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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

TERRANCE D. RUTHERFORD,	)	Case No. CV 13-02934 DDP (MANx)
individually and on behalf	)	
of other similarly situated	)	
individuals,	)	
	)	<b>ORDER GRANTING DEFENDANTS'</b>
	)	<b>MOTIONS TO DISMISS</b>
Plaintiff,	)	
	)	
v.	)	
	)	
FIA CARD SERVICES, N.A.,	)	[Dkt. Nos. 51 and 52]
(Bank of America), ALASKA	)	
AIRLINES, INC. and HORIZON	)	
AIR INDUSTRIES, INC.,	)	
	)	
Defendants.	)	
_____	)	

Presently before the court are two Motions to Dismiss, one filed by Defendant FIA Card Services, N.A. ("FIA" or "the Bank") and the other by Defendants Alaska Airlines, Inc. ("Alaska") and Horizon Air Industries, Inc. (together with Alaska, the "Airlines"). Having considered the submissions of the parties and heard oral argument, the court grants the motions and adopts the following order.

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1 **I. Background**

2 As described in detail in this court's earlier orders,  
3 Plaintiff works for Alaska. FIA operates Bank of America's credit  
4 card operations. The Airlines and FIA entered into a marketing  
5 partnership, under which FIA agreed to issue "Alaska Airlines"  
6 brand credit cards and make payments to the Airlines. The Airlines  
7 and Bank further agreed to establish an "Incentive Program," under  
8 which airline employees would be trained by the airlines and paid  
9 by the Bank to market the Alaska credit cards to consumers.

10 Under the Incentive Program, Airlines employees would  
11 distribute credit card applications, which included a space for the  
12 employees' identifying information, to passengers and other third  
13 parties. Applicants could either submit the applications through  
14 the distributing Airlines employees or mail the applications  
15 directly to the Bank.

16 Employees were offered five dollars for each credit card  
17 application submitted to the Bank, so long as the application  
18 contained enough information to allow the Bank to accept or reject  
19 the application. Employees were offered forty-five dollars for  
20 applications that were ultimately approved. The Airlines would  
21 deposit these incentive amounts into employee bank accounts, along  
22 with wages. (Second Amended Complaint ("SAC") ¶ 40.)<sup>1</sup> The  
23 Airlines also encouraged employee participation in the incentive  
24 program by offering cash and other prizes to "top performers."  
25 (SAC ¶¶ 38-39).

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27 <sup>1</sup> This allegation notwithstanding, the SAC alleges that the  
28 Bank offered to pay the incentives, "on behalf of itself and the  
[A]irlines." (SAC ¶ 19.)

1           The SAC alleges that Plaintiff distributes over 200  
2 applications per month. (SAC ¶ 47.) The SAC lists several dozen  
3 instances in which, between January and September 2013, Plaintiff  
4 received credit card applications and forwarded them to the Bank.  
5 (SAC ¶ 51.) Plaintiff alleges, however, that the vast majority of  
6 people to whom applications are distributed do not return their  
7 applications to Plaintiff. (SAC ¶ 48.) Plaintiff does not know  
8 whether the Bank processed any of the applications submitted  
9 directly by applicants, with his identifying information. (SAC ¶¶  
10 54-55.) Plaintiff has, however, received incentive payments during  
11 the relevant period of \$5,260. (SAC ¶ 56.)<sup>2</sup> Plaintiff also  
12 alleges that he is ranked as a "top performer" in the incentive  
13 program. (SAC ¶ 55.)

14           Plaintiff alleges that he has not been paid the amounts due to  
15 him under the incentive program. (SAC ¶ 61.) His SAC alleges  
16 causes of action for an accounting, common count for the reasonable  
17 value of services rendered, and common count for a book account.  
18 Defendants now move to dismiss the SAC.

19           **II. Legal Standard**

20           A complaint will survive a motion to dismiss when it contains  
21 "sufficient factual matter, accepted as true, to state a claim to  
22 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
23 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
24 570 (2007)). When considering a Rule 12(b)(6) motion, a court must  
25 "accept as true all allegations of material fact and must construe  
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27           <sup>2</sup> Had all 117 of the applications Plaintiff himself submitted  
28 been approved, Plaintiff would have been entitled to \$5,265.

1 those facts in the light most favorable to the plaintiff." Resnick  
2 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint  
3 need not include "detailed factual allegations," it must offer  
4 "more than an unadorned, the-defendant-unlawfully-harmed-me  
5 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or  
6 allegations that are no more than a statement of a legal conclusion  
7 "are not entitled to the assumption of truth." Id. at 679. In  
8 other words, a pleading that merely offers "labels and  
9 conclusions," a "formulaic recitation of the elements," or "naked  
10 assertions" will not be sufficient to state a claim upon which  
11 relief can be granted. Id. at 678 (citations and internal  
12 quotation marks omitted).

13 "When there are well-pleaded factual allegations, a court should  
14 assume their veracity and then determine whether they plausibly  
15 give rise to an entitlement of relief." Id. at 679. Plaintiffs  
16 must allege "plausible grounds to infer" that their claims rise  
17 "above the speculative level." Twombly, 550 U.S. at 555.

18 "Determining whether a complaint states a plausible claim for  
19 relief" is a "context-specific task that requires the reviewing  
20 court to draw on its judicial experience and common sense." Iqbal,  
21 556 U.S. at 679.

### 22 **III. Discussion**

#### 23 A. Whether the SAC Alleges an Amount Owed

24 Defendants first contend that the SAC must be dismissed  
25 because it fails to allege facts to support Plaintiff's contention  
26 that Defendants owe him any money. In response, Plaintiff contends  
27 that the facts alleged, specifically those regarding the number of  
28 applications he distributed and submitted, and the amount of

1 compensation he received, are sufficient to give rise to a  
2 plausible inference that he has been underpaid.

3 Defendants highlight the fact that the amount of compensation  
4 plaintiff received, \$5,260, is within five dollars of the amount  
5 Plaintiff would have received if every single one of the  
6 applications he submitted had been approved. Plaintiff does not  
7 dispute that it is extremely implausible that every application he  
8 submitted was approved. Indeed, Defendants argue that it is  
9 implausible that every application that every one of the 117  
10 applications contained sufficient information to be processed, let  
11 alone approved.

12 The question, however, is whether these facts could support an  
13 inference that Plaintiff has been underpaid. Defendants argue that  
14 Plaintiff's receipt of so much money, given the relatively small  
15 number of applications Plaintiff himself submitted, indicates that  
16 Plaintiff must have received payment for some applications  
17 submitted directly by applicants. This inference, plausible though  
18 it may be, is not the only one supported by the facts alleged.

19 Plaintiff has alleged that fully 90% of customers do not  
20 return their applications to Plaintiff. While Plaintiff cannot  
21 confirm at this stage that any of those customers, who likely  
22 exceed 1,000 in number, actually did submit an application,  
23 Defendants concede that some of them must have. Considering  
24 Plaintiff's status as a "top performer" and the possibility that  
25 Plaintiff's submissions, comprising only 10% of distributed  
26 applications, alone could account for almost all of the payments

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1 received, the SAC alleges sufficient facts to give rise to an  
2 inference that Plaintiff has not been fully compensated.<sup>3</sup>

3 1. Whether Alaska Owes Plaintiff Anything

4 In addition to the argument discussed above, Alaska contends  
5 that all claims against Alaska must be dismissed because the SAC  
6 does not allege that Alaska itself owes Plaintiff any money.  
7 Though the SAC alleges that Alaska deposits incentive payments into  
8 employee bank accounts, nowhere does it allege that Alaska actually  
9 pays employees. Rather, the SAC alleges that the Bank pays Alaska  
10 employees. (SAC ¶ 40.) Plaintiff's opposition to Alaska's Motion  
11 does not address this argument. Accordingly, all claims against  
12 Alaska are DISMISSED.

13 B. Accounting Claim

14 The Bank next asserts that Plaintiff's claim for an accounting  
15 must be dismissed because an accounting is a remedy, not a cause of  
16 action. Indeed, some courts have held "that an accounting is  
17 merely an equitable remedy, and therefore cannot be maintained as  
18 an independent cause of action." Fradis v. Savebig.com, No. CV 11-  
19 7275 GAF, 2011 WL 7637785 at \*8 (C.D. Cal. Dec. 2, 2011). Other  
20 courts, however, citing Tesselle v. Mcloughlin, 173 Cal.App.4th 156  
21 (2009), have concluded that an accounting can exist as an  
22 independent equitable cause of action. See, e.g., Dahon North Am.,  
23 Inc. v. Hon, No. 11-cv-5835 ODW, 2012 WL 1413681 at \* 11 (C.D. Cal.  
24 Apr. 24, 2012); see also Baidoobonso-Iam v. Bank of Am., No. CV 10-

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26 <sup>3</sup> Indeed, if Plaintiff distributed 200 applications a month  
27 and only received a total of 117 back, over 1,500 applications  
28 remain unaccounted for. Even if the majority of those went  
unsubmitted, the number is high enough to support an inference that  
Plaintiff was underpaid.

1 9171 CAS, 2011 WL 3103165 at \*6 (C.D. Cal. Jul. 25, 2011) ("An  
2 accounting may take the form of either a legal remedy or an  
3 equitable claim."). This court agrees with the latter approach.

4 A cause of action for an accounting requires that "a  
5 relationship exist[] between the plaintiff and defendant that  
6 requires an accounting, and that some balance is due the plaintiff  
7 that can only be ascertained by an accounting." Though the  
8 relationship giving rise to an accounting claim need not  
9 necessarily be a fiduciary one, courts typically require that it  
10 reflect some degree of confidentiality or closeness. Tesselle, 173  
11 Cal.App.4th at 179.; Dahon, 2012 WL 1413681 at \*13; Fradis, 2011 WL  
12 7637785 at \*9; Canales v. Fed. Home Loan Mortgage Corp., No. CV 11-  
13 2819 PSG, 2011 WL 3320478 at \* 8 (C.D. Cal. Aug. 1, 2011).

14 Here, the SAC conclusorily alleges that both the Airlines and  
15 the Bank owe Plaintiff a fiduciary duty (SAC ¶¶ 79-80). The SAC  
16 makes no further factual allegations regarding this supposed  
17 fiduciary relationship, nor do Plaintiff's Oppositions make any  
18 attempt to argue that such a duty exists beyond a single statement  
19 that "present circumstances, where Defendant holds all the books  
20 and records necessary to calculate proper payment [are] one of  
21 'trust and repose.'" (Opp. at 11-12.) The allegations of the SAC  
22 are insufficient to establish Plaintiff and the Bank shared the  
23 type of relationship that would give rise to an independent  
24 accounting claim.<sup>4</sup>

25 C. Common Count for Reasonable Value of Services Rendered

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27 <sup>4</sup> Though Plaintiff's opposition makes some reference to an  
28 agent-principal relationship, the SAC contains no allegations to  
that effect, nor do the facts alleged appear to support any such  
relationship.

1            "[I]t is well settled that there is no equitable basis for an  
2 implied-in-law promise to pay reasonable value when the parties  
3 have an actual agreement covering compensation." Hedging Concepts,  
4 Inc. v. First Alliance Mortgage Co.. 41 Cal.App.4th 1410, 1419  
5 (1996). The SAC alleges the existence of an agreement to pay  
6 Plaintiff precise amounts for various types of submitted  
7 applications. Nevertheless, Plaintiff contends that the Second  
8 Cause of Action for Common Count for Reasonable Value of Services  
9 Rendered is adequately pled because Federal Rule of Civil Procedure  
10 8(d)(3) allows inconsistent claims to be pled. Rule 8 does not,  
11 however, allow a plaintiff to circumvent state law by stating a  
12 claim for both express and quasi contract. See In re Facebook  
13 Privacy Litigation, 761 F.Supp.2d 705, 718 (N.D. Cal. 2011)  
14 ("Although Rule 8 . . . allows a party to state multiple, even  
15 inconsistent claims, the rule does not allow a party invoking state  
16 law to assert an unjust enrichment claim while also alleging an  
17 express contract."); Custom LED, LLC v. eBay, Inc., No. C 12-350  
18 SI, 2012 WL 1909333 at \*5 (N.D. Cal. 2012). Plaintiff's Second  
19 Cause of Action is DISMISSED with prejudice.

20            D. Common Count for A Book Account

21            "A book account is a detailed statement of debit/credit  
22 transactions kept by a creditor in the regular course of business,  
23 and in a reasonably permanent manner." Reigelsperger v. Siller. 40  
24 Cal.4th 574, 579 n.5 (2007). "A book account is created by the  
25 agreement or conduct of the parties in a commercial transaction.  
26 Nonetheless, the mere recording . . . or the incidental keeping of  
27 accounts under an express contract does not of itself create a book  
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1 account." H. Russell Taylor's Fire Preverntion Serv., Inc. v.  
2 Cocal Cola Bottling Corp., 99 Cal.App.3d 711, 728 (1979).

3 Here, the SAC alleges only that "a book account was created .  
4 . . as a result of Plaintiff's . . . participation in the Incentive  
5 program for Defendants' benefit." (SAC ¶ 106.) This naked  
6 assertion is insufficient to sustain a common count for a book  
7 account. Plaintiff's Third Cause of Action is DISMISSED, with  
8 prejudice.

9 **IV. Conclusion**

10 For the reasons stated above, Defendants' Motions to Dismiss  
11 are GRANTED. Plaintiff's SAC is DISMISSED with prejudice.

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15 IT IS SO ORDERED.

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18 Dated: September 5, 2014

  
DEAN D. PREGERSON  
United States District Judge

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