Supreme Court Case No: S255262

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DEBORAH SASS.,	(Court of Appeal Docket No.: B283122)
Plaintiff and Respondent.	Sup. Ct. No. BC554035
vs.	
THEODORE L. COHEN	
Defendant and Appellant,	

From the Published Opinion of the Court of Appeal, On Appeal from the Los Angeles County Superior Court; The Honorable Frederick Shaller, Judge Presiding, Dept. 46

REPLY BRIEF ON MERITS

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REPLY BRIEF ON MERITS

Sass showed in her Opening Brief on the Merits that the answer to this Court's first question is that a complaint seeking an accounting for half the value of an identified asset in the defendant's possession *can* support a default judgment, though it does not state "the specific dollar amount sought." *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157 at 1164. (*Cassel*).

Cohen argues to the contrary that to allow that would be inconsistent with the applicable principles of due process and fundamental fairness (AB

40-44); and that it would be barred by the plain language of the relevant statutes. (AB 7).

In reply, Sass will show first that Cohen's arguments depend in part on mis-characterizing Sass's position as supporting a far more vague and broader rule than the narrow and precisely stated answer reiterated above.

Beyond that, Sass will show that Cohen makes no convincing arguments for the claim that adoption of Sass's answer would violate due process, and, in any case, that those arguments are undercut by Cohen's virtual concession, elsewhere in the brief, that Sass's answer is consistent with due process. So too, Sass will show that there is nothing in the plain language of the controlling statutes that would bar recovery on default based on such a complaint.

The central point is this:

Where a plaintiff seeks an accounting for half the value of specified property in the defendant's hands, having no basis for determining that value in money terms without defendant's input, and defendant defaults, it cannot serve due process to deny plaintiff relief for failure to give pre-default notice of "the specific dollar amount sought."

To insist under such circumstances that defendants were not given "adequate notice of the judgments that may be taken against them" (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489 at 493-94 (*Becker*)), unless that notice was in the form of a "specific dollar amount," is indeed to elevate form over substance.

Finally, as to this Court's second question, Sass will show that the Court of Appeal rightly decided that, in determining whether a default judgment is supported by the complaint, items of relief sought in the

complaint should be compared in the aggregate to the relief awarded in the judgment, rather than item-by-item, and that Cohen has no colorable argument to the contrary.

ARGUMENT

I. CONTRARY TO COHEN'S ASSERTIONS, SASS'S ANSWER TO THIS COURT'S QUESTION REMAINS NARROWLY WITHIN THE LIMITS STATED IN THE QUESTION.

Sass answers this Court's first question by straightforwardly stating that,

> when plaintiff brings an accounting action seeking an equal division of the value of property in defendant's possession, and identifies that property in the pleadings, section 580 is satisfied without the need to state a specific sum for its value.
>
> OBM 8.

That answer affirms that, *in cases within the narrow ambit this Court's question presents*, adequate notice of the relief sought is satisfied though not stated as a precise sum of money. Cohen, however, mis-characterizes Sass's answer, giving the impression that it goes far beyond the ambit of the question and would create grave uncertainty about what notice is required.

Cohen's misstatements of Sass's answer start on the first page of his Answer Brief, where he describes Sass as answering that, in general,

> plaintiff... does not need to plead a specified amount of damages to support a default judgment.
>
> AB 7.

Later in his brief Cohen misstates Sass's answer again, describing it as advocating a "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.
>
> AB 22 (emphasis added).

Sass agrees with Cohen that such answers would be "directly contrary to the plain language of the controlling statutes (AB 7)." Those answers, as stated by Cohen, could well appear to sanction the view, rejected by this court in *Becker,* 27 Cal.3d 489 at 493-94, that "a prayer for damages according to proof" may provide "adequate notice of a defaulting defendant's potential liability...."

But that is not true of the answer Sass actually offers here.

An accounting action for an equal division of the value of specifically identified items of defendant's own property – like the accounting action for a former partner's contractually defined interest in the partnership in *Cassel,* 76 Cal.App.4th at 1164 – gives defendant fully adequate notice of exactly what relief plaintiff seeks, though not in terms of "the specific dollar amount sought." *Id.* A request for damages according to proof provides nothing like such notice.

To the extent that Cohen's arguments are responses to his own misstatements of Sass's position, they necessarily miss the mark.

II. COHEN FAILS TO SHOW THAT SASS'S ANSWER VIOLATES DUE PROCESS OR FUNDAMENTAL FAIRNESS.

As Sass has shown (at OMB 39-45), due process and fundamental fairness are satisfied where an accounting plaintiff gives notice of seeking an equal division of specified items of property possessed by defendant, without a specific sum of money being stated. The identification of the

relief sought as a stated proportion of assets known to defendant is adequate notice though not stated in money terms.

Cohen rejects that showing, arguing that even in such a case the award of a money judgment on default violates due process and fundamental fairness without the formal notice of a specific sum of money (a sum which, by definition, the accounting plaintiff has no ability to determine). (AB 40-44).

Sass demonstrates in what follows that Cohen's arguments (1) are undercut by his own effective acknowledgment that Sass's approach meets the requirements of due process, and (2) fail to justify that exclusive focus on a dollar sum as the only adequate notice, at the expense of the plaintiff's right receive what is in justice due her.

Ignoring the principle that "no inflexible rule has been permitted to circumscribe the power of equity to do justice" (*Bisno v. Sax* (1959) 175 Cal.App.2d 714, 729, quoting 1 Pomeroy Equity Jurisprudence, 4th ed. (1918) p. 125, § 111; (OBM 39)), and preferring form to substance, Cohen insists that Sass cannot have what in equity is due her, because she did not give notice of it in this particular form.

A. COHEN EFFECTIVELY CONCEDES THAT DUE PROCESS IS SATISFIED BY THE DEFAULT JUDGMENT HERE.

Cohen argues extensively that Sass's answer to this Court's first question is contrary to due process and fundamental fairness (AB 40-44). Earlier in his brief, however, Cohen effectively acknowledges that such an answer – while it may not comply with sections 580 and 585 – accords with due process. (AB 34-35).

The background is Cohen's statement of the holdings of *In re*

Marriage of Andresen (1994) 28 Cal.App.4th 873, 879-80, and the marital dissolution cases following it (*In re Marriage of Kahn* (2013) 215 Cal.App.4th 1113 and *In re Marriage of Eustice* (2015) 242 Cal.App.4th 1291), as prevailing law. Those cases hold that the due process requirements of identifying the nature and extent of the relief sought may be satisfied by checking the box on marital dissolution forms for division of community property, and attaching a list of the properties to be divided equally. In acknowledging them as law without qualification, Cohen signals acceptance of their holdings on due process as sound. (AB 26-27).

Cohen then takes up Sass's argument that, if due process is satisfied by the *Andresen* line of marital dissolution cases, it must also be satisfied by the default judgment here. (AB 34). He does not reject that contention, but points out that default judgments must not only satisfy due process, but the relevant statutes as well. Meeting the demands of due process, both in the marital dissolution cases and here, satisfies "a necessary, but not sufficient," condition for entry of a default judgment. The need to satisfy the additional demands of sections 580 and 585 remains. (AB 34).

Cohen contends that the marital dissolution cases satisfy those statutory (as opposed to Constitutional) requirements only because the Legislature "tempered" them by providing for form petitions in the Family Law Code, a "tempering" not available in accounting cases. (AB 33).

Sass will later show that the *Cassel* approach as applied here can be understood to comply with the plain language of sections 580 and 585. The immediate point, however, is Cohen's apparent agreement that the default judgment here met the "necessary" condition of satisfying due process.

B. COHEN FAILS TO REFUTE SASS'S SHOWING THAT DUE PROCESS WAS SATISFIED HERE.

Even aside from Cohen's effective concession that due process is satisfied by notice such as Sass's complaint, Cohen's arguments that the *Cassel* approach as applied here is contrary to due process are unconvincing.

Cohen starts by quoting the Opinion's objection that the *Cassel* approach would replace the "'bright-line rule' of formal notice" with a "case-by-case inquiry" into what defendant actually knew or should have known about the relief plaintiff seeks. (Opn., p. 16; AB 40).

But Cohen's complaints are unjustified. Application of *Cassel* in this context means neither a "case-by-case" approach depending the specific degree of a particular defendant's actual knowledge (or lack of cooperation, see AB 44), nor rejection of the need for formal notice as to the relief sought.

The same is true of Cohen's other arguments. As shown below, none withstand scrutiny.

1. SASS'S ANSWER DOES NOT CALL FOR A "CASE-BY-CASE APPROACH BASED ON THE INDIVIDUAL FACTS OF EACH CASE.

First, the *Cassel* approach as applied here does not assess whether default judgments are supported by due process notice on a case-by-case assessment of what individual defendants knew or should have known, as Cohen contends. (AB 40).

Rather, it makes the limited point that due process and fundamental fairness are served specifically in accounting actions where the complaint seeks the equal division of identified assets in defendant's possession,

without the need to plead a specific dollar amount. (See OBM 45).

As is true of form petitions in matrimonial dissolution cases under *Andresen*, 28 Cal.App.4th 873, 879-80, acceptance of this kind of accounting complaint as sufficient due process notice without a specific money amount would *not* open the process up to the kind of uncertainty that would result from "a case by case inquiry into what individual defendants knew or should have known..."(AB 40), or how badly individual plaintiffs behaved. (AB 44).

2. NOR DOES SASS'S ANSWER REPLACE FORMAL NOTICE WITH ACTUAL NOTICE.

Second, the *Cassel* approach does not replace formal notice with actual notice.

Here, as in marital dissolution cases under *Andresen*, the complaint's formal specification of particular assets in the possession of the defendant to be divided equally "...informs and puts the respondent on notice of what specific relief the petitioner is, or is not, seeking...." *In re Marriage of Lippel* (1990) 51 Cal.3d 1160 at 1169-70. It provides them with "proper notice of their maximum exposure (OBM 40, quoting Opn., p. 16)," though not in terms of a dollar amount.

There is an assumption of actual knowledge present in the fact that the identified property be in the defendant's possession, and therefore presumably[1] known and accessible to the defendant. But that actual knowledge is not substituted for formal notice; it is inherent in the notice formally given by the complaint.

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1 Refutable only by a showing that defendant has been blocked from having such knowledge. *Warren v. Warren* (2015) 240 Cal.App.4th 373, 379.

3. NEITHER DOES SASS'S ANSWER OPEN THE DOOR TO "DAMAGES ACCORDING TO PROOF" AS SUFFICIENT NOTICE.

Cohen also argues that notice of a specific money amount is always necessary because granting a money default judgment in its absence would open the way for courts to "subject defaulting defendants, without notice, to open-ended liability." *Finney v. Gomez* (2011) 196 Cal.App.4th 1495 at 541-42. (AB 41-42).

To follow *Cassel*, he argues, would justify default judgment based on a request for damages "according to proof," provided only that "the defendant might have knowledge of the extent of damages." (AB 22).

This Court expressed its concern in *Becker* that fundamental fairness would be undermined "if the door were opened to speculation... that a prayer for damage *according to proof* provided sufficient notice" to the potentially defaulting defendant. 27 Cal.3d at 494. (emphasis added) (AB 41).

But the *Cassel* approach as applied here does not open that door. Rather, it contemplates precise notice of the relief sought: half of the value of specified assets belonging to the defaulting party. Such a constrained approach cannot be understood as a step toward accepting "damages according to proof" or "open-ended liability," just because notice is not given in the form of a specific dollar amount.

Cohen also objects specifically that notice he could be liable for half of TAG's value was insufficient because, whatever information he may have had about his own company, his ultimate liability would depend on the method the trial court used to evaluate it. (AB 42).

That, however, is equally true of the community property to be divided in marital dissolution cases, and Cohen agrees that due process is not

violated in such cases. (pp.10-11, *supra;* OMB 38-39).

Given the extensive notice Sass's complaint actually gave him – that she was seeking half the value of his own company – and the impact of Cohen's default on Sass's ability to obtain a full and fair accounting of that value, Cohen should not be heard to complain that he was denied due process just because his ultimate dollar liability depended on the trial court's choice of valuation method.

4. COHEN'S ARGUMENTS ABOUT THE NATURE OF ACCOUNTING ACTIONS MISS THE POINT.

Cohen insists that the presence of an accounting cause of action in Sass's complaint made no difference for what is, in his view, the invariable requirement that the recovery of money in a default judgment must be supported by prior formal notice of the amount sought in money terms. (AB 35).

Focusing on the rule that accounting plaintiffs are barred from stating a sum certain as damages, he reiterates the Opinion's point (Opn. p. 14-15) that such plaintiffs can still provide notice in dollar terms, in the form of an "estimate" of the likely recovery. And, Cohen indicates, because they can provide an estimate, they are required to do so, either in the original complaint or in an amendment to it. (AB 35-38).

But the rule barring accounting complaints from stating a sum certain is not a dispensable procedural detail of accounting practice. It is inherent in the "unique" character of accounting as an equitable cause of action providing "'a species of disclosure predicated upon the plaintiff's legal inability to determine how much money, if any, is due.'" *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156 at 180, quoting 1A C.J.S. (2005)

Accounting, pp. 7-8; *St. James Church v. Superior Court* (1955) 135 Cal.App.2d 352, 359. (See OMB 24).

Cohen's argument implies that, given the ability to provide an estimate of the relief to be awarded, the issue of notice on default is no different in accounting cases than in other cases. But default has a different impact in the accounting context.

In the standard case, default means only that the defendant will not oppose the plaintiff's efforts to prove what is due. In an accounting action, however, the plaintiff cannot "determine how much money, if any, is due" without the aid of a "disclosure" process in which the defendant plays a necessary part. *Teselle v. McLoughlin, supra,* 173 Cal.App.4th 156 at 180. Default for an accounting defendant, then, does not mean merely stepping aside, but refusing to play his or her part in the process of obtaining justice for the plaintiff.

Plaintiffs like Sass are then left, in Cohen's words (AB 38) to "evidenc[e] a specific amount of damages at the prove-up hearing, as the plaintiff must do in order to obtain a default judgment." The problem is that, unlike other plaintiffs, accounting plaintiffs are by definition incapable of accomplishing that task unaided.

The potential consequence for such a plaintiff is made clear by the facts here. Unable to determine the value of Cohen's business (TAG) without Cohen's help (especially after Cohen suspended the corporation and hid its assets, CT 121[2]), Sass had only the partial records Cohen provided her on the eve of being declared in default (2 CT 196-97) on which to base her

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[2] Note: the source of this information was erroneously stated to be CT 113 at OMB 17, 43.

prove-up.

To require accounting plaintiffs to provide estimates before default which will serve as a ceiling for the relief awarded after default is, then, to ignore the realities that face them.

Cohen again ignores those realities when he supports the requirement of providing estimates with the Opinion's comment that "noneconomic damages are notoriously difficult to fix," but plaintiffs are still required to plead an "educated guess" at them. (AB 35, quoting Opn., p. 14) *Janssen v. Luu* (1997) 57 Cal.App.4th 272, 279.

Again, this misses the fundamental point that, while noneconomic damages in legal actions arise out of problems or trauma experienced by the plaintiff, the factors that determine the award in an accounting action are by definition within the defendant's control.

Nor is Cohen's suggestion that the plaintiff can amend on receiving further information a panacea. Again such information would have to come from the defendant, and, if forthcoming at all given the defendant's default, it may, as here, be only partial and late. (2 CT 196-97).

Cohen implies that Sass "sandbag[ged] him" by failing to provide an estimate of the amount due her in her complaint, or in an amendment once she had further information, but instead just "waiting for [him] to default." Any loss Sass suffered, therefore, was "the result of her faulty pleading and failure to put Cohen on notice of the damages he faced in the event of default." (AB 38).

That harsh critique is unwarranted for a number of reasons.

First, Cohen made it impossible for Sass to provide evidence on

which to base the accounting herself by (1) suspending TAG and hiding its assets after the complaint was filed (CT 121[3]), and (2) finally by providing her with only a portion of TAG's financial records, and then only after Sass had already filed a motion for terminating sanctions, and a few days before she filed her request to enter default. (2 CT 196-97).

Further, the notion that the loss Sass suffered was "the result of her faulty pleading (AB 38)" is untenable given that her decision not to provide a money number for the value of TAG was supported by *Cassel,* and validated by trial court.

On the other hand, Cohen dismisses as "just wrong" Sass's statement that the Court of Appeal decision "allowed Cohen to profit from his own wrong, and deprived Sass of much of what she should in equity have received." (OBM 44).

There too Cohen's assessment is unjustified. Sass was not making a wrongful "accusation" (AB37). She was simply reporting reality.

By suspending TAG and secreting its assets, and by belatedly providing Sass with only a portion of TAG's financial records, Cohen wrongfully ensured that the trial court would be able to award Sass only a part of what was due her. The Court of Appeal decision, through its insistence that notice of relief sought be in dollar terms, then deprived her of much of that.

By holding that plaintiffs in cases such as this can give notice of the relief sought in a form other than a "specific dollar amount," *Cassel*, 76

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[3] Cohen's unwillingness to participate honestly in the trial court proceedings is also evidenced by the fact that two judges found him lacking in candor. See Motion to Dismiss Appeal, pp. 2-4.

Cal.App.4th at 1163, this Court will at least provide Sass, and others like her in future, with something closer to what is in justice due them.

III. COHEN HAS FAILED TO SHOW THAT THE DEFAULT JUDGMENT HERE NECESSARILY VIOLATES THE PLAIN LANGUAGE OF SECTIONS 580 AND 585.

As seen above, Cohen has failed to show that Sass's answer to this Court's first question would conflict with the principles of due process and fundamental fairness which are at the basis of sections 580 and 585. On the contrary, Sass has shown that notice of the type and amount of relief sought as half the value of an identified property in defendant's hands is fully in accord with due process and fundamental fairness, and that it would be unfair to plaintiffs to hold otherwise.

In what follows, Sass will show that Cohen's arguments for concluding that Sass's answer would necessarily conflict with the provisions of the controlling statutes also fail.

A. THE PLAIN LANGUAGE OF THE STATUTES DOES NOT REQUIRE NOTICE OF DAMAGES SOUGHT IN THE FORM OF A DOLLAR AMOUNT.

Cohen argues that the application of the *Cassel* approach to the facts contemplated in the Court's first question (and present here) necessarily violates the plain language of the controlling statutes. (AB 19-23). It does not.

Cohen focuses his argument on the statutory requirement that there be *formal* notice of the extent of the relief sought, as opposed to actual or constructive notice. (AB 22). As shown above (pp. 8, 14-15 *supra*), however, the complaint here, like all complaints contemplated in this Court's first question, gives formal notice of precisely what the plaintiff seeks: an accounting for half of the value of a specified asset in defendant's

possession. The real issue is whether notice can satisfy the statutory provisions only if it is in the form of "the specific dollar amount sought." The plain language of the statutes does not compel that conclusion.

The relevant language in the statutes upon which Cohen focuses provides (1) in section 580 that the relief given in a default judgment "cannot exceed that demanded in the complaint," and (2), in section 585, that in actions on a contract or "for recovery of money or damages only (in subdivision (a)," recovery should be "in the principal amount demanded in the complaint," while in all other actions (under subdivision (b)), the plaintiff may apply for the relief demanded in the complaint, and the court shall, having heard the evidence offered by the plaintiff, and render judgment for that relief in an amount "not exceeding the amount stated in the complaint...."

Also relevant, though not referenced in Cohen's brief, is section 425.10, which provides that, where "money or damages is demanded" in a complaint, "the amount demanded shall be stated."

The only language in these statutes that may plausibly be said to point necessarily and unequivocally to a requirement that notice be given in terms of a dollar amount is section 585(a), which provides that relief recovered on default must be "*in the principal amount* demanded in the complaint... or a lesser amount if credit is acknowledged... together with interest... (emphasis added)."

But subdivision (a) applies to contract actions and actions "for recovery of money or damages only...."

In general, then, accounting complaints would fall under the provisions of subdivision (b), which applies to "other actions." That is

especially clear where, as here, the complaint seeks an accounting of both "income and property." (1 CT 125).

Subdivision (b) of section 585 requires only recovery of relief in an amount, "not exceeding the amount stated in the complaint...."

So too, section 580 provides simply that the relief awarded in a default judgment "cannot exceed that demanded in the complaint." There is nothing in that language which points necessarily to the need to state relief sought as a "specific dollar amount."

Nor is that the case with section 425.10. Though it refers to cases in which "money or damages is demanded," it requires only that "the amount demanded be stated." While that amount would typically be in dollar terms, the language does not preclude stating the amount in other terms, such as those used here: the value of a stated portion of the value of a specific piece of property.

As this Court stated succinctly in *Lippel,* 51 Cal.3d at 1165, these statutes provide simply that "a plaintiff cannot be granted more relief than is asked for in the complaint." That requirement was met here. Sass was awarded no more than half the value of certain of the assets identified in the complaint.

In fact, there was a reference in earlier versions of section 585(b) to the relief awarded as "such sum," presumably referring back to a dollar figure stated in the complaint. But that reference was removed in the Legislature's 2007 overhaul of the statute's language. See Editor's Notes to Code of Civil Procedure section 585 in Deering's California Codes. As already seen, it now provides only that the court shall award plaintiff "the relief demanded in the complaint." Here, that relief would be the result of an

accounting for half the value of the specified property.

Cohen argues against *Cassel*'s extension of *Andresen* to cases such as this because the *Andresen* holding was a deviation from the plain language of sections 580 and 585, admissible only because it was supported by legislative action, which is not present here. (AB 33).

However, as shown above, those statutes do not make it an absolute requirement for an award of money on default that the relief sought be cast in dollar terms. It follows, therefore, that no legislative exception is required to support the *Cassel* holding, or its application here.

B. EVEN IF THE RELEVANT STATUTES ARE READ TO REQUIRE NOTICE OF A SUM CERTAIN, AN EXCEPTION IS WARRANTED HERE.

Even if these statutes (sections 425.10, 580 and 585) and are read to require notice in the form of a sum certain, an exception should be made for cases falling within the narrowly defined ambit of this Court's first question: accounting actions seeking equal division of specified assets in the defendant's hands.

This Court has consistently understood these statutes as embodiments of the principles of due process and fundamental fairness as they apply to notice required to support default judgments. See *Becker*, 27 Cal.3d 489, 493-94; *Greenup v. Rodman* (1986) 422 Cal.3d 822, 826; *Lippel,* 51 Cal.3d 1160, 1165.

Cohen described section 580 as "an equitable statute" (Answer to Petition for Review, p. 13), and that is an apt description of all three of these statutes. Particularly in the context of an equitable cause of action such as accounting, the "strict construction" which this Court has applied to these statutes may appropriately be tempered by the principle that "no inflexible

rule has been permitted to circumscribe the power of equity to do justice." *Bisno v. Sax* (1959) 175 Cal.App.2d 714, 729, quoting 1 Pomeroy Equity Jurisprudence, 4th ed. (1918) p. 125, § 111.

Here, that means relaxing a requirement that notice be in the form of a sum certain in order to ensure that both plaintiff and defendant are treated fairly and equitably. Crucially, this does not mean subjecting notice requirements to the uncertainty that the general exercise of "the wide range of discretion accorded a court of equity" would create. *Finney v. Gomez, supra,* 196 Cal.App.4th 1495, 542.

It means only that, in the limited context of accounting actions for equal division of identified property in defendant's possession, defendant's right to fair and adequate notice can and must be respected, while the plaintiff is allowed to recover, insofar as possible, what is in equity due to her, by not insisting that such notice must be in the form of a dollar amount.

IV. THE COURT OF APPEAL RIGHTLY CHOSE TO COMPARE THE AGGREGATE OF RELIEF SOUGHT IN THE COMPLAINT TO THE AGGREGATE GRANTED ON DEFAULT IN DECIDING WHETHER THE JUDGMENT CAN STAND.

Cohen's arguments (at AB 44-54) in favor of an "item-by-item" approach to deciding whether the relief awarded on default exceeds that requested in the body of the complaint do not seriously challenge the soundness of the Court of Appeal's aggregate approach.

First, Cohen's arguments (at AB 48) that his position is supported by this Court's decision in *Becker* and the Court of Appeal opinion in *Ostling v. Loring* (1994) 27 Cal.App.4th 1731 at 1741, were answered in Sass's Opening Brief on the Merits. Both opinions make the point that punitive damages cannot be aggregated with compensatory damages for this purpose.

They have no application where, as here a complaint seeks compensatory money damages for a number of specific losses. (OBM 46-47).

Second, Cohen argues that the Court of Appeal's assumptions about how defendants decide whether to default – "by examining the *total, aggregate relief sought*," Opn., p. 17 – "are simply not true." (AB 49). Cohen makes the contrary assumption that defendants take the "item-by-item" approach, deciding to default in some cases despite the extent of relief sought because they are confident that some of the items pled are completely meritless. (*Id.*)

But Cohen offers this Court no reason to believe that his assumption more accurately reflects the reality of defendants' decision-making process than the Court of Appeal's. Rather, in addition to speculating on how he would have responded to an absurd allegation about a lost yacht (AB 49-50), he points out that one of the allegations in Sass's complaint was meritless on its face. (AB 50).

The speculation about the yacht requires no response, and the point about the purportedly meritless allegation actually made is, on examination, no more convincing. (AB 49-50).

The allegation Cohen focuses on is that Sass was entitled to $700,000 for business she brought into TAG. Cohen points out that the trial court rejected that claim because it decided that, as a salaried employee, she could make no such claim. (AB 50).

But if the fact that the trial court rejected that claim established that it was totally meritless, appeals would never be successful.

Cohen is assuming, solely on the basis of that trial court ruling, and without citation of authority, that the law unambiguously bars salaried

employees from ever getting commissions or bonuses on the basis of business they have generated. He further assumes that all defendants in his position would therefore simply ignore such an item in the complaint.

That assumption too is founded on speculation. As the Court of Appeal accurately stated, defendants cannot know at the time they must decide whether to default which items of relief requested will ultimately be meritorious and which will not. (Opn., p. 18).

Cohen also challenges the Court of Appeal's point that comparing the total relief requested with the total awarded is more consistent with the existing body of law on the issue, including the statutes, and, in particular, this Court's focus, in *Greenup, supra,* 42 Cal.3d at 826, and *Lippel, supra,* 51 Cal.3d at 1166, on ensuring that defendants have notice of the "maximum judgment" which can be awarded against them. But Cohen argues to the contrary only by ignoring the clear "aggregate" connotation of those references to the need for notice of the overall "maximum judgment" which may be awarded. (AB 51-52).

Finally, Cohen insists that there is no authority in favor of the aggregate approach, rejecting Sass's showing that *National Diversified Services v. Bernstein* (1985)168 Cal.App.3d 410 (*National*), which this court cited favorably in *Greenup*, 42 Cal.3d 822, 829, clearly supports the aggregate approach. (OBM 47-48).

Cohen argues that *National* took the "item- by-item" approach because it put together the two "separate, specific" items it found to be alleged in the complaint to determine what the maximum judgment could be. (AB 53).

But that is in fact a description of the aggregate approach. The "item-

by-item" method compares individual items from the complaint to those same items in the judgment rather than adding "separate, specific" items to each other.

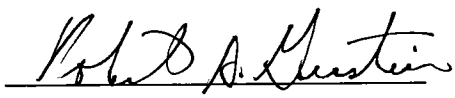
The crucial point in *National* is that the Court of Appeal there found that there was no notice whatever in the complaint of any of the items on which the trial court based its complaint, and that it nevertheless upheld that judgment to the extent of the total of the items which, though absent from the judgment, it found in the complaint. 168 Cal.App.3d 410, 412-19. (OBM 47-48). That could only be accomplished using the aggregate approach. The "item- by-item" approach would have resulted in no award at all.

CONCLUSION

For the reasons stated above and in the Opening Brief, the answer to this Court's first question should be that notice in the form of specific money amount is not required to support a money default judgment in an accounting action seeking half of the value of assets in the defendant's possession, and, in answer to the second question, the conformity of a default judgment award with the pleadings should be determined by comparing aggregate amounts rather than item-by-item. On that basis, the decision of the Court of Appeal should be reversed, with directions to affirm the trial court's judgment.

Dated: November 22, 2019 Respectfully submitted,

LAW OFFICES OF ROBERT S. GERSTEIN
LAW OFFICES OF JAMES P. WOHL

By 
ROBERT S. GERSTEIN
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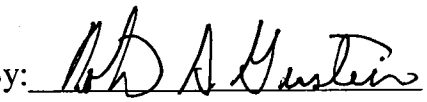
CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the REPLY BRIEF ON MERITS is proportionately spaced, has a typeface of 13 points or more, and contains 5555 words.

DATED: November 22, 2019

LAW OFFICES OF ROBERT S. GERSTEIN

By: 

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PROOF OF SERVICE

Case Name: Sass v. Cohen
Court of Appeal Case No.: 2d Appellate District, No. B283122
Superior Court Case No.: L.A.S.C. Case No. BC554035

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 171 Pier Avenue, # 322, Santa Monica, CA 90405.

On November 25, 2019, I served true and correct copies of the foregoing document described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[X] BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing I know that the correspondence is deposited with the U.S. Postal Service on the same day this declaration was executed and in the ordinary course of business. I know that the envelope was sealed, and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practice, at Los Angeles, California.

[X] SUBMISSION OF AN ELECTRONIC COPY provided to the Court of Appeal for service on the Supreme Court is provided to satisfy the requirements under rule 8.212(c)(2).

[ ] **(BY ELECTRONIC MAIL)** Via TrueFiling

[ ] **VIA E-MAIL** Pursuant to the agreement between counsel for email service in this case I served the above documents to the email listed on the service list below.

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

Executed on this 25th day of November , 2019, at Los Angeles, California

Luda Rosenbaum

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