are "divided" on whether a plaintiff may recover damages exceeding the amount demanded in the complaint where the plaintiff seeks an accounting or valuation of a business owned by the defaulting defendant. But review of the case law demonstrates that *Cassel* was an outlier that misapplied this court's decision in marital dissolution cases. No other published court of appeal opinion has applied *Cassel* to affirm a default judgment that exceeds the amount demanded in the complaint,

and other courts of appeal have repeatedly rejected *Cassel*'s application beyond the unique circumstances of that case, where the parties' partnership agreement included a specific formula for determining the precise value of the withdrawing partner's interest.

In short, there is no confusion among the courts of appeal as to the proper rule to apply in the circumstances of this case, and, therefore, there is no important question of law that warrants this court's review. Cal. Rules of Court, Rule 8.500(b)(1).

## Statement of Additional Issue

Should this court be persuaded to grant review, it should also review the novel question addressed by the court of appeal: "Should the comparison of whether a default judgment exceeds the amount of compensatory damages demanded in the operative pleadings examine the *aggregate* amount of non-duplicative damages or instead proceed on a claim-by-claim or item-by-item basis?" [Op'n at 2 (emphasis in original).]

## Statement of Facts

For purposes of this answer, Cohen adopts the facts as stated in the court of appeal's opinion.

## Legal Discussion

## I

## Cohen's Petition for Review Should Be Denied

Sass's petition for review asserts that courts of appeal are "divided" on the question whether a plaintiff may recover damages exceeding the amount demanded in the complaint where the plaintiff seeks an accounting or valuation of a business owned by the defaulting defendant. Close examination of the case law, however, shows that this is simply not true.

### A. Courts of appeal have repeatedly refused to extend the holding in *Cassel* beyond the facts of that case

Contrary to Sass's depiction of a divided judiciary, in twenty years, no published case has ever applied *Cassel* to affirm a judgment that exceeds the amount of damages sought in a plaintiff's complaint. For example, Sass cites the decisions in *Warren v. Warren* (2015) 240 Cal.App.4th 373, and *Schwab v. Southern California Gas. Co.* (2004) 114 Cal.App.4th 1308 as cases that supposedly "follow *Cassel* . . . ." [Pet. at 9.] While it is true that each of those cases cited the *Cassel* decision with approval, neither applied its holding to affirm a default judgment that exceeded the amount demanded in the complaint. To the contrary, both those cases reversed entry of the default judgment and limited the holding in *Cassel* to its specific context—partnership dissolution proceedings where "[t]he partnership was in possession of the partnership agreement, which included a formula for calculating the value of the partnership interest, and

the partnership's financial information." *Schwab, supra*, 114 Cal.App.4th at 1326; see also *Warren*, *supra*, 240 Cal.App.4th at 378-79 (*Cassel* does not apply); *Los Defensores, Inc. v. Gomez,* (2014) 223 Cal.App.4th 377, 400 (same). Thus, the most that can be said for these cases is that they noted the narrow rule in *Cassel*, and held that it did not apply on the facts.

By contrast, *every published case* that has gone beyond merely reciting (and then not applying) the rule in *Cassel* to actually analyze that decision has rejected its rationale as improperly extending this court's decision in *In re Marriage of Lippel*, and the court of appeal decision in *In re Marriage of Andresen*, which only allow petitioners in marital dissolution actions to recover damages above those asserted in their pleadings because the required form petition in those proceedings does not allow for petitioners to plead a specific amount. For example, in *Finney v. Gomez*, the court held that *Cassel* improperly "relied on the reasoning in *Lippel* regarding the provision of notice via form complaints and extended it to justify a broad, unclear exception to section 580." *Finney, supra,* (2003) 111 Cal.App.4th 527, 541. *Finney* held that individual cases where the defendant has information sufficient to assess the ultimate judgment "cannot lessen the requirements of section 580." *Ibid.*; see also *id.* at 541-42 ("the rationale of *Cassel* runs counter to the primary purpose of section 580 of ensuring notice and fundamental fairness.").

Other cases agree. In *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495 the court not only distinguished *Cassel* on the facts, but rejected its rationale:

> [E]ven if this case were not factually distinguishable from *Cassel*, we would not apply the holding in *Cassel* here because *Cassel* is contrary to this court's decision in *Ely*, which we continue to adhere . . . . The fact that the defendant may have access to material from which it can calculate the extent of its liability is not a substitute for *notice from the plaintiff* of the amount of money the plaintiff is seeking. Accordingly, we reject *Cassel*, adhere to *Ely*, and conclude that where a complaint seeking an accounting does not request a specific amount of money from the defendant, the plaintiff must serve a statement of damages before taking the defendant's default.

*Id.* at 1527; see also Op'n at 15 ("*Cassel*'s rule impermissibly substitutes actual or constructive notice for formal notice because it predicates the propriety of a default judgment in accounting cases on whether the defaulting defendant knew or, by dint of his equal or greater access to information, should have known about his maximum exposure.").

### B. This case is not the proper vehicle for review because, even if *Cassel* is good law, it would not apply here

Even assuming that *Cassel* was good law and created some split among the courts of appeal, this court should deny Sass's petition because this case is not the proper vehicle to address

that split. In *Cassel*, the plaintiff withdrew from a law partnership and then filed an action for an accounting and valuation of his interest in that partnership. *Cassel*, *supra*, 76 Cal.App.4th at 1159. Despite that the complaint did not assert a specific amount of damages, the court of appeal affirmed a default judgment for $305,690 for plaintiff. *Id.* at 1160. That decision was premised, however, on the fact that the partnership agreement there set forth a "specific method for calculating a withdrawing partnership interest" and, therefore, the defendant could "*precisely* calculate the amount for which [he] could be liable if [he] chose to default." *Id.* at 1163 (emphasis added).

Here, there is no specific formula Cohen could have applied to "precisely" determine the amount Sass was entitled to under her breach of contract complaint. The similarity between *Cassel* and the facts here begins and ends at the plaintiff seeking the profits of a business. Determining the value of Cohen's business, Tag Strategic ("Tag"), required expert analysis of both subjective and objective factors, as highlighted by Sass's own use of an expert in this case. It was not Cohen's duty to hire experts to determine the value of Sass's complaint. Instead, it was Sass's statutory duty to provide *formal* notice of damages. For these reasons, *Cassel* is wholly inapplicable even if it is good law.

There is, therefore, no reason for this court to grant review to determine the viability of a decision that would not apply here in any event.

### C. Equity does not favor Sass or other plaintiffs that do not provide notice of the damages sought in default proceedings

Sass repeatedly suggests that this case is about fairness *to her*. She implies that the court of appeal decision here somehow prevents her "from receiving all that is justly due" because she supposedly had "no clear idea of the dollar value of the relief" to seek in her complaint. [Pet. at 10, 11.] Moreover, she asserts that the decision allows "Cohen to profit from his own wrong." [Pet. at 10, 13.] Nonsense.

As the court of appeal noted, there are lots of circumstances where the amount of damages a plaintiff should seek are difficult to determine—for example, where a plaintiff seeks noneconomic damages—but a plaintiff "is still required to plead her 'educated guess' as to the amount of such damages." [Op'n at 14 (quoting *Janssen v. Luu* (1997) 57 Cal.App.4th 272, 279).] Moreover, to recover damages, plaintiffs are ultimately required to prove the amount thereof at a prove up hearing. Sass's claimed ignorance of the damages she suffered is belied by her default prove up package that ultimately sought a specific amount of damages. The only question is whether Sass should have been required to give Cohen notice of those calculable damages while he still had time to answer the complaint.

Requiring notice of the amount of damages sought does not prevent Sass or other plaintiffs from receiving what they are "justly due," and does not allow Cohen or other defendants to profit from any provable wrongdoing. That rule simply provides

defendants their right to choose between (1) giving up their right to defend in exchange for the certainty that they cannot be held liable for more than a known amount, and (2) exercising their right to defend at the cost of exposing themselves to greater liability. *Greenup*, *supra*, 42 Cal.3d at 829 ("[D]ue process requires notice to defendants, whether they default by inaction or by willful obstruction, of the potential consequences of a refusal to pursue their defense.").

Section 580 is itself an equitable statute that provides plaintiffs a mechanism for redress while providing a due process protection for defaulting defendants that limits the plaintiff's recovery to that which they specifically sought in the complaint which, for all intents and purposes, has no limit. Sass is the master of her own complaint and could have alleged the amount of damages she ultimately sought from Cohen. *Petersen v. Bank of America Corp.* (2014) 232 Cal.App.4th 238, 259. Her failure to do so does not make the operation of section 580 inequitable. Moreover, even at default plaintiffs hold the keys to the damages because they can: (a) proceed directly to a prove up hearing and receive the universe of what they sought in their complaint, or (b) open the pleadings to amend the complaint to provide formal notice of the damages they seek, and await a second default or proceed to a trial on the merits. *Van Sickle*, *supra*, 196 Cal.App.4th at 1522.

The equities simply do not favor allowing plaintiffs to obtain a default, preclude a defendant from defending himself,

and then obtaining damages without notice. That is especially true where, as here, a default is obtained over a *pro se* litigant not trained in California civil procedure. Adopting a rule whereby a plaintiff may take the defendant to the cleaners on default because the plaintiff failed to allege a specific amount is not "equitable" and would encourage plaintiffs to purposefully disguise the allegations of their complaint to obtain surprise judgments. It should not be forgotten that while the allegations of the complaint are presumed admitted by operation of law in default proceedings, they have not been proven. It would be inequitable to allow surprise judgements to be taken against a defaulting defendant, when the plaintiff alone has the ability to put all litigants on formal notice of the damages sought.

## II

## If Review Is Granted, this Court Should Also Decide the Additional Issue Presented by Cohen

Because the issue presented by Sass's petition is not worthy of this court's review, the petition should be denied. But if the court grants the petition, it should also consider the question presented by Cohen, which concerns whether the amounts alleged in the complaint may be aggregated to determine whether the default judgment exceeds the complaint's demand and, if so, by how much.

Sass's complaint asserts seven causes of action, but does not pray for a specific amount of damages for any of those claims. Rather, the complaint's prayer merely asserts damages "in a sum

to be proven at trial." [Op'n at 5.] Elsewhere in the complaint, however, Sass asserted she was damaged in specific amounts related to specific property and conduct by Cohen. [*Ibid.*]

For example, the complaint asserts that Sass is entitled to a 50% share in Cohen's business, TAG Strategic, but includes no specific allegations regarding the value of that business. [Op'n at 5.] Elsewhere, Sass alleges $700,000 in damages from revenue she allegedly brought to Tag, $3 million in damages related to two residential properties owned or sold by Cohen, and other smaller amounts related to her employment at Tag and certain stock options. [*Id.* at 5.] The default judgment rejects Sass's claim for the $700,000, but awards (i) $126,504 in proceeds from the sale of one home, (ii) $2,099,610 for Sass's alleged 50% interest in Tag as an ongoing business, (iii) $444,918 for half of Tag's bank account balances, (iv) $125,000 for Sass's employment-related claims, (v) $10,500 for certain stock, and (vi) a constructive trust over the other residential property. [*Id.* at 7.]

Thus, the vast majority of the default judgment—$2,544,528—represented damages for breach of an alleged agreement to share with Sass 50% of Tag, despite that Sass had included no allegations with regard to the value of Tag in her complaint. The court of appeal had to determine, therefore, whether to view the judgment on an item-by-item basis—which would have precluded judgment in any amount related to Tag—or whether to aggregate all of the damages allegations in the complaint—which would allow the court to award damages up to

the total aggregated damages allegations, even if doing so included significant damages related to Tag.

The court of appeal acknowledged that "it is well settled that a court must separately compare the amounts demanded and obtained for *compensatory* damages, and those demanded and obtained for *punitive* damages," and that [i]t is also well settled that a court must evaluate the relief pled against each defendant separately . . . ." [Op'n at 16 (emphasis in original).] Nonetheless, the court decided that it could aggregate the complaint's compensatory damages allegations in order to compare the total compensatory award in the default judgment to the total compensatory relief alleged in the complaint. [*Id.* at 17.]

Should this court grant review, it should also consider the novel question of whether to aggregate damages allegations and conclude that the court of appeal's decision here is wrong.

"It is fundamental to the concept of due process that a defendant be given notice of the existence of a lawsuit and notice of the specific relief which is sought in the complaint served upon him." *Lippel*, *supra*, 51 Cal.3d at 1166 (emphasis added). Thus, "a prayer for damages according to proof passes muster under [Code of Civil Procedure] section 580 only if a specific amount of damages is alleged in the body of the complaint." *Becker*, *supra*, 27 Cal.3d at 494. This notice requirement "enables a defendant to exercise his right to choose . . . between (1) giving up his right to defend in exchange for the certainty that he cannot be held liable for more than a known amount, and (2) exercising his right to

defend at the cost of exposing himself to greater liability." *Greenup*, *supra*, 42 Cal.3d at 829.

Here, as Sass herself acknowledged in the court of appeal, "Sass's complaint does not, it is true, state specific figures to support the award of Sass's half-share of Tag and its bank account." [RB at 8.] Cohen had the right to rely on the specific allegations in the complaint to elect not to respond knowing that he could not be subjected to open-ended liability but would be liable only for the specific amounts alleged. *Stein v. York*, (2010) 181 Cal.App.4th 320, 325. (holding that "although this may [be] a tactical move by defendant, it is a permissible tactic. . . . Section 580 'ensure[s] that a defendant who declines to contest an action . . . [is] not . . . subjecte[d] . . . to open ended liability' and operates as a limitation on the court's jurisdiction."). Thus, based on the complaint's allegations, Cohen could have chosen to default knowing that Sass could not prove entitlement to any of the $700,000 in revenue she allegedly brought to the business, knowing that the homes were not worth anywhere close to what was alleged in the complaint, and knowing that Sass did not allege any specific damages related to Tag. Cf. *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1740 (refusing to aggregate complaint's claim for actual damages with claim for treble damages because defendant "could have elected to default on the ground that he was liable for $50,000 in damages confident that there was no way that the [Plaintiffs] could prove the predicate facts to warrant trebling"). By aggregating the damages allegations, Cohen was deprived of his due process right to

against being held liable for losses which he was not specifically warned about in the complaint.

## Conclusion

For the foregoing reasons, this court should deny Sass's petition for review. If the petition is granted, however, the court should also consider the issue presented in this answer.

Dated: May 6, 2019

SNELL & WILMER L.L.P.
Keith M. Gregory
Todd E. Lundell
Daniel G. Seabolt

By: */s/ Todd E. Lundell*
Todd E. Lundell
Attorneys for Appellant
Theodore L. Cohen

## Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this answer to the petition for review, it contains 3,287 words, exclusive of the matters that may be omitted under rule 8.504(d)(3).

Dated: May 6, 2019

SNELL & WILMER L.L.P.
Keith M. Gregory
Todd E. Lundell
Daniel G. Seabolt

By: */s/ Todd E. Lundell*
Todd E. Lundell
Attorneys for Appellant
Theodore L. Cohen

*Sass v. Cohen*
*Supreme Court S255262*
*Court of Appeal, 2d Appellate District, Case No. B283122*
*Los Angeles Superior Court Case No. BC554035*

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/s/ *Todd E. Lundell*
Todd E. Lundell
tlundell@swlaw.com

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| Daren M. Schlecter<br>Law Office of Daren M. Schlecter<br>1925 Century Park E #830<br>Los Angeles, CA 90067 | **By Electronic Service**<br><br>Attorneys for Plaintiff and Respondent<br>email:<br>daren@schlecterlaw.com |
| Robert S. Gerstein<br>Law Offices of Robert S. Gerstein<br>171 Pier Ave., #322<br>Santa Monica, CA 90405 | **By Electronic Service**<br><br>Attorneys for Plaintiff and Respondent<br>email:<br>robert.gerstein1@verizon.net |
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**STATE OF CALIFORNIA**
Supreme Court of California

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