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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NORTH AMERICA SEAFOOD,

Plaintiff and Appellant,

v.

NORTH AMERICAN SEAFOOD  
EXPORT et al.,

Defendants and Respondents.

B287378

(Los Angeles County  
Super. Ct. No. BC570293)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed.

Law Offices of Mark R. McKinniss, and Mark R. McKinniss  
for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

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Plaintiff North America Seafood (Plaintiff) challenges the denial of its request for entry of default judgment against numerous defendants. Plaintiff contends the trial court erred in failing to consider evidence showing the defendants caused it to suffer \$3.3 million in damages. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *Complaint*

Plaintiff is in the seafood business and appears to be owned and operated by Jose Flores.<sup>1</sup> According to its complaint, in November 2014, Plaintiff entered into a contract to sell Shorty's Seafood Corporation (Shorty's)—which is owned by Lufei Lee and Alex Ji—120 metric tons of live lobsters (Shorty's Agreement). The base price was \$60 per kilogram, which was subject to change according to Asian market movements. The contract forbid Shorty's from “trying to deal, negotiate or even try[ing] to retrieve information from anybody related to North America Seafood or Jose Flores[']s . . . business operation, related sales force . . . and any other third party providers . . . .” Around the same time, Flores made an oral agreement with Tony Torres to sell to his company, Crab International Corporation (Crab International), two metric tons of lobsters at a price of \$61.50 per kilogram (Crab International Agreement).

After making these agreements, Plaintiff entered into a limited partnership agreement (Partnership Agreement) with North American Seafood Export (NASE). NASE, which was

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<sup>1</sup> It is not clear what sort of entity Plaintiff is or its precise relationship to Flores. Plaintiff occasionally refers to itself as a corporation. However, in its opening brief on appeal, Plaintiff asserts Flores was “doing business as” North America Seafood, indicating North America Seafood is not a corporate entity separate from Flores.

owned by Kevin Bader, operated a seafood processing plant in San Diego. Under the agreement, Plaintiff would provide financing to NASE to purchase lobsters, which would then be sold and shipped to various buyers, including Shorty's and Crab International. Sixty percent of the profits from the sales would go to Plaintiff. Per the Partnership Agreement, Plaintiff provided NASE financing for an initial purchase of lobsters. Bader, however, used the money for other purposes.

In early December 2014, Torres went to NASE's processing plant accompanied by three men who identified themselves as FBI agents. Torres told Bader that Flores was a "scam artist," and convinced him to sell seafood directly to Crab International without Plaintiff's involvement. Lee subsequently told Flores that Torres represented Shorty's as well, which would also be dealing directly with Bader going forward.

Based on these allegations, Plaintiff asserted causes of action against NASE, Bader, Shorty's, Lee, Ji, Crab International, and Torres for breach of contract, breach of the covenant of good faith and fair dealing, unfair business practices, and tortious interference with a business contact. Plaintiff alleged the breach of the Shorty's Agreement resulted in \$1.2 million in damages, breach of the Partnership Agreement resulted in \$900,000 in damages, and breach of the Crab International Agreement resulted in damages "not less than the jurisdictional limit" of the court. Plaintiff further alleged the defendants' tortious interference with the Partnership Agreement caused it to suffer \$900,000 in damages.

*Trial and Judgments against Bader and NASE*

Default was entered as to all defendants except Bader. After a bench trial, the court entered judgment against Bader

and NASE for \$120,000, which it found to be the sum Plaintiff advanced to NASE under the Partnership Agreement. The court declined to award additional damages for lost profits, explaining that Plaintiff presented no reliable evidence to show what those profits would have been. The court also noted the Partnership Agreement was valid only for a trial period of November 19, 2014 to December 1, 2014, and there was no evidence the parties had agreed to an extension.

*Requests for Default Judgment*

Between January and March 2017, Plaintiff filed three requests to enter default judgment against Shorty's, Lee, Ji, Crab International, and Torres (together, Defaulted Defendants). The court denied each request on the basis that Plaintiff failed to submit sufficient proof of damages.

On September 7, 2017, Plaintiff filed its fourth request for entry of default judgment, which it called a "Motion for Prove-Up Hearing re: Defaulted Defendants." Plaintiff specifically requested a \$1.2 million judgment against Shorty's, Lee, and Ji, and a \$1.2 million judgment against Crab International and Torres.

In its supporting brief, Plaintiff explained how it calculated its damages: "The cost of the live lobsters was \$19.00 per lb or \$42.00 per kilogram, plus processing, packing and air shipping \$5.00 per kilogram, Total cost of \$47.00 per kilogram, prices of Lobsters in the Chinese market opened at \$61.50 but quickly increased up to \$71.00 and stayed at that level for the remainder of the season. The expected profit for the plaintiff was 60% of the total profit or \$10.00 per kilogram, so based on the amount contracted of 120 tons or 120,000 kilograms the total expectation damages to Plaintiff is \$1,200,000.00." Plaintiff did not cite any

evidence in support of these assertions.

Plaintiff also included in the brief two identical tables entitled “Lobsters Processing and Sales Projection, November 2014 to March 2015.” Each table had 32 rows, consisting of a shipment number, the quantity of lobsters that can be purchased for a specific amount of money, and the sales price for that quantity of lobsters. For example, the first row stated: “01 shipment, \$120,000 will allow to buy 3,000 kilos of lobsters, sale price \$ 195,000.” The tables were not supported by citations to evidence.

Underneath each table, Plaintiff wrote: “Any subsequent shipment will be the same amount of kilograms (16700). The plant has the maximum capacity of holding 10,000 kilos at any given time, normally two shipments could be processed per week, and a total of thirty two shipments could be processed through the season with a total of **490,000 kilograms or 490 tons** with a total sales value of **\$32,000,000** Fishermen gladly agreed to dedicate all their production to us, Freight forwarder company agreed to be paid once per month. Between Plaintiff North America Seafood and defendant NASE there were more than enough buyers to absorb the entire production. Based on the above figures Plaintiff’s profit would be **\$ 4,920,000.**” Plaintiff did not cite evidence in support of these assertions.

In addition to the brief, Plaintiff submitted a declaration from Zhang Cheng, who is the CEO of a company called Sunkfa International Trade, LTD (Sunkfa). According to Cheng, in late 2014, Sunkfa contracted with Plaintiff to purchase 120 tons of lobsters. Cheng said the market price of lobsters in China in late 2014 and early 2015 was between \$65 and \$71 per kilogram, meaning Sunkfa’s contract with Plaintiff was worth \$8,520,000.

Plaintiff also submitted a declaration from Flores, in which he attempted to authenticate text messages and emails “entered into evidence without objection in the trial of Kevin Bader.” Flores did not specifically identify the text messages or emails to which he was referring. Although not alleged in the complaint, Flores also contended that Plaintiff had a “verbal contract” with Torres to supply 1.2 tons of lobsters.

On the issue of damages, Flores stated: “The projected damages are extrapolated from tables provided by Kevin Bader in his business proposal to Hualong (Alex) Ji, dated January 11, 2015. I hereby swear and affirm that the said tables were provided as verified responses to discovery from Hualong (Alex) Ji and Lufei Lee, through their then-attorney, Joseph Balice of Ezra Brutzkus Gubner LLP. . . . North America Seafood and North American Seafood Export had a contract to supply lobster to the customers of both companies. Therefore, the projected damages claimed in this matter are extremely conservative; actual profits had defendants not breached their contracts would have been worth substantially more money.”

Plaintiff additionally submitted a declaration from its counsel, stating: “All documents appended as exhibits are true and correct copies of the exhibits used in the trial of Kevin Bader which took place on December 19, 2016. . . . All assertions made regarding the conduct of defendants are made based on the evidence contained in the exhibits appended hereto.”

The trial court denied Plaintiff’s request with prejudice, explaining: “[T]his is the fourth time Plaintiff has requested entry of default judgments against these defendants . . . . On this occasion, as in prior occasions, Plaintiff has failed to submit competent evidence in support of the claims. In seeking entry of

default judgment, the plaintiff must submit competent proof. . . . Plaintiff has had a more than reasonable opportunity to support the claims against these defendants.”

On November 8, 2017, at Plaintiff’s request, the court dismissed the Defaulted Defendants. Plaintiff timely appealed. None of the Defaulted Defendants filed respondent’s briefs.

### **DISCUSSION**

Plaintiff contends it submitted sufficient evidence showing it suffered \$3.3 million in damages, and the trial court erred in refusing to enter judgment against the Defaulted Defendants for that amount. We disagree.

Before turning to the substantive issues, we briefly discuss a few of the many deficiencies in Plaintiff’s submissions, both in the trial court and on appeal. Plaintiff’s September 7, 2017 brief in support of its request for default judgment is nearly incomprehensible, despite having purportedly been drafted by counsel. The brief has little discernable structure, numerous sections are repeated verbatim for no apparent reason, various contentions are made “on information and belief,” and some sentences are written in the first person. The brief also contains seemingly nonsensical assertions. On three occasions, for example, Plaintiff asserts that “Crab International Corporation and Torres breached the contract between Shorty’s and North America Seafood.” Plaintiff declined to explain how Crab International and Torres breached a contract to which they were not parties.

Plaintiff’s appellate briefing does not fare much better. Plaintiff asserts in its opening brief that it is entitled to judgment against the Defaulted Defendants for \$900,000, which Flores purportedly “affirmed in his affidavit” to be the lost profits under

the Partnership Agreement. Plaintiff, however, did not identify this amount in its September 7, 2017 request for default judgment. Moreover, we have reviewed Flores's declaration and find no mention of \$900,000, let alone affirmation that Plaintiff suffered such losses. In fact, after reviewing all the evidence in the record, we remain completely perplexed as to how Plaintiff arrived at the \$900,000 figure.

We also cannot tell whether the record on appeal accurately reflects the documents filed in the trial court. Plaintiff opted to proceed under California Rules of Court, rule 8.124(a), and submitted its own appendix instead of a clerk's transcript. Confusingly, the version of Plaintiff's September 7, 2017 request in the appendix does not include any exhibits; this, despite the fact that the supporting brief cited numerous exhibits, and counsel's declaration referred to "documents appended as exhibits." Near the end of the appendix, Plaintiff included six "Trial Exhibits," which seem to correspond to citations in the brief. It is not clear, however, that these documents were actually filed in support of Plaintiff's request. Nor were the documents specifically identified or authenticated in the supporting declarations. Adding to the confusion, the documents are prefaced by a "Table of Exhibits," which lists an additional six exhibits that do not appear in the appendix.

It is also evident that at least one of the "Trial Exhibits" included in the appendix was not actually introduced at trial. In its ruling after the bench trial, the court noted that the Partnership Agreement was valid only through December 2014, a fact Plaintiff admitted in its post-trial briefing.<sup>2</sup> The version of

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<sup>2</sup> Plaintiff insisted the December 2014 date was a typographical error that the parties subsequently corrected.



the contract in the appendix, however, states the agreement is valid until December 2015. Plaintiff offers no explanation for this discrepancy.

Even setting aside these deficiencies, we find the trial court properly denied Plaintiff's request for default judgment. "Once a default is entered against a defendant, the plaintiff ordinarily may apply to the court for a default judgment awarding the relief sought in the complaint. ([Code Civ. Proc.], § 585, subds. (b) & (c).) The court is required to hear the evidence offered by the plaintiff and render judgment in the plaintiff's favor 'as appears by the evidence to be just,' but not in excess of what is sought in the complaint. (*Ibid.*) To obtain the requested relief, the plaintiff need only make a prima facie showing because the defendant admits the material allegations of the complaint by defaulting. [Citation.]" (*Harbour Vista, LLC v. HSBC Mortgage Services Inc.* (2011) 201 Cal.App.4th 1496, 1513, fn. omitted; see *Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361; *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 287.) The plaintiff's evidence may be in the form of affidavits, but the "facts stated in the affidavit or affidavits shall be within the personal knowledge of the affiant and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto." (Code Civ. Proc., § 585, subd. (d).)

We may not interfere with the trial court's determination of damages unless the award, or lack thereof, is "totally unconscionable and without justification." (*Johnson v. Stanhiser, supra*, 72 Cal.App.4th at p. 361; accord *Uva v. Evans* (1978) 83 Cal.App.3d 356, 364.) Where, as here, "the issue on appeal turns on a failure of proof . . . , the question for a reviewing court

becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' ” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528; accord *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466.)

Even assuming all the “Trial Exhibits” were properly filed and authenticated in connection with the request for entry of default judgment, Plaintiff failed to submit sufficient evidence of its damages. Plaintiff essentially acted as a middleman between lobster fishermen on the one hand, and Shorty's and Crab International on the other. The proper measure of damages under such circumstances is the net profits Plaintiff would have earned, but for the Defaulted Defendants' breaches of the Shorty's and Crab International Agreements, and tortious interference with the Partnership Agreement. (See *Distribu-Dor, Inc. v. Karadanis* (1970) 11 Cal.App.3d 463, 470; Cal. U. Com. Code, § 2708, subd. (2).) Net profits are the “‘gains made from sales “after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed”. [Citation.]’ ” (*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 223; accord *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 884.) Here, Plaintiff's net profits under the various contracts would have been 60 percent of the price of lobsters sold to Shorty's and Crab International, minus the cost of obtaining and shipping those lobsters.<sup>3</sup>

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<sup>3</sup> Plaintiff did not request damages for lost profits related to

Although Plaintiff submitted evidence showing the price of lobsters was between \$60 and \$70 per kilogram during the relevant time period, it failed to present any competent evidence showing the cost to obtain and ship those lobsters. Instead, Plaintiff simply stated, without citing any evidence, that the cost of obtaining lobsters was “\$42.00 per kilogram, plus processing, packing and air shipping \$5.00 per kilogram.”

The closest Plaintiff came to providing evidentiary support for these assertions was Flores’s declaration that the “projected damages are extrapolated from tables provided by Kevin Bader in his business proposal to Hualong (Alex) Ji, dated January 15, 2015, I hereby swear and affirm that the said tables were provided as verified responses to discovery from Hualong (Alex) Ji and Lufei Lee, through their then-attorney, Joseph Balice of Ezra Brutzkus Gubner LLP.” The business proposal, however, was not attached to Flores’s declaration, nor does it appear elsewhere in the record. Flores also neglected to explain the nature of the tables contained in the business proposal, or how he “extrapolated” his “projected damages” from those tables. Consequently, Plaintiff failed to submit sufficient evidence of its damages, and the trial court properly denied its request for entry of default judgment.

#### **DISPOSITION**

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

STRATTON, J.

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the Sunkfa agreement.