

**IN THE ASSOCIATE CIRCUIT COURT  
OF THE COUNTY OF XXXXX  
STATE OF CALIFORNIA**

DEBT COLLECTOR COMPANY, LLC,	)
ASSIGNEE OF CC COMPANY (Mastercard),	)
Plaintiff,	)
	) Cause NO. 10AC- xx
	) Div. x
vs.	)
	)
JOHN Q. PUBLIC,	)
	)
Defendant.	)

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY  
DEFENDANT JOHN Q. PUBLIC**

Comes Now Defendant, John Q. Public, and for his Motion for Summary Judgment states as follows.

INTRODUCTION

Plaintiff, a junk debt buyer, brings its claim against Defendant for failure to pay on a credit card account, alleging that had “failed and refused to pay” a balance of \$8,500 due and owing [and for “Account Stated.”] Plaintiff’s allegations were verified as true, and defendant’s allegations in his answer, denying liability, were also verified. On [date] Defendant sought a bill of particulars from plaintiff, seeking, among other things, all the items allegedly constituting the claim brought, the dates these items were incurred, any fees or charges added, all terms and conditions applicable to the suit, and any documents allegedly giving plaintiff a right to collect these amounts. **See, Attached, Exhibit A** [fill in history of the bill of particulars demand, response, and meet and confer letter, attaching them to this motion, too. For present purposes, assume that plaintiff provided three credit card statements

showing a balance of \$8,500.] Under CCP Sec. 454, response to a demand for a bill of particulars is due ten days after the demand is served. When plaintiff had not responded within ten days, defendant sent it a letter (**attached as Exhibit B**) pointing to the time requirement of Sec. 454 and requesting a response within five (5) days and stating that he would file a request for exclusion of evidence if no response was forthcoming. Plaintiff's response came eleven days later and is attached as **Exhibit C**. Defendant had commenced working on a motion to preclude evidence pursuant to Sec. 454 before plaintiff's response was received and in fact had almost completed work on it. **See Exhibit D, Affidavit of John Q. Public, para. 3.**

Rather than provide any particulars, plaintiff objected to the demand for a bill of particulars, stating without argument that its claim did not come within the ambit of Cal. Civil Code Sec. 454 and that a bill of particulars was not required, but attaching copies of three credit card statements supposedly showing that he owed the amount claimed at the time plaintiff allegedly purchased the debt. Plaintiff's response did not provide any details responsive to any of the questions presented. Plaintiff's papers showed no items allegedly purchased by defendant or any occasions when plaintiff allegedly advanced money to defendant. Likewise absent was any proof of ownership of the debt or of any charges or fees incurred by defendant or advanced by plaintiff. Plaintiff did claim, however, that it was "conducting an on-going investigation" into the matter and would provide further documents if they appeared.

In short, plaintiff's paper was no bill of particulars at all.

Defendant sent plaintiff another good-faith letter pointing to *Distefano v. Hall, 218 Cal. App. 2d 657* as authority for the position that a bill of particulars was required upon demand in the instant action, stating that the documents provided were not a bill of particulars, and requesting an adequate response within five (5) days. **See, attached, Exhibit E.** Plaintiff did not respond to this letter at all.

Defendant files his Motion to Preclude Evidence concurrently with this Motion for Summary

Judgment, and this Motion for Summary Judgment is dependent upon the court's issuing an order precluding plaintiff from entering evidence as to its claims. If this court does not so order at this time, then defendant requests that this motion be stayed until such time as the court has entered such order.

#### STATEMENT OF UNCONTESTED FACTS

Plaintiff is precluded from presenting evidence as to any part of its claim for money on account and accordingly cannot sustain its burden of proof as to any part of its claim, and particularly:

1. Plaintiff does not possess the right to bring suit on this alleged debt against defendant because it does not own this debt.
2. Defendant did not ... [simply state the paragraphs of plaintiff's petition]
3. ...
4. [for the account stated part: Plaintiff has not presented, and cannot present, admissible evidence that any alleged open account subsisting between it and defendant was separately agreed to by the parties.
5. No statements of account were ever presented to defendant by plaintiff or any alleged predecessor in interest. **Affidavit of John Q., para. \_\_.**
6. Defendant did not at any time manifest any agreement with plaintiff as to the sum it is seeking in this suit. **Affidavit of John Q., para. \_\_.**

#### DISCUSSION

A motion for summary judgment shall be granted if all the papers submitted show there are no triable issues as to any material facts and the moving party is entitled to judgment as a matter of law. C.C.P. § 437c(c). To be "material" for purposes of a summary judgment proceeding, a fact must relate to some claim or defense in issue under the pleadings, and it must also be

essential to the judgment in some way. *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926, 68

**Cal.Rptr.2d 571.**

Section 437c (c) provides that: “The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Section 437c(o) further provides that: A cause of action has no merit if either of the following exists:

- (1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.
- (2) A defendant establishes an affirmative defense to that cause of action.

Because defendant has shown that none of the elements of plaintiff’s cause of action on an open account can be established, considering that plaintiff is precluded from presenting evidence on any of them, the court must award summary judgment [as to that claim. Because plaintiff cannot show the existence of any secondary agreement as would be required to establish a claim for account stated, summary judgment dismissing that claim must also be awarded.]

### **Summary Judgment Is Appropriate and Just as to Plaintiff’s Claim on Open Account**

Not only is an award of summary judgment necessary under the words of the law when a plaintiff, like this one, is precluded from presenting evidence, but that result is also fair and just in the circumstances of this case. Plaintiff filed its petition and verified its claims against defendant. Supposedly, this meant that plaintiff had actual knowledge of the facts constituting its claims. If this were so, it should have had no trouble providing an adequate bill of particulars upon written request pursuant to Sec. 454. Its failure to do so is inexplicable and should not be tolerated by the court. Sec. 454 exists to provide defendants a right to obtain knowledge of the particulars of the claim brought against them. *Burton v. Santa Barbara, supra*, 247 Cal. App. 2d at 433. Without the materials sought here, for example, defendant might very well be “embarrassed at trial”... *Id.*

If plaintiff has the materials and answers sought, the court might consider that plaintiff was abusing the discovery process and playing games with defendant. If so, losing its right to sue defendant is a small price to pay for such misbehavior.

On the other hand, if plaintiff does *not* have the materials sought by defendant (as defendant believes), then it was lacking good faith in the premises when it filed suit and **verified its allegations as fact.**

Either plaintiff has knowledge of the account upon which it brought suit which it was required to divulge and which it has unreasonably withheld despite defendant's repeated good faith efforts to obtain it, or it lacks such knowledge and should never have verified its petition against defendant. In either event, dismissal of the petition is not just required by Sec. 454, but also fundamentally fair.

### **The Court Must Dismiss Plaintiff's Claim under the Account Stated Theory**

Plaintiff has alleged that it [or a predecessor in interest] submitted statements of account to defendant, that defendant acquiesced to these statements, and that therefore plaintiff's claim on an open account has been transmogrified into an account stated. Plaintiff cannot prove the essential elements of account stated, and so the court must dismiss this claim against defendant as well.

It is an uncontested fact that neither plaintiff nor any predecessor in interest ever sent defendant any statements of account on the account for which it sues (*see, Affidavit of John Q., para* \_), and defendant never acquiesced in any other way to this claim. *Id., para.* \_\_\_\_\_. To have an account stated, "it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing." *H. Russell Taylor's Fire Prevention Service Inc. v. Coca Cola Bottling Corp. (1979) 99 Cal. App. 3d 711, 726.* The key element in every context is agreement on the final balance due. (See1 Witkin, Summary of Cal. Law (9th ed. 1987), Contracts, § 917, p. 820). The burden of proof is upon the plaintiff to establish its case.

*Maggio, Inc. v. Neal (1987), 196 Cal. App. 3d 745 [241 Cal. Rptr. 883].*

There are no allegations in the Complaint that plaintiff or its predecessor in interest regularly mailed statements to defendant. The petition makes only the bare allegation that defendant had “failed to contest” the amount in unspecified, unnamed, unnumbered and entirely unidentified hypothetical statements. [Or, plaintiff cannot prove that it had sent statements of account, despite its allegations, as all the evidence it has produced is mere hearsay and inadmissible under California law.]

Plaintiff’s claims under the account stated theory should also be dismissed because the allegations [evidence] allegations in Count II do not support a finding of an express or implied agreement that defendant would pay the amount set forth in the statement attached to plaintiff’s complaint. It is true that there are cases showing that that mere silence in the face of a bill will create an implied agreement as to the accuracy of that bill, *see, e.g., California B.G. Assn. vs. Williams (1927) 82 Cal.App. 434, 442* (The agreement necessary to establish an account stated need not be express and is frequently implied from the circumstances. When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered). But this implication arose from situations in which silence really did probably signify understanding and agreement. Such is not the case with credit card bills and transactions. With credit card bills, the evidence is overwhelming that silence does not signify understanding or acceptance.

Account stated is, ultimately, a form of contract law based on a promise, express or implied, to pay an amount agreed upon. Implying a credit card holder’s agreement based upon his or her failure to dispute a credit card bill is not warranted or justified where cardholders typically do not know, and cannot be expected to know, whether the amounts shown as “due” on a credit card statement are correct.

Credit card holders who do not pay the full amount of the new balance usually do not know whether any charges, other than the charges for purchases and cash withdrawals, are correct. It is reasonable to assume that most credit card holders have never attempted to read the entire initial

cardholder agreement. Furthermore, even if they attempted to do so, it is unlikely that they would fully understand what they have read. Also, most agreements provide that they can be amended by the card issuer upon fifteen days' notice, and frequently the monthly statements are accompanied by amendments to the initial agreement that cannot be understood unless the credit card holder has access to and does review the initial agreement, subsequent amendments, and the newest amendment. This does not occur.

While the credit card holder, looking at the statement, can see the amount of the charges that were imposed, he or she is unlikely to know whether the charges are consistent with the writings governing the card holder's obligations. Consequently, he or she is not in a position to agree or disagree with the amount of the balance in any monthly statement that does not begin with a \$0.00 balance.

The above description of the cardholder and issuer relationship is consistent with the findings in a September 2006 108-page report prepared by the United States Government Accountability Office titled **Credit Cards - Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers**, [www.gao.gov](http://www.gao.gov), Document GAO-06-929(9/2006).

The portion of the Report titled "Results in Brief" states that disclosures are too complicated for many consumers to understand. *Id. at 4-6*. In addition, the disclosures are often poorly organized, burying important information in the text, and scattering information about a single topic in numerous places. *Id. at 6*. The design of the disclosures often makes the disclosures hard to read with large amounts of the text in small, condensed typefaces and poor, ineffective headings. *Id.*

Prior to 1990, most issues charged a fixed interest rate and imposed few other charges. Thus, furnishing an adequate disclosure was relatively easy. Today, credit cards feature complex pricing structures. *Id. at 13*. Most cards now assess one interest rate on balances from the purchases of goods, another on balances that are transferred from another credit card, and a third on balances that result from using the card to obtain cash. Also, the cards usually provide for payments to be allocated first to the balance assessed at the lowest interest rate. *Id. at 14-15, 27*.

In addition to having separate rates for the different transactions, the cards increasingly impose interest rates that vary periodically as market interest rates change. Issuers typically establish these variable rates by taking the prevailing level of a base rate, such as the prime rate, and adding a fixed percentage amount. They frequently reset the interest rates on a monthly basis. *Id. at 15.*

Most credit cards provide for a penalty fee, described as a late fee, which issuers assess when they do not receive at least a minimum required payment by the due date. Most of the cards have a tiered fee structure depending upon the amount of the balance held by the cardholder. *Id. at 19-20.*

Most issues also assess cardholders a penalty fee for exceeding the credit limit, with the over limit fee also involving the use of a tiered structure. *Id. at 20-21.* Cards frequently have total credit limits at a lesser limit for cash. *Id. at 22.* Also, issuers do not reject purchases during the sales authorization even though the transaction puts the cardholder over the card's credit limits, thereby exposing the card holder to an over limit fee and a higher interest rate. *Id. at 30.*

Many cards provide for higher interest rates to be assessed if cardholders make late payments or exceed the credit limit. *Id. at 24.* Many cards also provide for increased rates when cardholders fail to make payments to other creditors. *Id. at 24-25.*

Most of the cards also provide for the cardholder to pay fees for certain services (e.g., 3% of cash advance amounts, 3% of balance transfers from another creditor, 3% of purchases made in a foreign country). *Id. at 23.*

The Report concluded that the disclosures which provide information about the costs and terms of using credit cards had “serious weaknesses that likely reduce their usefulness to consumers;... The disclosures... were written at a level too difficult for the average consumer to understand and *had design features, such as text placement and font sizes, that did not conform to guidance for creating easily readable documents.* When attempting to use these disclosures, cardholders were often unable to identify key rates or terms and often failed to understand the information in the documents.” *Id. at 33* (emphasis added).

The cause of action of an account stated is based on principles of contract law. There must be an express or implied agreement between the creditor and debtor that the debtor owes the amount set forth in the account. Credit card holders do not know whether the finance charges, fees, penalties and costs set forth in a monthly statement are permitted under the applicable credit card agreement. If cardholders cannot be expected to know whether the information in the monthly statement accurately states what they owe, there cannot be an express or implied agreement that their silence means that they have agreed that the amount claimed is correct.

### **Conclusion**

Plaintiff is appropriately barred from presenting any evidence of an open account on this claim by its failure to respond to defendant's request for a bill of particulars. It is also uncontested that plaintiff cannot establish its claim under account stated against defendant. Accordingly, this action must be dismissed in its entirety.

Respectfully,

John Q. Public  
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