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

OPENING BRIEF ON MERITS

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Attorneys For Plaintiff and Respondent, *Deborah Sass*

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QUESTIONS PRESENTED

(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?

(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

This Court should hold that (1) 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, and that (2) whether the compensatory damages in the default judgment exceed the amount demanded in plaintiff's pleadings should be decided on an aggregate basis.

As to the first question, it has long (and rightly) been held that marital dissolution petitions seeking equal division of property satisfy section 580 though they do not state a specific dollar amount of damages. *In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 879-80 (*Andresen*); *In re Marriage of Eustice* (2015) 242 Cal.App.4th 1291 (*Eustice*). It is necessary only to check the box on the form petition for division of property and attach a list of the specific properties to be divided.

The court in *Cassel v. Sullivan, Roche & Johnson* (1999) 76

Cal.App.4th 1157, 1164 (*Cassel*) showed that there is no good reason not to extend that holding to accounting cases involving the division of specified property in the hands of the defendant. See also *Warren v. Warren* (2015) 240 Cal.App.4th 373 (*Warren*), and *Schwab v. Southern California Gas.Co.* (2004) 114 Cal.App.4th 1308 (*Schwab*).

Views to the contrary in the Opinion below, in *Finney v. Gomez* (2011) 196 Cal.App.4th 1495, and *Van Sickle v. Gilbert* (2011) 111 Cal.App.4th 527, should be rejected. The *Cassel* holding most fully accords with section 580, the due process and fundamental fairness values underlying it, and the equitable principles applicable to the accounting cause of action.

The answer to the second question is that the damages alleged in the pleadings must be aggregated in order to determine whether default judgment exceeds them. This Court has held it is the "ceiling" on "potential liability" overall of which the defendant must have notice in deciding whether to appear or default. *Greenup v. Rodman* (1986) 42 Cal.3d 822 at 833 (*Greenup*). That ceiling is found in the aggregation of all compensatory damages stated in the complaint, whether in the form of specific dollar figures or the identification of property in defendant's hands, the value of which is to be divided equally between the parties.

In what follows, Sass will show why both questions should be answered affirmatively, as well as to clarify the current state of the law which gave rise to the questions.

STATEMENT OF THE CASE

Sass filed her original complaint against Cohen and TAG for breach of Cohen's *Marvin* agreement, fraud, accounting and other causes of action, in August, 2014. (CT 9). She filed her operative Second Amended Complaint on December 15, 2015. (1 CT 106). She thereafter filed a notice of punitive damages in the amount of $4,000,000. (CT 147-50).

As defendants filed neither an answer or demurrer to the Second Amended Complaint, the trial court entered default against both on March 10, 2016. (CT 157). Thereafter, the trial court entered default judgment against both in the amount of $2,812,128.50 in compensatory damages, $88,984 in punitive damages, $37,951.20 in prejudgment interest, and $2,569.04 in costs. (1 CT 164-65).

As shown in the trial court's statement of decision (CT 257-61), the judgment included:

(A) Against Cohen, for violation of the *Marvin* agreement to share equally in their assets and income during their relationship, (1st Cause of

Action, CT 113-15):

(1) $126,504 representing one half of the profits from the sale of a Hollywood property, plus $37,951.20 in interest (CT 257);

(2) an order directing Cohen to deed Sass a 50% interest in an Oakley Drive property as tenant in common (CT 259);

(3) $2,099,610.00, representing one half of the value of TAG Strategic LLC, and one half of the $444,918 remaining in the TAG bank account as her half of the income produced by TAG during their relationship (CT 257-58);

(4) $10,500 for 50% of Sass's original investment in Cohen's Rock & Reilly stock (CT 259-60);

(B) Against TAG, for failure to pay wages (Third Cause of Action, CT 113-14), $120,0000 (CT 258);

(C) Against TAG, for waiting time penalties (Fourth Cause of Action, CT 117), $5,000 (CT 258);

(D) Against both defendants, for fraud (Seventh Cause of Action, CT 120-21), the same compensatory damages as for breach of the *Marvin* contract, along with $88,984 as punitive damages (CT 260);

(E) Against both defendants, 37,951.20 in prejudgment interest and $2,569.04, in costs. (CT 261).

Cohen's motion to set aside the default and default judgment against him was heard and denied on April 13, 2017. (CT 296-311). The ruling rejected Cohen's claim of excusable neglect as not credible (CT 309-11), and cited *Cassel, supra,* 76 Cal.App.4th 1157, 1164, as the basis for rejecting Appellant's claim that the default and judgment should be set aside for failure to provide a timely statement of damages. (CT 301-02).

The Court of Appeal Opinion rejects the reasoning of *Cassel, supra,* 76 Cal.App.4th 1157, 1164, holding that section 580 requires notice of damages in the complaint be in the form of precisely stated dollar amounts. (Opn., pp. 13-16). The Opinion then goes on to find that the amount of compensatory damages exceeded the amount of which Cohen had notice from the complaint by $1,819,032. (Opn., p. 22).

The Opinion arrived at that figure in this way:

First, the Opinion finds the sum of all the specific dollar amounts alleged in the complaint as compensatory damages to be $3,837,500. That figure includes $3,000,000 as the value of Sass's half interest in the two houses acquired during the relationship, the Hollywood house (which Cohen had sold) and the Oakley house. But, as the judgment awarded Sass

a constructive trust over her half interest in the Oakley home, the Opinion concluded it must find a value for that half interest and subtract it from the aggregate total. (Opn., p. 19-20).

The Opinion found the value of the constructive trust to be $2,850,000 as follows. The complaint alleged that Cohen had received at least $300,000 in profits from the sale of the Hollywood property, and sought half that, $150,000, as Sass's share of those profits. (see Opn., p. 5). The Opinion, taking that $150,000 to be Sass's "share of the proceeds from the sale," subtracted it from the $3,000,000 stated to be the value of Sass's half share in both houses together, concluded that Sass's constructive trust over her share of the Hollywood house substituted from $2,850,000 in the damages alleged, so that only $987,500 in alleged compensatory damages remained. (Opn., pp. 19-20).

Finally, the Opinion remands to the trial court for an exercise of discretion whether to (1) reinstate the default judgment with a reduction of $1,819,032, or (2) vacate the the default and allow Sass to file an amended complaint.

Sass filed a Petition for Rehearing, pointing out that the complaint stated $3,000,000 to be the fair market value of the two houses taken together, but that Sass's complaint sought half of $300,000, neither as her

half of the fair market value of the Hollywood house, nor as "her share of the proceeds from the sale of the Hollywood house," (Opn., p. 19), but only as "her share of the profits" from the sale, alleged to be "in excess of $300,000." (Opn., p. 5; CT 118) (PRH 6).

In response, the Court of Appeal modified the Opinion to assert that the complaint stated $300,000 to be the "fair market value of . . . the Hollywood [h]ouse received by . . . Cohen when he sold that house." (Order of April 4, 2019).

STATEMENT OF FACTS

(The facts are drawn from the Second Amended Complaint and the evidence presented by Sass in support of entry of default under California Rule of Court 3.1800, as described in the trial court's Statement of Decision, CT 257).

Beginning in May, 2006, Cohen and Sass formed a relationship which developed into an agreement to merge their lives, and to make all property and income acquired by either of them during their relationship joint property. Cohen promised that if Sass left London and came to live with him in Los Angeles, he would take care of her for the rest of her life. (CT 71).

In October, 2007 Cohen told Sass he was buying "their house" on

Hollywood Boulevard. He promised repeatedly to put Sass on the title of that home, but never did. (CT 71).

In December, 2007, Sass relocated to Los Angeles in reliance on Cohen's promises. She lived in the Hollywood house with Cohen, who for the time being paid all of the bills, and Sass's expenses. (CT 72). Once Cohen and Sass formed their relationship, Cohen left the job he had at EMI and formed TAG Strategic LLC, of which he was sole shareholder. Sass worked at TAG, first as Vice President of Client Relations, and later as Global Head of Business Development. (CT 72-73).

Cohen told Sass he wanted her to have equity in the company, but paid her nothing for her work there until January, 2009. At that time she began working 70 hours a week. For that work, which ultimately brought in approximately $1.4 million in revenue, Cohen promised to pay her a "token sum" of $5,000 a month. In fact, he paid her only $2,000 a month for 10 months altogether. (CT 73).

In April, 2011 Sass returned to the United Kingdom on an extended vacation. She expressed to Cohen her dissatisfaction at his failure to keep his promises, and told him she would return to Los Angeles only if he agreed to a series of terms, including putting her on the title of the Hollywood House, giving her equity in TAG, and incorporating TAG

Europe in both their names. (CT 110-11, Aug. 16-17). Cohen agreed and Sass returned. (CT 111).

In summer 2011, once Cohen and Sass's work had made TAG into a thriving, profitable business (CT 119; Motion to Augment [hereinafter Aug.] 126), Cohen announced to Sass that he was "buying her a house." He then asked Sass to provide $200,000 for half of the down payment on the house on Oakley Drive he was buying. In reliance on his promise that this would be "her" house, she sold a home she owned in Australia to raise the $200,000 she put into it. When escrow closed, they moved into the house together. (CT 74).

Also that summer, Sass purchased (to be held in Cohen's name) stock in Rock & Reilly, a company formed to operate a restaurant in West Hollywood. (CT 111-12). According to the complaint. Sass invested $25,000 (*ibid*), but the trial court found on the basis of Sass's declaration in support of the default judgment that the amount was $21,000. (CT 259; Aug.126).

Cohen made his many promises to Sass without any intention of carrying out any of them. (CT 120).

In December, 2012, Sass moved out of the Oakley house, and later leased an apartment of her own. (CT 112). In April, 2013, Cohen

announced he would no longer pay Sass's expenses. (CT 114).

Then, about six months before Sass filed this action in August, 2014 (CT 9), Cohen sold the Hollywood House, making a profit on the sale the trial court found to be $253,008.87. Cohen has never shared any of the proceeds with Sass. (CT 113, 257).

Further, the complaint alleges that the fair market value of Sass's half interests in the Hollywood and Oakley properties was $3 million. (CT 120-21).

After the complaint was filed, Cohen closed the TAG offices, caused the California Secretary of State to suspend the company, and secreted its assets. (CT 113). On the basis of evidence from Sass's forensic accountant, the trial court valued TAG at $4,199,219 (CT 257; Aug. 112), and found that there was $889,836 remaining in TAG accounts. (CT 258; Aug. 119).

ARGUMENT

I. A MONEY DEFAULT JUDGMENT IN AN ACCOUNTING ACTION AWARDING HALF THE VALUE OF ASSETS IN DEFENDANT'S POSSESSION SPECIFICALLY IDENTIFIED IN THE COMPLAINT SATISFIES SECTION 580 AND DUE PROCESS, WITHOUT PRIOR NOTICE OF THEIR PRECISE MONEY VALUE.

Section 580 provides that the relief awarded plaintiff on default "cannot exceed that demanded in the complaint," or the subsequent

statements of damages required by statute in personal injury and wrongful death cases (Code Civ.Proc. §425.11), or where punitive damages (Code Civ.Proc. §425.11) are sought.

This Court has held that section 580 "means what it says and says what it means": where the defendant has defaulted, "a plaintiff cannot be granted more relief than is asked for in the complaint." *In re Marriage of Lippel* (1990) 51 Cal.3d 1160 at 1165. The limitation includes both the type and amount of relief. "If no specific amount of damages is demanded, the prayer cannot insure adequate notice of the demands made upon the defendant." *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493-94 (*Becker*). Further, this Court has held that section 580's notice provision is required of due process. *Lippel, supra,* 51 Cal.3d 1160,1166; *Becker, supra*, 27 Cal.3d 489, 494; *Greenup, supra*, 42 Cal.3d 822, 829.

The question here is whether a complaint with an accounting cause of action, which gives the defendant notice that the plaintiff seeks half the value of specified assets in defendant's possession, satisfies due process as embodied in section 580, making the inclusion of a precise dollar amount unnecessary.

Cassel, supra, 76 Cal.App.4th 1157, 1164, a principle focus of the

Court of Appeal opinion here (Opn., pp. 13-16), decided that it does[1], using as its starting point the development of decisional law under section 580 as applied in marital dissolution cases, beginning with this Court's *Lippel* opinion.

A. IT IS WELL ESTABLISHED THAT MARITAL DISSOLUTION PETITIONS SEEKING AN EQUAL DIVISION OF ASSETS NEED NOT INCLUDE A PRECISE MONEY FIGURE.

The issue in *Lippel* was whether a spouse petitioning for marital dissolution could be awarded child support against the defaulting respondent, though she had not checked the child support box on the mandatory Judicial Council petition form. 51 Cal.3d 1160, 1163-1164. This Court held that no child support could be awarded on default if the box had not been checked. *Id.,* 1173.

Applying section 580's requirement of fair notice (see *supra*, pp. 17-18) in the context of the form prescribed by the Judicial Council, this Court concluded that "the manner in which these boxes area checked or not checked..." on the prescribed petition, "...informs and puts the respondent on notice of what specific relief the petitioner is, or is not, seeking." 51

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[1]In *Cassel*, the plaintiff was not seeking a half interest, but his fractional partner's interest in a law firm which was precisely defined in the partnership agreement. 76 Cal.App.4th 1157, 1163.

Cal.3d at 1170.

In *Andresen, supra*, 28 Cal.App.4th at 879-80, the issue was whether section 580's notice requirement was satisfied where wife checked the box for equal division of marital property and liabilities, and attached a list of those properties and liabilities, without the need to further specify "the amount of relief requested...."

The *Andresen* court held that section 580 was satisfied by the combination of checking the box for division of property and attaching the list. 28 Cal.App.4th 873, 879-80. Its reasoning began with this Court's statement, in *Lippel*, that by checking boxes as required on the petition, a petitioner in marital dissolution cases "...informs and puts the respondent on notice of what specific relief the petitioner is, or is not, seeking." 28 Cal.App.4th at 879, quoting 51 Cal.3d at 1169-70.

Though admitting that this Court had no occasion to deal with that specific issue in *Lippel,* the *Andresen* court found nothing in *Lippel* to preclude the use of that reasoning to hold that "the amount of relief requested, as contrasted with the type of relief requested" need not be stated where the relevant form does not require it. 28 Cal.App.4th at 879. Husband was "given adequate notice that the wife sought a division of the property and liabilities identified in the wife's papers," and that the court

would "undertake to assess and then divide the alleged community equally between the parties." If husband "desired to be heard on the subject of the valuation and division of the listed items, he should have appeared." *Id.,* at 880.

Andresen's holding has been reaffirmed and applied in *Eustice,* 242 Cal.App.4th 1291, and *In re Marriage of Kahn* (2013) 215 Cal.App.4th 1113.

In *Kahn*, wife in the dissolution proceeding indicated what relief she sought by checking the box for "Other" relief on the form petition, and typing in that she was seeking relief for her husband's breach of fiduciary duty. 215 Cal.App.4th 1113, 1116. The trial court struck husband's responsive pleading as a discovery sanction, and awarded wife a default judgment of $275,000. 215 Cal.App.4th 1113, 1115-16.

The *Kahn* court, recognizing *Andresen* as prevailing law on the issue, concluded it would be "stretching *Andresen* too far" to uphold the default judgment in the case before it. Unlike the box for division of community property, "other" is "a catchall category." Providing nothing more than a checkmark by the word "other" denied husband the "notice of the specific nature and amount" of the relief sought against him to which he was entitled under section 580. 215 Cal.App.4th 1113, 1119.

The *Eustice* court found justification in the facts before it for flexibility in application of the instructions for filling out the form petition. In *Eustice*, wife had checked the petition's box for division of community property, but had not attached a list of assets to the petition. She did, however, list assets in her supplementary declarations thereafter, and husband filed a responsive pleading with his own list. The trial court struck the responsive pleading for failure in discovery, and entered a default. 242 Cal.App.4th 1291, 1295-1299, 1307-08. The trial court awarded wife a default judgment dividing real and personal property, investment accounts, insurance policies and a bank account balance. 242 Cal.App.4th 1291, 1302.

The *Eustice* court found that, while there was no identification of the properties at issue in the petition, husband had fair notice of them from the supplementary declarations, as demonstrated by his responsive pleading. The default judgment should stand, the court concluded, for one thing, because "Joseph should not be permitted to benefit from his recalcitrance" in refusing to provide discovery. 242 Cal.App.4th at 1307.

Andresen and the cases following it demonstrate that, at least where the form petitions for marital dissolution are mandated, section 580 is satisfied without the need to state a specific dollar figure. Providing the

respondent a list of assets and debts to be divided equally is enough.

The *Andresen* opinion itself suggests that, given the mandatory character of the form petition and the instructions accompanying it, section 580 can be satisfied in this context simply by identifying the "type" of relief sought, without stating the "amount." 28 Cal.App.4th 873, 879. But *Kahn* indicates otherwise, stating that the defaulting defendant was entitled to "notice of the specific nature *and amount*" of the "other" relief sought against him. 215 Cal.App.4th 1113, 1119. *Eustice* too makes it clear that while a precise dollar figure is not required, there must be some form of genuine notice of the "amount" of recovery sought. 242 Cal.App.4th 1291, 1307.

B. THE REASONING OF SUCH MARITAL PROPERTY DIVISION CASES AS *ANDRESEN* IS EQUALLY APPLICABLE TO ACCOUNTING CASES ALSO SEEKING EQUAL DIVISION OF THE VALUE OF PROPERTY IN THE DEFENDANT'S POSSESSION.

The first question presented here is whether the *Andresen* holding that a default money judgment can, consistent with section 580, be awarded in a marital dissolution case without prior notice of a specific dollar amount, extends to accounting cases where plaintiff seeks equal division of the value of property possessed by the defendant. As demonstrated below, the answer is that it does.

All of the reasons for interpreting section 580 to allow for default judgments for the value of equally divided property without prior notice of a sum certain in marital dissolution cases are also present in these accounting cases. It is the value of property defendants know (or can readily learn about) as their own, which is to be divided. And it is to be divided, not in some proportion left to the discretion of the trial court, but equally.

Further, just as the petitioners in dissolution cases are precluded by statute from stating a "sum certain" for the value of the property to be divided in their petitions, accounting plaintiffs are precluded from doing so by well-established precedent. It has long been the law that the plaintiff in an accounting action *cannot* allege and seek a sum certain. *St. James Church v. Superior Court* (1955) 135 Cal.App.2d 352, 359.

Still, the Courts of Appeal are divided as to whether the *Andresen* interpretation of section 580 applies to such accounting cases. A survey of both sides of the issue as they have developed demonstrates that this Court's first "question presented" should be decided affirmatively.

1. THE DEVELOPMENT OF THE CURRENT DIVISION OF AUTHORITY.

Ely v. Gray (1990) 224 Cal.App.3d 1257, was the first decision to

explicitly confront the "conundrum" created by the conflicting mandates requiring that (1) notice be given of a maximum which can be awarded in default cases under section 580, and that (2) no sum certain be alleged in accounting cases. *Ely* was an accounting action in which no such notice was given in the complaint, and a default money judgment was awarded. *Id.*, 1260-61.

The *Ely* court set the judgment aside, holding that strict application of section 580 requires notice of the specific money amount sought, despite the prohibition on specifying such a sum in an accounting complaint. The court found its solution in the statutes regarding wrongful death and personal injury cases (Code Civ. Proc. §425.10(b)), which also preclude the naming of a specific number in the complaint, but require that the plaintiff provide the defendant with a separate notice of damages sought a reasonable time before default can be entered. Code of Civil Procedure section 425.11. By analogy, the *Ely* court held that the same requirement should be judicially imposed in accounting cases. *Id.* at 1263. *But see Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc.* (2018) 23 Cal.App.5th 1013, 1019-20; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1176.

Cassel took another approach, using *Andresen* and *Lippel* as its

starting point.

The plaintiff in *Cassel* withdrew from a law partnership and sued for an accounting of his share of its assets. 76 Cal.App.4th 1157, 1159. Cassel obtained a default judgment of $305,690 against the partnership after it defaulted. But the trial court set the judgment aside for failure to provide notice as required by *Ely*.

On appeal, the *Cassel* court reversed. Rejecting *Ely,* the *Cassel* court found the principles enunciated in *Andresen* and *Lippel* applicable to the case before it. Just as spouses in dissolution proceedings will "be in possession of the essential information necessary to calculate their potential exposure" when division of community property is the issue, so will partners faced with the division of their partnership assets. The court saw no danger that defaulting defendants in such a case would "be taken by surprise by judgments against them...," and, therefore, found no violation of section 580 or defendant's due process rights. 76 Cal.App.4th at 1164.

Andresen held that there was no need for notice of a specific amount sought there, because the respondent in a marital dissolution case will be on notice from a petition in which the community property box is checked that, on default, the court will divide the assets named in the attached list equally between the parties. 28 Cal.App4th 873, 679-80. In *Cassel*, the defendant

partnership's knowledge of the partnership agreement's provisions governing such situations and of its own finances made notice beyond the Cassel's request for an accounting upon withdrawal unnecessary. 76 Cal.App.4th 1157, 1163-64.

As the Opinion makes clear (Opn., p. 14), the Courts of Appeal remain divided on the issue. See *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 399.

On the one hand, there are the decisions which have rejected *Cassel, Finney v. Gomez, supra* 196 Cal.App.4th 1495, *Van Sickle v. Gilbert, supra,* 196 Cal.App.4th 1495, and the Opinion here.

Finney was a partition action in which, in addition to division of the subject property, sought an accounting for half of the common expenses for the property, alleged to be $33,000. After Gomez' default, the trial court awarded Finney $60,536.96 for half of the expenses and lost rental income. 111 Cal.App.4th 527, 532-33. On appeal, the *Finney* court rejected Finney's argument under *Cassel*, and applied section 580 to cut that amount to the $16,500 justified by the complaint. *Id.,* 550.

The *Finney* court's starting point in rejecting *Cassel* was its view that this Court did not intend in *Lippel* to allow the amount of recovery sought to be omitted except "where there is a statutorily mandated form

petition." 111 Cal.App.4th at 537. The court conceded that, in individual partition cases where the defendant possesses "*all* the information necessary to assess the ultimate judgment," fundamental fairness can be served by applying *Cassel*. It was concerned, however, that to make exceptions for such cases would lessen the assurance of avoiding "an unfair burden on defendants who do not necessarily have all the information required to calculate the risk of defaulting" in others. *Finney*, 111 Cal.App.4th at 541.

The *Finney* court expressed fear that *Cassel* would be insufficiently protective of defendants in a cases like that before it involving "an accounting under the partition statute" (Code of Civil Procedure §872.140), deprecating "the wide range of discretion accorded a court of equity" in such cases. It found no such concern appropriate in marital dissolution cases such as *Andresen*, where "the court *must* value and divide the community estate of the parties equally...." 111 Cal.App.4th at 542.

In *Van Sickle* the plaintiff sought an accounting against an attorney who had represented her in a divorce proceeding, alleging he had mismanaged property she received in the divorce. 196 Cal.App.4th 1495, 1500.

The *Van Sickle* court first distinguished *Cassel* from the case before it. In *Cassel*, the court pointed out, it was undisputed that the defaulting

partnership possessed the information needed to "precisely calculate" the amount for which it could be liable. In the case before it, on the other hand, client Van Sickle asserted that attorney Gilbert had such information, but had no evidence to support that claim. Further, because the period of alleged mismanagement had ended 12 years before Van Sickle filed her complaint, the court doubted whether all of the relevant financial records still existed. *Ibid.*, 1527.

In deciding not to follow *Cassel* even if indistinguishable from the case before it, however, the *Van Sickle* court, like the *Finney* court, found the crucial line to be between marital dissolution cases such as *Andresen* and other cases involving division of property.

Given that the law requires an equal division in marital cases such as *Andresen*, due process is satisfied where the petitioner checks the appropriate box on the form petition and "identifies the community assets to be divided." According to the *Van Sickle* court, no such clear notice is provided where, as in *Cassel*, partnership assets are to be divided, because there is no such requirement of equal division. 196 Cal.App.4th at 1527.

Much the same points are made in the Opinion here.

First, the court here emphasizes the need for strict application of section 580, and contends that, though a sum certain cannot be sought in an

accounting cause of action, that does not preclude giving an "estimate" of "maximum value." (Opn., pp. 14-15). See *Ely, supra,* 224 Cal.App.3d 1257, 1262 ("[s]uch actions often include an estimate of the amount due....").

The Opinion then repeats the point made in *Finney*, that *Andresen* depends solely on the statutory requirements in marital dissolution cases. Opn., p. 15).

Finally, the Opinion makes the point that the *Cassel* approach would effectively substitute "actual or constructive notice for formal notice," because it depends on the defaulting defendant's awareness of facts beyond those stated in the complaint, and thereby "dims section 580's bright line rule." (Opn., p. 15).

On the other hand, two opinions have affirmed the soundness of the *Cassel* approach: *Warren, supra*, 240 Cal.App.4th 373, and *Schwab, supra*, 114 Cal.App.4th 1308.

In *Warren, supra*, 240 Cal.App.4th 373, Christopher Warren, Jr. sought an accounting from his parents, Warren, Sr. and Brook Kerr, as well as the family corporation, alleging that his parents had used the family corporation's funds to pay their own expenses. All defendants defaulted, then appealed from the default judgment on the basis that there had been no

prior notice of the damages awarded. *Id.*, 375-76.

The *Warren* court agreed with *Cassel* no such notice is in general necessary in an accounting case, because "[g]enerally, the defendant, not the plaintiff, has the information necessary to determine its liability." 240 Cal.App.4th at 378. In the case before it however, there was unrefuted evidence that Warren Jr. had full information about the finances of the family corporation to be divided, and had kept the defendants. in the dark about them. In the absence of a clear figure in the complaint, therefore, the *Warren* court vacated the default judgment. 240 Cal.App.4th 373, 379.

Schwab was not an accounting case, but a personally injury action in which Schwab sought damages from a city, utility companies and contractor for injuries from a natural gas explosion, and the city and utilities counter-claimed against the contractor for indemnity. 114 Cal.App.4th 1308, 1315. In setting aside the default indemnity judgment against the contractor in favor of the city and electric company for failure to state any figure for damages, the *Schwab* court noted that *Cassel* states a limited exception to statutory notice provisions, not applicable to the case before it, where defendant has information from which it "can precisely calculate the amount for which it could be liable if it chose to default." 114 Cal.App.4th at 1326, quoting *Cassel*, 76 Cal.App.4th at 1163.

As shown below, none of the objections to the *Cassel* reasoning *Finney*, *Van Sickle* and the Opinion here justify denying its application to accounting cases where equal division of the value of property possessed by the defendant is sought.

2. THERE IS NO SOUND BASIS FOR DISTINGUISHING FOR THIS PURPOSE BETWEEN MARITAL DISSOLUTION AND ACCOUNTING ACTIONS SEEKING AN EQUAL DIVISION OF THE VALUE OF PROPERTY.

The Opinion and other decisions critical of *Cassel* draw a sharp distinction between the marital dissolution cases, in which no precise money figure need be included in the petition, and all other cases, in which, they assert, section 580 compels the statement of such a figure to serve as a ceiling for money default judgment.

The central argument for this distinction is that the statutorily mandated petition forms in dissolution cases bar petitioners from stating the specific value of the property to be divided in those petitions. *Finney, supra*, 111 Cal.App.4th 527, 537, 542. (Opinion, p. 15).

A major problem with that rationale is that these opinions also agree that, despite this statutory preclusion, marital dissolution cases remain subject to section 580. *Lippel*, 28 Cal.App.4th 873, 879-80; *Andresen*, 28

Cal.App.4th 873, 879-80. It could not be otherwise given that section 580 embodies the notice required by due process and fundamental fairness.

How, then, is the apparent conflict between the demands of section 580 and the statutes which appear to bar its full application to marital dissolution cases to be resolved?

Andresen suggests that the conflicting demands of the two statutes can be reconciled by interpreting section 580 to require a statement only of the "type" of relief in the marital dissolution context, not the "amount." 28 Cal.App.4th 873, 879. The Opinion here takes the same view, asserting that the marital dissolution cases excusing parties from "pleading the amount of relief sought" are justified solely because the "statutorily mandated form" precludes them from doing so, and "do not rest on any broader principle." (Opn., p. 15).

One objection to that analysis is that it arbitrarily reserves the exception applied in the marital dissolution cases for actions in which the parties are *statutorily* barred from seeking a precise money amount in pleadings (Opn., p. 15), excluding actions, like accounting, in which it is barred by long-standing precedent. *St. James Church v. Superior Court*,

supra, 135 Cal.App.2d 352, 359.[2]

But the more fundamental objection is that this approach 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.

If dissolution petitions such as those approved by *Andresen* and *Eustice* are acceptable, it cannot be on the assumption that the rules governing the checking of boxes in those petitions trump section 580's due process requirement that respondents and defendants have fair notice of the type and extent of relief that could be levied against them. Whatever the rules for filling out the form petitions may say, and whatever their origin, the due process requirement of fair notice could not possibly be satisfied simply by stating the type of relief being sought (money or property, for example) with no indication of its extent: how much money, or what property?

These cases indeed rest on a "broader principle": the principle – embodied in section 580 – that litigants must always have fair notice of both

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[2]The Opinion also cites the fact that accounting plaintiffs are not precluded from including "estimates" of the amount due in their complaints. (Opn., p. 15). That point is responded to below. (pp. 40-41, *infra*)

the type and extent of relief sought against them. The point of *Andresen* and *Cassel* is that this "broader principle" should not be constricted by strict insistence that such noti

ce always be in the form a specific money figure. *Andresen* holds that section 580 can be satisfied without notice of a specific monetary sum by a petition requesting division of community property to which a list of the specific community property to be divided equally is attached. 28 Cal.App.4th 873, 879-80. The same is true where, as here, an accounting complaint seeking equal division of property or its value attaches a list of the specific property at issue.

In both cases the principle of fair notice is tempered by the reasonable assumption that, both where community property is to be divided and in an accounting for the division of property possessed by the defendant, the party who must decide whether to respond or default has knowledge of the property as great, or greater than, that of the petitioner or plaintiff.

The doctrine of "less particularity" holds that pleadings may be less specific "when it appears that defendant has superior knowledge of the face, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense." *Doe v. City of Los Angeles* (2007) 42 Cal.4th

531 at 549-50, quoting *Okun v. Superior Court* (1981) 29 Cal.3d 442 at 458. The same concept is applicable where, as here, the question is whether the pleading gives notice sufficient to enable the decision whether to respond or default.

According to the *Finney* court, there is another reason for distinguishing dissolution cases from accounting cases. Clear notice of the relief sought under section 580 is achieved in the former because "the court *must* value and divide the community estate of the parties *equally*...." 111 Cal.App.4th at 542. (emphasis added). That is clearly established Family Law Code section 2550. *In re Marriage of Peterson* (2016) 243 Cal.App.4th 923, 937.

The issue here, however, is whether section 580's notice requirement is met where the plaintiff in an accounting action seeks neither more nor less than an equal division of specific property in defendant's possession. Section 580's requirement that a default money judgment be held to the amount stated in the complaint must in this context surely be understood to require that the trial court, in exercising its equitable jurisdiction to frame the default judgment, not depart from the equal division of which notice was given.

Cassel did not involve equal division of partnership property. It was,

however, based on a partnership agreement which set out precise rules for calculating a departing partner's share. 76 Cal.App.4th 1157, 1160. That, together with the fact that the partnership had precise information regarding the assets to be divided (in the form of a recent financial statement, *id.*, 1163), was sufficient in the eyes of the *Cassel* court to satisfy section 580.

Here, Sass sought through an accounting action an equal share of identified assets in defendant's possession, or their value. It follows that section 580 will be satisfied here as well, on the assumption that the identified assets will be divided equally, based on information about their value accessible to Cohen, who was in possession of them.

In short, the statutory requirement that the trial court divide property equally in marital dissolution cases adds nothing to section 580's mandate that any trial court, whether applying family law or equitable principles to an accounting, strictly adhere to the equal division of which notice was given in framing a default judgment.

Because, therefore, 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.

The same reasoning applies to the Opinion's point that the *Cassel*

approach would effectively substitute actual for formal notice, because it depends on the defaulting defendant's actual knowledge of the identified property. (Opinion, p. 15). That too is also true of dissolution cases.

Thus, *Andresen* depends on the assumption that a defaulting spouse has enough *actual* knowledge of the value of the property on the list attached to the petition not to be surprised by the result when the court undertakes to "accurately value and fairly allocate" it between the spouses. 28 Cal.App. 4th 873, 880. Such a list nevertheless satisfies due process in dissolution cases, and it should do so in accounting cases as well.

Like the defaulting spouses in *Andresen*, defaulting defendants in such accounting cases can reasonably be assumed to "be in possession of the essential information necessary to calculate their potential exposure." 76 Cal.App.4th at 1164.[3] *See Doe v. City of Los Angeles, supra*, 42 Cal.4th 531, 549-50.

Of course, a defaulting defendant with thorough knowledge of the property's value may still be confronted by an unexpected choice by the court of a method of valuation. But the same is true of defaulting

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[3] If there is reason to believe the defaulting defendant has somehow been denied such information, the trial court can and should, applying equitable principles, take that into account. (see pp. 41-42, *infra*).

respondents in marital dissolution cases, where the trial court's evaluations have been found to satisfy section 580 and due process.

In sum, the court in a dissolution case is required under the Family Law Code to "accurately value and fairly allocate" the identified property between the spouses, 28 Cal.App. 4th 873, 880, and the court in an accounting case is required by equitable principles to do the same. There is no good reason to distinguish between the marital dissolution cases and accounting cases seeking equal division of property in the defendant's possession for purposes of section 580.

C. THE *CASSEL* APPROACH SATISFIES THE DEMANDS OF DUE PROCESS, FUNDAMENTAL FAIRNESS AND EQUITY FOR BOTH PARTIES.

It has long been understood 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. As accounting is an equitable cause of action, and Cohen has rightly described section 580 as "an equitable statute" (Answer to Petition for Review, p. 13), that principle is doubly applicable here. The Opinion's insistence on the rigid application of a rule requiring notice of a precise sum of money in an accounting action for equal division of property in defendant's possession runs counter to equitable principles.

Admittedly, the Opinion and the precedents supporting it are not insisting on inflexibility for its own sake. Giving defendants notice of a precise money figure does provide the highest degree of certainty that their due process rights will be respected in a default money judgment. See *Finney, supra,* 111 Cal.App.4th 527, 541-42; *Van Sickle, supra,* 196 Cal.App.4th 1495, 1527 (Opn., 14-16).

But that across-the-board certainty for the defendant comes at a cost.

The rule against stating a sum certain in an accounting complaint is no arbitrary formality either. It arises from the essential nature of the cause of action, which is to provide an equitable remedy for those unable to determine how much is due them without resort to it. *St. James Church v. Superior Court, supra,* 135 Cal.App.2d 352, 359.

So, while accounting plaintiffs are not precluded from providing an estimate of the maximum value they may recover (Opn., pp. 14-15; *Ely, supra,* 224 Cal.App.3th 1257, 1262), to compel them – at a time when they by definition have insufficient information to name a figure – to make guesses as to the maximum due, and to insert those guesses into their accounting complaints as a limit to their recovery in case of default, is to undermine the action's equitable character. It limits the trial judge's ability to award plaintiffs what justice may require, and will deny plaintiffs the full

amount due them if they guess too low.

On the other hand, it is hard to see that the defendant's rights to due process and fundamental fairness are well served where the plaintiff attempts to avoid such a result by using exorbitant figures. Further, plaintiffs who do so may make themselves the targets of malicious prosecution actions. *Citi-Wide Preferred Couriers v. Golden Eagle Insurance Corp.* (2003) 114 Cal.App.4th 906 at 201, holds that, just as malicious prosecution may be brought where only one of several claims in the underlying action is without probable cause, "so too can a malicious prosecution action be maintained where most but not all of the amount sought... was claimed without probable cause."

Applying section 580 with a measure of equitable flexibility also means providing relief to defaulting defendants who do not have access to information of the property to be divided, whether because the plaintiff has blocked it otherwise.

That was the case in *Warren v. Warren, supra*, 240 Cal.App.4th 373. (pp. 30-31, supra). The *Warren* court, though adopting the *Cassel* approach, found it inapplicable in the case before it given the unrefuted evidence that plaintiff had kept from the defendants the information necessary to understand the extent of the relief sought against them. 240

Cal.App.4th 373, 379.

Here, as already shown, it is possible to temper the "inflexible rule" which the Opinion understands section 580 to be, with the need of a court of equity to do justice in the particular case. That can be accomplished by holding that it is sufficient for purposes of section 580 that the plaintiff in an accounting case give notice of seeking an equal division of property in defendant's possession. Of course, if there is evidence, as in *Warren*, that the defendant has been denied knowledge of property's worth, by the plaintiff or otherwise, equity requires that be taken into account as well.

The instant case is an example of how the Opinion's quest for absolute certainty through insistence on precise dollar figures can lead to injustice.

A principle element awarded by the trial court in its default judgment was half of the value of Cohen's business (TAG), for which Sass's complaint had provided no dollar figure, but which the trial court found (based on the incomplete information) to be worth more than $2 million. (CT 257-258).

The record indicates that Sass obtained such information about TAG's value as she was able to provide to the court only after she had filed her complaint. (CT 197). What made that difficult was that Cohen had

closed down TAG and secreted its assets when served with Sass's complaint, for the very purpose of hindering her efforts to obtain a share in them. (CT 113). As the trial court commented in denying relief from the default and default judgment, Cohen "thumbed his nose at this case and at Ms. Sass...." (RT 16). Further, the trial court found the award to Sass of half of the value of those assets (insofar as Sass's accountant was able to obtain some evidence of their value) was justified because Cohen "...knew what he took," and "...he's in a position to make accounting to Ms. Sass for the amounts." (RT 17).

That Cohen was "thumbing his nose at this case" was also indicated by the trial court's finding that Cohen's excuses for failing to answer the Second Amended Complaint were not credible (2CT 309). See *Marriage of Eustice, supra,* 242 Cal.App.4th at 1307 ("Joseph should not be permitted to benefit from his recalcitrance").

Here, the trial court acted equitably to calculate the award on default based on the still incomplete evidence Cohen had by then disgorged, taking account both of Sass's right to her fair share of the business, and Cohen's right to reasonable notice of what could be awarded against him on default.

Specifically, the trial court, far from acting vindictively against Cohen in calculating the judgment, repeatedly showed its concern to treat

him fairly.

So, the accountant calculated Sass's half share of TAG's net business income, again based on the basis of incomplete information, as $1,633,798 (Aug. 107). The Court, however, took a position far more protective of Cohen. To ensure Sass would get no more than was due to her, the court assumed the distributions from TAG over time went to pay for Sass's expenses equally with Cohen's. (Aug. 258). It therefore awarded Sass a sum, none of which could possibly have gone to pay any of Sass's expenses: half of the money remaining in the TAG accounts when Cohen shut it down. (CT 258; Aug. 119).

So too, while Sass's statement of punitive damages sought $4,000,000, the trial court awarded only $88,984 (CT 261).

In excluding the value of Sass's equity in TAG, her share of the TAG profits, and other elements from its calculation of the maximum amount awardable in the default judgment, because no dollar value was provided for them in the complaint (compare Opn., pp. 4-6 to pp. 1-20), the Opinion allowed Cohen to profit from his own wrong, and deprived Sass of much of what she should in equity have received.

The Opinion suggests that Sass could have, and should have, included an estimate of the maximum value of TAG in the complaint.

(Opn., p. 15). But, as already noted (pp. 40-41, *supra*), such an estimate would have been no more than a (not very educated) guess, which could have short-changed Sass even more severely than did the incomplete information on which the trial court's award was based may well have done.

Further, as already shown in the Statement of the Case (pp. 12-13, *supra*), the Opinion arrives at $987,500 as the aggregate amount of damages demanded in the complaint by putting two incommensurate numbers together to find the value of the half interest in the Oakley house over which Sass was awarded a constructive trust, thereby diminishing the judgment by $1,819,032. (Opn., pp. 19-20). There is reason for concern that such a single-minded focus on dollar figures will lead to illogical results in other cases in which the judgment includes both money damages and property in lieu of damages.

In sum, the requirements of section 580 and due process for fair notice are met where (1) a complaint seeks an accounting of half of the value of specified assets in the defendant's possession, though no specific dollar amounts are given for their value, and (2) the trial court on default awards a default judgment of half of what it finds to be the value of those assets, unless (3) as where the defendant was somehow denied access to information about the value of those assets before default, application of

equitable principles to the facts of the particular case requires otherwise.

II. WHETHER COMPENSATORY DAMAGES IN A DEFAULT JUDGMENT REMAIN WITHIN THE LIMITS OF THOSE CLAIMED IN THE COMPLAINT SHOULD BE JUDGED IN THE AGGREGATE, NOT ITEM BY ITEM.

The compensatory damages awarded in a default judgment should be judged for conformity with the notice given in the complaint in the aggregate, as the Opinion does here (Opn., pp. 17-19), not item by item.

Primarily, the aggregate approach accomplishes the purpose of section 580. That purpose is to ensure that defendants considering whether to answer or default have in the complaint "adequate notice of the maximum judgment that may be assessed against them." *Greenup*, *supra,* 42 Cal.3d at 826. That aggregate maximum would include all items for which precise money figures are given, and, where property is divided for which the pleadings do not have a precise money value, the value of the half of that property specifically identified as found by the trial court.

This Court made it clear in *Becker*, 27 Cal.3d at 494-95, quoting *Gudarov v. Hadjieff* (1952) 38 Cal.2d 412, 417, that punitive damages cannot be aggregated with compensatory damages for this purpose. Because they 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.'" The Court of Appeal in *Ostling v. Loring* (1994) 27 Cal.App.4th 1731 at 1741, 1750, took the same view of treble damages under Civil Code 3346, which that court deemed "penal and punitive."

But that is not the case where a complaint seeks compensatory money damages arising from various injuries or different causes of action. Nothing in this Court's prior decisions, or in the section 580, suggests otherwise. On the contrary, in at least one decision, *National Diversified Services v. Bernstein* (1985)168 Cal.App.3d 410 (*National*), the Court of Appeal opted for the aggregate approach.

National alleged in its complaint that it had contracted with Ramsey Motor Co. to buy two Ferraris, and had paid for them in part by conveying a boat with a trade-in value of $22,000, but that Ramsey refused to deliver the cars. In the prayer, National sought specific performance, or, in the alternative, damages "in excess of $10,000."

The trial court entered a judgment of $56,779.89. *National*, 168 Cal.App.3d 410, 412. It included $45,000 in damages for failure to deliver the Ferraris, $6,179,89 for boat repairs, and $5,000 for loss of the use of the Ferraris. *Id.*, 418.

On appeal, the *National* court, citing this Court's decision in *Becker*,

held that the judgment as entered could not stand because the complaint failed to give defendants notice of its full extent. *National*, 168 Cal.App.3d 410, 417-19.

Specifically, the court found that no damages were alleged in the complaint representing two of the items included in the judgment: the $45,000 for failure to deliver the Ferraris and the $5,000 for loss of their use. *Id.*, 418.

The court did not, however, cut back the judgment all the way to the $10,000 stated in the prayer. Rather, it followed *Becker*, 27 Cal.3d 489, 494, again, in holding that the damage allegations in the complaint could augment the damages prayed for. In the body of the complaint it found (a) an allegation of damages of $22,500 as the value of the boat National conveyed to the defendants, and (b) an additional allegation of $10,000 in damages for the boat's "detention." 168 Cal.App.3d at 419.

Finally, the *National* court aggregated these items of damage which were not included in the trial court's default judgment to affirm a default judgment of $32,500. 168 Cal.App.3d 410, 419. The *National* opinion was cited favorably by this Court in *Greenup*, 42 Cal.3d 822, 829, and by the Court of Appeal in *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 866.

Cohen has argued for the "item by item" approach on the basis of the

the unsubstantiated assertion that he might have chosen to default knowing that Sass would be unable to prove her claims as to certain specific items in the complaint. (Answer to Petition for Review, p. 17). There is no justification, however, for holding such speculation worthy of due process protection.

In any case, as pointed out in the Opinion, the item-by-item approach would not in practice honor the plaintiff's speculation, but be measured by the results of the prove-up after default. It would then serve as a "one-way-ratchet" lowering the overall ceiling for the default judgment to the extent that individual items of damage are not proven up. Meanwhile, it would disadvantage plaintiffs who make their complaints more specific, a practice that should be encouraged, not penalized. (Opn., p. 18).

As this Court held in *Greenup*, it is the "ceiling" on "potential liability" under the complaint of which due process and section 580 requires notice, 42 Cal.3d at 833, and that means it is the aggregate liability to which defendant has a right to notice.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeal

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should be reversed, with directions to affirm the trial court's judgment.

Dated: July 19, 2019

Respectfully submitted,

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By _____
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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.204(c)(1), I certify that the OPENING BRIEF ON MERITS is proportionately spaced, has a typeface of 13 points or more, and contains 9131 words.

DATED: July 19, 2019

LAW OFFICES OF ROBERT S. GERSTEIN

By: _____
ROBERT S. GERSTEIN
Attorney for Respondent Deborah Sass

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 July 22, 2019, I served true and correct copies of the foregoing document described as **OPENING 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.

[ ] 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 22 day of July, 2019, at Los Angeles, California

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