

PROPOSED TENTATIVE

On January 12, 2023, plaintiff Goldman Sachs Bank USA (hereafter, plaintiff) filed a limited action complaint on standard Judicial Council forms against defendant Michael Hudson for common count (open book account for money due, money lent by plaintiff defendant at defendant's request, and for money paid, laid out, and expended). Plaintiff loaned defendant \$30,000 originally, and according to the complaint, plaintiff defaulted, presently owing \$14,751.18. Defendant filed an answer, admitting some allegations, denying others, and raising four (4) affirmative defenses.

Plaintiff has filed a motion for summary judgment as to common count based on open book account only. It contends that undisputed evidence shows it kept a detailed log of the loan payouts plaintiff was required to pay per a written loan agreement, with an account number ending in "1774," on an ongoing basis, with all information made, gathered, and stored at the time the invoices were issued and sent, on a permanent basis, all electronically stored. According to defendant, this established an open book account, and summary judgment in the amount of \$14,751.18 is appropriate. A CMC is scheduled for December 19, 2023. No opposition has been filed, which would be untimely in any event (at least as of this writing).

Under California law, "common counts" are general pleadings that seek to recover money owed without necessarily specifying the nature of the claim. (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731; *Interstate Grp. Adm'rs v. Cravens* (1985) 174 Cal.App.3d 700, 706 & n. 2.) "A common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished." (*Kawasho Int'l, U.S.A. v. Lakewood Pipe Serv.* (1983) 152 Cal.App.3d 785, 793.) An open book account is an example of a common count. (*Fagelbaum & Heller LLP* (2009) 174 Cal.App.4th 1351, 1355.)

To prove an open book account, the evidence must show that there was a contract (oral or written) between plaintiff and defendant concerning a financial transaction between the parties; plaintiff in the regular course of business kept either a written or electronic account of the debits and credits involved in the transaction; defendant owed money on the account that has not been paid; and evidence of the amount of money defendant owes plaintiff. (CACI No. 372; see *State Compensation Insurance Fund v. ReadyLink Healthcare, Inc.* (2020) 50 Cal.App.5th 422, 449 [CACI 372 properly describes elements of open book account cause of action in common count].) Plaintiff has shown undisputed evidence that there was a written contract between the parties about the original loan; that defendant owed the amount loaned and has not paid the all money to plaintiff in full; and plaintiff presently owes a specific sum. The issue for the court is whether defendant has shown undisputed evidence that the parties agreed to treat the debt

(despite the written contract) as one subject to an open book account, as alleged in the operative pleading.

A “book account” is “a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner.” (Code Civ. Proc., § 337a.) Examples of statements held to be book accounts include a law firm's billing statements reflecting work performed on an hourly basis (*In re Roberts Farms, Inc.* (9th Cir.1992) 980 F.2d 1248, 1252 [applying California law]) and a ledger sheet recording amounts due for deliveries. (*Costerisan v. DeLong* (1967) 251 Cal.App.2d 768, 769–771.) A book account is “open” where a balance remains due on the account. (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708; see *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, fn. 5.)

“An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is not, as a rule, an open account.” (*Durkin v. Durkin* (1955) 133 Cal.App.2d 283, 290.) This general rule has been applied in cases where money is owed pursuant to the terms of an express contract. (*Eloquence Corporation v. Home Consignment Center* (2020) 49 Cal.App.5th 655, 666.) However, there is an exception -- an open book account cause of action may lie where the parties had agreed to treat the money due under an express contract as items under an open book account. (*Parker v. Shell Oil Co.* (1946) 29 Cal.2d 503, 507; *Eloquence, supra*, at p. 665.) “[I]n such a case the cause of action is upon the account, not under the [express contract].” (*Ibid*; *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 969; see p. 970.) As one appellate court queried: “What constitutes a ‘contrary agreement’ sufficient to meet th[is] exception?” “In *Warda v. Schmidt* (1956) 146 Cal.App.2d 234 the court held that ‘parties to a written or oral contract may, *by agreement or conduct*, provide that monies due under such contract shall be the subject of an account between them.’” (*Warda*, at p. 237, 303 P.2d 762, italics added.) **Like other courts, we are persuaded by Warda that an express contract is unnecessary.** (E.g., *H. Russell Taylor's Fire Prevention Serv., Inc.* [(1979) 99 Cal.App.3d 711,] 728 [“A book account is created by the agreement or conduct of the parties in a commercial transaction.”])” (*Eloquence Corporation, supra*, 49 Cal.App.5th at p. 666, emphasis added.)

To be an open book account (and thus the proper basis of a common count cause of action), the mere recording in a book of transactions or the incidental keeping of accounts under an express contract does not of itself create a book account. (*Eloquence Corporation v. Home Consignment Center, supra*, 49 Cal.App.5th at p. 666; *H. Russell Taylor's Fire Prevention Serv., Inc., supra*, 99 Cal.App.3d at p. 728.) An open book account must be a detailed statement that is

entered in the regular course of business. (*Eloquence Corporation, supra*, 49 Cal.App.5th 655, 666; see also *Imperial Merchant Services Inc. v. Hunt* (2009) 47 Cal.4th 281, 397 [a check is not a document entered in the regular course of business].)

The court is not persuaded that Exhibit C (offered by defendant) establishes a basis for an open book account. It is essentially the same document attached to the complaint, and appears to have been created in October 2022, four years after the loan payments began, and after the last payment was made by defendant in April 2022. This is no more than a detailed billing statement or billing history spreadsheet, found insufficient to establish an open book account. (*Eloquence, supra*, 49 Cal.App.5th at p. 666 [the date on the accounts receivable statement indicates the document was created almost eight years after the invoices were issued; further, the billing history spreadsheet and two computer printouts appear to have been prepared for litigation]; see *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1343 [finding a document failed the definition of a book account where it was prepared for use in opposing summary judgment motion].)

Defendant's Exhibit B, on the other hand, consists of separate invoices, generated on specific dates during the full course of the loan, indicating that at a given particular time, on an ongoing monthly basis, the amounts paid, the amounts due, and the amounts owing were all entered in into a computer system on a revolving basis as permanent record. (See, e.g., *In re Roberts Farms, Inc, supra*, 980 F.2d at p. 1253, fn. 3 [under California law, billing records are sufficient to satisfy the open book account requirements, as they show permanent records that reflect an ongoing relationship between the parties]; see also *Chamberlin v. Hartog, Baer & Hand, APC* (N.D. Cal., Feb. 22, 2022, No. 19-CV-08243-JCS) 2022 WL 526157, at *21 [the invoices and billing letters that Defendants have provided are not materially different from the records held to be sufficient in *Roberts*].) These invoices (as contained in Exhibit B) are essentially the primary and principal record of the transactions between creditor and debtor arising out of the loan relationship.¹ The invoices start from September 23, 2020, and go to May 22, 2022; each monthly statement details the amount owed on the original loan, the remaining unpaid total balance to be paid, the amount due and owed with interest paid to date, all on a revolving basis. Put in terms of the statutory language contained in Code of Civil Procedure section 337a, the invoices presented here both individually and collectively show the name of the debtor, the date of transaction, the details of the transaction arising out of a contract, reflecting an ongoing account of debits and credits, kept in a reasonably permanent manner and form electronically in the normal course of business; and they were kept in the ongoing financial relationship between the parties. This evidence shows that the parties, at least by conduct, treated the loan as an open book account. (*H. Russell Taylor, supra*, 99 Cal.3d at p. 728 [parties

¹ In *Eloquence*, the court noted that the “monthly sales and biannual reconciliation invoices were the principal records of the parties’ transaction,” but only four documents were submitted – and each simply “listed invoices sent” to the debtor, and in that regard, were “only secondary or incidental record that do not establish an open book account.” (49 Cal.App.5th at p. 666.) The invoices here have been submitted.

by conduct may provide that monies due under contract are subject to open book account between them]; see, e.g., *Western Oilfields Supply v. Goodwin* (E.D. Cal., May 12, 2008, No. CVF07-1863AWIDLB) 2008 WL 2038048, at *4 [open account book stated when \$392,000 of debt remains unpaid by Defendants, the amounts are reflected through a rental agreement and invoices, and the amounts invoiced were to a particular account and directed against Defendants in an ongoing basis, all in a permanent form].) For our immediate purposes, the evidence shows that the amount owed was determined by computing all of the credits and debits entered in the invoices on an ongoing basis, leaving a balance due. (*Interstate Group Administrators, Inc.*, (1985) 174 Cal.App.3d 700, 708 [“A book account is described as ‘open’ when the debtor has made some payment on the account, leaving a balance due. [Citation.]” The invoices provide the type of detailed record that qualifies as an open book account. (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752 [conduct of parties show they intended or expected an open book account was created.]

This conclusion is underscored by the declaration provided by defendant. According to Tanna Hicks, Legal Operations Analyst for defendant, the records in Exhibit B are maintained “in the ordinary course of [defendant’s] business, and the records are updated with information on events (such as charges and payments on the loan) . . . that track such events at or near the time that the events occur. The same systems that record this information also generate periodic statements” provided to debtors (with periodic statements on an on-going bases).

In the end, the court finds that plaintiff has satisfied its prima facie burden to show *each* element of the open book account cause of action has been established by admissible evidence. (*Aguilar v. Atlantic Richfield Co.*, (2001) 25 Cal.4th 826, 850-851 [moving party must establish prima facie showing].) In moving for summary judgment, plaintiff’s initial burden does not require it to negate affirmative defenses asserted by the defendant. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, 564.) It must prove only “each element of the cause of action entitling the party to judgment on the cause of action.” (Code Civ. Proc., § 437c, subd. (p)(1).) “Once the plaintiff . . . has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.” (*Oldcastle, supra*, at pp. 564-565.) Defendant has not filed opposition, which would be late in any event as of this writing. There is nothing offered to counter defendant’s prima facie showing.

Accordingly, the court grants plaintiff’s motion for summary judgment. The court will sign defendant’s proposed order, filed on September 20, 2023, and sign defendant’s proposed judgment, filed on September 15, 2023.