Filed 6/27/17 Elite Destinations v. JD&T Enterprises CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ELITE DESTINATIONS, LTD., Plaintiff and Respondent, v. JD&T ENTERPRISES, INC. et al., Defendants and Appellants,	B269315 (Los Angeles County Super. Ct. No. BC506819)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed in part as modified, reversed in part, and remanded with directions.

Alan S. Yockelson for Defendants and Appellants.

Law Offices of Gary Kurtz, Gary Kurtz, for Plaintiff and Respondent.

Appellants JD&T Enterprises, Inc. (JD&T), Diane Sharp, Jeanette Nunez Bunn and Rick Nunez appeal from a default judgment for over $2.8 million in favor of respondent Elite Destinations, Ltd. (Elite). Appellants contend that the judgment is void because at the time it was entered Elite's charter had been revoked in its home state of Nevada, and because Elite was not qualified to do business in California. We disagree. The brief revocation of Elite's charter in Nevada is not a reason to void the judgment, and there is substantial evidence in the record that Elite operates in California through a fulfillment company qualified to do business in this state.

Appellants also argue that the damage award is not supported by substantial evidence, and that it exceeds the demand in the complaint as to Sharp, Bunn and Nunez. We conclude Elite failed to adequately allege or prove damages for fraud as to any appellant, but did establish a prima facie case for breach of contract damages as to JD&T, at an amount exceeding that requested and awarded. Sharp, Bunn and Nunez, however, may not be held jointly and severally liable for those damages.

We order the judgment modified to delete the $200,000 damage award characterized in the judgment as damages for fraud and remand for recalculation of interest on the judgment accordingly. As modified, the judgment is affirmed as to JD&T. As to Sharp, Bunn and Nunez, the judgment is reversed. On remand, a new judgment should be prepared to reflect this outcome.

FACTUAL AND PROCEDURAL SUMMARY

Elite brought this action for unfair business practices, breach of contract, breach of the covenant of good faith and fair

dealing, and fraud in April 2013. JD&T is a named defendant in all counts; the unfair business practices and fraud counts are directed against Sharp, Bunn and Nunez as well.[1]

The complaint alleges that Elite is "a membership travel company that markets discount travel services to the public, contracts with members for access to discount travel services, and contracts with fulfillment companies to provide the access to discount travel services." Despite the allegation that Elite contracts out fulfillment services to other companies, the complaint was drafted to state that Elite "exists and operates" in Nevada and California, and that it "performs intrastate travel fulfillment services from 21781 Ventura Boulevard, Suite 231, Woodland Hills, California 91364." According to the complaint, JD&T is a California corporation operating from San Diego as "a fulfillment company that provides the access to discount travel services to members obtained by membership companies" such as Elite; Sharp, Bunn and Nunez are family members, and shareholders, directors "and/or" officers of JD&T.

The complaint alleges that, in July 2010, BQ Associates, Inc., a company affiliated with Elite, entered into a fulfillment contract with JD&T and assigned that contract to Elite. A large number of Elite's clients cancelled their membership because JD&T stopped granting access to its website and failed to provide promised discounts and fulfillment services. After Elite terminated the fulfillment contract in April 2012, JD&T allegedly continued to use Elite's name, misleading Elite's clients into renewing their membership with JD&T. The complaint also

---

[1] Two other defendants have been dismissed from this action.

alleges Elite "sought out another fulfillment company" but does not mention that company by name or location and instead claims JD&T competes with Elite "with respect to the travel fulfillment services" Elite "performs from its Woodland Hills, California location."

Before the fulfillment contract was terminated, the parties entered into negotiations for the sale of a majority interest in JD&T to Elite. In February 2011, Elite memorialized the negotiations in a letter of intent and an addendum, neither of which was signed by any appellant. Nevertheless, the complaint alleges that the parties entered into a sale agreement. In reliance on its terms, Elite allegedly gave appellants a check for $200,000 (which appellants did not deposit), and spent over $20,000 and "200 professional hours" in due diligence efforts and accounting services to determine a sale price based on financial information provided by appellants. Appellants allegedly provided incomplete, inaccurate and misleading information, and eventually refused to go forward with the sale.

On the cause of action for unfair business practices, Elite purported to seek restitution for all payments of annual dues appellants had collected from diverted members since the termination of the fulfillment contract, as well as an injunction prohibiting their use of Elite's name. For breach of the fulfillment contract, Elite sought no less than $425,228 for its share of membership renewal fees over a 5-year period and for the annual membership fees of 500 diverted members, plus $501,600 for "loss of revenue caused by cancellations of sales (new Members)," based on an initial review of 132 such cancellations. For breach of the covenant of good faith and fair dealing on the same contract, Elite sought over $1 million in

damages, based on membership fees and its share in fulfillment and renewal fees. With regard to the alleged sale agreement, Elite sought specific performance and $2.5 million in damages for breach of the covenant of good faith and fair dealing, as well as $200,000 for fraud, based on its "good faith deposit," and additional unspecified damages, exceeding the court's jurisdictional minimum.

Appellants initially were served by substituted service, and the trial court granted their motion to quash service of the summons. They then were personally served, but failed to answer the complaint, and defaults were entered against them.

In July 2014, the trial court denied Elite's request for a default judgment, finding its prove-up papers to be deficient. Specifically, the court noted that the declaration of Ari Daniels, who claimed to be a "representative" of Elite, did not disclose that "he was personally involved in or has personal knowledge of any transaction." The court found the evidence was insufficient to support Elite's request for $1,021,538.49 in damages for breach of the fulfillment contract. With regard to the alleged sale agreement, the court found Elite had failed to prove it was entitled to any relief for breach of contract, specific performance or fraud because the unsigned documents attached to the complaint did not give rise to an enforceable contract. The court also denied Elite's request for injunctive relief, punitive damages, and attorney fees.

Appellants then moved to set aside the defaults and quash service. One of their arguments was that as a self-admitted foreign company doing "intrastate business" from an office in Woodland Hills, California, Elite could not maintain this action

without obtaining a certificate of registration to transact such business. (Corp. Code, § 17708.07, subd. (a).)

In opposition, Elite's attorney, Gary Kurtz, submitted a declaration admitting he had drafted both the complaint and Daniels's declaration for the prove-up. Kurtz explained that his use of the word "intrastate" was a typographical error because he had intended to use the word "interstate" when he drafted the complaint. He then unwittingly copied the error into Daniels's declaration when borrowing language from the complaint.

Kurtz made several other disjointed averments, which, taken together, indicate that Elite does business in California through a company called IDS, Inc., located in a building in Woodland Hills, where Kurtz's law office also was located. Kurtz clarified one of the incomplete allegations in the complaint by stating that after JD&T breached the fulfillment contract, Elite "associated with IDS, Inc., with a California location, for the fulfillment services. IDS, Inc. is a Nevada Corporation, qualified to do business in California and is identified as Entity No. C3691425. [Elite] . . . has contracted with IDS for fulfillment services" to Elite's members, most of whom reside outside California.

The court overruled appellants' objections to Kurtz's declaration and accepted Kurtz's explanation that the use of the word "intrastate" in the complaint was in error.[2] It denied appellants' motions to set aside the defaults and quash service.

---

[2] Appellants' writ petition, which challenged that ruling, was denied in case No. B261969. Both sides reference the record in that case, and on our own motion, we augment the record in this case to include it.

After a significant delay and imposition of sanctions by the court, Elite filed new prove-up papers in August 2015, and in September the court entered a default judgment without holding a hearing.

In its request for entry of default judgment, Elite represented that the demand in its complaint came to $2,126,828.[3] In its default memorandum, Elite made only two claims for damages: for breach of the fulfillment contract, and for fraud during the negotiation of the sale agreement. The principal support for these claims was in Daniels' amended declaration. Daniels stated that he "was employed by each company involved in the various dealings with [appellants]" and that he "personally negotiated the fulfillment deal . . . , supervised the process of selling memberships, and negotiated the agreement to purchase JD&T. . . ."

According to Daniels, the fulfillment contract was in effect from July 2010 to April 2012, and Elite "obtained no less than 1321 new members," each of whom paid "a minimum of $199 in annual dues for at least two years." Under the fulfillment contract, the second year (or renewal) dues were to be collected by JD&T, which was required to remit $76 of each member's renewal dues to Elite. The total damages for Elite's share of

---

[3] The complaint did not include a total damage amount in the prayer for relief. The number on the request for default judgment appears to be a sum of the following four amounts: $425,228, $501,600, $1,000,000, and $200,000. In the complaint, the first two amounts were listed as damages for breach of the fulfillment contract, the third was listed under breach of the covenant of good faith and fair dealing as to the same contract, and the fourth was listed in the cause of action for fraud based on the separate sale agreement.

renewal dues (for 1321 members at $76) came to $100,396. Richard B. Folk, an expert on vacation club memberships, opined in a separate declaration that the attrition rate for such clubs fluctuates between 1 and 4 percent, but should not exceed 2 percent in a "non-aggressive social environment."

Daniels also stated that approximately 617 new members cancelled quickly because "they were given no service at all" by JD&T, and Elite "was forced to return" their first year dues and initial membership payments, which varied based on the plans they had bought. Attached to Daniels' declaration was a spreadsheet listing the names of inactive members, along with the amounts of their membership payments (ranging from several hundred to several thousand dollars) and annual dues of $199. Altogether, the listed amounts added up to $2,463,009.87. According to Daniels, that number represented the total amount of refunds due to cancellations. Also attached were a representative membership contract package,[4] and sample initial contract pages and proof of payments at various dates during 2010 and 2011, made mostly by credit card by some of the members whose names appeared on the spreadsheet. Daniels offered to provide additional contracts if the court requested more information.

As to the claim for fraud damages, Daniels stated he negotiated the sale agreement with Bunn and Nunez, "as well as others," and they all represented that JD&T and its related

---

[4] Documents in this package indicate the membership was valid for one year, but could be renewed annually. Members were allowed to rescind within three days for a refund, less a restocking fee of 2.8 percent and a processing fee of $350.

companies maintained accurate financial records and had no outstanding judgments. Daniels claimed Elite expended $120,200 "in time and funds . . . to do good faith due diligence for the anticipated purchase" in reliance on these representations, which turned out to be false. The breakdown of claimed damages consisted of $13,000 of unidentified costs, $7,200 in professional services, and $100,000 in professional time. No explanation for any of these expenses was offered in the second prove-up; in the first prove-up, Daniels had claimed that he valued his own time at "$500 per hour."

Despite the higher amounts of damages claimed in Daniels' declaration, the court limited Elite to the lower amount in its default judgment request, entering a default judgment for $2,126,828, plus interest and costs for a total of $2,845,067.58.[5] The damage award was against all appellants jointly and severally, and $200,000 of it was characterized as "damages for fraud."

In October 2015, appellants applied for a stay based on proof that Elite's status in Nevada had been revoked in February 2015, its business license in that state had expired, and there was no certificate of its qualification to do business in California. The application was granted. It was followed by a motion to set aside the default judgment, based on Elite's revoked status in Nevada, and its failure to register in California. Appellants also argued that the court's acceptance of Kurtz's representation of a

[5] The judgment signed by the court lists the base amount of damages as $2,216,828. We assume that is a typographical error, and the amount actually awarded is $2,126,828 since the total awarded amount of $2,845,067.58 is consistent with the amount requested by Elite.

typographical error effectively amended the complaint post-default and rendered the default judgment void. In opposition, Elite filed proof that it had reinstated its business license and status in Nevada, as well as a printout from the Nevada Office of the Secretary of State showing that IDS, Inc.'s reported address in California matched the Woodland Hills address listed in the complaint. In reply, appellants raised a new argument—that the damages awarded as to Sharp, Bunn and Nunez exceeded the amount sought in the complaint.

The court denied the motion to set aside the default judgment, finding that the reinstatement of Elite's status in Nevada retroactively validated the judgment. The court also rejected appellants' claims that there had been a substantive amendment of the complaint, and that damages exceeded the amount requested, noting broadly that the complaint stated "maximum damages of $2.5 million."

This appeal followed.

DISCUSSION

I

Appellants' principal arguments are directed at trying to void the judgment on the ground that Elite lacks capacity to maintain this action, for two reasons. First, it does not qualify to do intrastate business in California. Second, its charter in Nevada had been revoked at the time the judgment was entered. Neither argument is persuasive.

Broadly speaking, capacity to sue is "the right to come into court." (*Color–Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1604.) Its lack "is merely a legal disability . . . that can be cured during the pendency of the litigation." (*Washington Mutual Bank*

v. Blechman (2007) 157 Cal.App.4th 662, 669.) Thus, lack of capacity to sue is not a jurisdictional matter. (*Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 371.) Rather, it gives rise to a plea in abatement that may be waived by the defendant if not raised at the earliest opportunity. (*Color-Vue, Inc.* at p. 1604; see also *Washington Mutual Bank* at pp. 669–670.) The defendant bears the burden of proving the plaintiff lacks capacity to sue, and if it meets that burden, the matter ordinarily is stayed to permit cure by the plaintiff. (*United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1740.) The point is not to penalize the plaintiff but to encourage cure. (*Id.* at p. 1741.) The matter may be dismissed only if the plaintiff fails or refuses to cure where cure is required. (See *Gar-Lo, Inc. v. Prudential Sav. & Loan Assn.* (1974) 41 Cal.App.3d 242, 244.)

With these broad considerations in mind, we examine the arguments presented.

A. Lack of Registration to Transact Intrastate Business

Appellants rely on California Revised Uniform Limited Liability Company Act section 17708.07, subdivision (a), which provides: "A foreign limited liability company transacting intrastate business in this state shall not maintain an action or proceeding in this state unless it has a certificate of registration to transact intrastate business in this state." (Corp. Code, § 17708.07, subd. (a).)[6] Transacting intrastate business means

[6] The revised statute "applies only to the acts or transactions by a limited liability company . . . occurring . . . on or after January 1, 2014" (Corp. Code, § 17713.04, subd. (b)), but prior law is substantially similar. (See *id.*, former § 17456, subd. (a).) A narrower prohibition exists against foreign corporations that transact intrastate business without a certificate—they are not permitted to "maintain any action or proceeding upon any

entering "into repeated and successive transactions of business in this state, other than in interstate or foreign commerce." (*Id*., § 17708.03, subd. (a); see also *id*., § 191, subd. (a) [same definition for foreign corporations].) Statutory exceptions to this definition provide that a foreign limited liability company does not transact intrastate business if it sells through independent contractors, if its agents and employees solicit orders that require acceptance outside California, if its subsidiary transacts intrastate business, or if it is a shareholder of a domestic or foreign corporation. (*Id*., § 17708.03, subds. (b)(5)&(6); (c)(1)&(2).) Other exceptions provide that maintaining an action in this state by itself does not constitute intrastate business; nor does holding meetings of the company's members or managers, or transacting business in interstate commerce. (*Id*., subd. (b)(1), (2) & (10).)

Appellants cite to the allegation in the complaint, which was copied into Daniels' declaration, that Elite "performs intrastate travel fulfillment services from 21781 Ventura Boulevard, Suite 231, Woodland Hills, California 91364." They argue that the court abused its discretion in accepting Kurtz's representation that the use of the word "intrastate" in that allegation was a typographical error, and that the court ignored conflicting evidence. We disagree. The court expressly said that it accepted Kurtz's representation after reading the complaint, Daniels' declaration and Kurtz's own declaration. The conflicting "evidence" appellants point to was in the documents the court considered. It follows that the court resolved the factual conflicts in the papers before it in favor of Elite.

---

intrastate business so transacted in any court of this state" until they comply with the registration requirement. (*Id*., § 2203.)

The resolution of factual disputes is the province of the trial court, and on appeal we review its factual determinations for substantial evidence, drawing all reasonable inferences in favor of the judgment. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630–631; see also *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828.) While an unequivocal factual concession in a complaint sometimes results in a binding and conclusive judicial admission that may not be contradicted by other evidence (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48), that is not the case here. A factual allegation in an unverified complaint, such as the one in this case, may constitute a binding judicial admission that disposes of an issue if the plaintiff "sought to obtain some advantage" from it, or if there is no benign explanation for it. (See *Womack v. Lovell* (2015) 237 Cal.App.4th 772, 787.) The term "intrastate" is a legal term of art, rather than a factual statement. Appellants do not point to any advantage Elite could have sought to obtain by alleging it did intrastate business in California when it was not qualified to do so, and poor drafting is a plausible explanation, especially in light of other internally contradictory and incomplete allegations in the complaint.

Kurtz's declaration makes it clear that Elite performs fulfillment services in California through a company named IDS, Inc., located at the Woodland Hills address listed in the complaint, and qualified to do business in this state. Paragraphs 9 and 11 of the complaint state that Elite "contracts with fulfillment companies" to provide travel services and that it "sought out" another fulfillment company after JD&T breached its fulfillment contract. The allegations in those paragraphs, when read together, support an inference that Elite performs

fulfillment services from the Woodland Hills address through another company. (See *Buena Vista Mines, Inc. v. Industrial Indemnity Co.* (2001) 87 Cal.App.4th 482, 488 [complaint must be read as a whole].)

Elite does not transact intrastate business in California if, as claimed, it sells services through an independent contractor located in this state. (See Corp. Code, § 17708.03, subd. (b)(5).) Elite's attempt to acquire an interest in JD&T makes no difference because as a foreign shareholder of a domestic company it would not have transacted intrastate business either. (See *id.*, subd. (c)(1).) Kurtz's "understanding" that "at the time relevant to this lawsuit" Elite did "[m]ost, if not all" of its marketing outside of California does not establish one way or another whether Elite marketed in California at all; whether it did so directly, or through another company, such as BQ Associates, Inc.; or whether it continues to do so. None of the evidence establishes as a matter of law that Elite conducts intrastate business in California, and since appellants bear the burden of proof on the issue, it was properly resolved against them.

Appellants recharacterize the court's acceptance of Kurtz's representation that "intrastate" should read "interstate" as a de facto amendment of the complaint, which relieved them of the default. The case on which they rely, *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, has been criticized for unnecessarily using the phrase "a de facto amendment of the complaint" to describe the trial court's error in allowing new evidence of causation at a default judgment prove-up hearing. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1744.) Here, the complaint was not amended, but even were we to assume for the sake of

argument that a de facto amendment occurred, to be material the amendment must permit the plaintiff "to prove matters not in issue when the default was taken, which 'would materially affect the defendant's decision not to contest the action . . . .' [Citation.]" (*Ostling v. Loring*, *supra*, 27 Cal.App.4th at p. 1744 [amendment material if it increases demand for damages or changes theory of liability].) In other words, a material amendment typically results in "greater or different liability than was presented by the complaint on file." (See *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1595.) On the other hand, an amendment "of form, or one that is immaterial as far as the defaulting defendant is concerned" does not open up the default. (*Weakly-Hoyt v. Foster* (2014) 230 Cal.App.4th 928, 934, fn. 2.)

As we have discussed, substantial evidence in the record supports the conclusion that Elite does not directly engage in intrastate business in California, which means that the typographical error in the complaint was not substantive. But to the extent the complaint created the impression that Elite lacked capacity to sue, the defense was apparent on its face, and should have been raised by demurrer. (*V & P Trading Co., Inc. v. United Charter, LLC* (2012) 212 Cal.App.4th 126, 134.) Taking away an apparent defense that normally would be waived by delay, on a procedural disability that a plaintiff could cure if required to do so, could not have affected appellants' decision not to contest the action; nor could the absence of that defense expose appellants to any greater or different liability than that to which they already were exposed. The court's treatment of the use of the term "intrastate" as a typographical error did not result in a de facto material amendment of the complaint that opened the default.

B. Charter Revocation in Nevada

When a Nevada limited liability company fails to comply with certain filing requirements, its charter "is revoked and its right to transact business is forfeited." (Nev. Rev. Stat. Ann., § 86.274(2).) Appellants rely on Elite's revoked charter in Nevada at the time the default judgment was entered to argue that the judgment is void. Elite points out that, under Nevada law, a reinstatement of the company's status "relates back to the date on which the company forfeited its right to transact business . . . and reinstates the company's right to transact business as if such right had at all times remained in full force and effect." (*Id.*, § 86.276(5).) Nevertheless, appellants argue that a foreign company should not be allowed to maintain legal action in California during the time when it had no "right to transact business." (See *id.*, § 86.274(2).)

As we have explained, maintaining a legal action, by itself, is not considered transacting business in California. (Corp. Code, § 17708.03, subd. (b)(1).) More importantly, there is no authority that California law determines a revoked foreign company's legal rights during the period of its disability in its home state. To the contrary, whether a Nevada company has the right to sue is determined under Nevada law. (*Lewis v. LeBaron* (1967) 254 Cal.App.2d 270, 279; see also *CM Record Corp. v. MCA Records, Inc.* (1985) 168 Cal.App.3d 965, 967 ["California law recognizes that the continuing legal existence of a corporation depends on the law of the state of incorporation"].)

The Nevada Supreme Court has held that revocation of a company's charter "suspends the entity's right to transact business, not its ability to prosecute an ongoing suit. . . . [M]oreover, reinstatement retroactively restores the entity's right

to transact business; it is 'as if such right had at all times remained in full force and effect.'" (*AA Primo Builders, LLC v. Washington* (2010) 126 Nev. 578, 580, citing Nev. Rev. Stat. Ann., §§ 86.274(5), 86.505, 86.276(5).) Thus, under Nevada law, Elite never lost its right to maintain this action.[7]

In sum, the judgment is not void for lack of capacity to sue.

II

Appellants also challenge the damage award for insufficient evidence and lack of notice to the individual appellants. Some of their challenges have merit. In addition, the parties filed supplemental briefs on several legal issues we raised on our own motion: whether the complaint states a valid cause of action for fraud as to all appellants and a valid claim for joint and several liability for breach of contract damages as to the individual appellants, whether fraud damages were proven with sufficient particularity, and whether a reversal of the fraud damages would reduce the judgment as to JD&T.

Initially, we disagree with Elite that issues regarding the legal sufficiency of the complaint are necessarily forfeited in the case of a default. That is because a default is a permissible tactical move by a defendant, and "[t]here is no penalty for defaulting." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 281–282 (*Kim*).) A default admits only the well-pleaded allegations in a complaint, ""but not contentions,

---

[7] What California law requires in similar situations is beside the point. Nevertheless, as we have explained, temporary incapacity due to a forfeiture or suspension of corporate status is not a jurisdictional defect under California law and does not render a judgment void. (See *Traub Co. v. Coffee Break Service, Inc.*, *supra*, 66 Cal.2d at p. 371; *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 373.)

deductions or conclusions of fact or law."'"'" (*Id.* at p. 281, citations omitted.) Hence, a default judgment cannot stand if the allegations fail to state a cause of action against a defaulting defendant. (*Id.* at p. 282.)

At a prove-up hearing to seek entry of a default judgment, a plaintiff need not introduce evidence to support the allegations of liability, but must submit sufficient evidence to establish a prima facie case of entitlement to the damages demanded in the complaint. (*Kim, supra,* 201 Cal.App.4th at pp. 281, 288; *Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 363.) If the trial court allows the showing of damages to be made by affidavit, the facts stated must be "set forth with particularity." (Code Civ. Proc., § 585, subd. (d); *Kim*, at p. 287.)

The damages awarded in a default judgment may not exceed the amount demanded in the complaint. (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493–494; see Code Civ. Proc., § 580 ["The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint"].) The purpose of this requirement is to ensure "fundamental fairness" by giving defaulting defendants notice of the judgments that can be taken against them. (*Becker*, at p. 494.)

On appeal from a default judgment, we may interfere with an award of damages where the complaint fails to state a cause of action, the damage award exceeds the demand in the complaint, the complaint has failed to state a clear demand, or the award is so lacking in evidentiary support "that it shocks the conscience of the appellate court." (*Uva v. Evans* (1978) 83 Cal.App.3d 356, 363–364; see also *Kim*, *supra*, 201 Cal.App.4th at pp. 288–289 & fn. 11.) We review the damage award within this general framework.

A. Breach of the Fulfillment Contract

Under the substantial evidence test, the trial court's implied findings are conclusive "'"[s]o far as it has passed on the weight of evidence or the credibility of witnesses . . . . When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed." [Citations.]' [Citation.]" (*Giorgio v. Synergy Management Group, LLC* (2014) 231 Cal.App.4th 241, 247.)

Appellants argue that Daniels' declaration in support of the second prove-up is no different than the declaration submitted in support of the first prove-up and that he lacks personal knowledge. That is incorrect. During the first prove-up, Daniels stated only that he was a "representative" of Elite with legal training, and conclusorily claimed he had personal knowledge of the facts included in his declaration. In contrast, the amended declaration states that Daniels "was employed by each company involved in the various dealings" with appellants, negotiated both the fulfillment contract and sale agreement, and "supervised the process of selling memberships." His claim of personal knowledge regarding the signing of new members and the parties' relationship under the fulfillment contract cannot be said to be entirely conclusory.

Appellants claim Daniels' statement that there were "no less than 1321 new members" during the relevant period, for each of whom JD&T was required to remit $76 to Elite, fails for lack of specificity. We disagree. Unlike the phrases "less than" or "fewer

than," which would signal an unidentified number lower than the one specified, the phrases "no less than" or "no fewer than" signal a specific minimum number that is ascertained, and above which Elite does not seek damages.

Appellants also take issue with the proof of the existence of such members. Besides Daniels' declaration to that effect, the supporting contracts and proofs of payment show that dozens of new members were signed up in between 2010 and 2011. Moreover, Daniels offered to provide additional contracts upon request by the court. Since the court did not request additional information, we presume that it credited his claim about the number of new members on its face. We may not second guess the court's credibility determination on a claim that is not "inherently improbable." (See *Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1234.)

The evidence is less clear on the question of renewal of memberships. Daniels represented that members paid dues "for at least two years," with dues for the second year collected by appellants under the fulfillment agreement. However, the sample contract attached to Daniels' declaration shows membership is for one year with an option for renewal, and the fulfillment contract charges JD&T with "diligently" seeking renewals.

Folk, Elite's expert, provided a declaration that the normal attrition rate for vacation club memberships in a "non-aggressive" environment should not be over 2 percent. Appellants challenge Folk's estimate on the ground that it is not based on numbers specific to Elite. That challenge misses the point. The complaint alleged that Elite lost members at a higher rate than normal due to JD&T's breach of the fulfillment

contract, and that JD&T diverted to itself the fees it collected from renewing members. By defaulting, appellants admitted these allegations. (*Kim*, *supra*, 201 Cal.App.4th at p. 281.) Thus, the actual attrition rate for Elite's members during and after the contract period is irrelevant since it was allegedly affected by JD&T's breach and unfair competition.

Appellants do not address the overestimation of damages for renewal fees claimed in Daniels' declaration based on a retention rate of 100 percent, despite Folk's opinion about the industry's 2 percent attrition rate. However, the overestimation amounts to less than $2,000, and the error appears to be harmless because Elite's proven breach of contract damages substantially exceeded those requested and awarded.

The bulk of the damage award was based on the claimed cancellation by some 617 new members. According to Daniels, this massive cancellation required the refund of $2,463,009.87 in membership fees and first year dues. Appellants point to the discrepancy between Daniels' declaration and the attached spreadsheet, which lists "inactive members," but does not otherwise indicate these are members who cancelled their credit card payments or received refunds due to JD&T's breach of the fulfillment contract. The sample contract pages and proofs of payment match some of the names on the spreadsheet, and thus tend to corroborate Daniels' claim that the inactive members had joined in 2010 and 2011. But there is no clear documentary evidence supporting Daniels' claim that the inactive members on the spreadsheet all cancelled their credit card payments or received refunds. Nevertheless, our task on appeal is not to reweigh the evidence, or to redetermine its credibility. Elite's terminology in the spreadsheet may create a conflict in the

evidence, but it does not render Daniels' claim that the spreadsheet reflects actual cancellations occasioned by JD&T's breach inherently improbable.

We, therefore, must reject appellants' challenge to the sufficiency of the evidence of damages for breach of the fulfillment contract.

B. Fraud

The award of fraud damages with regard to the negotiation of the separate sale agreement is a different matter. We agree with appellants that Daniels' declaration is insufficient to make a prima facie case for these damages. The declaration states only that Elite expended $120,200, consisting of $13,000 in unidentified costs, $7,200 in professional (presumably accounting) services, and $100,000 in professional time. There is no explanation of how these amounts were arrived at and no supporting documentation for any of them. (See *Kim*, *supra*, 201 Cal.App.4th at p. 288 [unsupported conclusory demand for damages insufficient].)

Other parts of the record raise additional concerns about the propriety of the fraud damages. The first prove-up suggests that the $100,000 in professional time resulted from multiplying 200 hours by $500 an hour, the rate at which Daniels valued his time. But it is unclear that his own valuation is relevant and that damages for the value of his time should accrue to Elite's benefit. Daniels does not state in what capacity he was employed by Elite, and at what rate he was paid for his services, if he was paid at all. While Daniels' declaration suggests he has legal training, Elite's counsel conceded at oral argument that Daniels is not a licensed attorney. If he were, a reasonable hourly rate for an attorney is derived from the "'"reasonable market value of

the attorney's services,"'" not from his own valuation. (*Center For Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 619 (citations omitted).) Elite cites no evidence or authority that Daniels' valuation of his own time is relevant to, let alone determinative of, Elite's fraud damages.

The fraud damages are improper for another reason as well. In rejecting the first prove-up, the trial court ruled that Elite was not entitled to relief for fraud. Nevertheless, Elite proceeded to request "reliance" damages, with Daniels claiming that Elite expended time and incurred due diligence costs in reliance on appellants' oral misrepresentations during negotiations about the state of their companies' credit and financial records. The claim that appellants' misrepresentations caused Elite's damages fails as a matter of law.

"A plaintiff asserting fraud by misrepresentation is obliged to . . . '"establish a complete causal relationship" between the alleged misrepresentations and the harm claimed to have resulted therefrom. [Citations.]'" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.) "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused the plaintiff to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062.)

According to the letter of intent that memorialized the preliminary negotiations, Elite was to engage in due diligence after appellants provided their financial records, and it could conduct an audit at its own expense after requesting and reviewing additional information. The terms of the letter of

intent, upon which Elite allegedly relied, do not envision that it would incur substantial expenses until after it received financial documentation from appellants. Elite's claim that such expenses were incurred in reasonable reliance on oral representations made during preliminary negotiations is not borne out by its own exhibits to the complaint. (See *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83 [when exhibits attached to complaint conflict with its allegations, contents of exhibits prevail].) Moreover, the request for specific performance in the complaint and the first prove-up indicated that appellants' alleged misrepresentations had not affected Elite's desire to acquire an interest in JD&T. If Elite was still willing to buy into JD&T despite appellants' misrepresentations, then it cannot be said that it suffered damages in reliance on them. Rather, it appears that the deal fell through because, at some point, JD&T refused to go forward with it.

Either because the fraud claim fails as a matter of law or because Elite has not made a prima facie case for fraud damages, the fraud damage award must be reversed. We asked the parties whether the base damage award should be reduced by the $200,000 that the judgment characterizes as "damages for fraud." The parties agree that if Elite failed to prove its fraud damages, the judgment should be so reduced.[8] We order the judgment modified to delete the $200,000 fraud damage award. Interest should be recalculated on the reduced base damage award of

---

[8] Elite's second prove-up requested only $120,200 in fraud damages. In its supplemental brief, Elite attempts to increase that amount by adding interest to it, but in the judgment interest was awarded separately from the base damage award, which included the damages for fraud.

$1,926,828.

C. Joint and Several Liability

Appellants argue that the complaint does not give notice that Sharp, Bunn and Nunez may be jointly and severally liable for over $2 million in breach of contract damages. We agree.

A defendant must be notified of the specific amount of damages sought either by the prayer or by allegations in the body of the complaint. (*National Diversified Services, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 418.) Here, the prayer in the complaint requested damages according to proof, which by itself is insufficient to give notice. (See *Becker v. S.P.V. Construction Co.*, *supra*, 27 Cal.3d at p. 494.) Only the unfair business practices and fraud claims were directed at the individual appellants. Of those, the unfair business practices claim did not state what specific amount of restitution was sought. By analogy to actions for accounting, Elite argues that no specific amount is required when a defendant has the necessary financial information to calculate the amount of damages. But the holdings of the cases it cites are limited by the specific nature of an action for accounting. (See *Warren v. Warren* (2015) 240 Cal.App.4th 373, 377; *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157, 1163-1164.) The complaint in this case does not include such an action.

Elite attempts to find notice of liability for restitution in various numerical allegations in the breach of contract and breach of fiduciary duty claims. However, to the extent the restitution claim sought disgorgement based on appellants' alleged unfair practices of diverting members from Elite *after* the termination of the fulfillment contract, it did not overlap with the

contract-based claims and required separate proof of the number of members appellants had lured away from Elite.

Nor does the complaint give notice that the amount of restitution for diverting members may exceed $2.5 million because nothing indicates that the formula for calculating unremitted renewal fees over five years in paragraph 26.1 of the complaint is equally applicable to calculating restitution for the diversion of members in the same period under paragraph 26.2. Paragraph 26.2 gives no notice that damages will be sought over a five-year period. Rather, it alleges "damages in the amount of no less than $149,500," and that specific amount is used in the following paragraph 27 to arrive at a total sum of damages under both paragraphs 26.1 and 26.2. A defaulting defendant "should not be subject to damages in excess of an amount specifically set out in the complaint." (*Becker v. S.P.V. Construction Co.*, *supra*, 27 Cal.3d at p. 494.) Nor may the plaintiff use every number in its complaint to arbitrarily raise the amount of its demand for damages on appeal. (See *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 866.)

Additionally, not every allegation of fact that includes numbers demonstrates damages. (*Heidary v. Yadollahi*, *supra*, 99 Cal.App.4th at p. 866.) For instance, Elite points to the allegation of $200,000 in fraud damages, but as appellants note, $200,000 was the amount of Elite's good faith payment by check that appellants allegedly "did not negotiate," i.e., that was never deposited. Such an allegation does not show harm to Elite and therefore "demonstrates no damages." (Cf. *ibid.* [allegation of moving funds between business accounts for the benefit of jointly owned businesses shows no misappropriation and therefore no damages].)

The damage award against Sharp, Bunn and Nunez fails for another reason as well. In the second prove-up, Elite did not seek restitution for diversion of members after the termination of the fulfillment contract. Rather, it sought and obtained damages for breach of contract (besides the fraud damage award that we reverse). Yet Elite fails to show that the individual appellants could be subject to joint and several liability for breach of contract damages as a matter of law.

Elite points to paragraph 8 of the complaint, which pleads in overbroad and conclusory terms: "At the time of the wrongful acts described in this complaint, the named defendants . . . participated in some or all acts herein alleged, whether as principal, agent, alter ego, employer, employee, successor or representative of some or all of the other defendants, acting within the course and scope of said agency and employment." This is not a well-pleaded factual allegation that would be deemed admitted by the default. (*Kim*, *supra*, 201 Cal.App.4th at p. 281.) It begs the question which of the many legal relationships listed in this paragraph impose liability on Sharp, Bunn and Nunez.

In its prove-up papers, Elite referenced the fact that the individual defendants are family members who own and control JD&T. Assuming that was an attempt to establish alter ego liability, neither the complaint, nor the evidence at the prove-up, sufficiently establish a need to "pierce the corporate veil." In *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, the appellate court reversed a default judgment based on a "bare conclusory allegation that the individual and separate character of the corporation had ceased and that [the corporation] was the alter ego of the individual defendants." (*Id.* at p. 749.) The court

noted that to establish such liability, the complaint had to plead "such a unity of interest and ownership that the separate personalities of the corporation and the individuals do not exist, and that an inequity will result if the corporate entity is treated as the sole actor. [Citations.]" (*Ibid.*; see also *Meadows v. Emett & Chandler* (1950) 99 Cal.App.2d 496, 499 ["Mere ownership of all the stock and control and management of a corporation by one or two individuals is not of itself sufficient to cause the courts to disregard the corporate entity"].)

Nor may Sharp, Bunn and Nunez be held liable for breach of contract damages based on a contract one of them signed in a representative capacity, and two others did not sign at all. It is axiomatic that an agent is not liable for the breach of a contract signed on behalf of a disclosed principal, as is the case here. (See *McDevitt v. Chas. Corriea & Bros.* (1924) 70 Cal.App. 245, 250 ["a principal and his agent are not jointly liable upon any contract made by the agent for the principal"].)

In sum, the complaint did not fairly alert Sharp, Bunn and Nunez that they may be personally liable for $2 million in damages. More importantly, the complaint does not state a valid claim for joint and several liability for breach of contract as to those individual appellants. Therefore, the default judgment must be reversed as to them.

DISPOSITION

The award of fraud damages is reversed as to all appellants, and the judgment is ordered modified to delete the $200,000 fraud damage award. As modified, the damage award is affirmed as to JD&T. As to Sharp, Bunn and Nunez, the judgment is reversed. We remand the matter for recalculation of

interest on the reduced base award of $1,926,828 and for preparation of a new judgment to reflect the outcome of this appeal.

The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.