JAMS ARBITRATION

IN THE MATTER OF

BASSAM A. HAJJIRI,

Claimant,

vs.

DISCOVER BANK,

Respondent.

JAMS REF. NO. 1240024332

FINAL AWARD

RECITALS

On July 21, 2021, the parties appeared before me for an evidentiary hearing. By previous agreement of counsel, as memorialized in Preliminary Hearing Order No. 1 dated March 4, 2021, the evidentiary hearing was conducted virtually. Claimant was represented by Joshua B. Swigart, and Respondent was represented by Carina M. Jordan.

Although this arbitration was initiated by Mr. Hajjiri, the dispute arises from a state court complaint filed by Discover Bank. Accordingly, counsel stipulated Respondent would assemble the documentary evidence pertaining to the claim, and as the party with the burden of proving its collection case, Respondent would be the first to present its evidence.

Each party submitted a Prehearing Brief, and Respondent submitted an assemblage of documents comprising Exhibit "A" (monthly credit card account statements from December 4, 2013, through May 2, 2019), Exhibit "B" (January 2018 Cardmember Agreement), and Exhibit "C" (Claimant's check payable to Respondent dated June 30, 2006). Claimant presented the oral testimony of Charlotte Strickland, a Vendor Analyst with Discover Products—the sole servicing agent for Discover Bank. Respondent testified on his behalf, and Ms. Strickland was recalled as a rebuttal witness. Each witness testified under oath and was cross-examined by opposing counsel. At the conclusion of the testimony, both counsel stated there was no further evidence to offer, and the parties rested. Claimant's counsel requested an opportunity to submit closing briefs, and a briefing schedule was established, providing Respondent 5 weeks for an opposition brief. Claimant and Respondent each filed post-hearing briefs, and Claimant filed a reply. The evidentiary records was closed on September 17, 2021.

By agreement of the parties, I was the Arbitrator under the Agreement to Arbitrate in the Discover Cardmember Agreement appended to the Demand. That Agreement provides:

> **Agreement to arbitrate.** . In the event of a dispute between you and us arising out of or relating to this Account or the relationships resulting from this Account or any other dispute between you or us ("Claim"), either you or we may choose to resolve the Claim by binding arbitration, as described below, instead of in court. Any Claim (except for a claim challenging the validity or enforceability of this arbitration agreement, including the Class Action Waiver) may be resolved by binding arbitration if either side request it. THIS MEANS IF EITHER YOU OR WE CHOOSE ARBITRATION, NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A JURY TRIAL. ALSO DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN ARBITRATION.
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> ....
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> **Governing Law and Rules.** This arbitration agreement is governed by the Federal Arbitration Act (FAA). Arbitration must proceed only with the American Arbitration Association (AAA) or JAMS. The rules for the arbitration will be those in this arbitration agreement and the procedures of the chosen arbitration organization, but the rules in this arbitration agreement will be followed if there is a disagreement between the agreement and the organization's procedures. If the organization's procedures change after the claim is filed, the procedures in effect when the claim was filed will apply.
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> ....
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> **Fees and Costs.** If you wish to begin arbitration against us but you cannot afford to pay the organization's or arbitrator's costs, we will advance those costs if you ask us in writing....If you lose the arbitration, the arbitrator will decide whether you must reimburse us for money we advanced for you for the arbitration. If you win the arbitration, we will not ask for reimbursement of many we advanced. Additionally, if you win the arbitration, the arbitrator may decide that you are entitled to be reimbursed your reasonable attorneys' fees and costs (if actually paid by you).
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> The arbitrator must:
>
> - Follow all applicable substantive law, except when contradicted by the FAA;
> - Follow applicable statutes of limitations;
> - Honor valid claims of privilege;
> - Issue a written decision including the reasons for the award.

> The arbitrator's decision will be final and binding except for any review allowed by the FAA....
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> ....
>
> Any arbitration award may be enforced (such as through a judgment) in any court with jurisdiction.
>
> ....

Now having examined the submissions of the parties, reviewed the allegations, and considered all the evidence, I find, conclude, and issue this Final Award.

FINDINGS OF FACT

The following is a statement of those facts I find true and necessary for this Award. To the extent this recitation differs from any party's position, such results from determinations regarding credibility, relevance, materiality, the burden of proof, and the weight of the oral and written evidence.

I. Claimant is **BASSAM A. HAJJIRI.**

2. Respondent is **DISCOVER BANK.**

3. Claimant made an online application for a Discover Credit Card at an unknown date in 2004. The card was issued, and a New Account Package of information was sent to Claimant's address of record. That Package contained a Cardmember Agreement, the provisions of which are unknown. The interest rate applicable to the card was to increase from 0% to 5% after the first year of card usage.

4. After issuance of the Discover Card in 2004, Claimant used the credit card for purchases. He received credit card statements regularly and made payments to Respondent at various times.

5. As of December 4, 2013, Claimant's credit card account had a balance of $19, 840.54. Claimant does not recall what charges to the account made up that balance, and Respondent has no record to explain the balance due. Claimant did not contest the amount due within 90 days after he received a monthly statement dated January 3, 2014.

6. From time-to-time after January 3, 2014, Claimant made payments on the credit card account, and he occasionally made purchases charged to the account. The total payments from that date to present is $21,811.04; the total purchases is $2579.69. During this period, Respondent debited the credit card account for interest charges and late payment fees.

7. At an unknown date in 2014 prior to a brain surgery procedure, Claimant made a telephone call to Respondent raising questions about the rate of interest being charged to his credit card account. He was told someone would investigate the matter and contact him with an explanation. Claimant received no further report from Respondent.

8. Claimant made 5 or 6 additional telephone calls to Respondent between his surgery in 2014 and March of 2017—a date when he contested late charges that Respondent ultimately reversed. These telephone calls were made to question the accuracy of interest rates and interest charges, but only the March 2017 call resulted in any known response by Respondent.

9. Records of its credit card accounts are maintained electronically by Respondent for a period of time. Records for Claimant's credit card account before December 2013 no longer exist. Any Cardmember Agreements sent to Claimant between 2004 and January 2018 are unavailable for consideration as evidence.

10. Claimant made a purchase on September 29, 2017, which was the last time he used the credit card (Ex. "A", p. 0095).

11. At an unknown date after January 1, 2018, Respondent sent an email to Claimant with a new Cardmenber Agreement effective that month (Ex. "B").

12. Respondent does maintain electronic records, including memoranda of events pertaining to Claimant's account. Ms. Strickland reviewed these electronic records and prepared notes in anticipation of her testimony, but these records were not produced to Claimant as part of the parties' voluntary exchange of information. These records are regarded by Respondent as "proprietary," and as a matter of bank policy, they are not made available for production in arbitration.

13. Respondent closed Claimant's credit card account as of June 1, 2019. The balance due was reported to be $18, 765.19. . No interest has accrued or late charges assessed on the account since that date. Claimant has denied liability in this arbitration, but there is no evidence he communicated a disagreement with closing balance on his credit card account

14. Discover Bank filed a collection complaint against Claimant in San Diego County Superior Court on October 13, 2020. That complaint pleaded causes of action of a Book Account and Account Stated.

ANALYSIS

I. Open Book Account

Respondent's first cause of action is for an Open Book Account. Code of Civil Procedure section 337a defines that common count as:

> 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.

Briefing by the parties confirms they agree on the elements needed to establish an Open Book Account, namely a continuous course of business with a running series of transactions giving rise to properly recorded credits and debits over time. (E.g., *H&C Global Supplies, SA de CV v. Pandol Assocs. Mktg, Inc.*, Case No. 1:13-CV-0827 AWI SKO (E.D. Cal. Nov. 5, 2013)). The account can be created by express agreement or implied from conduct of the parties. (See *H. Russell Taylor's Fire Prevention Ser., Inc. v. Coca-Cola Bottling Corp,* 99 Cal.App. 3d 711, 728 (1979)). However created, the records of the account must be maintained in "some reasonably permanent form." (See Code Civ. Proc. 337a)

Evidence established that some form of account was created when Respondent approved Claimant's credit card application and issued a Cardmember Agreement setting forth the terms under which charges and payments could be made. The testimony of Ms Strickland regarding creation of the account and its "open" character is supported by Exhibit "A," which contains representative monthly account statements sent to Claimant.

Notwithstanding the existence of an account relationship between the parties, Respondent's claim falters for want of critical proof. First, it is uncontroverted the account was opened under a written agreement, but there is no evidence what that agreement permitted or required. Respondent could not produce a copy of the form agreement it employed in 2004 when the account was opened. Ms Strickland testified there were multiple updated agreements sent to Claimant during the 14 + year period the account was open, but none of those were produced. What Respondent did offer was a 2018 Cardmember Agreement published and provided to Claimant well after the last use

he made of the card. Even if Claimant impliedly agreed to the terms of that 2018 document, I am left to demur because there is no evidence the terms in Exhibit "B" were the same or similar to those governing administration of the account during prior periods.

I can surmise the original Cardmember Agreement that created the account in 2004 is similar to the 2018 exemplar introduced by Respondent. But my surmise is not evidence, and failing to offer the text of the original agreement or provide some other evidence of its terms is a material deficiency.

The evidence also establishes that administration of this credit card account fell short of California's statutory requirements. An actionable open account must be evidenced by a record of credit and debits maintained in some reasonably permanent form. Ms Strickland testified unequivocally that Respondent keeps nothing close to a permanent record of credit card accounts. While Respondent does record transactions contemporaneously and maintains an electronic record of credits and debits on a current basis, the bank does not have records pre-dating 2014—the earliest date of monthly statements produced in Exhibit "A."

The lack of a permanent record of account is especially significant because there is evidence the December 2013 balance of $19, 840.54 is a major component of the balance Respondent now seeks to collect. Yet, there is no record to substantiate any portion of that amount other than an implicit request that the accuracy of Respondent's partial record of account be deemed trustworthy. Were this a matter of equity, that argument might have more resonance, but this is an action asserting a legal claim, and proving the elements of a claim at law is critical.

The parties have not cited any authority explaining Section 337a's requirement for a book or record maintained in a reasonably permanent form. In the case of credit card accounts open for extended periods of time, one can speculate that reasonableness allows for some form of document destruction. Yet, I do not need to decide whether the statute required Claimant's credit card record be preserved from the inception of the account to date. There is no evidence in the record to establish any permanent record of transactions giving rise to the December 2013 balance, and at a minimum, Section 337a requires a record of sufficient duration prior to that date to substantiate the balance underlying this collection action. Respondent has not offered that evidence, and it apparently cannot do so.

Respondent argues it only must maintain three years of account records under federal regulations, and five years of records in Exhibit "A" is more than it must retain under Regulation Z of the Truth in Lending Act of 1968 (See 12 C.F.R. 1026). This

argument begs the question; compliance with federal law is not at issue. In support of this state law claim, I am cited no authority that Regulation Z permits assertion of an action for Open Book Account even though the financial institution has destroyed the record of credits and debits giving rise to the balance due.

Respondent has failed to sustain its burden to prove the essential elements of an Open Book Account cause of action. It should take nothing on its First Cause of Action.

II. Account Stated

The Second Cause of Action is for an Account Stated between the parties. Again, the parties agree the elements of this claim are (1) commercial transactions establishing a debtor-creditor relationship; (2) the parties' agreement on the amount due; (3) a promise to pay that indebtedness (E.g., *Martini E Ricci Iamino S.P.A. v. W. Fresh Mktg. Servs., Inc.* 54 F. Supp. 3d 1094, 1107 (E.D. Cal 2014); *Zinn v. Fred R. Bright Co.,* 271 Cal. App. 2d 597 (1969)).

An agreement stating the precise amount due on account can be express or implied (E.g., *Hansen v. Fresno Jersey Farm Dairy Co.*, 220 Cal. 402, 408 (1934)). Commercial practicality underpins the proposition that an agreement respecting the amount due can be implied from acquiescence to the balance set forth in a bank account statement (E.g., *Price v. Wells Fargo Bank*, 213 Cal App 3d .470, 480-81 (1989)).

As with Respondent's claim for an Open Book Account, the evidence establishes the existence of a credit card account agreement between the parties, and this satisfies the first element of the claim for an Account Stated. The burden of proof then rests on Respondent to establish the existence of an agreement regarding the amount due and a promise to pay that amount.

Respondent argues there was an agreement to the amount of indebtedness by implication from Claimant's inaction. And it is correct to observe Claimant did not object, orally or in writing, to the stated balance due as of January 2014 or June 2019. This is evidence of an agreement by implication, but its weight is offset by the uncontroverted fact that between 2014 and closing the account, Claimant made some 6 or 7 telephone calls to Respondent challenging interest being charged on the account; those calls are inconsistent with a suggestion he acquiesced in the amount due. Notably, Ms Strickland testified that on March 17, 2017, claimant called regarding a Late Fee appearing on the monthly account statement, and that amount was refunded by the bank.

I found Mr. Hajjiri's testimony credible, even though he did not have a record of the dates and times he called to register an objection about the balance due. In the real

world, that is not surprising. Claimant was facing critical health issues during this period, and it is understandable that did not scrupulously keep a record of every call he made regarding the account. Further, Respondent's reported failure to act on any of these calls would be a natural source of frustration, discouragement, and exasperation on Claimant's part.

Of greater concern, Respondent does have records regarding at least some of Claimant's telephone calls; those records are maintained in some electronic memoranda or notes available for Ms Strickland's review in preparation for her testimony. Inexplicably, none of those records were produced by Respondent in compliance with the voluntary disclosure requirements of JAMS Rule 17,[1] even though the bank did produce the three exhibits it ultimately introduced into evidence. I have no indication this voluntary production was accompanied by the assertion of some privilege or other basis on which to withhold production of the bank's internal records pertaining to the account. The bank's silence on the point could only be interpreted by Claimant's counsel and by me as stating it had made a full production of all relevant documents in Respondent's possession.

To her credit, and as reinforcement of her own credibility as witness, Ms Strickland did not hide the fact there were records pertaining to Claimant's credit card account that the bank regarded as "proprietary." On that basis, Respondent determined on its own behalf these records not only did not need to be produced, but their existence did not need to be disclosed.

I am left to speculate what is contained in the records Respondent has elected to keep confidential. Yet, is inescapable those records may well detail Claimant's disagreements with the account balances being reported during the four year period at issue. And who knows what those records might reveal about the opening of the account and the accrual of almost $20,000 debt by December 2013. Failure to produce this evidence gives rise to a reasonable inference the bank's records would refute a statement of account. Respondent's failure to disclose what its records show raises questions whether there was some implied promise to pay.

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[1] JAMS Rule 17(a) provides the parties "shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions ...." Preliminary Hearing Order No 1 in this matter stated "The parties shall comply with JAMS Rule 17(a) and exchange **all non-privileged documents and other information relevant to the dispute** by the close of business on **Thursday, April 1, 2021.**

Under the facts of this case, I cannot find an implied agreement on the amount due. Nor can I find a promise by Claimant to pay. It is not enough to argue California law gave Claimant 90 days within which to dispute inaccuracies in monthly account statements. Code of Civil Procedure Section 1747.50 imposes duties on financial institutions, and it obligated Respondent to correct errors within 90 days after Claimant may have called those inaccuracies to the bank's attention. Further, Section.1747.50(b) provides "Any card issuer who fails to correct a billing error made by the card issuer within the period prescribed by subdivision (a) shall not be entitled to the amount by which the outstanding balance of the cardholder's account is greater than the correct balance, nor any interest, finance charges, service charges, or other charges on the obligation giving rise to the billing error." The statute does not say a credit card holder must object within 90 days or "forever hold his piece."

The question at hand is not whether Claimant may have used his credit card and failed to pay some amount due. I face a specific claim for relief—an Account Stated. Respondent has failed to establish by a preponderance of the evidence that Claimant ever agreed to the amount of his indebtedness or promised to pay $18,765.19, as alleged by the bank.

CONCLUSIONS

A. Respondent should take nothing on its First or Second Causes of Action for Open Book Account or Account Stated.

B. Claimant should be entitled to a Final Award dismissing Respondent's First and Second Causes of Action with prejudice.

C. Claimant should be entitled to recover its fees, costs, and litigation expenses.

ATTORNEY FEES, COSTS, and LITIGATION EXPENSES

On September 27, 2021, I issued an Interim Award, which was sent to counsel by email on the following day. In that Award, I allowed Claimant to apply for an award of Attorney Fees, Costs, and Litigation Expenses (to the extent actually paid by him), and Claimant did file such application on JAMS Access on September 28, 2021. The Interim Award permitted Respondent's objection to the application within 10 days after the application was received. No objection has been received, and I am informed by counsel that Respondent does not intend to contest the Application.

Claimant's Application seeks recovery of $1800 attorney fees, $320 state court filing fees for opposition to Respondent's state court complaint, and $250 filing fee for initiation of this arbitration; the total sought is $2420. The Application is supported by

the Declaration of Joshua Swigart, who confirms Claimant actually incurred fees and costs in that amount. Mr. Swigart further states the actual time expended multiplied by his hourly rate would be $6359, which otherwise would appear to be a reasonable fee for this matter.

I find Claimant actually incurred fees, costs, and litigation expenses for $2420. Under the terms of the Agreement to Arbitrate, Claimant should be entitled to recover that amount at the prevailing party.

FINAL AWARD

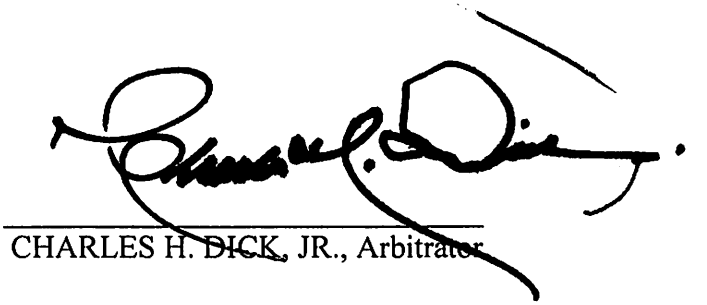
I. Respondent should take nothing on its First or Second Causes of Action for Open Book Account or Account Stated, and the claims set forth in Respondent's Complaint should be dismissed with prejudice.

II. **DISCOVER BANK** shall pay to **BASSAM A. HAJIRRI** the sum of $2420 Attorney Fees, Costs, and Litigation Expenses by November 5, 2021, after which the sum shall bear post-judgment interest under California law at 10% per annum.

III. This Award resolves all issues submitted for decision in this proceeding.

IT IS SO ORDERED:

Dated: October 19, 2021



CHARLES H. DICK, JR., Arbitrator