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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CAPITAL EXPRESS LINES, INC.,
Plaintiff,
v.
JPMORGAN CHASE BANK, N.A.,
Defendant.

No. 2:24-cv-01639-DAD-DB

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT, WITH LEAVE TO AMEND

(Doc. No. 5)

This matter is before the court on the motion to dismiss filed by defendant JPMorgan Chase Bank N.A. on July 12, 2024. (Doc. No. 5.) The pending motion was taken under submission on the papers on August 2, 2024. (Doc. No. 7.) For the reasons explained below, the court will grant in part and deny in part defendant's motion to dismiss, with leave to amend also being granted.

BACKGROUND

On May 2, 2024, plaintiff Capital Express Lines, Inc. filed the complaint initiating this lawsuit against defendant JPMorgan Chase Bank, N.A. ("defendant") and Doe defendants 1–10 in the Sacramento County Superior Court. (Doc. No. 1-1 at 3–6.) Defendant removed the action to this federal court on June 7, 2024. (Doc. No. 1.) In its complaint, plaintiff alleges as follows.

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1 Plaintiff is a transportation business. (Doc. No. 1-1 at ¶ 8.) Plaintiff receives payments
2 from its customers via check and Automated Clearing House (“ACH”). (*Id.*) Plaintiff provides
3 ACH information to customers to facilitate these payments. (*Id.*) In March 2024, plaintiff
4 became aware that some of its clients had issued an ACH and/or checks to an incorrect account
5 that was fraudulently created through defendant. (*Id.* at ¶ 9.) Plaintiff immediately informed
6 defendant, requesting the account be closed and/or suspended, monies be directed to plaintiff, and
7 plaintiff be given the opportunity to review banking activity to protect plaintiff against further
8 financial injury and to estimate the risk of further financial injury. (*Id.*) Defendant indicated it
9 was investigating the matter. (*Id.*) In April 2024, plaintiff became aware of additional deposits
10 into the same fraudulent account with defendant. (*Id.* at ¶ 10.)

11 Based on these allegations, plaintiff brings two claims against defendant in this action—
12 restitution and accounting.

13 On July 12, 2024, defendant filed the pending motion to dismiss plaintiff’s complaint in
14 its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 5.) On July 25, 2024,
15 plaintiff filed an opposition to the motion, and on August 2, 2024, defendant filed its reply
16 thereto. (Doc. Nos. 6, 8.) Additionally, plaintiff requests that the court take judicial notice of
17 certain documents attached as exhibits to its opposition. (Doc. No. 6 at 4 n.2, 8–26.) Plaintiff
18 purports to add allegations to its complaint based on those documents. (*See id.* at 4–5, 8–26.)

19 LEGAL STANDARD

20 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
21 sufficiency of the complaint. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir.
22 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of
23 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901
24 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to
25 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A
26 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
27 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
28 *Iqbal*, 556 U.S. 662, 678 (2009).

1 In determining whether a complaint states a claim on which relief may be granted, the
2 court accepts as true the allegations in the complaint and construes the allegations in the light
3 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). However,
4 the court need not assume the truth of legal conclusions cast in the form of factual allegations.
5 *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not
6 require detailed factual allegations, “it demands more than an unadorned, the-defendant-
7 unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A pleading is insufficient if it offers
8 mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.”
9 *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 676 (“Threadbare recitals of the elements
10 of a cause of action, supported by mere conclusory statements, do not suffice.”). Moreover, it is
11 inappropriate to assume that the plaintiff “can prove facts that it has not alleged or that the
12 defendants have violated the . . . laws in ways that have not been alleged.” *Associated Gen.*
13 *Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

14 In ruling on a motion to dismiss under Rule 12(b)(6), the court is permitted to consider
15 materials outside the pleadings if those documents are attached to the complaint, incorporated by
16 reference in the complaint, or are matters of which judicial notice is taken. *United States v.*
17 *Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“Even if a document is not attached to a complaint, it
18 may be incorporated by reference into a complaint if the plaintiff refers extensively to the
19 document or the document forms the basis of the plaintiff’s claim.”). Pursuant to Federal Rule of
20 Evidence 201(b), a court may “judicially notice a fact that is not subject to reasonable dispute
21 because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be
22 accurately and readily determined from sources whose accuracy cannot reasonably be
23 questioned.” Fed. R. Evid. 201(b). Public records are properly the subject of judicial notice
24 because the contents of such documents contain facts that are not subject to reasonable dispute,
25 and the facts therein “can be accurately and readily determined from sources whose accuracy
26 cannot reasonably be questioned.” *Id.* Documents that constitute “matters of public record” may
27 be judicially noticed. *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir.
28 2007).

1 Defendants contend, however, that the court should decline to take judicial notice of the
2 documents because plaintiffs are attempting to use them to supplement allegations included in the
3 complaint. . . . Plaintiffs cannot utilize the documents to amend the complaint and defeat
4 defendants’ motions to dismiss. . . . Consequently, the court declines to take judicial notice of the
5 individual defendants’ Forms 4.”); *Schulenburg v. Handel’s Enters., Inc.*, No. 18-cv-513-GPC-
6 WVG, 2018 WL 3020206, at *2 (S.D. Cal. June 18, 2018) (“Dismissal under Federal Rule of
7 Civil Procedure (‘Rule’) 12(b)(6) for ‘failure to state a claim upon which relief can be granted[’]
8 requires the Court to look at facts alleged in the complaint, and not facts contained in [the
9 d]efendant’s opposition or documents contained in a request for judicial notice.”).

10 Here, plaintiff attempts to use the attached exhibits to supplement its complaint with the
11 following additional allegations: The third party opened the account with defendant under
12 “Capital Express Lines, LLC,” which is the exact same name as plaintiff. (Doc. No. 6 at 4, 19–
13 26) (citing exhibit 5). Plaintiff is controlled by Gurdip Samra, its CEO. (*Id.* at 4 n.2, 8–14)
14 (citing exhibits 1–3). Dharmender Samra was the member of a previously terminated entity with
15 the same name, and the entity was terminated on June 22, 2018. (*Id.* at 4 n.2, 15–18) (citing
16 exhibit 4). The third party directed plaintiff’s customers to deposit their funds into an ACH
17 through an account with defendant and stolen checks from plaintiff. (*Id.* at 4, 19–26) (citing
18 exhibit 5). The deposited checks expressly reference defendant on the endorsement. (*Id.*) (citing
19 exhibit 5). After informal efforts by plaintiff in April 2024 to notify defendant of the issue,
20 plaintiff notified defendant in writing. (*Id.*) (citing exhibit 5). Without citing to any exhibits,
21 plaintiff also references further harm purportedly suffered since plaintiff filed the complaint.
22 (Doc. No. 6 at 4–5.) In its opposition to the pending motion to dismiss, plaintiff relies on these
23 new factual allegations to argue, among other things, that defendant had an obligation to prevent
24 the third party from opening the offending account. (*Id.* at 5–6.)

25 While it would not be appropriate to take judicial notice of exhibits 1–3, *see Oklahoma*
26 *Firefighters Pension*, 50 F. Supp. 3d at 1350, “[f]acts raised for the first time in [a] plaintiff’s
27 opposition papers should be considered by the court in determining whether to grant leave to
28 amend or to dismiss with or without prejudice,” *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th

1 Cir. 2003). Therefore, the court will not consider any new factual allegations included in
2 plaintiff’s opposition or the exhibits thereto when evaluating whether to grant defendant’s motion
3 to dismiss, but will consider such allegations in determining whether leave to amend should be
4 granted.

5 **B. Motion to Dismiss Pursuant to Rule 12(b)(6)**

6 1. Plaintiff’s First Cause of Action for Restitution

7 In moving to dismiss, defendant argues that plaintiff’s complaint fails to state a claim for
8 quasi-contract seeking restitution.¹ (Doc. No. 5 at 4–5.) As defendant highlights, (*id.* at 4–5), a
9 quasi-contract claim for restitution requires a plaintiff to “show that (1) the defendant received a
10 benefit from the plaintiff, and (2) it would be unjust for the defendant to retain that benefit,”
11 *Produce Int’l, LLC v. Fresh is Best, Inc.*, No. 19-cv-05935-JAK-AS, 2023 WL 3311113, at *6
12 (C.D. Cal. Apr. 19, 2023). Defendant argues that plaintiff has not met the first prong because
13 plaintiff has failed to allege that defendant received a benefit *from plaintiff* where plaintiff’s
14 customers, rather than plaintiff, made deposits into an account with defendant that did not belong
15 to plaintiff. (Doc. No. 5 at 4–5.)²

16 Plaintiff argues in opposition that defendant owed a duty to take proactive steps to prevent
17 fraudulent deposits. (Doc. No. 6 at 5–6) (citing *Bhatia v. Silvergate Bank*, 725 F. Supp. 3d 1079,
18 1116 (S.D. Cal. 2024); *Attisha Enters., Inc. v. Capital One, N.A.*, 505 F. Supp. 3d 1051, 1056–57

19 ¹ Plaintiff brings a cause of action for “restitution.” (Doc. No. 1-1 at ¶¶ 11–13.) Although
20 “[t]here is no freestanding cause of action for ‘restitution’ in California,” *Munoz v. MacMillan*,
21 195 Cal. App. 4th 648, 661 (2011), such claims are treated “as an attempt to plead a cause of
22 action giving rise to a right to restitution,” *McBride v. Boughton*, 123 Cal. App. 4th 379, 388
23 (2004). “[R]estitution may be awarded in lieu of breach of contract damages when the parties had
24 an express contract, but it was procured by fraud or is unenforceable or ineffective for some
25 reason.” *Id.* “Alternatively, restitution may be awarded where the defendant obtained a benefit
26 from the plaintiff by fraud, duress, conversion, or similar conduct.” *Id.* As in *McBride*, because
27 there is no contract at issue here, “the only possible premise” of plaintiff’s cause of action for
28 restitution is that plaintiff is entitled to restitution “on a quasi-contract” theory based on
defendant’s “tortious conduct.” *Id.* at 388–89. In such circumstances, the claim is one for “quasi
contract . . . seeking the remedy of restitution.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d
753, 762 (9th Cir. 2015).

² Defendant does not make any argument regarding the sufficiency of plaintiff’s allegations as to
the second prong of the applicable legal standard governing such a claim.

1 (S.D. Cal. 2020)). Given this duty, plaintiff argues that the right to restitution arises from
2 defendant improperly opening the offending account, receiving notice of the fraud, and not taking
3 appropriate action. (Doc. No. 6 at 6) (citing *Cnty. of San Bernardino v. Walsh*, 158 Cal. App. 4th
4 533 (2007)). Defendant argues in reply that plaintiff did not respond to defendant’s argument in
5 substance and as such has conceded the point. (Doc. No. 8 at 3.) Defendant further argues that
6 the district court’s decision in *Attisha Enterprises*, cited by plaintiff, supports dismissal of this
7 claim. (Doc. No. 8 at 4.)

8 As an initial matter, the court agrees that plaintiff has not adequately responded to
9 defendant’s argument in this regard. (See Doc. No. 6 at 6.) Moreover, “once an issue or claim is
10 properly before a court, the court is not limited to the particular legal theories advanced by the
11 parties, but rather retains the independent power to identify and apply the proper construction of
12 governing law.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

13 As to the substance of defendant’s argument that it received no benefit *from plaintiff*, the
14 court concludes that this argument interprets the applicable law too narrowly. To state a claim for
15 quasi-contract seeking restitution under California law, “a plaintiff must show that the defendant
16 received and unjustly retained a benefit *at the plaintiff’s expense*.” *ESG Cap. Partners, LP v.*
17 *Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016) (emphasis added); *see also Bhatia*, 725 F. Supp. 3d
18 at 1126 (“Contrary to their assertion, [the d]efendants have not cited any authority supporting
19 their contention that [the d]efendants must have received the benefit directly from [the
20 p]laintiffs.”). According to California courts, and “[a]s the Restatement [(Third) of Restitution
21 and Unjust Enrichment] explains, where someone other than the plaintiff provided the benefit
22 [that] the defendants allegedly unjustly retained, as between the plaintiff and the defendant, the
23 plaintiff is entitled to restitution from the defendant where the plaintiff has a better legal or
24 equitable right.” *City of Oakland v. Oakland Raiders*, 83 Cal. App. 5th 458, 479 (2022) (internal
25 quotation marks and citation omitted). “The Restatement cautions that the requirement [that] the
26 plaintiff demonstrate ‘a better legal or equitable right’ to the benefit in question is actually highly
27 restrictive.” *Id.*

28 /////

1 Here, plaintiff’s customers intended to send payment to plaintiff and by mistake or fraud
2 sent the money to an account with defendant. (Doc. No. 1-1 at ¶ 9.) Pursuant to the Restatement
3 and on these facts as alleged, plaintiff has a better legal or equitable right to the deposits than
4 defendant. *See* Rest. 3d of Restitution and Unjust Enrichment § 48 cmt. b (Am. L. Inst. 2011)
5 (“A owes B \$500. Intending to pay this debt, A sends \$500 by mistake to C, to whom A has no
6 obligation. C is liable to A by the rule of § 6 and to B by the rule of this section. C’s payment of
7 \$500 to either of them discharges both of C’s liabilities.”). Therefore, the court concludes that
8 plaintiff has adequately alleged that defendant received the funds at issue “at . . . plaintiff’s
9 expense.” *ESG Cap. Partners*, 828 F.3d at 1038.

10 For the first time in reply, defendant argues in passing that the court’s decision in *Attisha*
11 *Enterprises* favors dismissal because in that case, the district court concluded that the California
12 Uniform Commercial Code (“UCC”) displaced the plaintiff’s claims for negligence in accepting a
13 transfer, negligence in releasing transferred funds to third parties, conversion, and money had and
14 received. (Doc. No. 8 at 4); *see also Attisha Enters.*, 505 F. Supp. 3d at 1057–59. The court
15 declines to consider this argument raised for the first time in defendant’s reply. *See Zamani v.*
16 *Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The district court need not consider arguments raised
17 for the first time in a reply brief.”).³

18 Accordingly, the court will deny defendant’s motion to dismiss plaintiff’s quasi-contract
19 claim seeking restitution.

20 ////

21 ³ Nevertheless, the court notes that the district court in *Attisha Enterprises* concluded that UCC
22 §§ 11101 *et seq.* (“Division 11”) displaced the plaintiff’s claims as they related to the bank’s
23 initial acceptance of fraudulent *wire* transfers. *Attisha Enters.*, 505 F. Supp. 3d at 1057. Division
24 11 governs “fund transfers” as defined in UCC § 11104. *Miller v. Bank of Am., N.A.*, No. 1:21-
25 cv-00337-JLT, 2022 WL 3704093, at *3 (E.D. Cal. Aug. 26, 2022). Wire transfers unequivocally
26 qualify as “fund transfers” within the meaning of § 11104. *Id.* In contrast here, plaintiff’s
27 complaint lists checks and ACH, not wire transfers, as the means by which funds were
28 fraudulently diverted to an account with defendant. (Doc. No. 1-1 at ¶ 9.) “[T]he applicability of
Division 11 to the . . . transfer methods in this case is somewhat unclear.” *Miller*, 2022 WL
3704093, at *3; *cf. id.* (“Without further information, and absent a showing that all transfers at
issue in this case constitute ‘fund transfers’ under § 11104, the Court declines to dismiss
Plaintiff’s claims on the ground that they are displaced by the California Uniform Commercial
Code.”).

1 2. Plaintiff’s Second Cause of Action for Accounting

2 Defendant next argues that plaintiff’s complaint fails to state a claim for an accounting.
3 (Doc. No. 5 at 5–6.) “An action for an accounting has two elements: (1) ‘that a relationship
4 exists between the plaintiff and defendant that requires an accounting’ and (2) ‘that some balance
5 is due the plaintiff that can only be ascertained by an accounting.’” *Sass v. Cohen*, 10 Cal. 5th
6 861, 869 (2020) (quoting *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179 (2009)). “An action
7 for accounting is not available where the plaintiff alleges the right to recover a sum certain or a
8 sum that can be made certain by calculation.” *Teselle*, 173 Cal. App. 4th at 179.

9 Defendant argues that plaintiff has failed to allege that it had any relationship with
10 defendant. (Doc. No. 5 at 5.) According to defendant, even a customer relationship would be
11 insufficient. (*Id.*) Plaintiff responds by arguing that the required relationship is sufficiently
12 alleged between defendant and either plaintiff or Gurdip Samra as the actual member of Capital
13 Express Lines, LLC, since an account opened for Capital Express Lines, LLC, should have been
14 reviewable by Gurdip Samra. (Doc. No. 6 at 6.) Defendant responds by arguing that plaintiff
15 does not allege a relationship between defendant and plaintiff itself. (Doc. No. 8 at 4.)

16 “The right to an accounting will often arise where the defendant has abused a special
17 relationship with the plaintiff, such as in cases involving trusts, partnerships and domestic
18 relations, or fiduciary relationships.” *Meister v. Mensinger*, 230 Cal. App. 4th 381, 403–04
19 (2014). However, “a fiduciary relationship between the parties is not required to state a cause of
20 action for accounting. All that is required is that some relationship exists that requires an
21 accounting.” *Id.* at 179. Here, plaintiff’s allegations do not involve trusts, partnerships, domestic
22 relations, or fiduciary relationships.⁴ As such, the court turns to whether there otherwise exists a
23 qualifying relationship between the parties to this action.

24 “The right to an accounting can arise from the possession by the defendant of money or
25 property which, *because of the defendant’s relationship with the plaintiff*, the defendant is obliged

26 _____
27 ⁴ In connection with its restitution claim, plaintiff alleges defendant owed a duty to plaintiff.
28 (Doc. No. 6 at 5–6) (citing *Bhatia*, 725 F. Supp. 3d at 1116; *Attisha Enters.*, 505 F. Supp. 3d at 1056–57). Any such duty would be a duty of care, not a fiduciary duty. *Bhatia*, 725 F. Supp. 3d at 1105 (“duty of care”); *Attisha Enters.*, 505 F. Supp. 3d at 1054 (same).

1 to surrender.” *Teselle*, 173 Cal. App. 4th at 179–80 (emphasis added). As stated previously,
2 plaintiff adequately alleges in its complaint that defendant is in possession of money or property
3 to which plaintiff has a superior right. Still, plaintiff must allege a qualifying relationship with
4 defendant to state a cognizable claim for an accounting. *Compare Robinson v. Bank of Am.*, No.
5 12-cv-00494-RMW, 2012 WL 1932842, at *1, *2, *10 (N.D. Cal. May 29, 2012) (finding
6 persuasive the defendant’s argument that the requisite relationship between the plaintiff and the
7 defendant did not exist and dismissing the plaintiff’s accounting claim even where the defendant
8 bank owed the plaintiff money due to excess mortgage payments), and *First Am. Cinema, LLC v.*
9 *Chicken Soup for the Soul Ent., Inc.*, No. 19-cv-09577-PSG-GJS, 2020 WL 11025582, at *9
10 (C.D. Cal. Mar. 12, 2020) (finding persuasive the defendants’ argument that the requisite
11 relationship between the plaintiff and the defendant did not exist and dismissing the plaintiff’s
12 accounting claim as to the defendants who profited as improper licensees of the plaintiff’s
13 intellectual property but who had no contact with nor conducted any business with the plaintiff),
14 with *Rath v. Defy Media, LLC*, No. 2:18-cv-09624-ODW-RAO, 2019 WL 3067198, at *6 (C.D.
15 Cal. July 12, 2019) (rejecting the defendant’s argument that the requisite relationship between the
16 plaintiffs and the defendant did not exist and denying the defendant’s motion to dismiss the
17 plaintiffs’ accounting claim where the plaintiffs operated under the defendant’s umbrella such
18 that the defendant “possessed and managed” the plaintiffs’ money on behalf of the plaintiffs’
19 clients), and *Lazar v. Grant*, No. 17-cv-00309-RGK-PJW, 2017 WL 6942756, at *3 (C.D. Cal.
20 Sept. 27, 2017) (“[The p]laintiffs are able to show an investment with [the defendant] over the
21 course of several years. Such conduct is sufficient to establish the requisite relationship.”).

22 The court concludes that plaintiff has failed to adequately allege a qualifying relationship
23 between plaintiff and defendant. As stated previously, plaintiff argues that defendant had a
24 qualifying relationship with either plaintiff or Gurdip Samra as the actual member of Capital
25 Express Lines, LLC, since an account opened for Capital Express Lines, LLC, should have been
26 reviewable by Gurdip Samra. (Doc. No. 6 at 6.) However, this argument relies on new
27 allegations introduced for the first time in plaintiff’s opposition and which are not included in
28 plaintiff’s operative complaint. (Doc. No. 1-1.) Such arguments may not be considered in

1 resolving defendant’s motion to dismiss. *Schneider*, 151 F.3d at 1197 n.1 (9th Cir. 1998). Based
2 on the complaint before it, the court finds that plaintiff has failed to sufficiently allege a
3 qualifying relationship that would support a claim for accounting. *See Robinson*, 2012 WL
4 1932842, at *10.

5 Because the court finds that plaintiff has alleged no qualifying relationship with
6 defendant, fiduciary or otherwise, plaintiff has failed to state a claim for accounting, and the
7 claim must be dismissed. As a result, the court need not address defendant’s additional
8 arguments regarding plaintiff’s accounting claim.⁵

9 3. Leave to Amend

10 Leave to amend should be granted “freely” when justice so requires. Fed. R. Civ.
11 P. 15(a). The Ninth Circuit maintains a policy of “extreme liberality generally in favoring
12 amendments to pleadings.” *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406, 406 (9th Cir. 1960).
13 Reasons “such as undue delay, bad faith or dilatory motive . . . repeated failure to cure
14 deficiencies . . . undue prejudice to the opposing party . . . [or] futility” may support denial of
15 leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A district court “should grant leave
16 to amend even if no request to amend the pleading was made, unless it determines that the
17 pleading could not possibly be cured by the allegation of other facts.” *Cook, Perkiss and Liehe,*
18 *Inc. v. N. Cal. Collection Servs.*, 911 F.2d 242, 247 (9th Cir. 1990). “Facts raised for the first
19 time in [a] plaintiff’s opposition papers should be considered by the court in determining whether
20 to grant leave to amend or to dismiss with or without prejudice.” *Broom*, 320 F.3d at 1026 n.2.

21 Here, plaintiff requests leave to amend, (Doc. No. 6 at 7), plaintiff’s original complaint is
22 pending before this court, (Doc. No. 1-1 at 3), and it is possible the deficiencies the court

23 ⁵ Nevertheless, the court notes that defendant’s argument that plaintiff can calculate any amount
24 owed by consulting its customer’s unpaid invoices appears to have merit. (Doc. No. 5 at 6.) “An
25 action for accounting is not available where the plaintiff alleges the right to recover a sum certain
26 or a sum that can be made certain by calculation.” *Teselle*, 173 Cal. App. 4th at 179. Plaintiff’s
27 complaint alleges in a conclusory fashion that “[a]t this point, it is unclear the nature and scope of
28 financial injury.” (Doc. No. 1-1 at ¶ 10.) “Nowhere has [p]laintiff alleged facts to suggest that an
ordinary legal action demanding a sum certain is impracticable.” *Nan Hui Chen v. Deutsche
Bank Nat’l Tr. Co.*, No. 13-cv-3352 YGR, 2014 WL 2738071, at *9 (N.D. Cal. June 9, 2014).
Plaintiff should address this pleading deficiency in any forthcoming amended complaint.

1 identifies may be cured by the allegation of additional facts, *Cook*, 911 F.2d at 247. Accordingly,
2 plaintiff will be granted leave to amend the complaint.

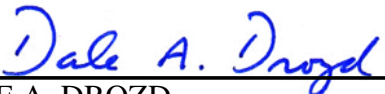
3 **CONCLUSION**

4 For the reasons explained above,

- 5 1. Defendant's motion to dismiss (Doc. No. 5) is granted in part and denied in part as
6 follows:
- 7 a. Defendant's motion to dismiss plaintiff's quasi-contract claim seeking
8 restitution is denied;
- 9 b. Plaintiff's accounting claim is dismissed with leave to amend;
- 10 2. Within twenty-one (21) days from the date of entry of this order, plaintiff shall file
11 either a first amended complaint, or a notice of its intent not to file a first amended
12 complaint and to proceed only on the claim found to be cognizable in this order;
13 and
- 14 3. If plaintiff files a notice of its intent not to file a first amended complaint, then
15 defendant shall file an answer as to the claim found to be cognizable in this order
16 within twenty-one (21) days of service of that notice.

17 IT IS SO ORDERED.

18 Dated: January 6, 2025

19 
20 DALE A. DROZD
21 UNITED STATES DISTRICT JUDGE