

PROPOSED TENTATIVE

On June 2, 2025, plaintiff Cavalry SPV I, LLC, as assignee from Citibank, N.A. (plaintiff), filed a complaint against defendant Alan Skinner, alleging one count for breach of contract. According to the complaint, on May 13, 2012 Citibank “issued a Consumer Credit Card Account” to defendant. Defendant used the account to make purchases and/or to take cash advances and reaffirmed the obligation to pay through use of the account. Defendant’s last payment was made on April 30, 2023, and he thereafter breached the agreement to pay. Defendant is in default and owes \$9,627.04. Plaintiff alleges that it purchased defendant’s account from Citibank on January 30, 2024. (§ 7.) Attached to the complaint are the following documents: 1) Exhibit 1, consisting of “Bill of Sale and Assignment” involving “November 2023 Costco Fresh Flow Accounts” ; 2) a January 30, 2024, “Bill of Sale and Assignment” and Exhibit 1 Asset Schedule (Costco Fresh Lot), indicating the sale of number of accounts to plaintiff; an “Affidavit of Sale of Account” indicating the sale of a “pool of charged-off accounts” from Citibank to plaintiff; and “Certificate of Conformity” confirming the document’s veracity under State of Kentucky; and 3) Exhibit 2, a copy of a “Costco” Visa Card statement, indicating that defendant was cardholder since 2012, had account number ending in 9515, and as of June 3, 2023, defendant owed \$6,446.24.

Defendant, in pro per, has filed a motion to dismiss pursuant to Code of Civil Procedure¹ section 430.10 [this is the statutory scheme for a demurrer].) Defendant raises two arguments: 1) the complaint fails to show plaintiff has “standing” to advance the breach of contract cause of action; and 2) the complaint fails to state facts sufficient to constitute a breach of contract cause of action. As to the first claim, defendant contends that the “only documentation provided [in the complaint] . . . is a master purchase agreement or list that does not name [defendant] and fails to identify any account number or terms specific to Defendant,” and thus, according to defendant, plaintiff has failed to establish any legal interest in the account. Defendant contends that plaintiff has failed to attach a signed credit card agreement, or any billing statements identifying defendant as the account holder and has failed to provide any evidence that defendant’s account was properly transferred by Citibank to plaintiff. As to the second claim, defendant contends (generically) that “alleging a debt without a contract . . . is insufficient.”

Plaintiff has filed opposition, including a request for judicial notice and a separately filed declaration from attorney Ranjeet K Brar. Attached to the declaration are the following documents as exhibits: 1) the demand letter sent to defendant, dated March 24, 2025; 2) the proof of service showing personal service on defendant of the present lawsuit (and which is already reflected in Odyssey, having been filed with the court on June 2, 2025); 3) Civil Case Sheet (also filed with the court on June 2, 2025, as reflected in Odyssey); 4) a “Notice of Related Case,” not filed with the court and not indicating on its face what case is related; 5) an “Answer” and a “Cross-Complaint” from defendant in this matter, although these documents were not filed with the court and are not part of the register of actions; 6) defendant’s answer to the complaint and counterclaim, which includes as an exhibit a partial copy of the “Credit Card Agreement” signed by Citibank and defendant (again, not filed with the court); and 7) plaintiff’s proposed answer to defendant’s cross complaint again not filed with the court. Mr. Brar in his declaration details plaintiff’s efforts to serve all documents on defendant; defendant’s efforts to serve plaintiff with a

¹ All further statutory references are to the Code of Civil Procedure.

number of documents (none of which were filed with the court, as noted); and plaintiff's efforts to file an answer to defendant's cross-complaint, which was rejected by the court, because no cross-complaint had been filed. According to Mr. Brar, at no point has defendant prior to the "motion to dismiss" made any efforts to meet and confer. On the merits, plaintiff makes the following ripostes: 1) the demurrer must be overruled because defendant failed to engage in any meet and confer efforts; 2) on the merits, it has pleaded all elements to a breach of cause of action. It argues that if it has not, the demurrer should be sustained with leave to amend. Defendant has failed reply (although it was late). All briefing has been reviewed.

The court will examine defendant's request for judicial notice, address a number of procedural issues raised by the briefing, including the impact of the documents attached to Mr. Bahr's declaration, and then address the merits of the "motion to dismiss." The court will finish with a summary of its conclusions.

A) Judicial Notice

Plaintiff asks the court to take judicial notice of the following documents: 1) Exhibit A, which includes the operative pleading filed by plaintiff in this matter, including all exhibits. The court does not need to take judicial notice of the operative pleading that is at issue in the matter. However, as the request is unopposed, it will be granted.

B) Procedural Issues

First, the court will deem defendant's "motion to dismiss" to be a "demurrer," as defendant expressly relies on section 430.10 as the basis of the motion, which outlines the rules and standards for demurrers.

Second, the court reminds the parties that this court, when examining the merits of a demurrer, is limited to the facial allegations made in the operative pleading as well as documents that have been judicially noticed (or are otherwise properly part of the trial court record, such as a proof of service and civil cover sheet. (§ 430.30; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 [limited role of demurrer is to test the legal sufficiency of a complaint and court may not consider substance of declarations].) Mr. Brar's declaration, and the documents attached thereto, are of exceptionally limited value as a result, as they include documents outside the scope of review permitted by a demurrer. Documents not filed with the court have not been considered for purposes of assessing the merits of the demurrer.

Finally, the court rejects plaintiff's claim that the court must overrule the demurrer because defendant failed to engage in any meet and confer efforts. Section 430.10, subdivision (a)(4) could not clearer – "A determination by the court that meet and confer process was insufficient shall not be grounds to overrule or sustain the demurrer." (See *Dumas v. Los Angeles Bd. of Supervisors* (2020) 45 Cal.App.5th 348, 355.) This includes failure to make any effort at all, as nothing in section 430.41 distinguishes between some attempt and no attempt at all. It imposes no penalty for failing to meet and confer properly, even if no meet and confer occurred

at all. There is nothing offered to suggest to the court that a continuance to allow the parties to meet and confer would be fruitful. Accordingly, the court will therefore assess the merits of the demurrer.

C) Merits.

The court rejects defendant's claim that "standing" has not been adequately alleged. It is settled of course that only parties with a real interest in a dispute have standing to seek its adjudication. (Code Civ. Proc., § 367.) A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law. (*Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787.) "The question of standing to sue is one of the right to relief and goes to the existence of a cause of action against the defendant [citation]." (*Payne v. United California Bank* (1972) 23 Cal.App.3d 850, 859.) Subject to limited exceptions not pertinent here, the real party in interest may transfer his or her right in a cause of action to third party. (Civ. Code, § 954; *Essex Ins. Co. v. Five Star Dye Horse, Inc.* (2006) 38 Cal.4th 1252, 1259 [recognizing assignability of cause of action arising out of an obligation under contract].) When this occurs, the assignee becomes the real-party-in-interest, standing in the "shoes of the assignor and taking the rights and remedies" (*Essex, supra*, at p. 1264[.]) It is sufficient, however, that plaintiff plead only ultimate facts, not evidentiary facts, for this purpose. (See, e.g., *Estate of Lind* (1989) 209 Cal.App.3d 1424, 1437 [plaintiff need only allege sufficient ultimate facts to state a basis for standing]; see *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 [a complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts]; *Doheny Park Terrace Homeowners Assn. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1098–1099.) An ultimate fact is an element of the cause of action, while an evidentiary fact supports the existence of an element. (*Carlson v. Koivumaki* (2014) 227 Cal.App.4th 879, 884, fn. 6.)

Here, plaintiff has alleged sufficient ultimate facts to support its standing as an assignee. It indicates that Citibank and defendants were the original signatories on the "Account and [A]greement," in which Citibank agreed to provide a consumer credit card funds to defendant, and defendant agreed to repay the amounts used, with interest, fees, and other charges "pursuant to the agreement." (§ 18.) Citibank issued a credit card pursuant to this agreement, and defendant used the card, accruing charges and interest per the agreement. Plaintiff claims it "purchased the Account from Citibank, N.A. on January 30, 2024," and now plaintiff "is the sole owner of the Account which forms the basis for the Complaint." While it is true, as defendant claims, that nothing in plaintiff's exhibits expressly mentions a transfer of defendant's credit card account from Citibank to plaintiff (as part of the transfer of the pooled accounts), defendant's challenge is evidential; there are sufficient ultimate facts to support standing, as this court is required to assume the truth the allegations made in the pleading for purposes of demurrer. (*Freemont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111 [we assume the truth of properly pleaded factual allegations].) Defendant on summary adjudication or trial

can advance claims that his account was not transferred, and that there is no evidence to support it. For pleading purposes, however, the demurrer is without merit on this ground.

In reply, defendant cites to *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284 and *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 in aid of his position. Neither case is apposite. In *Cockerell*, our high court determined the standards at trial when someone claims they have standing via assignment. (*Cockerell, supra*, 42 Cal.2d at p. 292 [the burden of proving an assignment falls upon the party asserting rights thereunder, and the evidence must be sufficient].) Nothing in *Cockerell* discussed the pleading standards when an assignment is alleged as a basis for standing. *JP Morgan Chase Bank, N.A.* involved a discussion of plaintiff's claim, in the nonjudicial foreclosure context, that defendant has no authority to initiate a preemptive challenge to a nonjudicial foreclosure by challenging the foreclosing party's authority to foreclose. The *Jenkins* court indicated nothing in the scheme allowed such a preemptive challenge, and in any event, the foreclosing party does not have to have an actual beneficial interest in the promissory note and deed of trust to commence and execute a nonjudicial foreclosure sale. (*Jenkins, supra*, 216 Cal.App.4th at pp. 512-513.) It also did not discuss the pleading requirements for standing when an assignment is alleged. It is axiomatic that cases are not authority for propositions not considered. (*Sonic-Calabasas A., Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1160.)

Defendant's general demurrer to the breach of contract cause of action requires a more developed analysis. The gravamen of the action rests exclusively on breach of a written cardmember agreement between Citibank and defendant, as discussed in paragraph 18 of the operative pleading.² To plead a breach of contract, plaintiff must allege (1) the contract; 2) plaintiff's performance of the contract or excuse for nonperformance; (3) defendant's breach; and 4) the resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see Witkin, California Procedure (6th ed. 2025 Supp.), Pleading, § 525.) A written contract is usually pleaded and by setting it out verbatim ("*in haec verba*") in the body of the complaint or

² Common count is not pleaded. In this regard, the law is established in California that a debt which is predicated upon the breach of the terms of an express contract cannot be the basis of a common count/account stated. (*Rio Linda Poultry Farms v. Fredericksen* [(1932)] 121 Cal.App. 433, 435.) Because in the present case the cause of action was instituted to recover damages arising from the breach of this express contract for the payment of money, and because an account stated has not been pleaded in the alternative, there is no issue concerning the viability of the common count cause of action. (*Moore v. Bartholomae Corp.* (1949) 69 Cal.App.2d 474, 477-478.) The court in *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 971, fn. 5, was not convinced that the rules articulated in *Rio Linda Poultry Farms* and *Moore*, discussed above, "appl[y] in the context of contracts that do not bind the debtor to pay a specific sum, such as the Cardmember Agreement at issue here. However, given that the gravamen of [plaintiff's] action is breach of contract, we can leave to another day the question whether an account stated claim [i.e., common count] may be used to collect a credit card debt incurred in connection with a credit card governed by a cardmember agreement." The *Professional Collection* gloss plays no part here, because as stated plaintiff's only cause of action is one for breach of contract -- based exclusively on the original Cardmember Agreement between the assignor and defendant -- meaning breach of contract pleading rules apply.

by attaching a copy to the pleading (and incorporating by reference). (*Id.* at § 526.) A third way exists – pleading its legal effect, meaning plaintiff must allege the substance of its relevant terms for their legal effect. (*Ibid.*) Case law is clear about what this requires: “To state a cause of action for breach of contract, it is absolutely essential to plead the terms of the contract either *in haec verba* or according to legal effect.” (*Twaite v. Allstate Ins. Co.* (1989) 216 Cal.App.3d 239, 252.) “In order to plead a contract by its legal effect, plaintiff must ‘allege the substance of its relevant terms.’ This is more difficult, for it requires a careful analysis of the instrument, comprehensiveness in statement, and avoidance of legal conclusions.” (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1489; see *Constructional Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199 [“a plaintiff may plead the legal effect of the contract rather than its precise language”].) Where a party relies upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in the pleading, and are not stated in their legal effect, and the portion which may be material has been omitted, the complaint is insufficient. (*Witkin, supra*, at § 528.)

Under these rules, two defects appear on the face of the operative pleading. First, plaintiff has failed to plead plaintiff’s (or assignor’s) performance or any excuse for nonperformance under the written agreement. While the performance requirement can be satisfied in general terms, excuses must be pleaded specifically. (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1367.) Here, there are ***no*** allegations about plaintiff’s (or Citibank’s) performance or excuse for nonperformance under the agreement. A demurrer is appropriate when this defect is apparent. (See, e.g., *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388 [one element of a breach of contract that must be pleaded is the plaintiff’s performance or excuse for nonperformance].)

Second, defendant is relying on breach of a written contract, namely the Cardmember Agreement between Citibank and defendant, as reflected in paragraph 18 of the operative pleading. While plaintiff has attached to the complaint an account statement for amounts due in June 2023, ***that is not the written contract***. Nor has plaintiff set out the critical terms of the contract “*in haec verba*.” Further, the court is not convinced that plaintiff has pleaded the legal effect of the material terms of the contract, as it has not alleged the substance of its relevant terms. (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 993.) Plaintiff has alleged in the most conclusory fashion that defendant “agreed to repay amounts advanced, including interest, fees, and other charges pursuant to the agreement.” This seems the essence of a “legal conclusion” – for it contains no careful analysis of the instrument itself or a comprehensiveness of the statement. More must be pleaded (or the contract must be attached to the operative pleading). The demurrer is also sustained for this reason. Leave to amend is appropriate for both deficiencies.

The court concludes with the following observations. “Leave to amend” means plaintiff can continue to allege a breach of contract cause of action (if it can cure the above deficiencies);

the court is also allowing plaintiff to plead common count in the alternative if desired. “It is settled that where a common count follows a count wherein all the facts on which the plaintiff's demand is based are specifically pleaded and it is clear that the common count is based on the same set of facts, the common count is to be considered not as a different cause of action, but as an alternative method of pleading the plaintiff's right to recover. [Citations.].” (*City of Oakland v. Oakland Etc. Sch. Dist.* (1956) 138 Cal.App.2d 406, 411; see *Jade Fashion & Co, Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 634, 655 [three common count causes of action were properly pleaded in the alternative to a breach of contract cause of action].)

Additionally, the court’s decision here does not preclude plaintiff from advancing common count causes of action only should plaintiff choose to forego a breach of contract cause of action entirely. It is up to plaintiff to determine how it wishes to proceed within these parameters. The court is simply emphasizing that its decision to grant leave to amend is sufficiently commodious to allow plaintiff to pursue these choices. That being said, nothing here should be seen as addressing let alone resolving the merits of any amended pleading. Defendant will be afforded an opportunity to challenge any future pleading by demurrer/motion to strike.

Summary:

- The court deems defendant’s “motion to dismiss” as a demurrer.
- The court has not examined those documents attached to Mr. Ranjeet Brar’s declaration that are not part of court’s record, for they fall outside the documents that may be examined by demurrer (facial allegations of the operative pleading and judicially noticed documents).
- The court rejects plaintiff’s claim that the court should overrule the demurrer based on defendant’s failure to meet and confer.
- The court finds it unnecessary to take judicial notice of the very complaint at issue in the demurrer, although as the request is not opposed, the court grants plaintiff’s judicial notice request.
- As to the merits of defendant’s demurrer, the court rejects any claim that plaintiff has failed to allege standing. The court overrules the demurrer on this ground.
- The court nevertheless sustains defendant’s demurrer as to the breach of contract causes of action, for two reasons. First, plaintiff has failed to plead performance or excuse for nonperformance. Second, plaintiff has failed to attach the written Cardmember Agreement, has failed to plead its critical terms, or allege their legal effect without avoiding legal conclusions. More must be pleaded. Leave to amend is granted.
- Plaintiff has 30 days from today’s hearing date to submit a first amended pleading.
- The court wants to make it clear that leave to amend contemplates the addition of a common count cause of action, either alternatively to breach of contract or by itself, if plaintiff chooses. Nothing here should be construed as addressing the merits of decision plaintiff makes, as defendant will be afforded an opportunity to challenge through a demurrer/motion to strike.