PROPOSED TENTATIVE

On October 28, 2024, plaintiff Wells Fargo Bank, N.A (plaintiff) filed a complaint against defendant Luis M. Ballerio (defendant), advancing two causes of action for breach of contract, with the first involving breach of a written contract and the second involving breach of an implied-in-fact contract. As to both causes of action, plaintiff alleges that the parties entered into a written contract (a "Consumer Credit Card Customer Agreement . . . ."), in which plaintiff agreed to issue a credit card, which defendant accepted and upon which defendant agreed to make payments; defendant used the credit card to purchase goods, services, and/or for cash advances, for $8,571.33, and for which defendant agreed to repay with payments; and which defendant has not done, breaching the agreement. Plaintiff advanced no common cause of action in the operative pleading. Defendant filed a general denial as an answer. No trial date has been set.

Plaintiff has filed a summary judgment motion. It asks the court to enter judgment as to the two breach of contract causes of action, as well as four common counts (money lent, money paid, open book account, and account stated). Defendant has filed opposition; it has provided no evidence in opposition, advancing only evidentiary objections to plaintiff's evidentiary proffer. Plaintiff has filed a reply. All briefing has been reviewed.

A) Preliminary Observations

The court makes three preliminary observations that help frame issues before the court. First, plaintiff has filed only a summary judgment motion – it has not filed a summary adjudication motion. While procedurally they are treated the same, there is a difference -- summary judgment disposes of the entire action, while summary adjudication disposes of a particular cause of action. As a practical matter, however, given the related nature of the breach of contract causes of action, if plaintiff prevails on either the written breach of contract or the implied-in-fact cause of action, the summary judgment would be appropriate. The failure to advance a summary adjudication motion has little bearing on the outcome as a result. The court will explore this is more detail below.

Second, plaintiff raises four common count causes of action in its summary judgment motion. This is clearly improper, because in summary judgment proceedings the material issues *are framed and limited by the pleadings.* (*Hutton v. Fidelity National title Co*. (2013) 213 Cal.App.4th 486, 490.) As plaintiff failed to plead common count, it would be unfair to require defendant to address these claims in opposition. (See generally *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 182.) Plaintiff made no attempt to amend the operative pleading before the hearing on the summary judgment. This means as a practical matter that the court will ignore Issue Nos. 15 to 44 in plaintiff's separate statement, as they

discuss/involve the four theories of common count. Plaintiff's motion succeeds or fails based on Issues Nos. 1 to 15 of the separate statement (and the evidence offered in support). Plaintiff belatedly acknowledges this error in reply.

Third, the ***entirety*** of defendant's separate statement response, as to Issues Nos. 1 to 15 (and relevant here), consists only of evidentiary objections. As noted, defendant has provided no evidence in his separate statement, which is his right.[1] What is not his right, however, is to advance these evidentiary objections ***in the separate statement itself only***, targeted at defendant's claim that a fact is undisputed, as well as to any evidence offered by plaintiff in support of the undisputed fact.

This is erroneous for two reasons. First, the claim in the separate statement that a fact is "undisputed" is a concession only for purposes of summary judgment motion; it is not evidence (because it is not under oath or verified), and it is not a judicial admission. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 747.) Accordingly, evidentiary objections to the claimed undisputed facts are irrelevant, and for that reason the court overrules them.

Second, it is inappropriate for a party to advance evidentiary objections to the underlying evidence in a separate statement, as it violates California Rules of Court, rule 3.1354 (b), which requires that evidentiary objections in support of a summary judgment motion must be served and filed ***separately*** from the other papers. (*Hodjat v. State Farm Mutual Automobile Ins. Co*. (2012) 211 Cal.App.4th 1, 8]; see also *Universal City Studios Credit Union v. CUMIS Ins. Society* (2012) 208 Cal.App.4th 730, 734, fn. 1 [including evidentiary objections in separate statement, "as opposed to a *separate document raising only objections*, was improper"].) Here, defendant has not filed a separate document that meets these requirements. Despite *Hodjat* and progeny, however, the court will exercise its discretion and address only critical evidentiary objections made, overruling all others. (*Reid v. Google* (2010) 50 Cal.4th 512, 532 [parties should only object to evidence that counts].) This point is bolstered by the fact plaintiff ignores these procedural deficiencies in its briefing.

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[1] It is true, as defendant correctly argues, that a plaintiff moving for summary judgment bears both the burden of production and persuasion that each element of the cause of action has been proved (entitling plaintiff to judgment). (*S.B.C.C., Inc. v. St Paul Fire & Marine Ins. Co.* (2010) 196 Cal.App.4th 383, 388.) Plaintiff does not have to disprove affirmative defenses raised in the answer to prevail. (*Oldcastle Precast, Inc. v. Lumbermens Mutual Cas. Co.* (2009) 170 Cal.App.4th 554, 565; see also *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) It is only after that showing is made does the burden shift to defendant to demonstrate that a triable issue of one of more material facts exists as to either a cause of action or any defense raised in the answer. (Code Civ. Proc., 437c, subd. (p)(1).) Defendant is entitled to challenge the prima facie showing in the first instance by claiming plaintiff has failed to admit admissible evidence in support. If, however, plaintiff does meet this prima facie burden with admissible evidence (*LPP Mortgage, Ltd. v. Biza*r (2005) 126 Cal.App.4th 773, 776), defendant (having submitted no evidence) cannot demonstrate that triable issues of material fact exist as to any cause of action or any defense thereto.

For the most part defendant's evidentiary objections are blunderbuss, perfunctorily made without nuance or real analysis. That being said, the first set of objections the court will address are directed to the declaration of Ms. Linda Ross, an employee of and most "qualified witness for" Wells Fargo Bank, as well as two exhibits attached to her declaration: 1) Exhibit 1, which is a document entitled "Consumer Credit Card Customer Agreement & Disclosure Statement Visa"; and 2) Exhibit 2, which consists of monthly credit card billing statements sent by plaintiff to defendant over the years, starting in December 12, 2019 (the first month the credit card account was opened), and for each month thereafter in 2020, 2021, 2022, 2023, and up to June 30, 2024. Ms. Ross declares she is familiar with the facts contained in her declaration and the exhibits, and if called as a witness could testify that 1) she is responsible for monitoring plaintiff's credit card accounts, investigations, and resolution of customer disputes, as well as plaintiff's "business records for purposes of litigation"; 2) she has personal knowledge of the way the specific accounts are opened and operated, as well as the "usage and record keeping systems" for plaintiff. She declares that the documents contained in Exhibit 1 are "generated monthly statements," which "reflect the balance from the previous month, all payments and credits made since the last statement, new charges or cash advances made by the Defendant since the prior statement, and specified a minimum payment that will be due for that month. Additionally, the monthly statement showed the interest rate for the Defendant's account and calculation of said interest rate on the balance." According to Ms. Ross, defendant "made payments [on] the principal and interest on the subject account up to and through October 21, 2023, and no "further payments were made on this account after October 21, 2023, and a balance of $8,571.33 remans due and owning. . . . "

Ms. Ross's declaration, as well as the two exhibits attached thereto, are admissible pursuant to Evidence Code section 1271 (the business records exception to the hearsay rule), which provides as follows: "Evidence of a writing made as record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition or event if: (a) the writing was made in the regular course of a business; (b) the writing was made at or near the time of the act, condition, of event; (c) the custodian or other qualified witness testified to its identity and the mode of its preparation; and (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." A qualified witness need not be the custodian, the person who created the record, or the one with personal knowledge in order for a business record to be admissible under this hearsay exception. (*Jazayeri v. Maso* (2009) 174 Cal.App.4th 301, 322.)

In *Unifund CCR, LLC v. Dear* (2015) 243 Cal.App.Supp.1, defendant challenged the trial court's admission of a declaration of the custodian or records (an authorized representative), as well as all credit card billing statements, used to establish the existence of the debt and breach. The *Unifund* court rejected the challenge, finding the declaration was sufficient to authenticate the credit card account documents. The authorized agent (one Bloom) declared she was the

authorized representative and custodian of records for plaintiff, that all records of defendant's indebtedness by the original creditor were kept in the ordinary routine course of business. Bloom claimed she had personal knowledge of the manner, methods, and practices by which plaintiff maintained its business records. The court could "not find that the trial court abused its discretion in finding that Bloom adequately laid the foundation to authenticate the billing statements as business statements."

The same is true here. Ms. Ross's declaration is similar to Bloom's declaration in substance and scope Further, Ms. Ross has attached both the "Credit Card Agreement" and the billing statements to her declaration. She states that she has personal knowledge of the way Wells Fargo's record- keeping works and how it tracks the billing records, declares the documents were prepared at or near the time the events in the records took place, explains the records are "imaged and maintained" by plaintiff in the ordinary course of business, and recounts they were printed from the plaintiff's computer system by her. She also explains that she has been trained in the use of the computer systems, and she can testify how the system works. This is similar to the showing made in *Unifund*. (See, e.g*., Chambers v, Crown Asset Management, LLC* (2021) 71 Cal.App.5th 583, 589, fn. 5.)

Defendant objects to Ms. Ross's statement, as contained in paragraph 22 of her declaration, to the extent that "[n]o further payments were made on this account after October 21, 2023, and a balance of $8,571.22 remains due and owning from Defendant to Plaintiff on the subject account," as conclusory. Further, defendant challenges Ms. Ross's statement that she is responsible for "monitoring the legal process for credit card accounts," because she has failed to explain what "legal process" entails. Additionally, defendant claims that "as part of her duties as Loan Workout Specialist, I have reviewed the account of [defendant]," although she fails to indicate "what the 'account' consisted of . . . ," rendering these statements too vague to have substance.

The court rejects defendant's challenges. Ms. Ross is not making these statements unmoored to or unbuttressed by the documents attached to her declaration. She declares she is a "Loan Workout Specialist"; as part of her duties, she opines, she monitors the business records generated by plaintiff, researches "specific account issues," including "charges made and payments received, and account delinquencies," and thus has personal knowledge of what these investigations reveal. She declares that the documents attached to her declaration were not altered in any way, and as part of her duties she monitors "the account of [defendant], which is the subject of this lawsuit." She has knowledge of the facts contained in the declaration, and if called as witness, she could testify to the fact defendant is in default. There is nothing conclusory or inadmissible about this testimony given the documentation offered in support and given the nature of her expertise. There is absolutely no reason to discount the trustworthiness of Ms. Ross's declaration and her ability to testify about the nature of the business records at issue.

Sierra Managed Asset Plan, LLC v. Hale (2015) 240 Cal.App.4th Supp. 1 bolsters this conclusion. There, Sierra acquired defendant's credit card account through a series of assignments and sued to collect on the defendant's unpaid balance. Sierra submitted a declaration from ***its*** authorized agent and custodian, along with various documents showing account assignments originating from Citibank, the account agreement, and account statements reflecting the defendant's unpaid balance. (*Id.* at pp. 4, 8.) Sierra did not create the documents it submitted with its declaration and the declarant was not the authorized custodian of the documents of the original creditor, Citibank. (*Id.* at pp. 3, 8.) The appellate division concluded the records established only that Sierra, "as assignee from the creditor, received records originating from Citibank concerning the account in question. This falls short of the foundation necessary for admission of the business records as against a hearsay objection." (*Id.* at pp. 8-9.) Here, by contrast, Wells Fargo created the documents directly, and Ms. Ross was the authorized agent to discuss the documents directly.

The same is true for *Midland Funding LLC v. Romero* (2016) 5 Cal.App.5th Supp. 1. Midland, as the successor creditor, submitted the declaration of ***its*** custodian of records, who declared the original creditor's records it attached to the declaration were trustworthy and accurate because the original creditor was "required by law to keep careful records of the account or suffer business loss." (*Id.* at p. 4.) The appellate division analyzed the contrasting applications of the business records exception found in *Unifund* and *Sierra.* The court in *Midland* concluded *Unifund* incorrectly "relaxed the requirements under the Evidence Code regarding the business records exception to hearsay." (*Id.* at p. 9.) Following the traditional analysis utilized in *Sierra*, the *Midland* court concluded that Midland, as successor trustee creditor, established the "documents were part of [Midland's] business records, but did not satisfactorily establish those documents were a part of the prior creditor's business records under Evidence Code section 1271. That is, there was no evidence regarding the mode of preparation or other information indicating trustworthiness." (*Id.* at p. 9.) Even if the court acknowledges *Midland'*s criticism of *Unifund*, the defects at issue in *Midland* are simply not present here, for, as noted above, Wells Fargo is the creditor plaintiff, and Ms. Ross works directly for Wells Fargo, meaning she is in a position to know how the documents were generated and processed as part of the normal course of business.

The court overrules all of defendant's objections to Ms. Ross's declaration and to the two exhibits attached thereto.

B) Merits

The court finds it unnecessary to examine whether there was a breach of an express written contract, for it can explore the merits of plaintiff's summary judgment exclusively through the prism of the second cause of action, which advances a breach of an implied-in-fact contract. The case law supports this. "The vital elements of a cause of action based on contract are mutual assent (usually accomplished through the medium of an offer and acceptance) and consideration. As to the basic elements, there is no difference between an express and implied contract. While an express contract is defined as one in which the terms are stated in words (Civ. Code, § 1620), an implied contract is an agreement, the existence and terms of which are manifested by conduct. (Civ. Code, § 1621.) "Both types of contract are identical in that they require a meeting of minds or an agreement [citation]. Thus, it is evident that both the express contract and contract implied in fact are founded upon an ascertained agreement or, in other words, are consensual in nature, the substantial difference being in the mode of proof by which they are established [citation].' " (*Pacific Bay Recovery, Inc. v. California Physicians' Services, Inc.* (2017) 12 Cal.App.5th 200, 215.)

With this, plaintiff has shown that an implied-in-fact contract between the parties was established, that it was breached, and that defendant owes a specific amount, without any disputed issues of fact at play. Defendant admitted in his discovery responses (and specifically, in his response to Request for Admission No. 1, attached to Ms. Ashley Mulhorn's declaration,) that plaintiff issued defendant a credit card (and thus he opened a credit card account), ending in account number 4296. The promises made as result of this acceptance were contained in the Credit Card Agreement attached as Exhibit 1 to Ms. Ross's declaration, including an agreement to pay off the balance in the account. Further, while the promise to pay was not expressly agreed to in a signed document, it is undisputed that defendant was sent and thus was aware of the terms and conditions of the issuance as reflected in Exhibit 1 of Ms. Mulhorn's declaration, to the effect that a billing statement would be sent (on a monthly basis), and that defendant would be required to remit at least a monthly minimum amount, if the card were used. Defendant thereafter unquestionably and undisputedly used the credit card issued by plaintiff to purchase items. Defendant's conduct – by using the card, receiving monthly billing statements, and making payments – amounts to an acceptance by conduct of the terms of the agreement, constating an intent to agree (involving mutual assent). The undisputed evidence before the court shows defendant defaulted at least by October 2023, has since made no further payment, and presently owes $8,571.33. (See, e.g., *Stinger v. Chase Bank, USA, NA* (5th Cir. 2008) 265 Fed.Appx. 224, 227 [plaintiff's use of credit cards showed intent to be bound by terms of credit card agreement]; *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420 [a signed agreement is not necessary, and a party's acceptance may be implied-in-fact].) Defendant has presented no evidence to create a disputed issue of material fact on any of these critical points.

Accordingly, the court grants plaintiff's summary judgment motion as to the second cause of action for breach of an implied-in-fact contract. Plaintiff is directed to provide an order and judgment for signature.

C) Costs

One remaining item requires attention. Plaintiff, contemporaneously with the motion for summary judgment, filed a "Memorandum of Costs," asking for $800 ($725 for filing fees, and $75 for service). As the prevailing party, plaintiff would be entitled to these costs, and they appear reasonable. Defendant in opposition does not address the issue at all.

A problem nevertheless exists. There is a settled procedure for requesting costs, via a ***post-judgment*** motion, per California Rules of Court, rules 3.1700 [costs]. While the court has at times awarded costs contemporaneously with a summary judgment/adjudication motion, it has done so only when no opposition has been filed (the thought being that it would keep costs down). That is not the situation at hand – defendant ***has*** opposed the motion. As a result, the court is reluctant to ignore the procedure contemplated by the Rules of Court. The court wants to hear defendant's views on this topic. If defendant agrees (and ***only*** if defendant agrees) to forego the usual procedure will the court award $800 in costs at this time. If defendant balks, the court directs plaintiff to follow the traditional procedure. The parties should be prepared to discuss this. If the court awards costs today, the order and judgment should be adjusted accordingly.

Summary:

- The court overrules all evidentiary objections to the claims of undisputed fact, as those claims are not evidence. Defendant should not have made evidentiary objections to the evidence in the separate statement itself, as that violates California Rules of Court, rule 3.1345(b). Although the court has discretion to overrule the objections as a result, it exercises its discretion to address those objections made to critical evidence, namely Ms. Ross's declaration and the two exhibits attached thereto. The court overrules defendant's evidentiary challenges to these items, as the declaration and exhibits are admissible under Evidence Code section 1271 [business records exception to hearsay rule].) The court overrules all other objections as perfunctory, advanced without nuance or substance.
- The court grants plaintiff's summary judgment motion as to the second cause of action based on breach of an implied-in-fact contract. There are no disputed issues about contract formation, breach, or the amount defendant owes. Plaintiff is directed to submit a proposed order and judgment for signature.
- The court orders the parties to be prepared to discuss plaintiff's request for costs of $800 in its "Memorandum of Costs," filed contemporaneously with the motion. Plaintiff is the prevailing party, entitled to costs, and the amount seems reasonable. Nevertheless, because opposition was filed, the court is reluctant to forego the traditional procedure a party must use to secure costs, as dictated by California Rules of Court, rule 3.1700, namely through a post-judgment motion. The court will award costs today only if defendant agrees to the procedure. If defendant does not agree,

plaintiff must file a post-judgment motion per the Rules of Court. If costs are awarded today, plaintiff is directed to calibrate the proposed order and judgment accordingly.