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SUPREME COURT
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In the Supreme Court of the State of California

Deborah Sass,

Plaintiff and Respondent

v.

Theodore L. Cohen,

Defendant and Appellant.

Court of Appeal, Second Appellate District,
Division Two, Case No. B283122
Los Angeles County Superior Court, Case No. BC554035
Honorable Frederick Shaller

Answer Brief on the Merits

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Questions Presented

This case presents the following questions for review:

1. In a complaint that seeks an accounting of specified assets, is the plaintiff required to plead a specific amount of damages to support a default judgment, or is it sufficient for purposes of Code of Civil Procedure section 580 to identify the assets that are in defendant's possession and request half of their value?[1]

2. 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?

Introduction

On the first question presented, petitioner Deborah Sass asks this court to hold that a plaintiff seeking an accounting of specified assets does not need to plead a specific amount of damages to support a default judgment. Sass's position, however, is directly contrary to the plain language of the controlling statutes. And this court has repeatedly held that because the procedure governing entry of default is governed entirely by statute, courts have no authority to enter default except in conformity to sections 580 and 585. Sass's reliance on the marital

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[1] All statutory citations are to the Code of Civil Procedure unless otherwise noted.

dissolution cases to request a judicial exception to the statutory notice requirements should be rejected. The marital dissolution cases simply recognize that by authorizing a statutorily mandated form that leaves no room for plaintiffs in marital dissolution cases to specify an amount of damages, the Legislature tempered the requirements of sections 580 and 585 as to proceedings initiated by those forms. Moreover, Sass's argument that fundamental fairness is satisfied even without a specific prayer for damages because the defendant in an accounting action has knowledge of the value of the assets would, as this court has already recognized, frustrate the default judgment statutes' policy objectives, open the door to unnecessary and improper speculation, and undermine due process.

On the second question, this court should hold that where a plaintiff does not include a specific request for damages in the complaint's prayer, such that the court must look to the body of the complaint to determine the plaintiff's allegations of harm, courts should view those allegations item-by-item to determine whether the default judgment exceeds the amounts alleged in the complaint. Aggregating the damages allegations, as the court of appeal did below, allows facially deficient damages allegations—i.e. specific allegations of harm that the defendant can discern from the face of the complaint are unrecoverable—to form the basis of recovery at default. Sass's and the court of appeal's justifications for this result are based on faulty assumptions about how defaulting defendants view such complaints and the erroneous conclusion that an item-by-item approach would

somehow "penalize" plaintiffs who plead damages with greater specificity and disincentivize detailed complaints.

Statement of Facts and Procedural History

A. Sass sues Cohen

In 2006, Sass and Cohen began a romantic relationship, and shortly thereafter, Cohen asked Sass to move from London to work with him in Los Angeles so they could "merge their lives" together.[2] [1CT 108-09.] Cohen agreed that "all property and income acquired by them during their relationship would be joint property" and that he "would care for [Sass] and would pay all of her living expenses for the rest of her life." [1CT 108.] In reliance on Cohen's promise, Sass moved to Los Angeles to live with Cohen. [1CT 109.] As these stories often go, however, the parties eventually separated, and in 2013, Cohen stopped paying Sass's living expenses. [1CT 112.]

In August 2014, Sass filed a lawsuit against Cohen and Tag Strategic, LLC ("Tag"), a digital entertainment consulting company Cohen formed during the parties' relationship. [1CT 1.] The operative complaint asserts seven separate causes of action stemming from Cohen's alleged failure to live up to his promises to Sass, including (i) breach of contract, for Cohen's alleged

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[2] As this is an appeal from a default judgment, the facts stated herein are taken from the operative second amended complaint. It is worth noting, however, Cohen filed an answer to the first amended complaint in which he denied many of the material allegations that form the basis of Sass's claims against him. [1CT 91-101.]

failure to honor their *Marvin* agreement,[3] (ii) failure to pay wages for Sass's work at Tag, (iii) waiting time penalties under the Labor Code for failing to pay those wages, (iv) quantum meruit for the value of Sass's services to Tag, (v) an accounting of the value of Tag and other property acquired during the parties relationship, (vi) fraud for the alleged false promises Cohen made to share all property equally, and (vii) fraudulent transfer for transferring Tag assets. [1CT 106-26.]

The complaint's prayer for relief does not request a specific amount of damages, but only seeks compensatory, consequential, and punitive damages in an undetermined "sum to be proven at trial." [1CT 124-26.] Several allegations in the body of the complaint, however, seek specific amounts for portions of the damages Sass sought, including: (i) "no less than $3,000,000" for Sass's share in the combined value of two homes Cohen had purchased during the relationship—a home in Hollywood that Cohen had already sold for an alleged profit of $300,000, and a home on Oakley Drive in Los Angeles that Cohen still owned [1CT 118, 121], (ii) "at least the sum of $700,000, which represents 50% of the revenue brought to Tag by [Sass]" [1CT 120-21], (iii) unpaid wages of $5,000 per month from May 2006 to April 2013, less the $2,000 per month Cohen paid her for a period

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[3] A *Marvin* agreement is an express or implied agreement between nonmarital partners wherein the parties agree to post-relationship support or the division of property accumulated while the parties were together. See, e.g., *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684; *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 887-88.

of 10 months [1CT 110], and (iv) her share of $25,000 worth of shares in a restaurant/lounge Cohen purchased during the relationship. [1CT 111-12.] In the alternative, Sass sought a constructive trust over "all income and property earned and purchased by [Cohen and Tag] since May 2006." [1CT 124.]

Importantly, nowhere in the complaint does Sass allege a specific amount of damages for her share of Tag or Tag's profits.

B. Sass obtains a default judgment against Cohen and Tag

Early in the lawsuit, Cohen was represented by counsel, who filed demurrers to the original and first amended complaints. [1CT 7-9.] Cohen also answered the first amended complaint by denying any liability and asserting several affirmative defenses. [1CT 91-102.] In December 2015, however, the trial court granted Cohen's counsel's motion to be relieved as counsel. [1CT 10.] The same day the court entered its formal order granting the motion to withdraw, Sass filed a second amended complaint and served that complaint on Cohen's now-withdrawn counsel. [CT 139.] Despite eventually learning of the complaint and representing himself at a hearing on a discovery motion, Cohen never filed an answer or demurrer and neither did Tag. [2CT 323.]

In February 2016, Sass filed a notice of punitive damages, reserving her right to seek $4,000,000 in punitive damages on a default judgment. [1CT 147-50.] Thereafter, Sass requested entry

of default against Cohen and Tag, and default was entered against both defendants in March 2016. [1CT 153, 157.]

At a prove-up hearing, Sass submitted the declaration of a forensic accountant, who calculated that Sass's share of the value of the two homes, Tag, Tag's profits, Sass's unpaid wages, and the restaurant/lounge stock totaled $6,351,000. [Aug. Mot. at 107.][4]

In October 2016, the court entered a default judgment against Cohen and Tag in the total amount of $2,941,632.74 and imposed a constructive trust over Sass's 50% share of the Oakley home. [1CT 164-167.] The court issued a statement of decision explaining the basis for the judgment and damages as follows:

On Sass's first cause of action for breach of a *Marvin* agreement, the trial court awarded (1) $126,504 for failing to transfer to Sass 50% of the profits in the Hollywood home Cohen had sold, plus $37,951.20 in interest, (2) $2,099,610 for breach of the *Marvin* agreement to share with Sass 50% of the value of Tag, (3) $444,918 for breach of the *Marvin* agreement to share 50% of income received by Tag, (4) 50% ownership in the Oakley home, and (5) $16,096.50 representing 50%, plus interest, in the restaurant/lounge stock. [2CT 257-261.]

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4 References to "Aug. Mot." are to Cohen's motion to augment the record, which was granted by the court of appeal on March 20, 2019.

On her second cause of action for Cohen's alleged failure to pay wages, the trial court awarded $120,000 in wages for her work at Tag between 2011 and April 2013. [2CT 258.]

On her third cause of action seeking waiting time penalties, the trial court awarded $5,000. [*Ibid.*] The trial court did not award relief on Sass's fourth and fifth causes of action for quantum meruit or an accounting. [2CT 257-261.]

With respect to Sass's sixth cause of action for fraud, the court stated that any compensatory damages were the same as the damages awarded for the breach of contract cause of action; however, the court awarded additional punitive damages of $88,984. [2CT 260.]

For Sass's seventh cause of action for fraudulent transfer, the court imposed a constructive trust over the Oakley home, based on the court's finding that Sass was owed a 50% interest in that property. [2CT 260-61.]

C. The trial court denies Cohen's motion to vacate the default judgment

In January 2017, Cohen moved to vacate the default judgment asserting, among other things, excusable neglect in failing to answer the complaint and that Cohen's answer to the first amended complaint should be deemed a sufficient answer to the second amended complaint. [1CT 042-044] In his reply, Cohen also argued the default judgment was void because it awarded Sass greater relief than she demanded in her complaint, which violated both due process and sections 580 and 585. [2CT 241-47.]

After allowing Sass further briefing on whether due process and sections 580 and 585 compelled a finding that the judgment was void (2CT 275-78), the trial court denied Cohen's motion. The court found "Cohen has not met his burden of showing specific facts demonstrating excusable neglect" because his excuses for failing to respond to the second amended complaint were not credible. [2CT 309.] The court also held the answer to the first amended complaint was not a sufficient response to the second amended complaint because the latter alleged new causes of action and new facts. [2CT 307-9.] Thus, "the amendment was not made merely as to formal and immaterial matters, nor could the original answer have set forth a defense to the new facts alleged in the [second amended complaint]." [*Ibid.*]

Finally, the court rejected Cohen's argument that the judgment was void because it was in excess of the amount demanded by the complaint. Citing the decision in *Cassel v. Sullivan, Roche, & Johnson* (1999) 76 Cal.App.4th 1157, the court held "where a plaintiff alleges a cause of action for accounting and knowledge of the debt due is within the possession of the defendant, there is no notice requirement for damages sought before entry of default judgment." [2CT 319.] Thus, according to the trial court, Sass was excused from any obligation to plead a specific amount of damages, and the default judgment could properly award Sass damages that had not been specifically demanded in the complaint. [*Ibid.*]

D. The court of appeal reverses the judgment

Cohen appealed,[5] arguing only that the default judgment was void because it exceeded the amount specified in the operative complaint, which violated due process and the express edict of sections 580 and 585 requiring notice of the specific amount sought. [AOB at 19.] Cohen argued the *Cassel* case was distinguishable and, in any event, was wrongly decided and had been properly rejected by the vast majority of courts to have considered whether a default judgment on a complaint seeking an accounting can exceed the amount demanded in the complaint. [AOB at 25-28; Reply Brief at 17-29.]

In response, Sass conceded that her complaint "does not, it is true, state specific figures to support the award of Sass's half-share of [Tag] and its bank account." [Respondent's Brief ("RB") at 8.] In other words, Sass conceded the damages awarded exceeded the specific sums stated in the complaint by over $2.5 million—$2,099,610 (which the trial court awarded as Sass's share of Tag) + $444,918 (which the trial court awarded as Sass's share of Tag's income). [2CT 257-59.] Nonetheless, Sass argued the judgment should be affirmed based on the reasoning from *Cassel*.

The court of appeal reversed. The court's opinion addresses "two unsettled questions: (1) May a default judgment be entered

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[5] Tag was not a party to the appeal. [Op'n at 7, n.7.] References to "Op'n" are to the court of appeal's opinion filed March 7, 2019.

for an amount in excess of the demand in the operative pleadings when the plaintiff seeks an accounting or valuation of a business; and (2) 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 bases?" [Op'n at 2 (emphasis in original).]

As to the first question, the court "add[ed] [its] voice to the growing chorus of cases" holding that "actions alleging an accounting claim or otherwise involving the valuation of assets are not excused from limitations on default judgments . . . ." [*Ibid.*] Joining "the growing majority of cases," the court expressly rejected *Cassel* for three reasons. [*Id.* at 14.] First, the court recognized "the rule precluding plaintiffs from obtaining 'more relief than is asked for in the complaint' is dictated by the 'plain language' of section 580." [Op'n. At 14.] The court further held *Cassel*'s rationales cannot "overcome[] the clear direction from our Supreme Court that section 580 'means what it says and says what it means.'" [*Ibid.* (quoting *In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166).]

Second, the court recognized there are only three instances where a plaintiff is precluded from alleging an amount in the complaint: (1) personal injury actions, (2) actions for punitive damages, and (3) marital dissolution actions where the statutorily mandated pleadings preclude the plaintiff from alleging a damage amount. [*Id.* at 15.] But, in an accounting

action, "[n]o statute or statutorily mandated form precludes a plaintiff from pleading an amount of relief sought for an accounting claim or in an action involving the valuation of assets." [*Ibid.*]

Third, the court disagreed with *Cassel*'s impermissible substitution of actual/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." [*Ibid.*] As the court recognized, "this rule substantially dims section 580's 'bright line' rule of formal notice by replacing the straightforward inquiry into what is pled in the operative pleadings with a case-by-case inquiry into what individual defendants knew or should have known . . . ." [*Ibid.*]

On the second question, the court held "the amounts of damages awarded and demanded are to be compared on an aggregate basis"—that is, courts should compare the total compensatory relief granted by the default judgment to the total compensatory relief demanded in the operative pleadings without reference to the theory of liability or factual allegations attached to those requests for damages.[6] [Op'n at 2, 17.] According to the court, because a "defendant does not know which of the plaintiff's

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[6] Because Sass had not asserted in her respondent's brief that the damages could be aggregated in this way, the court of appeal asked for and received supplemental letter briefs on the issue.

claims will have merit or which alleged items of damages will be recoverable," "[t]he only way to calculate one's monetary exposure from a default is to add up the various, non-duplicative items of damages demanded." [*Id.*at 17.] The court also held that comparing the aggregate damages sought with the aggregate damages awarded "avoids penalizing a plaintiff for pleading her damages with greater specificity because, unlike the itemized approach, it does not cap the damages for each item on default at the amount demanded for such item in the operative pleadings." [*Ibid.*] Finally, the court held comparing aggregate amounts "is more consistent" with the statutory terms "[t]he relief," "the principal amount," or "the amount" "demanded in the complaint." [*Ibid.*]

Applying this aggregation analysis, the court of appeal determined the default judgment exceeded the amounts alleged in the complaint by $1,819,032. [Op'n at 22.] The court's opinion vacated the default judgment against Cohen and remanded to the trial court to either (1) reinstate the default judgment, less $1,819,032 or (2) vacate the underlying default and allow Sass to file and serve an amended complaint demanding a greater amount of relief.

This court granted review.

Legal Discussion

I

To Support a Default Judgment, A Plaintiff Is Required to Plead A Specific Amount of Damages Even When the Complaint Seeks an Accounting

Relying heavily on the decision in *Cassel, supra*, Sass argues that when a plaintiff "brings an accounting action seeking an equal division of the value of property in defendant's possession, and identifies the property in the pleadings, section 580 is satisfied without the need to state a specific sum for its value." [Petitioner's Opening Brief on the Merits ("OBM") at 8.] This court should not adopt such a broad rule, which directly conflicts with the plain language of section 580. As numerous courts have recognized, such a rule would improperly conflate constructive knowledge of the damages sought with the formal notice required by section 580. Sass's proposed rule would also improperly extend *legislatively created* exceptions to section 580's pleading requirements to virtually all cases where the defendant "should know" the damages.

A. A court's jurisdiction to enter default is purely statutory, and allowing a default judgment in excess of the damages specifically pleaded would violate the clear statutory language

While Sass passingly quotes section 580 at the beginning of the argument section of her brief (17-18), the remainder of her argument asks this court to ignore its clear language. The procedure governing entry of a default judgment is, however, governed entirely by statute. As this court has emphasized, "the

court's jurisdiction to render default judgments can be *exercised only in the way authorized by statute.*" *Burtnett v. King* (1949) 33 Cal.2d 805, 807 (emphasis in original). And "a court has no power to enter a default judgment other than in conformity with section 580." *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493. Thus, the question whether a default judgment in an accounting action can exceed the specific amount pleaded in the complaint must be answered by reference to the specific statutory language authorizing courts to enter default judgments. *Burtnett, supra*, 33 Cal.2d at 807 ("It has been held repeatedly, and recently, that where a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations, an act beyond those limits is in excess of its jurisdiction.").

The statutes governing entry of a default judgment are straightforward, unambiguous, and leave no room for interpretation:

> The relief granted to the plaintiff, if there is no answer, *cannot exceed that demanded in the complaint* . . .

§ 580 (emphasis added).

> In an action arising upon contract or judgment for the recovery of money or damages only, if the defendant has . . . been served . . . and no answer . . . has been filed . . . the clerk . . . shall enter the default of the defendant . . . and immediately thereafter enter judgment

> *for the principal amount demanded in the complaint . . .*

§ 585(a) (emphasis added)

> In other actions, . . . [after default] the plaintiff . . . may apply to the court *for the relief demanded in the complaint.* The Court . . . shall render judgment in the plaintiff's favor for that relief, *not exceeding the amount stated in the complaint.*

§ 585(b).

This court has "long interpreted section 580 in accordance with its plain language. Section 580, [the court has] 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." *Lippel, supra,* 51 Cal.3d at 1166; see also *Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 ("the Courts of Appeal have consistently read the code to mean that a default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction"); *Becker, supra,* 27 Cal.3d at 493 ("If a judgment other than that which is demanded is taken against him, [the defendant] has been deprived of his day in court a right to a hearing on the matter adjudicated."). Moreover, "the language of section 580 does not distinguish between the type and the amount of relief sought. The plain meaning of the prohibition against relief 'exceed[ing]' that demanded in the complaint encompasses both of these considerations." *Becker, supra,* 27 Cal.3d at 493-94. Thus, as the court of appeal held

here, "[u]nder these statutes, the operative complaint fixes 'a ceiling on recovery,' both in terms of the (1) type of relief and (2) the amount of relief." [Op'n at 10 (quoting *Greenup, supra,* 42 Cal.3d at 824).]

Sass's proposed broad rule allowing a default judgment to exceed the amount demanded in the complaint any time a defendant might have knowledge of the extent of damages is contrary to sections 580 and 585. The plain statutory language precludes a court from entering a judgment that exceeds the specific amount demanded by the complaint. Whether a defendant has actual or constructive notice of the amount of plaintiff's damages is irrelevant because only "formal notice" of the claimed damages will satisfy the statutes' requirements. See, e.g., *Greenup, supra,* 42 Cal.3d at 826 ("actual notice may not substitute" for the "formal notice" required by section 580); *Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc.* (2018) 23 Cal.App.5th 1013, 1019 ("Section 580 requires formal notice of damages sought through the complaint and does not consider whether a defendant had actual or constructive notice."); *Stein v. York* (2010) 181 Cal.App.4th 320, 326 ("Under section 580 actual notice of the damages sought is not sufficient; due process requires 'formal notice.'").

There simply is no way to reconcile Sass's proposed rule with the actual rules for entry of default judgment created by the Legislature. Whether Sass's proposed rule makes sense as a matter of policy is an issue for the Legislature to consider, and

this court should reject Sass's request to effectively amend the statutes by creating a first-of-its-kind judicial exception to the plain statutory language prohibiting a default judgment from exceeding the amount of damages demanded by the complaint.

B. The marital dissolution cases only recognize a legislatively created exception to the strict statutory pleading requirements where plaintiffs are required to file statutorily mandated form complaints

In arguing the judgment here complies with the statutory mandates of section 580 and 585, Sass relies on a line of marital dissolution cases, which permitted the entry of default judgments where the plaintiff's complaint stated only the type of relief demanded and the assets to be divided, but did not seek a specific dollar amount. Following the reasoning of the First District's decision in *Cassel*, *supra*, Sass tries to tease from these marital dissolution cases a "broader principle" that section 580 is satisfied whenever the plaintiff asserts an accounting claim and seeks half the value of specific assets. [OBM 18, 34-35.]

Both Sass and the *Cassel* court, however, misunderstand the basis for the holdings in the marital dissolution cases. Those cases did not themselves create any broad exception to sections 580 and 585, but simply recognized the Legislature had created a narrow exception to those statute's strict requirements by abolishing the traditional complaint and empowering the Judicial Council to create a form petition for dissolution that precludes petitioners in marital cases from seeking a specific amount of

relief. Sass's arguments for applying that narrow, legislatively endorsed exception to this case miss the mark.

1. The *Lippel* and *Andresen* decisions recognize a legislatively created exception to the strict pleading requirements

In *Lippel, supra,* this court considered "whether it is a denial of due process, as embodied in Code of Civil Procedure section 580 (section 580), to enter a default judgment ordering a husband to pay child support, where the wife's petition for marital dissolution . . . did not request child support and no notice of any such request was ever served on the husband." *Lippel, supra,* 51 Cal.3d at 1163. Although the wife had not requested it in her petition, on default the trial court ordered the husband to pay $100 per month in child support. *Id.* at 1164. The husband did not pay the ordered child support over the next 16 years, and the wife collected benefits from the City of San Francisco. *Ibid.* The City then obtained an order garnishing the husband's wages to recoup its losses. *Ibid.* The husband subsequently moved to vacate the child support judgment and the order assigning his wages, arguing that the judgment was void because wife's petition provided no notice that he would be required to pay child support. *Ibid.* The trial court denied the husband's petition, and the court of appeal affirmed. *Id.* at 1164-65.

This court reversed, holding the wife's form petition for marital dissolution failed to give notice that the husband could be liable for child support because the wife failed to check the box

specifically requesting it. *Id.* at 1169-70. This court recognized "[t]he enactment of The Family Law Act (Act) dramatically and drastically changed the whole landscape of family law." *Id.* at 1169. "The Act abolished the traditional complaint," and "empowered and directed the Judicial Council to create, as a substitute for the traditional complaint, a mandatory printed standard form petition." *Ibid.* This court recognized that the standard form petition created by the Judicial Council only required petitioners to check boxes indicating the type of relief requested, and held the manner in which those boxes were checked puts the respondent on notice on the specific relief sought:

> [I]n 1970, the Judicial Council . . . established a mandatory standard form dissolution petition. This standard form petition . . . requires a petitioner to set forth certain statistical information in spaces provided, and to check boxes, from a series provided, which indicate the remedy or relief requested . . . and the specific relief being sought (e.g. property division, spousal support, child custody support or attorney fees).
>
> Coupled with the requirement that the respondent be served with a copy of the petition (Civ. Code, § 4503), the manner in which these boxes are checked, or not checked, informs and puts the respondent on notice of what specific relief the petitioner is, or is not, seeking.

Id. at 1169-70. By failing to check the box requesting child support, the wife failed to put the husband on notice that child

support was at issue. Therefore, under section 580, the trial court had no jurisdiction to award child support when entering a default judgment. *Id.* at 1170-71.

Following the *Lippel* decision, the Fifth District in *In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, considered whether a wife who had checked the box on the statutorily mandated "standard form dissolution petition" seeking division of community property, and who attached a separate notice of the specific property to be divided, had given sufficient notice of the amount of the resulting judgment. *Id.* at 879. The court answered that question affirmatively and affirmed a trial court order refusing to vacate a default judgment. The court read *Lippel* as standing for the proposition that "due process is satisfied and sufficient notice is given for section 580 purposes in marital dissolution actions by the petitioner's act of checking the boxes and inserting the information called for on the standard form dissolution petition which correspond or relate to the allegations made and the relief sought by the petitioner." *Ibid.* In so holding, the court emphasized that "the standard form community property declaration" that petitioners are required to file specifically instructs: "When this form is attached to Petition or Response, values and your proposal regarding division need not be completed." *Id.* at 876; see also *id.* at 879 ("Consistent with the 'Instructions' in the declaration form, the wife did not assign any values to the described property or debts, or propose that they be divided in any particular manner.").

More recently, however, the courts in *In re Marriage of Kahn* (2013) 215 Cal.App.4th 1113 and *In re Marriage of Eustice* (2015) 242 Cal.App.4th 1291, both recognized the need for formal notice to the defendant of his potential liability for damages before entry of default. In *Kahn*, the court distinguished *Andresen*, holding that merely checking the box marked "other" on the form complaint was insufficient notice for section 580. *Kahn*, *supra*, 215 Cal.App.4th at 1119 ("The checkbox for 'other' relief is distinguishable from the checkboxes for a division of community property. It is a catchall category; it could encompass practically any kind of relief, including relief that is not statutorily required in a marital dissolution action."). The *Eustice* court took another approach, holding that the "preliminary declaration of disclosure" required by Family Code section 2103 "serves the purpose of ensuring notice of potential liability, just as would a section 425.11 statement of damages . . . or a section 425.115 written notice." *Eustice*, *supra*, 242 Cal.App.4th at 1304-05.

2. *Cassel* extends the exception in marital dissolution actions to cover any complaint seeking an accounting

As Sass explains in her opening brief (at 26-27), the court of appeal in *Cassel* expanded the exception recognized in *Lippel* and *Andresen* to affirm a default judgment in an accounting action despite that the plaintiff's complaint had not sought a specific amount of damages. There, 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. The complaint did not attempt to value the partnership or plaintiff's interest therein. *Id.* at 1159-60. The partnership did not respond to the complaint, and the trial court entered a default judgment for $305,690 plus $5,000 in attorneys' fees. *Id.* at 1160. The partnership then moved to set aside the judgment because the plaintiff had failed to serve a statement of damages. *Ibid.* The trial court agreed, but after plaintiff served the statement of damages, the trial court imposed a second default judgment for the same amount, plus additional fees. *Ibid.*

On appeal, the court of appeal agreed with the plaintiff that the original default judgment should not have been set aside. *Id.* at 1160-61. The court held "in an action seeking to account for and value a former partner's partnership interest and for payment of that interest, the complaint need only specify the type of relief requested, and not the specific dollar amount." *Id.* at 1163-64. The court (erroneously) interpreted the decisions in *Lippel* and *Andresen* as holding that the requirements of section 580 and due process are satisfied whenever the plaintiff seeks division of specific property and the defendant is "in possession of the essential information necessary to calculate their potential exposure." *Id.* at 1164. Applying what it discerned as the principle articulated in those marital dissolution cases, the court held that the plaintiff was not required to plead a specific amount of damages in his accounting action because "the partnership was in possession of the partnership agreement," which contained a "specific method for calculating a withdrawing partner's

interest." *Id.* at 1163. Thus, the partnership itself "could precisely calculate the amount for which it could be liable if it chose to default," and the original default judgment did not violate section 580 or due process. *Ibid.*

3. *Cassel* was wrongly decided; the *Lippel* and *Andresen* decisions are limited to marital dissolution actions filed by statutorily mandated form complaint

In the twenty years since its publication, no published decision has ever applied *Cassel* to affirm a judgment that exceeded the amount stated in the complaint. True, two decisions appear to have endorsed *Cassel*'s holding, but found it did not apply on the facts. See *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1326; *Warren v. Warren* (2015) 240 Cal.App.4th 373, 378-78. The vast majority of courts, however, have rejected *Cassel* to hold that *Andresen*'s narrow exception to the strict statutory pleading requirements in sections 580 and 585 is limited to marriage dissolution actions where the petitioner is required to file the complaint using a statutorily mandated form petition. As those courts have correctly recognized, *Cassel* misunderstood the decision in *Lippel* and, therefore, misapplied the exception recognized in *Andresen*.

In *Finney v. Gomez* (2003) 111 Cal.App.4th 527, for example, the court considered whether a default judgment on claims for non-marital partition of property, breach of contract, and contribution was void where it exceeded the amount asserted in the complaint. As Sass does here, the plaintiff relied on *Lippel*,

Andresen, and *Cassel* to argue that the judgment was proper, but the court of appeal disagreed. The court noted that if read broadly, the *Lippel* decision might allow a default judgment to exceed the amount demanded in the complaint, "but only when the type of relief is specified via a statutorily mandated form complaint which does not provide the ability to indicate an exact amount." *Id.* at 537. Thus, while the "holding and rationale [in *Andresen*] makes sense when applied to form complaints in marital dissolution actions," extending that holding to general civil actions "is unwarranted" because plaintiffs are "not confined to a mandatory form petition." *Id.* at 542.

Addressing *Cassel* directly, the court in *Finney* 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." *Id.* at 541. The court acknowledged that sometimes, as in *Cassel*, a defendant may "possess[] from the outset, *all* the information necessary to assess the ultimate judgment." *Ibid.* (emphasis in original). The court held, however, that "such individual cases 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.").

Similarly, in *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, the court summarized *Andresen* as holding "[i]n a marital dissolution action, notice sufficient to support a default judgment dividing the community's property . . . may be provided by

checking the appropriate boxes *on a form petition* and listing the property to be divided in the petition." 196 Cal.App.4th at 1527 (emphasis added). However, the court declined to extend that holding to an action seeking valuation of a partnership because "a simple request that the court value the partnership interest does not provide real notice to the defendant of the degree of financial liability the defendant will face in the event of a default." *Ibid.* The court also recognized that there may be circumstances, like *Cassel*, where "the defendant may have access to materials from which it can calculate the extent of its liability," but that "is not a substitute for notice from the plaintiff of the amount of money the plaintiff is seeking." *Ibid.*

Similarly, the court of appeal here rejected *Cassel*. The court explained that "the parties to a marital dissolution case may obtain a default judgment in an amount not alleged in the operating pleadings only where the statutorily mandated pleadings in such a case *preclude* them from alleging any such amount." [Op'n at 15 (emphasis in original).] The court properly rejected Sass's assertion that the marital dissolution cases rest on some "broader principle that parties seeking to value and divide assets should be excused from the statutory mandate of pleading the amount of relief sought," and held that "*Cassel* was incorrect in reading them as doing so." [*Ibid.*] The court also recognized the rule for which Sass advocates "impermissibly substitutes actual or constructive notice for formal notice" required by sections 580 and 585. [*Ibid.*]

Here, unlike in *Lippel* and *Andresen*, Sass was not constrained to a "statutorily mandated form complaint." More generally, the California Legislature has not abolished the traditional complaint for accounting actions, authorized plaintiffs to file a complaint in such actions without specifying an amount of damages, or otherwise authorized courts to enter a default judgment in amounts that exceed the relief requested by the complaint. This court should decline Sass's request to impose a judicially-created exception to the pleading requirements and limits on default judgments where, as here, plaintiffs have full control over the content and allegations in their complaint. Rather, the strict requirements of sections 580 and 585 should apply.

C. Sass's arguments for extending the exception recognized in marital dissolution cases to accounting actions miss the mark

This court should reject Sass's arguments for extending the exception to the strict pleading requirements in marital dissolution actions to accounting actions.

1. The distinction between marital dissolution actions and other actions is based on legislative action and does not elevate form over substance

Sass finds problematic the distinction between marital dissolution cases, where the petitioner is not required to state a specific amount of damages to recover a default judgment, and all other cases where section 580's pleading requirement serves as the ceiling for any default judgment. Sass argues that such a rule

cannot be justified based on the fact that the form petition in dissolution cases precludes petitioners from stating an amount certain because "despite this statutory preclusion, marital dissolution cases remain subject to section 580." [OBM at 32.]

Sass misses the point. While in some sense it is true that marital dissolution cases are subject to section 580, by doing away with complaints in favor of form petitions that preclude petitioners in dissolution proceedings from stating any specific amount of damages, the Legislature itself tempered the strict requirements of section 580 as applied to marital dissolution actions. The Legislature's more specific actions related to marital dissolution cases, which resulted in a form that does not allow petitioners to state a specific amount of damages, apply over the general requirements of sections 580 and 585. Cf., *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (1999) 71 Cal.App.4th 1518, 1524 ("As a principle of construction, it is well-established that a specific provision prevails over a general one relating to the same subject.").

Sass next complains that this distinction "elevates form over substance, giving precedence to statutorily mandated rules about the completion of form petitions over the demands of due process and fundamental fairness embodied in section 580." [OBM at 34.] A court's authority to enter a default judgment is not, however, merely a matter of "fairness," but is based on the very "statutorily mandated rules" that Sass wants to ignore. As this court has repeatedly held, "the court's jurisdiction to render

default judgments can be *exercised only in the way authorized by statute.*" *Burtnett, supra,* 33 Cal.2d at 807 (emphasis in original); see also *People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 666 ("the claim that a judgment exceeds the relief demanded in the complaint" is "jurisdictional" and can be raised for first time on appeal). The distinction between a plaintiff who is required to file a statutorily mandated form petition that precludes him or her from asserting a specific amount of damages and a plaintiff in an accounting action who is the "master" of her own complaint is, therefore, a matter of substance (jurisdiction) and not arbitrary form.

Sass also argues that because "due process as stated in section 580 is satisfied by a dissolution petition that seeks equal division of listed community property, it must also be satisfied by an accounting complaint seeking equal division of identified assets possessed by the defendant." [OBM at 37.] Again, Sass ignores the fact that the court's jurisdiction to enter default judgments is not purely a matter of due process, but is based on statute. Satisfying due process is, therefore, a necessary but not sufficient condition to a court's jurisdiction to enter a default judgment. Stated differently, the court's jurisdiction is limited not only by the requirements of due process, but also the specific requirements of sections 580 and 585, which specifically provide that "[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint" (§ 580), only authorize courts to enter default judgments "for the principal amount demanded in the complaint" (§ 585(a)), and specifically

preclude courts from entering a default judgment "exceeding the amount stated in the complaint" (§ 585(b)). Thus, even if Sass were correct that due process is satisfied where a plaintiff in an accounting action specifies the property to be divided equally—which we dispute, see Part I.C.3, post—that fact would not justify a judgment that violates the statutes authorizing a court to enter default judgments.

2. The nature of an accounting action does not justify an exception to sections 580 and 585

Sass argues the default judgment here is justified despite being in excess of the amount demanded in her complaint because she was "barred by long-standing precedent" from asserting a "precise money amount" in her pleading. [OBM at 33, 40.] As the court of appeal here recognized, however, Sass *was not* precluded from estimating a maximum value as part of her accounting action. [Op'n at 14-15.] Indeed, "[s]uch actions often include an estimate of the amount of money due the complaining party although an absolute amount is not specified." *Ely v. Gray* (1990) 224 Cal.App.3d 1257, 1262. And the requirement for a plaintiff to estimate damages is not unusual, "[a]fter all, noneconomic damages are notoriously difficult to fix, but a plaintiff is still required to plead her 'educated guess' as to the amount of such damages." [Op'n at 14 (citing § 425.11; *Janssen v. Luu* (1997) 57 Cal.App.4th 272, 279).]

Of course, we are not suggesting that plaintiffs should plead "exorbitant figures" or make claims for damages without

probable cause that might expose them to malicious prosecution actions.[7] [OBM at 41.] To recover damages in a default judgment, however, even plaintiffs in an accounting action will ultimately have to "prove that they are entitled to the damages claimed." *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1013 (internal quotation marks omitted); see also *Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 302 ("Plaintiffs in a default judgment proceeding must prove they are entitled to the damages claimed."); *Don v. Cruz* (1982) 131 Cal.App.3d 695, 707 (default judgment of $100,000 not supported by the evidence presented at prove up hearing); *Petty v. Manpower, Inc.* (1979) 94 Cal.App.3d 794, 798 (even in default judgment proceedings, "damages except when fixed by contract must be proved"). Requiring plaintiffs in accounting actions to provide an estimate of such damages in

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[7] It is worth noting that the tort of malicious prosecution is disfavored in California for numerous reasons, not the least of which is the "potential to impose an undue 'chilling effect'" on a litigant's constitutional right to petition the courts. *Zamos v. Stroud* (2004) 32 Cal.4th 958, 966. Therefore, a malicious prosecution plaintiff has a heavy burden of proving the earlier action was terminated favorably to him, that the earlier action was instituted without probable cause, and that it was instituted maliciously. *Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468. Moreover, the California Legislature has adopted a potent weapon—the anti-SLAPP statute (§ 425.16)—to curtail nonmeritorious lawsuits filed in violation of a litigants right to petition. That statute was designed *specifically* to protect victims of "meritless, retaliatory SLAPP lawsuits." *Moore v. Liu* (1999) 69 Cal.App.4th 745, 750. As such, there is no real threat of opening the floodgates to malicious prosecution litigation by requiring accounting plaintiffs to provide an estimate of damages.

their complaint is, therefore, hardly an onerous or novel, requirement. *Ely*, *supra*, 224 Cal.App.3d at 1263-64 ("We do not find such a requirement burdensome since a plaintiff must be able, as this plaintiff was, to prove some level of defendant's financial liability to receive an award of damages upon default.")

Sass also expresses concern that compelling accounting plaintiffs to assert in their complaint the maximum amount sought in the accounting action would "deny plaintiffs the full amount due them if they guess too low." [OBM at 41-42.] Sass goes so far as to accuse the court of appeal of "allow[ing] Cohen to profit from his own wrong, and depriv[ing] Sass of much of what she should in equity have received." [OBM at 44.] This accusation is just wrong.

There is no reason Sass or any other plaintiff in an accounting action should fear being "short-changed." [OBM at 45.] If, after the plaintiff files her complaint, she determines that the amount of damages sought was too low, plaintiff always has the option of amending the complaint to assert a greater amount. Some cases have suggested such a plaintiff also "has the solution of postcomplaint and predefault notice to the defendant of the amount plaintiff will seek to prove due him if the defendant defaults." *Ely*, *supra*, 224 Cal.App.3d at 1263; see also *Van Sickle*, *supra*, 196 Cal.App.4th at 1527 (holding 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").[8]

What an accounting plaintiff cannot do is sandbag the defendant by failing to put him on notice of the amount of relief sought by the complaint, waiting for the defendant to default, and then evidencing a specific amount of damages at the prove-up hearing, as the plaintiff must do in order to obtain a default judgment. Of course, if the plaintiff amends her complaint or files a statement of damages before taking default, the defendant will have an opportunity to answer the complaint and defend against the newly alleged assertion of damages. But that's the point. A plaintiff's obligation is to provide the defendant with notice of the damages sought so that the defendant may "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. Thus, if Sass was, in fact, deprived of "what she should in equity have received" (OBM at 44), it was the result of her own faulty pleading and failure to put Cohen on notice of the damages he faced in the event of default.

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[8] As the court of appeal below recognized, "[t]he courts are divided over whether a supplemental filing setting forth the amount of damages sought satisfies notice for purposes of section 580 where no statute authorizes such a filing, such as in cases not involving personal injury or wrongful death." [Op'n at 11, n.10.]

Finally, even if the rule Sass proposes would make some sense in a pure accounting action where the default judgment is based on the plaintiff's accounting claim, this is not such a case. The gravamen of the complaint here was not an accounting, but rather an action for damages. And the trial court's statement of decision specifying the damages awarded in the default judgment does not even mention the accounting cause of action, but rather awards specific amounts of damages for breach of contract, fraud, and employment claims. [2CT 257-61.] Nor could the court have properly awarded equitable relief on the accounting claim because Sass obtained full relief on her legal claims. See *Philpott v. Superior Court in and for Los Angeles County* (1934) 1 Cal.2d 512, 517 ("[I]t is elementary that where, as here, the primary right of a party is legal in its nature, as distinguished from equitable, and one for which the law affords some remedy, as here damages by way of compensation for breach of contract, a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice."); see also *Morrison v. Land* (1915) 169 Cal. 580, 584–585 ("[A] resort to any equitable remedy can be had only where the circumstances are such as to make the case one within the well-settled principles relative to the proper exercise of equitable jurisdiction."); see also *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 726 ("Given their extraordinary nature, equitable remedies are usually unavailable where the remedy at law is adequate, as where damages are quantifiable.").

Thus, whatever rule should apply to pure accounting actions like that in *Cassel*, the pleading standards should not be lowered where, as here, the primary relief sought by the plaintiff is damages for breach of contract and fraud.

3. The *Cassel* approach does not satisfy due process or fundamental fairness

Sass argues the *Cassel* approach satisfies due process and fundamental fairness because it would apply only where a plaintiff seeks an accounting and an equal division of property in the defendant's possession, and only where defendant has knowledge of the value of that property. [OBM at 41-42.] As the court of appeal below recognized, however, "[t]his rule substantially dims section 580's 'bright-line' rule of formal notice by replacing the straightforward inquiry into what is pled in the operative pleadings with a case-by-case inquiry into what individual defendants knew or should have known and in so doing, risks depriving defaulting defendants of their due process-based right to proper notice of their maximum exposure." [Op'n at 16 (citation omitted).] The court was correct.

The default judgment statutes' "emphasis on *formal* notice" is not arbitrary, but "stems from the policy goals at stake." *Airs Aromatics*, *supra*, 23 Cal.App.5th at 1020 (emphasis in original). As this court has recognized, the primary purpose of sections 580 and 585 "is to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them." *Greenup*, *supra*, 42 Cal.3d at 826. This is necessary so that defendants can exercise their right to choose whether or not to

answer the complaint, and "a defendant is not in a position to make such a decision if he or she has not been given full notice." *Lippel*, *supra*, 51 Cal.3d at 1166. Thus, it is precisely "because section 580 was 'designed to insure fundamental fairness' that it must be strictly construed." *Airs Aromatics*, *supra*, 23 Cal.App.5th at 1020; see also *Finney*, *supra*, 111 Cal.App.4th at 541 ("An extension of the reasoning in *Lippel* beyond the unique circumstances of marital dissolution actions entails a departure from the fundamental fairness section 580 was intended to protect.").

Nonetheless, Sass asserts that "[a]pplying section 580 with a measure of equitable flexibility" will protect both plaintiffs and defaulting defendants. [OBM at 41.] This court has already rejected such a proposition, however, holding that the default judgment statutes' policy objective of insuring fundamental fairness "would be undermined if the door were opened to speculation, no matter how reasonable it might appear in a particular case, that a prayer for damages according to proof provided adequate notice of a defaulting defendant's potential liability. . . . Consequently, a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint." *Becker*, *supra*, 27 Cal.3d at 494. Or, as the court of appeal in *Finney*, *supra*, held: "Some individual cases . . . may involve a defendant possessing from the outset, *all* the information necessary to assess the ultimate judgment. However, in order to protect notice and fundamental fairness in all cases, such individual cases

cannot lessen the requirements of section 580. . . . To hold otherwise would leave the door wide open for courts to subject defaulting defendants, without notice, to open-ended liability." *Finney, supra,* 111 Cal.App.4th at 541-42; see also *Greenup, supra,* 42 Cal.3d at 829 ("no matter how reasonable an assessment of damages may appear in the specific case, we cannot open the door to speculation on this subject without undermining due process").

Moreover, Sass's assertion that Cohen had all the information necessary to determine his maximum exposure in this case ignores reality. The valuation of a business like Tag is a complicated and necessarily subjective endeavor that is "an art rather than a science." *Matter of Shell Oil Co.* (Del. 1992) 607 A.2d 1213, 1221; see also Kenton K. Yee, *Control Premiums, Minority Discounts, and Optimal Judicial Valuation* (2005) 48 J.L. & Econ. 517, 536 ("The practice of valuation is an inexact art, not a precise science."); Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value* (1998) 47 Duke L.J. 613, 629 ("Each appraisal technique is but a way of estimating the "fair value" or "true value" or "intrinsic value" of a company, and undeniably, "'[v]aluation is an art rather than a science.") Sass's need for an expert forensic accountant to determine that value proves the point.

Thus, while Sass's request for "half" the value of Tag seems a facially "simple" calculation, the rub lies in the inability to specifically discern the "value" of Tag. It is true that Cohen may

have had information available to him from which he could make his own assessment of the estimated value of his company (or at least he could have hired an expert to make that determination for him after the complaint was filed—which he should not be required to do in the thirty days a plaintiff has to determine whether to default), he could not have known what precise value or valuation method Sass herself would claim or the court would ultimately use. For example, the trial court noted that Sass's expert used a "discounted cash flow" approach (2CT at 257), but he could just as easily have used any number of other methods, each of which would have resulted in a different claim for damages. It is fundamentally unfair to expose a defendant like Cohen to the vagaries of plaintiff's or the court's chosen valuation method without notice.

Notably, even the holding in *Cassel*—the *only* decision that supports Sass's position—was premised on the fact that the partnership agreement there set forth a "specific method for calculating a withdrawing partner's interest" and, therefore, the defendant could "precisely calculate the amount for which [he] could be liable if [he] chose to default" *Cassel, supra,* 76 Cal.App.4th at 1163. While the *Cassel* decision was wrongly decided, precision was still at its core. The same is not true here. While Cohen knew from the complaint that Sass sought an "equal division" of Tag, there was no formula or other mechanism by which Cohen could "precisely calculate the amount" for which he would be liable on default.

Finally, Sass's complaints about Cohen "thumbing his nose at this case" by not answering the complaint and not giving credible reasons for failing to do so provides no equitable justification for lowering the pleading requirement. [OBM at 43.] To the contrary, Cohen had the right to choose not to answer the complaint, and the only consequence should have been that he faced a default judgment in the amount actually pleaded, not at least $1.8 million in excess of that amount. Sass's complaints about Cohen's conduct also ignore this court's holding in *Greenup*, *supra*, that "due process requires notice to defendants, whether they default by inaction or by wilful obstruction, of the potential consequences of a refusal to pursue their defense." 42 Cal.3d at 829.

II

Where the Complaint's Prayer Does Not Seek An Overall Amount of Damages, Courts Should Review the Allegations in the Complaint's Body Item-by-Item to Determine Whether the Judgment Exceeds the Demand

As explained above, the prayer for relief in Sass's complaint does not request an overall amount of damages for any of her asserted seven causes of action, but only seeks compensatory, consequential, and punitive damages in an undetermined "sum to be proven at trial." [1CT 124-26.] Elsewhere in the body of the complaint, however, Sass asserted she was damaged in specific amounts related to specific property and conduct by Cohen. For example, while the complaint asserts Sass is entitled to a 50% share in Tag, it includes no specific allegations regarding the

value of that business. [1CT 111] But the complaint does allege $700,000 in damages from revenue Sass 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. [1CT 106-126.]

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 the stock, and (vi) a constructive trust over the other residential property. [2CT 257-61.] 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. [2CT 257-58.]

Thus, in determining the extent to which the default judgment exceeds the amount demanded in the complaint, the question whether to view the complaint's allegations on an item-by-item basis or whether to aggregate all damages allegations is really a question of whether specific allegations of harm for which Sass could never recover (e.g., the alleged $700,000 in revenue she allegedly brought to Tag) can justify a portion of the award of damages for Sass's alleged 50% interest in Tag, for which Sass's complaint included no valuations. This court should hold that

aggregating damages would violate Cohen's due process rights to be given notice of the specific relief which is sought against him.

While the case law related to this issue is sparse, at least two cases illustrate that the court should view the complaint's allegations on an item-by-item basis.

First, this court in *Becker*, *supra*, 27 Cal.3d 489, refused to aggregate allegations of compensatory damages, punitive damages, and costs in reviewing a default judgment. There, the complaint sought compensatory damages "in excess of $20,000," punitive damages of $100,000, and costs. *Id.* at 495. A default judgment was entered for $26,457.50 compensatory damages, $2,500 attorney's fees, and costs. *Ibid.* The trial court granted the defendant's motion to vacate the judgment under section 580 because the awarded damages exceeded the amount demanded in the complaint. *Ibid.* This court affirmed the order vacating the judgment, explaining that it could not aggregate the complaint's allegations of punitive damages and compensatory damages:

> It is irrelevant that the award of damages was within the total amount of compensatory and punitive damages demanded in the complaint. Since compensatory and punitive damages are different remedies in both nature and purpose, a demand or prayer for one is not a demand legally, or otherwise, for the other, or for both.

Id. at 494-95 (internal quotation marks omitted).

As the court of appeal here recognized, under *Becker* "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." [Op'n at 16 (emphasis in original).] This court's rationale in *Becker* should apply with equal force, however, when comparing separate allegations of compensatory damages alleged in the body of a complaint. Sass's demand for $700,000 related to revenue she brought to Tag cannot legally, rationally, or otherwise be considered a demand for 50% of the value of Tag and its income. As the complaint makes clear, these are separate allegations of harm. A demand for one is not a demand for the other or for both.

The court of appeal's decision in *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, is also instructive. There, the court of appeal affirmed a trial court order vacating a judgment that awarded $150,000 in actual damages where the complaint sought only $50,000 actual damages, but alleged those damages should be trebled pursuant to a statute that granted multiplied damages on the proper showing of intent. *Id.* at 1741. The court of appeal refused to aggregate the complaint's claim for actual damages with the claim for treble damages, agreeing with the trial court's reasoning that the 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." *Id.* at 1740. The court thus held that under *Becker*, a judgment "could not be saved on the theory it did

not exceed the aggregate damages alleged in the complaint." *Id.* at 1741.

The decision in *Ostling* is based on the fundamental due process principle 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). This requirement that the plaintiff provide notice of the "specific relief" sought "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.

Aggregating the damages allegations to determine the extent to which a default judgment exceeds the specific relief sought by the complaint violates these due process principles, particularly where, as here, some the damages alleged are not recoverable under any theory of liability, but then are used to justify an award for a totally separate injury. Just as the defendant in *Ostling* could have elected to default knowing plaintiff could not prove a basis for treble damages, so too could Cohen have chosen to default knowing Sass would be unable to prove some of the specific allegations of harm asserted in Sass's complaint, such as the $700,000 in unrecoverable revenue "brought in" to Tag. Aggregating the damages allegations

deprived Cohen of that rational choice and, therefore, deprived him of his right to notice of the "specific relief" sought.

The court of appeal disagreed because, in its view, "an item-by-item approach does not accurately reflect a defaulting defendant's decisional calculus." [Op'n at 18.] According to the court, before default "the defendant does not know which of plaintiff's claims will have merit or which alleged items of damages will be recoverable," and determinations regarding the merits of any particular claim or item of alleged damages "are not made until long after the defendant makes the decision to default." [Op'n at 17-18.] Thus, the court assumed that "at the time of default" the defaulting defendant has "accepted liability for the aggregate total of damages alleged." [Op'n at 18.]

The court is wrong for at least two reasons. First, the court's rationale goes too far, as it would justify aggregation of compensatory and punitive damages. After all, according to the court, at the time of default, a defaulting defendant cannot tell which allegations against him have any merit. The same is true of compensatory and punitive damages. Of course, aggregating damages in this way would directly conflict with this court's holding in *Becker*.

Second, and perhaps more importantly, the court's assumptions about how defaulting defendants make decisions are simply not true. Allegations in a complaint often reveal on their face that they lack merit. For example, if Sass had alleged she was entitled to $3 million dollars for a 50% interest in a yacht

Cohen allegedly purchased in the Caribbean, according to the court of appeal's reasoning, Cohen does not know whether that claim has merit until after default, even if Cohen knows he has never purchased a yacht in the Caribbean. That is incorrect.

The actual facts of Sass's complaint are no different. It was clear from the outset of this case—long before default—that Sass was not entitled to the $700,000 of business she allegedly "brought in" to Tag. As the trial court held, "[b]ecause Ms. Sass was a salaried employee, she is not entitled to an award for the business she 'brought in' to TAG." [2CT at 259.] The fact that Sass was a salaried employee was stated on the face of the complaint, as she alleged that Cohen had failed to pay her the salary she was promised. [1CT 110 (asserting Cohen promised to pay her $5,000 per month in wages).] Thus, the complaint itself revealed that Sass had no legal or factual basis for her claim for $700,000.

The court of appeal also justified its aggregation of damages by positing that an item-by-item review would "penalize" the plaintiff "for pleading her damages with greater specificity." [Op'n at 18.] But it is precisely the plaintiff's *lack* of specificity in the complaint's prayer for relief that leads a court into the body of the complaint to ascertain damages in the first place. Had Sass simply asserted the total amount she sought in the complaint's prayer, as she was required to do by section 425.10, the trial court would not have been tasked with looking to

the body of the complaint to determine whether the default judgment exceeded the complaint's demand.

In reality, an item-by-item approach does not "penalize[e] a plaintiff for pleading her damages with greater specificity" at all [Op'n at 18] because this approach only applies where, as here, the complaint's prayer does not demand a total amount of damages. If a plaintiff does not pray for specific relief, the only way she is entitled to a default judgment in any amount is to include specific allegations in the body of the complaint. *Becker*, *supra*, 27 Cal.3d at 494 ("a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint."). Even considering those allegations item-by-item, therefore, provides plaintiffs who have not prayed for a total amount of damages incentive to be specific and provide detailed information regarding their damages in the body of their complaint. Without that detail, plaintiffs won't be entitled to any relief at all.

The court of appeal here also held that "comparing the *total* amounts of compensatory relief demanded versus obtained is more consistent with the pertinent statutes and cases interpreting them." [Op'n at 18.] However, where, as here, the plaintiff's complaint does not include a specific prayer for relief, the statutory terms "relief," "the principal amount," and "the amount" "demanded in the complaint" used in sections 580 and 585 are entirely consistent with looking at the specific allegations item-by-item to determine what "relief" is requested or what

"amount" has been "demanded in the complaint." The statutory language simply doesn't answer the aggregate versus item-by-item question.

Moreover, while it's true the case law on default judgments sometimes refers to the "maximum judgment" against a defendant, none of those cases decide the question here. And those cases also refer to the defendant's right to notice of the amount "specifically demanded" in the complaint and the "specific relief" sought. See, e.g., *Lippel, supra*, 51 Cal.3d at 1166 ("It is fundamental to the concept of due process that a defendant be given . . . notice of the specific relief which is sought in the complaint served upon him."); *Greenup, supra*, 42 Cal.3d at 826 ("a default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction"); *Becker, supra*, 27 Cal.3d at 494 ("a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint."). Here, because the complaint's prayer for relief does not request any damages, the only damages "specifically demanded" are found in allegations related to specific items of property and specific allegations of harm. Viewing those allegations item-by-item as "specifically demanded" is, therefore, entirely consistent with the case law and the statutory language.

Finally, Sass cites *National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, as an example of a case where the court "opted for the aggregate approach." [Op'n at 47.]

But that is not an accurate reading of the case, which does not support Sass's argument here.

In *National Diversified*, the plaintiff alleged defendant breached an agreement to purchase two Ferraris. As part of the purchase price, the plaintiff alleged he gave the defendant a boat worth $22,500, but defendant refused to convey the cars. 168 Cal.App.3d at 412. The complaint sought either specific performance (plaintiff wanted the Ferraris) or return of his boat plus damages in excess of $10,000 for loss of use and deterioration. *Id.* at 412, 419. On defendant's default, the trial court entered a default judgment for $56,779.99. The court of appeal held that the judgment was void as in excess of the complaint's demand. *Id.* at 417-18. After reviewing the case law and determining that plaintiff was entitled to *both* restitution of the boat and damages, the court of appeal concluded the maximum default judgment was $32,500—$10,000 plus the value of the boat ($22,500) as specifically alleged by the complaint. *Id.* at 418-19.

Contrary to Sass's assertion, the court in *National Diversified* did not aggregate damages in the way the court of appeal did here. Rather, it viewed the maximum allowable judgment on an item-by-item basis. The complaint gave defendant specific notice that the plaintiff sought the $22,500 value of the boat *and* the $10,000 damages, and the court of appeal found plaintiff was entitled to *both* those separate, specific amounts.

Here, there is no dispute Sass is entitled to the total combined amounts of the specific allegations of harm for which the trial court found she was entitled. The question, however, is whether Sass is able to obtain damages for harm she did not specifically allege (e.g., damages related to the value of Tag) based on specific allegations of harm for which the trial court found she was not entitled (e.g., the $700,000 in business she allegedly brought to Tag). *National Diversified* provides no support for such a result.

Conclusion

For the foregoing reasons, this court should answer the first question by holding that where a complaint seeks an accounting of specified assets, the plaintiff is required to plead a specific amount of damages to support a default judgment. This court should answer the second question by holding that where the complaint's prayer does not request an overall amount of damages, the comparison of whether a default judgment exceeds the amount of compensatory damages demanded in the pleadings should proceed on a claim-by-claim and item-by-item basis in reviewing the allegations of harm in the body of the complaint.

Dated: September 20, 2019

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Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 11,881 words, exclusive of the matters that may be omitted under rule 8.504(d)(3).

Dated: September 20, 2019

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

Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, # 1400, Costa Mesa, California 92626-7689.

On September 20, 2019, I served, in the manner indicated below, the foregoing document described as **Answer Brief on the Merits** on the interested parties in this action as follows:

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☐ BY ELECTRONIC SERVICE: C.R.C., Rule 8.212(c)(2)(A)) *as indicated on the service list.*

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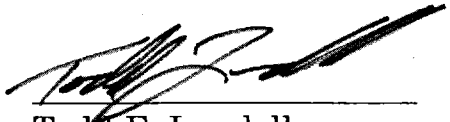
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 20, 2019, at Costa Mesa, California.



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