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4th Civil No. G054522

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

BANN-SHIANG LIZA YU,

Plaintiff and Appellant,

v.

LIBERTY SURPLUS INSURANCE CORPORATION, et al.

Defendants and Respondents.

Appeal from Orange County Superior Court
Case No. 30-2014-00737800
Honorable William Claster

AMERICAN SAFETY INDEMNITY COMPANY'S RESPONDENT'S BRIEF

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as successor by merger to American Safety Indemnity Company

Court of Appeal
State of California
Fourth Appellate District, Division Three

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: G054522

Case Name: Yu v. Liberty Surplus Insurance Corporation, et al.
Please check the applicable box:

□ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

■ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. TIG Insurance Company	Appellant American Safety Indemnity Company merged into TIG Insurance Company
2. Fairfax (US), Inc.	Owns 100% of the common shares of TIG Insurance Company
3. The Resolution Group, Inc.	Owns the preferred shares of TIG Insurance Company
4. Fairfax Financial Holdings, Limited	Ultimate controlling parent company of TIG Insurance Company, publicly traded on the Toronto Stock Exchange

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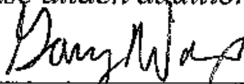

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INTRODUCTION

The Supreme Court has held that Code of Civil Procedure section 580, subdivision (a), governing entry of default judgments, "means what it says and says what it means": "[A] plaintiff cannot be granted more relief than is asked for in the complaint," including as applicable, a cross-complaint. A court has no jurisdiction to enter default judgment exceeding the amount demanded in the complaint. Such a default judgment is void, no matter when, and by whom, it is challenged. By extension, if *no* amount is demanded in the complaint, any default entered thereon necessarily exceeds the amount demanded, rendering it void. Such is the case here.

The express statutory procedural safeguards regarding default judgments protect parties' constitutional due process rights, enabling them to make an informed choice whether to respond and incur the expense of litigation or not. The controlling Supreme Court precedent is clear: Either the default judgment and underlying complaint comply with the strict, statutory, jurisdictional requirements, or they do not. There is no "other notice" or "fairness" exception. There's no halfway or close-enough substitute. *Formal notice*—i.e., via an amount demanded *in the complaint*—is required.

Here, the trial court, faced with a judgment-creditor lawsuit against a defaulting cross-defendant's supposed insurers correctly refused to enforce a default judgment against that cross-defendant. The default judgment, on its face, was jurisdictionally void, no amount having been

demanded in the underlying indemnity cross-complaint. That result is undoubtedly correct and must be affirmed.

The appellant judgment creditor seeks to avoid that result by claiming the amount at issue might have been inferred from surrounding circumstances. But the law is clear. The statutes and Supreme Court precedent allow no wiggle room for what is required: The amount demanded must be stated in the complaint or cross-complaint, not elsewhere. Any default judgment entered on a complaint or cross-complaint that does not comply with this straightforward and strict rule is void, as a matter of law. It's just that simple.

That's exactly the problem with the default judgment that the appellant seeks to enforce here. That's why the trial court entered summary judgment in respondent American Safety Indemnity Company's favor.

The opening brief doesn't dispute that no damages amount was mentioned in the cross-complaint. Rather, appellant urges this Court to ignore the formal due process notice rules that the Legislature has required and, instead, create a new scheme, at odds with Supreme Court precedent, based on vague, inapplicable notions of fairness, which she concedes are "legally irrelevant."

The opening brief's primary theory is that the indemnity cross-complaint adequately demanded a specific monetary amount by incorporating by reference the underlying construction-defect complaint, which, in turn, demanded "an amount not less than $10 million" from

different parties—a general contractor and various other subcontractors. That is not so:

- The indemnity cross-complaint does *not* mention or refer to *any* damage amount. By its own terms, the incorporation was limited: "for identification and informational purposes *only*." The supposedly incorporated-by-reference complaint was *not* attached to, or served along with the cross-complaint. A defendant cannot have notice of that which is not provided;

- The indemnity cross-complaint repeatedly alleges that it was seeking damages "according to proof," nothing more, nothing less; and,

- Incorporation by reference is inadequate, as a matter of law, to satisfy Code of Civil Procedure sections 425.10 subdivision (a)(2), 580 and 585's strict and clearly-worded statutory framework, requiring both complaints and cross-complaints to specify an exact damages amount demanded, and any default judgment entered thereon not to "exceed that demanded in the complaint [or cross-complaint]." Under the statutory scheme a complaint or cross-complaint must be complete in and of itself.

The opening brief's alternative argument that other served documents such as appellant's preliminary estimate, final defect list and cost of repair sufficed to comply with the strict statutory requirements likewise fails. To begin with, the argument was waived as the documents were not referenced in appellant's separate statement in opposition to the motion or included in the record before the trial court as to respondent

American Safety's summary judgment motion. Nor do the documents even mention the defaulting cross-defendant purportedly insured by American Safety. Nor could they make any sense as to the cross-defendant without significant guesswork and calculation. That such documents might be revealed by investigation cannot substitute for the required *formal* notice.

And, as the opening brief concedes, a general appearance by the defaulting defendants' counsel or other "fairness" considerations are "legally irrelevant." The formal notice pleading requirements are strict, inflexible and jurisdictional. Nothing in the opening brief, not even its vague requests for fairness, can overcome the default judgment's voidness.

Finally, multiple other grounds raised in respondent's summary judgment motion, and not addressed in the opening brief, independently support the trial court's order.

The trial court's judgment must be affirmed.

STATEMENT OF THE CASE

A. The Underlying Construction-Defect Suit And Cross-Complaint.

1. Yu's complaint against general contractor ATMI.

Plaintiff Bann-Shiang Liza Yu hired general contractor ATMI Design Build (ATMI) to build a hotel in Anaheim, California. (5 Appellant's Appendix (AA) 4126.) Even though ATMI had no contractor's license, it entered into a subcontract with Fitch Plastering Corporation of California. (4AA 2644; 5AA 4150-4151 ¶¶ 28-29.) Alleging various construction defects, Yu sued ATMI and more than a dozen subcontractors (not including Fitch Plastering) in *Yu v. ATMI Design Build, et al.*, Orange County Superior Court, Case No. 04CC00683. (5AA 4143 ¶ 2; 8AA 6398-6497.)

2. ATMI's indemnity cross-complaint against subcontractor Fitch Plastering, specifying no damages amount, and incorporating by reference Yu's underlying complaint "for identification and informational purposes only."

ATMI cross-complained for indemnity and contribution from, among others, two Fitch entities—Fitch Plastering Corporation and Fitch Construction Corporation (collectively "Fitch"). (5AA 4143 ¶ 4; 7AA 6016-6030.) The ATMI cross-complaint incorporated by reference the underlying construction-defect complaint, but only for a limited purpose: "The Fourth Amended Complaint and any future amended complaints filed in this action and any cross-complaints filed in this action are incorporated herein by reference as though fully set forth herein, *for identification and*

informational purposes only." (7AA 6018 ¶ 3, italics added.) The referenced complaints and cross-complaints were not attached to, or served with, the ATMI cross-complaint. (See 7AA 6016-6030.)

No specific damages amount was demanded in the cross-complaint. (7AA 6029-6030; see also 4AA 2621, 2632 [RFA No. 42]; 5AA 4145 [undisputed that cross-complaint did not set out damages amount].) Instead, ATMI alleged that the precise amount of claimed damages was "presently unknown," but would be established at trial. (7AA 6022 ¶ 22; see 7AA 6021 ¶ 16 ["an amount precisely unknown"].) The cross-complaint prayed for "compensatory damages according to proof." (7AA 6029.) The various causes of action pleaded that:

- "Cross-Complainant will establish the precise amount of damages at trial, according to proof" (7AA 6021 ¶ 16);
- the cross-complainant had been "damaged in an amount according to proof at the time of trial" (7AA 6028 ¶ 47);
- recovery would be sought for "sums [to] be ascertained and offered as proof of damage at trial or thereafter" (7AA 6029 ¶ 54), and for full or partial indemnity for unspecified amounts incurred or to be incurred in defense of Yu's complaint or by way of judgments rendered or settlement made as to Yu's complaint or any cross-complaint (7AA 6023-6025).

B. Subcontractor Cross-Defendant Fitch Fails To Answer The Cross-Complaint And Default Judgment Is Entered Against It.

1. When Fitch fails to answer the cross-complaint, ATMI seeks a default judgment against it.

When cross-defendant Fitch failed to answer the ATMI cross-complaint, ATMI sought entry of default judgment. (4AA 2660; 5AA 4149 ¶ 23, 4152 ¶ 38.) The statement of damages section in the application requesting entry of default was left blank. (4AA 2660; 5AA 4146 ¶ 11.)

2. Yu settles with ATMI and is assigned ATMI's cross-claims.

With the default request pending, Yu settled with ATMI for $6 million and ATMI assigned to Yu all of its claims against others. (2AA 990, 996-997.) Based on this assignment, the court granted Yu's motion to substitute in as the real party in interest on ATMI's cross-complaint. (2AA 982-988; 7AA 5931-5932.)

3. Default judgment is entered against Fitch.

Yu continued to prosecute the ATMI cross-complaint and to seek a default judgment against Fitch. The trial court entered a default judgment for more than $1,250,000 against Fitch. (1AA 65; 4AA 2660-2661; 5AA 4143-4144 ¶ 5; 7AA 5926-5929; 8AA 7067.)

C. The Policies.

American Safety Indemnity Company (American Safety) issued two liability policies for two successive one-year periods to an Arizona-domiciled Fitch Construction Corporation, in lieu of the formerly-named-insured, Arizona-domiciled Fitch Plastering. (3AA 2400 ¶¶ 2-4, 2413-2471

[XGI 03-4286-001, effective 2003/2004], 2473-2535 [ESL001454-04-02, effective 2004/2005], 2539-2543; 4AA 2638-2641; 5AA 4144 ¶¶ 6-7.)[1]

D. The Trial Court Rejects Yu's Judgment-Creditor Claim Against Subcontractor Fitch's Ostensible Insurance Carriers, Including American Safety.

1. Yu, as judgment creditor, sues Fitch's purported insurance carriers.

Yu filed a judgment-creditor action under Insurance Code section 11580 against four of Fitch's purported insurance carriers, Northland Insurance Company, Scottsdale Indemnity Company, Liberty Surplus Insurance Corporation, and American Safety. (1AA 58-63.)[2] Yu alleged that the carriers were obligated to pay all or part of Yu's $1.25 million default judgment against Fitch. (1AA 60-61 ¶¶7, 11-14.)[3]

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[1] TIG Insurance Company is the successor by merger to American Safety. For convenience and clarity we continue to use "American Safety," as that was the name in the trial court.

[2] Northland and Scottsdale were named in the initial complaint. (1AA 58-59.) Liberty Surplus and American Safety were added by amendment to substitute Doe designations. (1AA 164, 177.) Defendants Fitch Industries, Inc. and Fitch Industries, also named in the construction-defect complaint, were voluntarily dismissed without prejudice. (1AA 166-168.)

[3] The Arizona-domiciled Fitch Construction Corporation is the only named insured under the policies. To the extent that the default judgment is against any other entity, including any other "Fitch"-related entity in Arizona or California, American Safety is not a proper defendant in Yu's judgment-creditor suit. In particular, American Safety did not insure Fitch Plastering Corporation of California or Fitch Industries. (3AA 2400 ¶ 4.) It is an open question whether "Fitch Plastering Corporation" or "Fitch Construction Corporation," against which the default judgment was rendered, was served with the underlying complaint as the "Fitch Construction Corporation" that American Safety insured.

2. The trial court enters summary judgment in American Safety's favor, holding the underlying default judgment void for failing to demand a specific damages amount as Code of Civil Procedure sections 425.10 and 580 require.

The four carriers separately moved for summary judgment. (2AA 1245-1283 [Scottsdale]; 2AA 1575-1600 [Liberty Surplus]; 3AA 1973-1994 [Northland, MSJ #1]; 3AA 2360-2384 [American Safety]; 4AA 2903-2930 [Northland, MSJ #2]; 4AA 2783-2784 [Northland joins Liberty Surplus's motion].)[4] American Safety argued that summary judgment was required on multiple distinct grounds, including:

- As a matter of law, the default judgment is jurisdictionally void because the cross-complaint demanded no specific dollar amount as required by Code of Civil Procedure sections 425.10 and 580. (3AA 2373-2377; 6AA 5010-5014.)[5]
- Fitch misrepresented facts in its insurance application to American Safety, which is a complete bar to coverage, and consequently, the lawsuit. (3AA 2377-2380; 7AA 5014-5016.)
- Fitch failed to give notice of the claim as required by the policies, barring coverage. No prejudice showing is required for late notice as the policies have a Georgia choice of law provision and prejudice is irrelevant under Georgia law. (3AA 2380-2383; 7AA 5016-5017.)

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[4] The four carriers are filing separate respondent's briefs in this appeal. (California Rules of Court, rule 8.200(a)(5).)

[5] Unless otherwise stated, subsequent statutory references are to the Code of Civil Procedure.

And even if California law applied, American Safety was prejudiced by Fitch's failure to give notice. (3AA 2382-2383; 6AA 5017.)

The trial court held that the ATMI cross-complaint was jurisdictionally void because it "did not contain any amount demanded for money and damages and none was stated in the Request for Entry of Default." (8AA 7070; see also Reporter's Transcript (RT) 2, 29-30.) On that basis, it granted summary judgment to American Safety. It didn't reach any of the other grounds American Safety asserted in its motion.[6]

Only American Safety and Scottsdale had raised the jurisdictional issue in their summary judgment motions. The court deferred entry of judgment as to those two parties until after it ruled on pending motions for judgment on the pleadings filed by Liberty Surplus and Northland. (RT 29-32; 8AA 7075.)

About three months later, the court entered judgment in favor of all four insurance-carrier defendants: American Safety, Scottsdale, Liberty Surplus and Northland. (8AA 7103-7105.)

E. Yu Appeals.

Yu timely appealed from the judgment. (8AA 7122-7124.)

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[6] The opening brief's statement that "[t]he court quickly rejected other grounds for summary judgment" (AOB 23) is inaccurate. The trial court rejected summary judgment on only one ground—"the question regarding whether or not ATMI is [or was] licensed or not." (RT 1.) That issue was not raised in American Safety's motion.

STANDARD OF REVIEW

Whether Yu, as a matter of law, could satisfy an essential element of her judgment-creditor claim—a jurisdictionally valid default judgment—is reviewed de novo. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200 (*Hearn*); *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 858; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496 (*Cruz*); see also Code Civ. Proc., § 437c, subd. (p)(2) [lawsuit has no merit where moving party establishes that an essential element of claim cannot be established or that there is a complete defense to the cause of action].)

Jurisdictional questions are issues of law for the court, which may properly be adjudicated on summary judgment. (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1036; *Eagle Elec. Mfg. Co. v. Keener* (1966) 247 Cal.App.2d 246, 253-254.) They, too, are reviewed de novo. (*Hearn*, *supra*, 177 Cal.App.4th at p. 1200; *Cruz*, *supra*, 146 Cal.App.4th at p. 496.)

ARGUMENT

I. The Trial Court Properly Held The Underlying Default Judgment Void.

A. A Default Judgment Is Jurisdictionally Void If Entered On A Complaint Or Cross-Complaint That Fails To Specifically State An Amount Demanded.

1. The statutory, due process mandate is that a default judgment is void absent a specific amount demanded in the complaint or cross-complaint.

To maintain a valid Insurance Code section 11580 judgment-creditor claim, the judgment creditor must establish, as a threshold matter, a valid judgment to be enforced. (*Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1015-1016.)[7] If the judgment is jurisdictionally void, no section 11580 action will lie. (*Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 709.)

No subsequent judgment can be premised on a void default judgment. (See *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1320 (*Schwab*) ["any judgment entered after an invalid default is also invalid," citing *Baird v. Smith* (1932) 216 Cal. 408, 410 and *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1286].) This is the necessary implication of the fact that a jurisdictionally void judgment can be collaterally attacked at any time. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239; see also *In re Marriage of Lippel*

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[7] Insurance Code section 11580, subdivision (b)(2) provides that "whenever judgment is secured against the insured … in an action based upon bodily injury, death, or property damage, an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

(1990) 51 Cal.3d 1160, 1163-1164, 1167 (*Lippel*) [collateral attack permitted 16 years after entry of judgment].) Yu conceded at the summary judgment hearing that if a default judgment is "void on its face," "the court can or anybody can come and say it's void." (RT 7.)

When the judgment being enforced is a *default* judgment, it is void if either: (1) The underlying complaint or cross-complaint doesn't comply with section 425.10, subdivision (a)(2), or (2) the judgment entered on the pleading doesn't comply with sections 580 and 585. (*Petty v. Manpower, Inc.* (1979) 94 Cal.App.3d 794, 798; see also *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 760 [a default judgment that doesn't comply with section 580 "is void on the face"]; *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 830 [that no damages amount was stated in, or could be calculated from, the complaint rendered the default judgment entered thereon void].)

Section 425.10, subdivision (a)(2), requires both complaints *and* cross-complaints to demand "the relief to which the pleader claims to be entitled." If the pleader seeks money or damages, "*the amount demanded shall be stated*." (*Ibid.*, italics added.)[8] "This demand is usually called the 'prayer,' and is set forth in a separate paragraph at the end of the complaint." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before

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[8] There is an exception to section 425.10, subdivision (a)(2), not relevant here, for personal injury claims. In those instances, the amount demanded must be stated in a separate statement of damages, per section 425.11, and *not* in the complaint. The claims here are for property damage, so section 425.10, not section 425.11, applies.

Trial (The Rutter Group 2017) ¶ 6:271, p. 6-90.) The amount of damages sought must be stated in the complaint itself. (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494 (*Becker*).)

Sections 580 and 585 are closely related to section 425.10, subdivision (a)(2). They set forth the requirements for entry of judgment, and "are very specific in their requirements for a judgment following a default." (*Burtnett v. King* (1949) 33 Cal.2d 805, 806 (*Burtnett*).) Section 580—which is a statutory expression of the Constitution's due process mandates (*Parish v. Peters* (1991) 1 Cal.App.4th 202, 207 (*Parish*); AOB 44; RT 8)—deprives courts of jurisdiction to grant relief in a default judgment exceeding that which is "demanded in the complaint." (Code Civ. Proc., § 580, subd. (a).) Parallelly, section 585 requires a judgment rendered in plaintiff's favor *not* to exceed "the amount stated in the complaint." (Code Civ. Proc., § 585, subd. (b).)

These requirements are *jurisdictional.* (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826 (*Greenup*) [sections 425.10, 580 and 585 are all jurisdictional]; see *David S. Karton, a Law Corp. v. Dougherty* (2009) 171 Cal.App.4th 133, 150 (*Karton*) [the damages pleaded "ceiling is jurisdictional"].) A judgment that does not comply with sections 580 and 585 is *void* as beyond a court's power or jurisdiction to enter: Courts have "no power to enter a default judgment" that does not conform to sections 580 and 585. (*Becker*, *supra*, 27 Cal.3d at p. 493; *Greenup*, *supra*, 42 Cal.3d at pp. 826-827 [courts consistently hold that a default judgment's noncompliance with sections 580 and 585 renders it jurisdictionally void];

Finney v. Gomez (2003) 111 Cal.App.4th 527, 534 [section 580 is "an *unqualified limit* on the jurisdiction of courts entering default judgments," italics added].) "'[T]he court's jurisdiction to render default judgments can be *exercised only in the way authorized by statute.*' [Citation.] ... '[C]ertainly no statutory method of procedure or limitation on power could be more clearly expressed than that set forth in section 580....' [Citation.]" (*Lippel*, *supra*, 51 Cal.3d at p. 1167, quoting *Burtnett*, *supra*, 33 Cal.2d at p. 807, italics added in *Burtnett*.) Accordingly, "[a] default judgment that violates section 580 is void; it can be challenged and set aside at any time." (*Simke, Chodos, Silberfeld & Anteau, Inc. v. Athans* (2011) 195 Cal.App.4th 1275, 1286; accord, *Karton*, *supra*, 171 Cal.App.4th at p. 150.)

The sum effect of sections 425.10, subdivision (a)(2), 580 and 585 is to "deprive the clerk and the trial court of jurisdiction to enter a default, unless the defendant has been given *formal notice* of the amount of money damages or other relief sought." (*Schwab*, *supra*, 114 Cal.App.4th at p. 1325, italics added.)

2. The same amount-demanded rules apply to cross-complaints.

One of Yu's central themes in opposing American Safety's summary judgment motion was her contention that section 580 does not apply to cross-complaints. (5AA 4131-4132.) The opening brief now tacitly acknowledges that argument's lack of merit by suggesting it was only "arguabl[e]." (AOB 32.) On appeal, she relegates the argument's substance (to the extent she takes *any* position) to a footnote. (AOB 33, fn. 3.) "Footnotes are not the appropriate vehicle for stating contentions on

appeal." (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947.) Such footnote arguments, in fact, are waived on appeal. (*Regents of University of California v. East Bay Mun. Utility Dist.* (2005) 130 Cal.App.4th 1361, 1383, fn. 12 [footnote argument deemed waived]; see Cal. Rules of Court, rule 8.204(a)(1)(B) [each point must be stated "under a separate heading or subheading summarizing the point"].)

In any event, there can be no honest dispute that section 580 applies to both complaints *and* cross-complaints. (*Swycaffer v. Swycaffer* (1955) 44 Cal.2d 689, 692-693.) *Swycaffer* unequivocally holds that section 580 "is applicable to relief granted upon a cross-complaint." (*Ibid*.; see also *Emanuel v. Superior Court* (1960) 184 Cal.App.2d 844, 849 [it is "settled" that section 580 applies to cross-complaints].) There's nothing "arguable" about *Swycaffer*'s holding. Section 580 (and analogously sections 425.10 and 585) applies to the ATMI indemnity cross-complaint at issue here. (See *Schwab*, *supra*, 114 Cal.App.4th at p. 1320 [all three statutes "apply with equal force to cross-complaints and cross-defendants"].)

As we now show, the ATMI cross-complaint did not comply with any of the statutory mandates. The ensuing default judgment is, therefore, void.

B. The Default Judgment That Yu Seeks To Enforce Is Void On Its Face Because The Cross-Complaint Nowhere Alleges Any Damages Amount Demanded.

It is undisputed that the ATMI cross-complaint upon which the default judgment was entered *fails* to state a damages amount. (Code Civ. Proc., § 425.10, subd. (a)(2) ["the amount demanded *shall* be stated,"

italics added].) Try as one might, there is *no* dollar figure to be found anywhere in the cross-complaint. Nowhere does the cross-complaint allege the specific amount demanded or prayed for. (See 7AA 6017-6030; see also 8AA 7070.) To the contrary, the cross-complaint repeatedly alleges that it seeks an unspecified amount "according to proof" at trial. (7 AA 6021-6022, 6028-6029.)

Such nonspecific placeholders as (1) damages were incurred "in an amount which are presently unknown, but which will be established at the time of trial according to proof" (7AA 6022 ¶ 22), and (2) the cross-complainant "has been damaged in an amount according to proof at the time of trial" (7AA 6028 ¶ 47), are insufficient, as a matter of law, to satisfy the Code's formal notice and due process requirements. (*Parish*, *supra*, 1 Cal.App.4th at p. 216, citing *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 435; *Greenup*, *supra*, 42 Cal.3d at p. 826.) The notice requirement of section 580 "would be undermined if the door were opened to speculation, no matter how reasonable it might appear in a particular case, that a prayer for damages according to proof provided adequate notice of a defaulting defendant's potential liability.... Consequently, a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint." (*Becker*, *supra*, 27 Cal.3d at p. 494.) The cross-complaint's generic prayer for "compensatory damages according to proof" is likewise inadequate. (7AA 6026; see *Parish*, *supra*, 1 Cal.App.4th at p. 216.)

During discovery, Yu admitted the absence of any damages demand: "Responding Party admits that the Cross-Complaint filed by ATMI did not set out a monetary amount which was specifically sought against the Fitch entities for the result of its conduct." (4AA 2621, 2632 [RFA No. 42].) She also admitted the lack of a damages-demand during summary judgment proceedings, acknowledging the fact was undisputed in her response to American Safety's separate statement of undisputed facts. (5AA 4145 ¶ 9.) The opening brief doesn't attempt to suggest otherwise. (See AOB 8-49.)

C. Contrary To the Opening Brief's Assertion, The Underlying Cross-Complaint Does Not Incorporate By Reference The Operative Complaint's Demanded Dollar Amount.

Yu's one tactic to avoid the inescapable fact that the ATMI cross-complaint nowhere demands a specific damages amount is her assertion that it inferentially contains the $10 million prayer in her construction-defect complaint against ATMI, the general contractor, by incorporating that complaint by reference. (AOB 12-15, 32-43.) She is wrong both factually and legally.

1. The ATMI cross-complaint incorporated Yu's construction-defect complaint "for identification and informational purposes only."

As a factual matter, the ATMI cross-complaint does *not* incorporate by reference the construction-defect complaint's $10 million damages request. (See 8AA 6495.) Rather, it expressly incorporates Yu's complaint "*for identification and informational purposes only*." (7AA 6018 ¶3, italics added.) In doing so, it makes no mention of damages.

The word "only" must be given effect. It clearly and unambiguously signifies limitation. (*Adams v. MHC Colony Park Limited Partnership* (2014) 224 Cal.App.4th 601, 621.) The inclusion of "only" following "for identification and informational purposes," means it is not incorporated for any other purpose. The ATMI cross-complaint does not incorporate jurisdictional notice of the amount of damages being sought. Nor does it reference section 425.10. An amount sought in a complaint is not "informational." It is a jurisdictional due-process requirement. The indemnity cross-complaint does not come close to giving the requisite due-process notice that the Code and Constitution require.

The opening brief acknowledges the existence of this express limitation in the statement of facts (AOB 16), but conveniently omits the phrase from its argument—replacing the phrase with an ellipsis (AOB 34). Using an ellipsis in this context effectively misquotes language and "'is inexcusable[.]'" (*Biancalana v. Fleming* (1996) 45 Cal.App.4th 698, 701, fn. 2; see also *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 489 [blaming trial court's incorrect statutory interpretation on its "unfortunate resort to ellipsis"].) The ellipsis deletes the critical, operative language: "for identification and informational purposes only." The indemnity cross-complaint, thus, disavows the very function that Yu attempts to incorporate from her underlying complaint.

Incorporating allegations for a non-jurisdictional identification and informational purpose cannot be transmuted into a jurisdictional purpose.

The full phrase, when read (as it must be) along with the express limitation, does not satisfy the Code's strict formal-notice requirements.

2. Limited incorporation by reference, without attaching the incorporated document, cannot comply with the mandate of Code of Civil Procedure sections 425.10, 580 and 585.

Nor could the cross-complaint's limited incorporation by reference satisfy the Code's strict jurisdictional requirements, as a legal matter. Sections 425.10, subdivision (a)(2), 580 and 585 employ mandatory language (i.e., shall not, and cannot). "[T]he court's jurisdiction to render default judgments can be exercised *only* in the way authorized by statute." (*Burtnett*, *supra*, 33 Cal.2d at p. 807, italics added; see also *People v. Standish* (2006) 38 Cal.4th 858, 869 ["shall" is generally interpreted as mandatory and not permissive].)

Those statutes require a litigant to state a damages amount directly in the complaint or cross-complaint. Incorporation by reference, especially where the referenced document is not even attached to the pleading, does not satisfy these strict jurisdictional rules.

The amorphous nature of the "incorporation by reference" here is further demonstrated by the fact that the indemnity cross-complaint purported to incorporate by reference not only Yu's "Fourth Amended Complaint" but also "any future amended complaints filed in this action and any cross-complaints filed in this action"—that is, documents that might not even be in existence. (7AA 6018.)

Our Supreme Court has repeatedly held that a party seeking entry of default judgment must strictly comply with the Code's due process constraints. (*Becker*, *supra*, 27 Cal.3d at p. 494; accord, *Greenup*, *supra*, 42 Cal.3d at p. 826 [affirming *Becker*'s "strict construction of section 580"]; *Dhawan v. Biring* (2015) 241 Cal.App.4th 963, 970 (*Dhawan*) ["The case law favors a strict interpretation of section 580's requirement that a defendant be given formal notice"]; *Lippel*, *supra*, 51 Cal.3d at p. 1166 [section 580 "means what it says and says what it means"].) And it says that the amount must be stated *in the complaint.* (See *Becker*, at p. 494 ["a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint," italics added]; *Dhawan,* at pp. 968-970 [service of formal "statement of damages" does not suffice in non-personal injury/wrongful death case].) That means attempting to incorporate by reference the damages amount from any another source is inadequate, as a matter of law. (See *Stein v. York* (2010) 181 Cal.App.4th 320, 326 (*Stein*) [constructive notice insufficient].)

This is especially true where, as here, the document supposedly "incorporated by reference" is not even attached to, or served with, the complaint. A defendant should not have to put two and two together. It should not have to read a cross-complaint and then cross reference it with some other unattached document which may or may not be readily available. Formal notice to the defendant means that the defendant must be

able to determine the amount sought from the face of the complaint or cross-complaint, without having to rummage through other documents.

If anything, the "incorporation by reference" here provided *less* formal notice than, for example, participation in discovery or service of a formal statement of damages found insufficient in *Stein*, *supra*, 181 Cal.App.4th at pp. 325-327 (discovery) and *Dhawan, supra,* 241 Cal.App.4th at pp. 966-973 (statement of damages). The purpose behind section 580 is to give a defendant notice *on the face of the complaint*. Sections 580 and 585, thus, require the amount to be demanded or stated "*in the complaint*." A defendant does not have adequate formal notice if it has to investigate, find other documents, or search a court file to learn how much in damages is being sought against it.

Not surprisingly, we have located *no* case holding that the incorporation by reference of *another* complaint or cross-complaint that is not attached to the pleading *ever* suffices to afford the formal notice required by sections 580 and 585.

3. Even if the incorporation was not expressly limited, attempted incorporation by reference of a damages amount that specifies no subcontractor, trade, or damage cannot satisfy section 580's strict requirement to state an exact amount.

Section 580 and due process both require that defendants "'know *exactly* what risk they assume by not responding to the pleading'" by being "'told *exactly* what their exposure is.'" (*Janssen v. Luu* (1997) 57 Cal.App.4th 272, 277, italics added; accord, *Stein*, *supra*, 181 Cal.App.4th at p. 326.) The amount of damages demanded in the complaint must be

"specific," otherwise "there is no adequate notice to the defendant—and a default judgment entered under those conditions is void." (*Janssen*, at p. 279, citing *Lippel*, *supra*, 51 Cal.3d at p. 1167.) Thus, even if the construction-defect complaint's $10 million demand was incorporated by reference into the ATMI cross-complaint (it wasn't), because the cross-complaint alleges no specific damages amount as to any Fitch entity, let alone any Arizona-based Fitch Construction (i.e., the only named insured), section 580 would not be satisfied. The construction-defect complaint asserts various causes of action against multiple parties, primarily ATMI, but not Fitch. Its $10 million demand does not put Fitch on notice of exactly what exposure ATMI was seeking in the cross-complaint as against Fitch, nor could it have put Fitch on notice of which subcontractor, trade, or damage the $10 million referred to or how it would be allocated amongst them.

4. The cases relied on by the opening brief are inapposite.

None of the cases cited in the opening brief can resurrect the jurisdictionally void default judgment.

The opening brief relies primarily on *Pine Terrace Apartments, L.P. v. Windscape, LLC* (2009) 170 Cal.App.4th 1 (*Pine Terrace*), for the proposition that a party can incorporate by reference *any* allegation into *any* pleading, for *any* purpose—including satisfying the jurisdictional statutory and due-process requirement of stating the demanded amount of damages *in the complaint*. (AOB 12, 24.) *Pine Terrace*'s holding is much more

limited; it nowhere purports to address the statutory- and due-process requirements for a default judgment.

At issue in *Pine Terrace* was whether, on motion for summary judgment, an indemnity cross-complaint's incorporation by reference of the underlying complaint sufficiently alleged *facts* to prima-facie demonstrate willful misconduct, thereby satisfying section 425.10, *subdivision (a)(1)*, in a non-default setting. (170 Cal.App.4th at pp. 15-18.) Subdivision (a)(1) is a procedural rule that governs the form of *factual* allegations: requiring a complaint to include a "statement of the facts constituting the cause of action, in ordinary and concise language." It does *not* govern a default judgment's jurisdictional requirements under subdivision (a)(2), or sections 580 and 585, the provisions at issue here.

Pine Terrace held that the cross-complaint's allegation—"'[t]he Complaint is incorporated herein by reference without admitting any of the allegations contained therein'"—sufficed to plead a prima facie claim. (170 Cal.App.4th at pp. 15-18, italics omitted.) But *Pine Terrace* did not involve a default judgment, nor did it consider the statutory or due-process requirements for a default judgment. (See *Sagonowsky v. Kekoa* (2016) 6 Cal.App.5th 1142, 1156 [cases do not stand for propositions not considered by the court]; *Parish*, *supra*, 1 Cal.App.4th at p. 207; AOB 44; RT 8.)

The concern in *Pine Terrace* was whether a complaint sufficiently pleaded *facts* that would defeat summary judgment and thereby allow the action to proceed. That is an entirely different concern than whether a complaint afforded the formal notice to the defendant required for a default

judgment—the problem presented here. The extent of *Pine Terrace*'s holding was "'*that in the absence of restrictions imposed by statute* or by rules of court, *facts* alleged in other pleadings in the same case may be incorporated by reference in subsequent pleadings therein.'" (170 Cal.App.4th at p. 17, italics added.) But, of course, sections 580 and 585 *do* impose a pleaded "in the complaint" restriction.

The trial court acknowledged the significant problem with Yu's reliance on *Pine Terrace*: It does "not address whether incorporation by reference of damage amount claims—as opposed to factual allegations to support a cause of action—[is] permissible to hold a defaulting defendant liable under a default judgment." (8AA 7070.) In other words, *Pine Terrace* is completely inapposite.

But even if somehow *Pine Terrace* could be read to apply to default judgments, it is factually distinguishable. *Pine Terrace*'s incorporation by reference was global and unqualified (170 Cal.App.4th at p. 16); here, by sharp contrast, incorporation was narrowly limited to "identification and informational purposes only" (7AA 6018 ¶ 3). The limitation cannot be ignored. Even if *Pine Terrace* applied to the default judgment circumstance that it did not consider, the "only" limitation in the attempted incorporation here is fatal to Yu's incorporation-by-reference argument.

Yu's other cited cases fare no better in overcoming the jurisdictional defect in the ATMI cross-complaint and default judgment:

- In *Lewis v. Purvin* (1989) 208 Cal.App.3d 1208, 1212, the cross-complaint incorporated *the entire complaint* by reference without

limitation. The allegations incorporated were *factual*, purporting to establish legal malpractice. (*Id*. at pp. 1211-1212.) *Lewis* doesn't discuss section 452.10, subdivision (a)(2)'s jurisdictional demand requirement, it doesn't address whether the complaint prayed for a specific amount of damages, it doesn't address the "in the complaint" requirement of sections 580 and 585, it doesn't discuss the due process requirements of formal notice, and it doesn't address the propriety of incorporation by reference in any way, shape or form. Bottom line: It is irrelevant.

- *Reid v. Merrill* (1935) 4 Cal.2d 693, 695, also has nothing to do with a jurisdictional damages statement. The issue there was whether a particular date alleged in the complaint was effectively incorporated by reference into the cross-complaint (it wasn't). (*Ibid*.) Although *Reid* repeated the rule that factual allegations can be properly incorporated into a complaint, it did not address whether a jurisdictional damages statement can be properly incorporated for default judgment purposes. *Reid* also predates the seminal California Supreme Court cases, e.g., *Becker*, *Greenup*, strictly enforcing sections 580 and 585. (See pp. 26, 29, 33, *ante*.)

- *Klein v. Farmer* (1945) 70 Cal.App.2d 51, 59, confronts another pleading procedure not at issue here: whether an exhibit establishing the terms of a contract can be attached to a complaint and incorporated by reference. Unlike the complaint here, the exhibit in *Klein* was not attached to satisfy jurisdictional requirements for a

default judgment. On the contrary, it was attached to allege the basic facts. The complaint here was *not* attached. *Klein* also predates *Greenup*, *Becker*, etc.

- *Ranch Hand Foods, Inc. v. Polar Pak Foods, Inc.* (Mo.Ct.App. 1985) 690 S.W.2d 437, 446, fn. 3, deals with whether the complaint alleged actual damages, not about whether it alleged a specific amount of damages. There is no indication that Missouri has a statutory default-judgment scheme comparable to sections 580 and 585. It has no relevance to the issues presented in this case.

- *Republic Bank v. Marine Nat. Bank* (1996) 45 Cal.App.4th 919, 921 and *Bell v. Rio Grande Oil Co.* (1937) 23 Cal.App.2d 436, 440 (see AOB 34-35), are even more off base. Neither case even deals with pleading. Both cases stand for the inapplicable proposition that parties to a contract or lease agreement can incorporate other documents *into a contract* by reference. (*Ibid.*) Complaints have due process concerns not relevant to contracts.

None of these authorities even consider, let alone decide, default judgment issues. (See *Sagonowsky*, *supra*, 6 Cal.App.5th at p. 1156 [cases do not stand for propositions not considered by the court].) None move the needle.

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The trial court was correct in holding the default judgment here to be void. Its judgment so holding must be affirmed.

II. Other Documents Served On Fitch Cannot Afford The Statute- And Due-Process Required Formal Notice In The Complaint Of The Damages Amount Sought.

The opening brief urges this Court to ignore the lack of any formal notice in the ATMI cross-complaint of the damages amount sought suggesting—based on extrinsic evidence not included or mentioned in Yu's summary judgment opposition papers—that the Code's strict *formal* notice requirements were satisfied *informally*. (AOB 43-49.)

A. Any Argument That Other Served Documents Sufficed To Satisfy The Jurisdictional Notice Requirements Was Waived As Not Properly Raised In Opposing Summary Judgment.

As a threshold matter, Yu's extrinsic evidence argument is waived. She did not provide the extrinsic evidence she now relies on with her summary judgment opposition papers or mention it there or in her separate statement. Her failure to do so waived the argument. (See, e.g., *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28 (*North Coast*); *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 [argument not raised in summary judgment opposition papers waives the issue on appeal].)

A party opposing summary judgment *must* specify *within the separate statement* any material facts she disputes: "'This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*.'" (*North Coast*, *supra*, 17 Cal.App.4th at pp. 30-31, original italics, citations and additional quotation marks omitted; see also *Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co.* (2009) 170

Cal.App.4th 554, 573-577 [summary judgment proper where party opposing the motion failed to provide an adequate separate statement and substantive supporting evidence to create a triable issue of fact].)

Equally, appellate courts will "'consider only the facts before the trial court at the time it ruled on the motion' for summary judgment." (*North Coast*, *supra*, 17 Cal.App.4th at p. 30.)

It is undisputed that Yu did not present the extrinsic evidence that she relies on now in opposition to American Safety's motion or mention it in her separate statement. (5AA 4142-4157; RT 8-20.) Her counsel first vaguely mentioned the evidence at the summary judgment hearing, acknowledging that Yu hadn't proffered the documents along with her opposition papers. (RT 8-20.) The opening brief now relies on these later filed documents—filed after summary judgment was entered in American Safety's favor and instead filed only in conjunction with Yu's opposition to Northland's and Liberty Surplus's joint motion for judgment on the pleadings—even though they were not filed in opposition to American Safety. (See AOB 47, citing 7AA 5972-5981; 8AA 6857-7018.) When a fact is omitted from the separate statement, "it is irrelevant that such fact might be buried in the mound of paperwork filed with the court, because the statutory purposes are not furthered by unhighlighted facts." (*North Coast*, *supra*, 17 Cal.App.4th at p. 31.)

The trial court properly treated the tardy argument based on the later-filed evidence as waived. (RT 8-20; *North Coast*, *supra*,

17 Cal.App.4th at p. 31.) On appeal, Yu does not even claim there was no waiver.

B. Contrary To The Opening Brief's Assertion, Less-Than-Formal Notice Does Not Suffice.

Even if Yu didn't waive the argument that other served documents constitute formal notice, the argument fails on the merits.

1. Formal notice means the damages amount must be specified in the complaint.

To begin with, it is undeniable that *formal* notice is required. The opening brief concedes as much: "[A]ctual notice cannot be a substitute for formal notice[.]" (AOB 46.) There is no avoiding that "actual notice does not satisfy the formal notice requirements of sections 425.10 et. seq. and 585." (*Schwab*, *supra*, 114 Cal.App.4th at p. 1324.) "The clerk or judge has no authority to enter a default unless and until *formal* notice is given." (*Ibid*., citing §§ 425.10, 585, italics added.) "Under section 580 actual notice of the damages sought is not sufficient; due process requires 'formal notice.'" (*Stein*, *supra*, 181 Cal.App.4th at p. 326.) Formal notice is not only statutorily required, constitutional due process also "requires *formal notice* of the defendant's potential liability." (*Schwab*, *supra*, 114 Cal.App.4th at p. 1321, original italics; *Parish*, *supra*, 1 Cal.App.4th at p. 207 [section 580's due process mandate requires "'formal notice of potential liability'"].)

Faced with this reality, Yu disingenuously claims that there is no "singular definition of what constitutes 'formal notice.'" (AOB 46.) But the form of required notice is statutorily specified in sections 425.10, 580,

and 585: Notice "in the complaint." Not surprisingly, the case law has consistently held that the formal notice spelled out in section 425.10, subdivision (a)(2)—pleading an amount of damages in the complaint—"is 'an essential prerequisite to a valid default judgment.'" (*Schwab*, *supra*, 114 Cal.App.4th at p. 1321.) The Supreme Court, in evaluating "formal notice" of the amount of damages for default judgment purposes always references the amount stated directly in the prayer or body of the complaint. (*Becker*, *supra*, 27 Cal.3d at p. 494.) Whether the court has jurisdiction in the first instance is determined only "*from the face* of a well-pleaded complaint." (*Boisclair v. Superior Court* (1990) 51 Cal.3d 1140, 1156, italics added.) Looking anywhere else is prohibited. Noncompliant notice—i.e., notice that does not satisfy section 425.10, subdivision (a)(2)'s clear jurisdictional directive—is *necessarily informal*.

That's why service of a "formal" statement of damages has repeatedly been held *not* to suffice. (E.g., *Dhawan*, *supra*, 241 Cal.App.4th at pp. 966-973.) And, it is also why "formal" discovery responses are inadequate. (E.g., *Greenup*, *supra*, 42 Cal.3d at pp. 825-829; *Stein*, *supra*, 181 Cal.App.4th at pp. 325-327.)

2. There is no evidence that Fitch or American Safety had actual knowledge of the amount of damages demanded.

Even if actual notice were sufficient under the statutory framework (it isn't), there is *no* evidence that Fitch or American Safety had actual knowledge of the particular damages amount before entry of the default. (See 5AA 4143-4157 [separate statement of undisputed material facts];

see also 3AA 2402 ¶ 9 [American Safety had no notice].) Nor does the opening brief cite to any such evidence. Accordingly, there is no factual dispute on the issue. (See *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1526 [rejecting actual notice argument because plaintiff "points to no *evidence* to support this argument," original italics].)

3. Constructive knowledge through needle-in-a-haystack extrinsic evidence that doesn't mention Fitch, the defaulting defendant, is insufficient to overcome the lack of any formal damages statement.

Finally, the opening brief is wrong when it claims the undisputed lack of formal notice in this case was overcome through constructive notice via the documents that Yu purportedly served on the defaulting defendants. (AOB 47-48, citing 7AA 5972-5981.) Those documents—Yu's preliminary estimate and defect and repair list—did not even state a specific amount being sought. Rather, Yu's argument is that by inference and analysis, Fitch should have been able to tease out the specific demanded amount at issue. That does not begin to suffice for the required formal and specific notice. Such amorphous information buried in extrinsic documents cannot begin to satisfy the default judgment's jurisdictional threshold requirement of a damages amount stated in the complaint. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 5:241.1, p. 5-62 ["No constructive notice from other documents: Due process requires *formal notice* of the amount demanded and is not satisfied by 'constructive notice' from other sources," bold omitted, original italics].)

Yu relies on *Schwab*, *supra*, 114 Cal.App.4th at p. 1326, to argue that jurisdictional notice was afforded here because Fitch could have combed through the identified documents to calculate the damages alleged for the type of work performed. (AOB 47-48.) But *Schwab* stands for no such proposition. *Schwab* does *not* hold that if a damages amount might be calculated from some underlying documents, the strict requirements in sections 425.10, subdivision (a)(2), 580 and 585 are satisfied.

Rather, *Schwab* notes that in *personal injury or wrongful death* cases (which this is not), an amount of damages sought may not be included in the complaint. (114 Cal.App.4th at p. 1320; Code Civ. Proc., § 425.10, subd. (b).) In these types of cases *only*, a formal statement of damages served on the defendant is the requisite formal notice of the damages sought. (Code Civ. Proc., § 425.11; *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157, 1163.) And as long as the defendant *in these non-property damage case*s can easily and precisely calculate *from the statement of damages* the amount for which it could be liable, the Code requirements are satisfied. (*Schwab*, *supra*, 114 Cal.App.4th at p. 1326; *Cassel*, at p. 1163.) Neither *Schwab* nor any other case, even a personal injury/wrongful death case, allows for "constructive notice" from documents other than a formal section 425.11 statement of damages. (See *Jones v. Interstate Recovery Service* (1984) 160 Cal.App.3d 925, 929-930 [even amount stated in complaint insufficient where section 425.11 statement of general and special damages required].)

The same cannot be said about property damage cases like this one. In a property damage case, not even a formal "statement of damages" is enough to trigger the court's jurisdiction. (*Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1177.)

In any event, the documents Yu relies on would not have enabled Fitch or any defaulting defendant to """precisely calculate the amount for which [they] could be liable,""" as the opening brief contends. (AOB 47, quoting *Schwab*, *supra*, 114 Cal.App.4th at p. 1326.) Yu relies on a "preliminary estimate" of repairs and a defects list. The preliminary estimate contains 83 different line items, referencing various alleged construction defects or locations within the subject property. (8AA 6859-6864.) It contains no information as to which defect, area, repair, or damage is alleged to be caused by a specific trade, much less by a specific party. (*Ibid*.) It makes no mention of Fitch. Yu sued more than a dozen subcontractors besides Fitch. (8AA 6398-6399, 6412-6417.) There was no way to calculate from the face of the document Fitch's share of supposed damages, let alone to do so precisely. Not even a rough calculation is possible. Even more so, the defect list has *no* damages numbers attached to its various entries. These vague numbers cannot, and do not, constitute jurisdictional notice.

III. The Opening Brief's Asserted Equitable Concerns Do Not Overcome The Jurisdictional Defects, Nor, As The Opening Brief Concedes, Are They Legally Relevant.

A. The Opening Brief Concedes That Its Equitable-Concerns Argument Is Beside The Point.

The opening brief next urges this Court to consider various vague equitable or fairness concerns in determining whether Yu should be able to enforce a jurisdictionally void default judgment. (AOB 43-45, 48-49.) But, in the same breath, Yu admits that equity plays no role in jurisdictional issues, referring to it as "legally irrelevant." (AOB 48.)

In other words, Yu agrees that it doesn't matter whether the trial court's decision in this case was fair or equitable, so there is nothing else for this Court or the trial court to consider. (See *Greenup*, *supra*, 42 Cal.3d at p. 827 [requirements strictly construed]; *Becker*, *supra*, 27 Cal.3d at p. 494 [same].)

The Legislature and the Supreme Court long ago weighed the various practical, fairness, and equity concerns. They came out strongly in favor of having trials on the merits. They came out decisively on the side of strictly requiring *formal notice in the complaint* before damages can be imposed on a defendant by way of default judgment.

B. A General Appearance Does Not Overcome Section 425.10's Strict Notice Requirement Or Section 580 And 585's Express Limitation To The Amount Stated In The Complaint.

Yu claims that even though the defaulting defendants never answered the ATMI cross-complaint, they made a general appearance, so in the interest of fairness the court has jurisdiction to enter a default judgment

beyond any amount pleaded in the complaint. (AOB 48-49.) The law is otherwise.

As a matter of law, a general appearance is insufficient to satisfy the Code's strict notice requirements. In *Greenup*, a discovery default case—i.e., after a general appearance—the Court held that the default judgment was void, despite the general appearance: "It would undermine th[e] concern for due process to allow the judgment … to stand despite plaintiff's failure to meet the requirements of sections 425.10 or 425.11." (42 Cal.3d at p. 827; accord, *Stein*, *supra*, 181 Cal.App.4th at pp. 326-327 [formal notice of damages in the complaint required for default judgment despite defendant's "active participation in discovery and other pretrial procedures" and appearance by way of demurrer].) *Greenup* strictly construes the requirement to state the damages in the complaint underlying a default judgment. This Court must as well. No general appearance (if there was one) can change that.

In any event, the trial court found, as a matter of fact, that Fitch made no general appearance. (4AA 2697.) Whether a defendant has made a "general appearance" is a "fact-specific" issue. (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1147; accord, *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 420.) Accordingly, the factual finding must be affirmed unless there is no substantial evidence to support the finding. (*SFPP, L.P. v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461-462 [appellate courts apply the substantial evidence standard to a superior court's findings of fact].) Yu nowhere

argues that substantial evidence does not support the court's no-general-appearance finding and thereby waives the issue. (Cf. Code Civ. Proc., § 1014 [a general appearance is "when the defendant answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, moves for reclassification pursuant to Section 403.040, gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for the defendant"].)

C. Equitable Concerns Here Favor Affirmance.

Constitutional due-process concerns are at the root of the Code's strict default judgment limits. There is no dispute about that. (AOB 44; RT 8, 16-17.) Sufficient due process means that the court procedures employed were constitutionally fair. (See *Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70, 81, fn. 12 ["'freedom from arbitrary adjudicative procedures is a substantive element of one's liberty'"].) The default-judgment rules were enacted to ensure fairness. (*Ibid.*)

Here, the trial court correctly concluded, as a matter of law, that the default judgment Yu was trying to enforce was jurisdictionally void. It was fairness, itself, that precluded Yu from being able enforce the defective judgment. As the trial court held, the default judgment entered without any damages statement in the ATMI cross-complaint was "contradictory to basic notions of due process and fairness …." (8AA 7070.) It would be "unfair" to conclude that Fitch was put on notice of its potential damages "by virtue of an allegation in a complaint filed not against them, but against cross-complainant ATMI." (*Ibid.*)

Contrary to the opening brief's assertions, there would be nothing fair about forcing American Safety to provide coverage on a default judgment that is jurisdictionally void. Fairness favors affirmance.

IV. The Opening Brief Fails To Address The Other Summary Judgment Grounds In American Safety's Favor.

The opening brief does not address the other summary judgment grounds. This court reviews the judgment entered, not the grounds relied on: "On appeal, we are concerned with the validity of the summary judgment ruling, not its reasoning." (*Guarantee Forklift, Inc. v. Capacity of Texas Inc.* (2017) 11 Cal.App.5th 1066, 1081, additional citations and quotation marks omitted.) Summary judgment may be affirmed on any correct legal theory. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.) Normally, appellant would waive any challenge to these additional grounds by not raising them in the opening brief. But section 437c, subdivision (m)(2), allows appellant to brief them in reply. Each of the additional grounds not reached by the trial court independently requires affirming the judgment.

Misrepresentation in insurance application. Misrepresentation or concealment of a material fact in an insurance application is a complete defense in an action on the policy under both California and Georgia law. (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 192; *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 156 Cal.App.4th 1259, 1266-1268; *Marchant v. Travelers*

Indem. Co. of Illinois (2007) 286 Ga.App. 370, 374 [650 S.E.2d 316, 319], discussing Ga. Code Ann., § 33-24-7(b) (West) [Georgia law].)[9]

Fitch materially misrepresented two facts in the applications:

- Fitch represented that the height of any structure it built would not exceed 32 feet and 3 stories high. (3AA 2566 [#15]; 4AA 2598 [#15]; 5AA 4146 ¶¶ 13-14.) It is undisputed that the hotel was over 4 stories high. (5AA 4147 ¶ 15.)

- In the 2004 application, Fitch represented that the work would be performed only in Arizona. (4AA 2596 [#5].)[10] It is undisputed that the hotel at issue was built in Anaheim, California. (5AA 4143 ¶ 2.)

"'The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law.'" (*LA Sound USA*, *supra*, 156 Cal.App.4th at p. 1268, quoting *Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 916.) On its face, it is apparent why these particular questions—the size and location of the project—are relevant to the insurance applications.

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[9] The policies have a Georgia choice of law provision. (3AA 2471, 2527; 5AA 4148 ¶ 20.)

[10] As previously noted, American Safety's insurance policies were issued to Fitch Construction Corporation, an Arizona-domiciled company. (See pp. 19-20 & fn. 3, *ante*.) Because this particular entity was not involved in the hotel construction at issue here, Yu's direct action against American Safety is improper for this additional reason.

"[A]ccording to the Insurance Code, case law, and leading commentary," misstatement or concealment of material facts "is ground for rescission *even if unintentional*. The insurer need not prove that the applicant-insured actually intended to deceive the insurer." (*Id*. at pp. 1269-1270, original italics; see also *United Family Life Ins. Co. v. Shirley* (1978) 242 Ga. 235, 238 [248 S.E.2d 635, 638] [under Georgia law, it is immaterial to misrepresentation claim whether applicant acted in good faith in completing insurance application].)

Presumptively material questions were asked on the applications. They were answered incorrectly. That defeats insurance coverage and, hence, Yu's judgment-creditor claim.

Untimely notice. It is undisputed that the insured, Fitch, *never* gave formal notice to American Safety of the claims at issue here. (5AA 4150 ¶¶ 25-26.) In the trial court, Yu claimed it didn't matter because American Safety had notice from two other sources. (*Ibid*.; see also 5AA 4135.) But such constructive notice is insufficient. (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 57; *Kitt v. Shield Ins. Co.* (1978) 240 Ga. 619, 620 [241 S.E.2d 824, 825] [Georgia law].)

And, under governing Georgia law (5AA 4148 ¶ 21 [choice of law provision electing Georgia law]), the notice-prejudice rule does not apply. (E.g., *Canadyne-Georgia Corp. v. Continental Insurance Co.* (11th Cir. 1993) 999 F.2d 1547, 1557, citing *Townsend v. National Union Fire Ins. Co.* (1990) 196 Ga.App. 789 [397 S.E.2d 61, 62].) Rather, lack of timely

notice defeats coverage under the policies' notice provision requiring notice "as soon as practicable." (3AA 2430 [§ 2.b.(2)], 2487 [§ 2.a].)

Even if California law applies, summary judgment is proper because American Safety was prejudiced by the lack of notice. (3AA 2382-2383; 6AA 5017.) ATMI was an unlicensed contractor, so many of its claims against Fitch were barred. (See Bus. & Prof. Code, § 7031, subd. (a) ["no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter …"].) Had formal notice been properly afforded, American Safety, on behalf of Fitch, could have challenged liability on that and other bases while reserving its coverage defenses.

CONCLUSION

A void default judgment is unenforceable, including in a judgment-creditor suit. A monetary default judgment is beyond the court's jurisdiction to enter, and is void, where, as here, the cross-complaint only alleges damages according to proof, with no particular amount specified. The trial court properly held the default judgment void and granted summary judgment to American Safety. The opening brief does not demonstrate otherwise.

For all the above reasons, the summary judgment in American Safety's favor must be affirmed.

Respectfully submitted,

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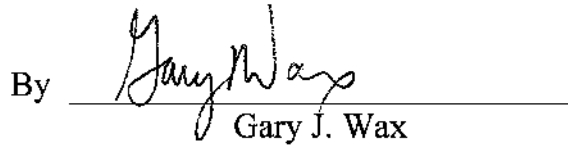
By 
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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENT'S BRIEF** contains **9,654** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: November 6, 2017

Gary J. Wax

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On November 6, 2017, I served the foregoing document described as: **RESPONDENT'S BRIEF** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Envelope: by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on November 6, 2017, at Los Angeles, California.

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

Leslie Y. Barela

Yu v. Liberty Surplus Insurance Corporation, et al.
4th Civil No. G054522

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