

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STARNET INTERNATIONAL AMC INC., dba)
ALL CHEER INTERNATIONAL LIMITED)
and KERRY INTERNATIONAL,)
Plaintiff,)
v.)
MOUSA KAFASH dba BAPAZ GARMENTS,)
et al.,)
Defendant.)

Case No.: 09-CV-04301-LHK
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

On September 16, 2009, Plaintiff Starnet International AMC Inc. filed its complaint against Defendant Mousa Kafash dba Bapaz Garments. Dkt. No. 1. In its complaint, Starnet alleged that Mousa Kafash ordered \$132,298.32 in goods from Starnet, that Starnet delivered the goods to Mousa Kafash, that Mousa Kafash received the goods, and that Mousa Kafash failed to pay for the goods. Based on these allegations, Starnet brought five causes of action: (1) Open Book Account; (2) Account Stated; (3) Reasonable Value of Goods Sold and Delivered; (4) Intentional Misrepresentation; and (5) Negligent Misrepresentation. On November 29, 2010, Mousa Kafash moved for summary judgment on all five causes of action, Dkt. No. 56, and the Court granted Mousa Kafash's motion as to Starnet's fourth and fifth causes of action, Dkt. No. 64. A Court trial on Starnet's three remaining causes of action was held on January 24, 2011.

1 Starnet's theory at trial followed the allegations in its complaint. Starnet's Chief Financial
2 Officer Kurt Miller testified that Starnet's business records show that Mousa Kafash dba Bapaz
3 Garments ordered, received, and failed to pay \$132,298.32 for fabrics. Beyond the value of the
4 goods allegedly sent to Mousa Kafash, Starnet seeks \$27,329.57 in pre-judgment interest, \$1,000 in
5 attorney's fees, and \$454.00 in recoverable court costs. Dkt. No. 76.

6 Mousa Kafash was not present at the trial. Mousa Kafash's sole witness at trial was his
7 son, Peter Kafash. According to the testimony of Peter Kafash, Mousa Kafash is the CEO of
8 Bapaz Garments Corp. Peter Kafash testified that Mousa Kafash never did business with Starnet in
9 an individual capacity. Rather, Peter testified that he, Peter Kafash, ordered goods from Starnet on
10 behalf of Bapaz Garments Corp. In other words, Peter Kafash claimed that any claims for unpaid
11 goods should be directed at Bapaz Garments Corp., not Mousa Kafash. Furthermore, Peter
12 testified that Bapaz Garments Corp. had received only \$69,673.32 in goods and that Bapaz
13 Garments Corp. had already paid for those goods.

14 At the close of the trial, the case was submitted for decision. Pursuant to Federal Rule of
15 Civil Procedure 52, the Court finds and concludes as follows.

16 FINDINGS OF FACT

17 Starnet and Mousa Kafash raised the following factual disputes during trial: (1) With whom
18 did Starnet transact business between January 1, 2008 and December 31, 2008; (2) What goods did
19 Starnet ship to Mousa Kafash dba Bapaz Garments; and (3) What payments, if any, did Mousa
20 Kafash dba Bapaz Garments make to Starnet for the goods received?

21 A. Background

22 Starnet International AMC Inc. aka Starnet International AMC Inc. ("Starnet") is a California
23 corporation organized in 2003 and is in the business of distributing fabrics. In 2004, Starnet
24 purchased the distribution rights of Kerry Fabrics, a Chinese manufacturing company. In May or
25 June of 2008, Starnet purchased the distribution rights of All Cheer International Limited, a
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1 manufacturing company in Hong Kong. Starnet still does business under the Kerry Fabrics and All
2 Cheer International Limited names.¹

3 Starnet maintains a customer file for each of its buyers in the regular course of business. A
4 buyer's file contains documents related to the buyer's interactions with Starnet, including purchase
5 orders, e-mails, invoices, and shipping documents. Starnet keeps these files in its company office
6 and sorts them alphabetically by customer name.

7 At the end of each month, Starnet sends out a statement of account to its customers. The
8 statement of account summarizes what Starnet believes the customer owes Starnet. Customers can
9 dispute the amount, and Miller conceded that the amount shown on a statement of account is not
10 always correct.

11 Starnet maintains different payment policies for its customers depending on the situation.
12 Sometimes Starnet requires a deposit. Sometimes it requires customers to pay in advance. One of
13 Starnet's consistent practices, however, is that when Starnet does business with a corporation,
14 Starnet requires a personal guarantee.

15 Kurt Miller is currently the Chief Financial Officer of Starnet. He began work as Starnet's
16 CFO in July 2008. He handles the financial needs of Starnet, Kerry Fabrics, and All Cheer.
17 Miller's duties include overseeing the accounting and collection activity.

18 Bapaz Garments Corp., a textile importer for garment manufacturers, is a New York
19 corporation organized in 2004. According to Peter Kafash, Mousa Kafash is the founder and CEO
20 of Bapaz Garments Corp. According to Peter Kafash, Peter Kafash runs the day to day operations
21 of Bapaz Garments Corp. and places all of Bapaz Garments Corp.'s purchasing orders.

22 **B. Burden of Proof**

23 As this is a diversity action, California law governs which party bears the burden of proof.
24 *See Robinson, Leatham & Nelson, Inc. v. Nelson*, 109 F.3d 1388, 1391 (9th Cir. 1997) (citing *Erie*
25 *R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). In California, "[a]s a
26 general rule, the 'party desiring relief' bears the burden of proof by a preponderance of the
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28 ¹ References to "Starnet" in the Court's Findings of Fact and Conclusions of Law refer to all of
Starnet's operating businesses.

1 evidence.” *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 861, 107 Cal. Rptr. 2d 841, 24 P.3d 493
2 (2001) (citation omitted); *see also* CAL. EVID. CODE § 500 (“Except as otherwise provided by law,
3 a party has the burden of proof as to each fact the existence or nonexistence of which is essential to
4 the claim for relief or defense that he is asserting.”). Starnet is the moving party and thus bears the
5 burden of proof on any of the facts in contention.

6 **C. With Whom Did Starnet Transact Business in 2008?**

7 The most contested point at trial was whether Starnet did business with Mousa Kafash dba
8 Bapaz Garments or with Bapaz Garments Corp.

9 Starnet maintained that it always did business with Mousa Kafash dba Bapaz Garments.
10 According to Miller, Starnet’s account for Bapaz Garments was set up as an individual, not a
11 corporate, account. Miller testified that the Bapaz Garments account file did not contain a personal
12 guarantee, which Starnet always requires of corporate customers, or any other documents
13 indicating that Bapaz Garments was a corporation. Miller also testified that he did not personally
14 learn that Bapaz Garments was a corporation until after Starnet filed the instant lawsuit.

15 Mousa Kafash did not appear at trial. Peter Kafash maintained at trial that only Bapaz
16 Garments Corp. ever did business with Starnet. Peter Kafash testified that Bapaz Garments Corp.
17 started doing business with All Cheer International Limited in 2007 and always did so as a
18 corporation. Invoices submitted by Peter Kafash show that Bapaz Garments Corp. purchased
19 thousands of dollars in goods from All Cheer International Limited in 2007 in just a few months
20 time. *See* D.’s Exs. 206, 207, 208. Peter Kafash further testified that even after Starnet purchased
21 All Cheer International Limited in 2008, he continued to communicate with the same people at All
22 Cheer and Kerry Fabric and continued to do business with them as a corporation. Moreover, Peter
23 Kafash testified that Mousa Kafash speaks little English and does not purchase goods for Bapaz
24 Garments Corp.

25 The Court finds that the facts are slightly more complicated than either side represents.
26 Peter Kafash’s testimony that he always did business with All Cheer International Limited as a
27 corporation is undercut by the three purchase orders included in Defendant’s exhibits. D.’s Exs.
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1 200, 201, 202.² Starnet’s customers prepare purchase orders and send them to Starnet in order to
2 purchase goods from Starnet. Thus, a customer controls how its name appears on a purchase order.
3 None of the purchase orders contained in Defendant’s exhibits, however, lists a purchaser named
4 Bapaz Garments Corp. *See id.* Rather, all three list the buyer’s name as “Bapaz Garments.” *See*
5 *id.* By not attaching “Corp.” to the end of the corporation’s name, whoever prepared the purchase
6 orders left it unclear whether Bapaz Garments was a corporation, a sole proprietorship, or some
7 other business form. This supports Miller’s testimony that Starnet was not aware that Bapaz
8 Garments was a corporation. Further supporting Miller’s testimony is the fact that all of the
9 invoices that Starnet produced for the Mousa Kafash dba Bapaz Garments account identify the
10 customer as Bapaz Garments, not Bapaz Garments Corp. *See P.’s Exs. 4, 5, 6, 11, 17.* From this
11 evidence, the Court finds that Starnet was not aware that Bapaz Garments was a corporation.³

12 Even though the Court finds that Starnet believed Bapaz Garments to be a sole
13 proprietorship, it is unclear why Starnet believed that it was doing business with Mousa Kafash.
14 Starnet did not call any witness who actually spoke with Mousa Kafash during the purchasing
15 process.⁴ Moreover, Starnet did not produce any purchasing order or invoice listing Mousa
16 Kafash’s name. The only document admitted into evidence that names Mousa Kafash is a
17 Statement of Account, dated December 31, 2008, that Miller testified was in the account file for
18 Mousa Kafash dba Bapaz Garments. *See P.’s Ex. 7.* Presumably, the presence of Mousa Kafash’s
19 name on the Statement of Account is a direct result of the fact that the account was created in his
20 name. Starnet, however, produced no evidence at trial explaining why Starnet put Mousa Kafash’s
21 name on the account in the first place. Miller, Starnet’s only witness, testified at trial that the
22 Mousa Kafash dba Bapaz Garments account was created before he began at Starnet. Furthermore,
23 the only evidence produced of any individual communicating with Starnet regarding purchasing
24 actually supports Peter Kafash’s testimony that he, not Mousa Kafash, did the ordering for Bapaz

25 ² Plaintiff’s exhibits also include copies of these three purchase orders. P.’s Exs. 1, 2, 3.

26 ³ Even though Bapaz Garments Corp. did business with All Cheer International Limited as a
27 corporation, *see D.’s Exs. 206, 207, 208*, this occurred before Starnet purchased All Cheer
International Limited’s distribution rights.

28 ⁴ Miller testified that he spoke with Mousa Kafash during collection activity. Miller claimed that
Mousa Kafash faxed him several documents, *see P.’s Exs. 19, 20, 21, 22, 23*, in response to their
conversation.

1 Garments. One of Plaintiff's exhibits is an e-mail sent to Hawell, whom Miller testified is a
2 salesman for Starnet, at hawellchan@yahoo.com.cn from someone named Peter at
3 pkafash@aol.com. *See* P.'s Ex. 15.⁵

4 Based on this evidence, the Court finds that even though Starnet was unaware that Bapaz
5 Garments was a corporation, Starnet has failed to meet its burden to prove by a preponderance of
6 the evidence that Mousa Kafash ordered goods from Starnet either on behalf of himself or on
7 behalf of Bapaz Garments Corp.

8 **D. What Goods Did Bapaz Garments Receive from Starnet?**

9 Starnet claimed at trial that Mousa Kafash is liable for the balance shown on a December
10 31, 2008 Statement of Account: \$132,298.32. *See* P.'s Ex. 7.⁶ Even though Miller admitted that
11 some of the numbers on the Statement of Account are not correct, Miller stood by the final total.
12 According to Miller, the \$132,298.32 total comes from adding the totals from three invoices,
13 Proform Invoice No. K-100567, Proform Invoice No. K-100568, and Commercial Invoice No. K-
14 100567/568, and subtracting a credit of \$3,535.00. Miller maintained that Starnet shipped to a
15 customer it believed to be Mousa Kafash dba Bapaz Garments all of the goods shown on those
16 three invoices.

17 Peter Kafash testified that the only goods that Bapaz Garments Corp. received from Starnet
18 were those listed on Commercial Invoice No. K-100567/568. *See* P.'s Ex. 6. Based on this
19 assertion, he claimed that Bapaz Garments only owed Starnet \$69,673.32, the amount shown on
20 Commercial Invoice No. K-100567/568.

21 To resolve the parties' dispute, it is necessary to understand the process that Starnet uses to
22 receive and fulfill a buyer's order. Both parties agreed at trial that to order goods from Starnet,
23 buyers must first open negotiations by sending Starnet a "purchase order." *See e.g.*, P.'s Exs. 1, 2,
24 3. On the purchase order, the buyer details the type and quantity of fabric that the buyer wants.

25 ⁵ Plaintiff's Exhibit 22 does have a signature above a line labeled "Mousa Kafash." That
26 document, however, is a communication between Bapaz Garments Corp. and Capital One Bank.

27 ⁶ Miller testified that Starnet sent Bapaz Garments this Statement of Account. Peter Kafash
28 testified that he opens all mail addressed to Bapaz Garments and that he did not see the Statement
of Account until after the start of litigation. On cross-examination, Miller had no explanation for
the presence of the words "DocuCom PDF Trial" appearing across the document. The Court finds
it doubtful, given the appearance of the document, that Starnet would have sent it to a customer.

1 Price is not specified on the purchase order. Eventually, the two sides agree on the terms of the
 2 bargain, and Starnet delivers to the buyer a specified amount of fabric at a specified price. During
 3 this process, Starnet utilizes two different types of invoices to share information with the buyer.
 4 One is called a “proform invoice,” and the other is called a “commercial invoice.” Both types of
 5 invoices contain the same basic categories of information. For example, each has a space for
 6 Starnet to list: (1) a description of goods; (2) the quantity in yards; (3) the price per yard; and
 7 (4) the total price. The headings for these two types of documents look, in simplified terms, as
 8 follows:⁷

ALL CHEER IINTERNATIONAL LIMITED				
		COMMERCIAL INVOICE	INV.NO: K-{{#####}}	
			DATE: {MONTH,DAY,YEAR}	
TO: BAPAZ GARMENTS			SHIP DATE:{YYYY/MM/DD}	
			VESSEL NAME:{XXXX}	
		PAYMENT BY TT		
FROM: SHANGHAI		TO: {DESTINATION}		
SHIPPING MARKS	DESCRIPTION OF GOODS	QUANTITY (YDS)	UNIT PRICE	TOTAL
	{DESCRIPTION OF FABRIC}			
	{COLOR}	{{####}}	USD {#.##}	USD {##,###}
	TOTAL	{{####}}		USD {##,###}
			DEPOSIT	USD -{##,###}
		{{####} PIECES)		USD {##,###}
	{INFORMATION OMITTED}			

⁷ Information that varies from invoice to invoice is contained in brackets.

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ALL CHEER IINTERNATIONAL LIMITED

PROFORM INVOICE NO: K-{\#####}

DATE: {MONTH,DAY,YEAR}

TO: BAPAZ GARMENTS

PAYMENT 20% DEPOSIT

FROM: SHANGHAI

SHIPPING MARKS	DESCRIPTION OF GOODS	QUANTITY (YDS)	UNIT PRICE	TOTAL
	{DESCRIPTION OF FABRIC}		USD {#.##}	USD {##,###}
		{COLOR}: {\####}		
	TOTAL	{#####}		USD {##,###}
	{INFORMATION OMITTED}			

Both parties conceded at trial that a commercial invoice is created and delivered to a customer when the goods listed on the commercial invoice are shipped to the buyer. Thus, both parties agree that a buyer owes Starnet the total price listed on a commercial invoice. The parties disagreed, however, over whether a proform invoice represents an actual shipment of goods or is simply a preliminary statement that is superseded by a commercial invoice. If a preliminary invoice does memorialize an actual, independent shipment of goods, then a buyer owes Starnet the total price listed on a proform invoice. If it does not, a buyer owes only the total price listed on a commercial invoice.

Miller testified at trial that a proform invoice does represent a shipment of goods. According to Miller, Starnet creates a proform invoice when it makes a partial shipment on a purchase order. When Starnet makes the final shipment on a purchase order and closes that

1 purchase order permanently, Starnet uses a commercial invoice. Thus, each type of invoice acts as
2 an independent bill, and Starnet calculates a customer's liability by adding the total prices listed on
3 both the proform and commercial invoices that it has sent to a customer.

4 In contrast, Peter Kafash testified at trial that a proform invoice does not represent a
5 shipment of goods. According to Peter Kafash, a commercial invoice supersedes all proform
6 invoices that are associated with the same purchase order. In other words, a buyer only receives
7 the goods listed on a commercial invoice and is thus only liable for the total price listed on the
8 commercial invoice.

9 If the Court were to decide the issue based on witness testimony alone, the Court would be
10 inclined to agree with Miller. Miller is a credible witness who possesses direct knowledge of
11 Starnet's accounting practices and procedures. His understanding of Starnet's uses of proform and
12 commercial invoices is likely more accurate than Peter Kafash's understanding as a customer.

13 Nevertheless, the Court finds that the proform and commercial invoices provided to the
14 Court raise three reasons to question Miller's view. First, several standard differences between
15 Starnet's proform invoices and Starnet's commercial invoices give the impression that the proform
16 invoice does not represent a shipment of goods. The most significant difference is that while all
17 three of the commercial invoices contained in Plaintiff's exhibits list a ship date and a vessel name,
18 *see P.'s Exs. 6, 8, 11, 17,*⁸ none of the three proform invoices contain this information, *see P.'s*
19 *Exs. 4, 5, 14.* The second significant difference is that while all three of the commercial invoices
20 list both a specific origin and a specific destination for the listed goods, the proform invoices only
21 indicate an origin. Finally, all three of the commercial invoices state: "Payment by TT;" the
22 proform invoices, in contrast, do not have this statement but state: "Payment 20% Deposit." It
23 seems reasonable that Starnet would ask for a deposit before shipping goods and then request full
24 payment once the goods are shipped. Thus, the fact that the proform invoices ask for a deposit, and
25 not for full payment, gives the impression that proform invoices issue before goods are shipped.
26 Added together, these readily apparent and consistent differences between Starnet's proform

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28 ⁸ Plaintiff's Exhibits 6 and 8 appear to be copies of the same Commercial Invoice. On closer
inspection, it appears that some of the information at the bottom of Plaintiff's Exhibit 8, including
the deduction of a \$10,000 deposit from the \$69,673.32 total, has been covered up.

1 invoices and Starnet's commercial invoices imply that the goods listed on a proform invoice have
2 not been shipped to a buyer. Instead, it appears that All Cheer uses the proform invoice to tell the
3 buyer how much fabric All Cheer is willing to ship and how much that fabric will cost the buyer.
4 If the buyer finds the terms agreeable, it appears the buyer then pays the deposit and receives the
5 commercial invoice when the goods actually ship.

6 The second reason to doubt Miller's view on proform invoices is that when a proform
7 invoice and a commercial invoice share invoice numbers, the type of fabric, the quantity, and the
8 price per yard listed on both invoices are substantially similar. Thus, if both types of invoices
9 represent a shipment of goods, then Starnet is shipping its customers the same basic order twice
10 within a relatively short time. The clearest example involves Proform Invoice No. K-100528-1,
11 dated December 18, 2008, and Commercial Invoice No. K-100528, dated December 26, 2008.
12 Proform Invoice No. K-100528-1 is for French Terry at a price of \$1.65/yard: 18,000 yards of
13 black and 14,500 yards of navy (a total of 32,500 yards). *See* P.'s Ex. 14. This makes for a total
14 listed price of \$53,625.00. *Id.* Commercial Invoice No. K-100528 is for 32,500 yards of Cotton
15 SP French Terry at \$1.65/yard. *See* P.'s Ex. 11. The Commercial Invoice shows a deposit of
16 \$10,000 has been paid and lists a final total price of \$43,625.00 (the equivalent of \$53,625 minus
17 \$10,000). *Id.* Furthermore, the fact that Proform Invoice No. K-100528-1 requested "Payment
18 20% Deposit" and that \$10,000 is approximately 19% of \$53,625.00 does not seem to be
19 coincidence.⁹ Although it is certainly possible that Bapaz Garments wanted the same shipment
20 twice, the consistent similarities between the quantity, type, and price of goods listed on proform
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22 ⁹ Starnet conceded at trial that the amounts shown on the invoices just described are not in
23 contention. Nevertheless, this same overlap holds true for the proform invoices and commercial
24 invoice at issue here. These are Proform Invoice No. K-100567, dated November 7, 2008, Proform
25 Invoice No. K-100568, dated November 7, 2008, and Commercial Invoice No. K-100567/568,
26 dated December 5, 2008. Proform Invoice No. K-100567 is for TTR Tropical at \$1.46/yard:
27 25,000 yards of black and 15,000 yards of brown. P.'s Ex. 4. Proform Invoice No. K-100568 is
28 for T/R Spandex Jersey at \$0.97/yard: 5,000 yards of black and 3,000 yards of brown. P.'s Ex. 5.
Commercial Invoice No. K-100567/568 lists two goods. P.'s Ex. 6. First, it lists "TTR 2WAY
TROPICAL SLD" at \$1.46/yard: 26,010.90 yards of black and 16,149 yards of brown. *See id.*
Second, it lists "T/R SPANDEX JERSEY SOLID" at \$0.97/yard: 5,096 yards of black and 3,275
yards of brown. *See id.* Commercial Invoice No. K-100567/568 also shows that a \$10,000 deposit
has been deducted from the total price. *See id.* Both Proform Invoice No. K-100567 and Proform
Invoice No. K-100568 request a 20% deposit. *See* P.'s Exs. 4, 5. Ten-thousand is approximately
15% of the amounts listed on both invoices.

1 invoices and commercial invoices that share the same invoice number make it difficult to believe
2 that each represents an independent shipment of goods.

3 At trial, Miller attempted to explain this overlap as coincidental. He said that customers
4 often purchase the same quantity of a good from a single purchase order. Although plausible,
5 Miller’s explanation is unpersuasive. This is because not only do related invoices list substantially
6 similar terms, but they each list the type and quantity of fabric that appears on the related purchase
7 order. A purchase order looks, in simplified terms, as follows:

BAPAZ GARMENTS		PURCHASE ORDER NO. {###}	
		ORDER DATE {YYY-MM-DD}	
PURCHASE ORDER			
VENDOR TO: ALL CHEER INTERNATIONAL LIMITED {ADDRESS} ATTE: MR. HAWELL CHAN		SHIP TO:	
ITEM NO./DESCRIPTION	QTY	PRICE	AMOUNT
{ITEM DESCRIPTION}			
COLOR: {COLOR}	{##,###}		

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22 As explained previously, Miller claimed that proform invoices represent a partial shipment
23 on a purchase order. It seems strange to think that a proform invoice listing the same quantity of
24 fabric as is listed on the purchase order would constitute a partial shipment. For example, Purchase
25 Order No. 1975, dated December 11, 2008, is an order for French Terry Cotton/Spandex: 18,000
26 yards of black and 14,500 yards of navy (32,500 yards total). P.’s Ex. 3. Proform Invoice No. K-
27 100528-1 and Commercial Invoice No. K-100528, each marked with “PO#1975” or “PO NO:
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1 1975,” list 32,500 yards of what appears to be “Cotton SP French Terry.” *See* P.’s Exs. 11, 14.¹⁰ If
2 both the proform and commercial invoice each memorializes a shipment of goods, then a buyer
3 ultimately receives double what the buyer lists on the purchase order. Even though it is possible
4 that this is the case, the more logical conclusion is that the proform invoice is a preliminary
5 statement memorializing the negotiated price and the commercial invoice is the statement
6 memorializing the actual shipment of goods.

7 The third and final reason to doubt Miller’s claim about proform invoices is that Starnet has
8 provided bills of lading for two of the commercial invoices that it issued to Bapaz Garments but
9 did not provide bills of lading for any of the proform invoices that it provided to the Court. Miller
10 testified at trial that Plaintiff’s Exhibit 13, a bill of lading, was the shipping document associated
11 with Commercial Invoice No. K-100528. P.’s Ex. 11. Likewise, Plaintiff’s Exhibit 9 is the bill of
12 lading for the goods shown in Commercial Invoice No. K-100567/568. P.’s Ex. 6 (showing a
13 shipment of 531 pieces, exactly the amount listed in Plaintiff’s Exhibit 9). If proform invoices did
14 memorialize the shipment of goods, it seems likely that at least one of the proform invoices
15 provided to the Court would have a bill of lading definitively showing shipment.

16 Based on the evidence before the Court, the Court finds that Starnet has failed to meet its
17 burden to prove by a preponderance of the evidence that proform invoices memorialize a shipment
18 of goods and that Starnet shipped Bapaz Garments the goods listed on Proform Invoice No. K-
19 100567 or Proform Invoice No. K-100568. Thus, Starnet has failed to prove by a preponderance of
20 the evidence that Bapaz Garments owes Starnet \$132,298.32. Because Peter Kafash admitted that
21 Bapaz Garments received \$69,673.32 worth of fabrics from Starnet and the trial exhibits support
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24 ¹⁰ This comparison also works for the invoices associated with Purchase Order No. 6029 and
25 Purchase Order No. 6030. Dated October 20, 2008, Purchase Order No. 6029 shows an order for
26 TTR Tropical Solid: 25,000 yards of black and 15,000 yards of brown. *See* P.’s Ex. 1. Proform
27 Invoice No. K-100567 is for TTR Tropical: 25,000 yards of black and 15,000 yards of brown. *See*
28 P.’s Ex. 4. Commercial Invoice No. K-100567/568 lists, under “PO NO:#6029,” “TTR 2WAY
TROPICAL SLD”: 26,010.90 yards of black and 16,149 yards of brown. *See* P.’s Ex. 6. Also
dated October 20, 2008, Purchase Order No. 6030 is an order for T/R Spandex Jersey: 5,000 yards
black and 3,000 yards brown. *See* P.’s Ex. 2. Proform Invoice No. K-100568 is T/R Spandex
Jersey: 5,000 yards of black and 3,000 yards of brown. *See* P.’s Ex. 5. Commercial Invoice No.
K-100567/568 lists, under “PO NO:#6030,” “T/R SPANDEX JERSEY SOLID”: 5,096 yards of
black and 3,275 yards of brown. *See id.*

1 this admission, the Court finds that Starnet sold and delivered to Bapaz Garments goods valued at
2 \$69,673.32, not \$132,298.32.

3 **E. What Payments Did Bapaz Garments Make to Starnet?**

4 Starnet argued at trial that, beyond the \$3,535.00 credit shown on the December 31, 2008
5 Statement of Account, Bapaz Garments had not made any payments towards the three invoices at
6 issue here. Miller testified that he personally conducted the collection activity on the Mousa
7 Kafash dba Bapaz Garments account. He claimed that individuals at Bapaz Garments told him that
8 the money had been wired out and that Bapaz Garments had paid for all goods received from
9 Starnet. Miller further testified that Bapaz Garments faxed him documents in response to his
10 inquiries about Bapaz Garments' payments. *See P.'s Exs. 19, 20, 21, 22, 23.*

11 Peter Kafash testified that Bapaz Garments Corp. wired All Cheer International Limited a
12 total of \$69,673.32 as payment for the goods shipped under Commercial Invoice No. K-
13 100567/568. As proof, Peter Kafash pointed to two pages from Bapaz Garments Corp.'s bank
14 statement. *See D.'s Ex. 209.* The first page is part of a January 2009 bank statement from
15 CapitalOne Bank. It shows a wire transfer withdrawal of \$59,673.32 to "ALL CHEER INTERN
16 ATIONAL LT." *See id.* The second page shows a \$10,000 wire transfer withdrawal to "ALL
17 CHEER INTERN ATIONAL LT." *See id.*

18 Starnet did not appear to dispute at trial that Bapaz Garments had attempted to pay the
19 \$69,673.32. Rather, Miller testified that Starnet never received the wire transfer payments because
20 Bapaz Garments did not properly wire the money. According to Miller, wire transferring money to
21 a bank requires use of the bank's swift number. A bank's swift number is an account number that
22 identifies the bank for purposes of wiring money. Miller testified that if an individual wires money
23 to an incorrect swift number, the money will initially be deducted from the individual's bank
24 account only to be credited back at a later time. According to Miller, Bapaz Garments used an
25 incorrect swift number for All Cheer International Limited's bank, and as a result, All Cheer never
26 received the money. Miller pointed to a money transfer verification form as support for his
27 testimony. The form, P.'s Ex. 19, shows an amount of \$59,673.32 being sent by Bapaz Garments
28 LLC to All Cheer International Ltd. on January 6, 2009. In the bottom right hand corner, the words

1 “SWIFT – CCBQHKAZ” appear. Miller testified that All Cheer International Limited’s bank’s
2 swift number is CCBQHKAX. *See also* P.’s Ex. 17.

3 The evidence presented by both sides has its weaknesses. Despite Peter Kafash’s testimony
4 that the \$69,673.32 that Bapaz Garments Corp. wired to All Cheer International Limited was never
5 returned to Bapaz Garments Corp.’s bank account, it is somewhat suspicious that Peter Kafash
6 failed to produce full bank statements for the Court’s review. Miller’s knowledge of All Cheer
7 International Limited’s swift numbers can also be questioned. Miller testified that All Cheer
8 International Limited’s bank’s swift number, to which Bapaz Garments Corp. transferred money,
9 *see* P.’s Ex. 22, is completely wrong, and that none of the entities owned by Starnet use such a
10 swift number.¹¹ However, this swift number, WIHBHKHH, is identical to the number listed on
11 two of the All Cheer International Limited invoices at issue in this case. *See* P.’s Exs. 4, 5.

12 Starnet bears the burden of proof to prove by a preponderance of the evidence that Mousa
13 Kafash has not paid for the goods delivered.¹² The Court finds that Starnet has not met its burden
14 of proof and has failed to show by a preponderance of the evidence that Mousa Kafash did not pay
15 the \$69,673.32.

16 CONCLUSIONS OF LAW

17 The Court will address the legal principles controlling each of Starnet’s causes of action¹³
18 and will apply those principles to the Court’s above findings of fact.

19 A. Open Book Account

20 A book account is “a detailed statement of debit/credit transactions kept by a creditor in the
21 regular course of business, and in a reasonably permanent manner.” *Imperial Merch. Servs., Inc. v.*
22 *Hunt*, 47 Cal. 4th 381, 397, 97 Cal. Rptr. 3d 464, 476, 212 P.3d 736, 746 (2009) (quoting
23 *Reigelsperger v. Siller*, 40 Cal. 4th 574, 579 n.5, 53 Cal. Rptr. 3d 887, 150 P.3d 764 (2007))

24
25
26 ¹¹ The invoice number on this document does not match the invoices at issue here.

27 ¹² As outlined in the Court’s conclusions of law below, a defendant’s non-payment for goods
received is an element of a claim for the reasonable value of goods sold and delivered.

28 ¹³ California law controls here. *See Goldberg v. Pac. Indem. Co.*, 627 F.3d 752, 755 (9th Cir. 2010)
 (“Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), federal
 courts are to apply state substantive law and federal procedural law to diversity cases.”).

1 (quotation marks omitted).¹⁴ A book account is open when there is a balance due on the account.
2 *See Interstate Grp. Adm'rs, Inc. v. Cravens, Dargan & Co.*, 174 Cal. App. 3d 700, 708, 220 Cal.
3 Rptr. 250 (1985). In California, a book account may furnish the basis for a cause of action “when
4 it contains a statement of the debits and credits of the transactions involved completely enough to
5 supply evidence from which it can be reasonably determined what amount is due to the claimant.”
6 *Id.* (quoting *Tillson v. Peters*, 41 Cal. App. 2d 671, 678, 107 P.2d 434 (1940)) (quotation marks
7 omitted). To sustain a cause of action the book account must also show against whom the charges
8 are made and in whose favor the charges run. *See id.* (quoting *Joslin v. Gertz*, 155 Cal. App. 2d 62,
9 65, 317 P.2d 155 (1957)).

10 “Whether a book account exists between parties is a question of fact.” *Cochran v. Rubens*,
11 42 Cal. App. 4th 481, 485, 49 Cal. Rptr. 2d 672 (1996) (citations omitted). “Further, whether a
12 book account is open or closed is a question of fact.” *Id.* The correctness of a book account is also
13 a question of fact. *See Thompson v. Machado*, 78 Cal. App. 2d 870, 874, 178 P.2d 838 (1947)
14 (“As for the correctness of the account, that was a matter of fact for the trial court . . .”). “[M]ore
15 proof of correctness should be required when the creditor relies on his own books than where he
16 relies on the regularly kept books of the debtor.” *Richmond v. Frederick*, 116 Cal. App. 2d 541,
17 548, 253 P.2d 977 (1953).

18 “In deciding whether a book account exists the court must examine the agreement, or lack
19 of agreement, between the parties and their conduct in the context of their commercial dealing.
20 The mere incidental keeping of accounts does not alone create a book account.” *Maggio, Inc. v.*
21 *Neal*, 196 Cal. App. 3d 745, 752, 241 Cal. Rptr. 883 (1987) (citation omitted). “The law does not
22 prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of
23 the business of which the record is kept.” *Warda v. Schmidt*, 146 Cal. App. 2d 234, 238, 303 P.2d

24 _____
25 ¹⁴ A more exhaustive definition is found in the California Code of Civil Procedure: "The term
26 'book account' means a detailed statement which constitutes the principal record of one or more
27 transactions between a debtor and a creditor arising out of a contract or some fiduciary relation,
28 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."
CAL. CIV. PROC. CODE § 337a.

1 762 (1956). “[I]t makes no difference whether the account is kept in one book or several so long as
2 they are permanent records, and constitute a system of bookkeeping as distinguished from mere
3 private memoranda.” *Id.* (citation omitted). Nevertheless, “[i]t must have been kept in the
4 ordinary course of business.” *Id.* (citation omitted).

5 Here, the Court found that Starnet did keep a file for the Mousa Kafash dba Bapaz
6 Garments account. In this file, Starnet kept permanent records in the ordinary course of business
7 detailing the goods that Starnet had shipped to Bapaz Garments and statements of account outlining
8 the debits and credits on the Mousa Kafash dba Bapaz Garments account. The Court also found,
9 however, that the December 31, 2008 Statement of Account, P.’s Ex. 7, listed incorrect charges.
10 As outlined above, Invoice No. K-100567 and Invoice No. K-100568, P.’s Exs. 4, 5, are proform
11 invoices that do not represent the actual shipment of goods. Without providing the Court an
12 accurate statement of the amount due on the Mousa Kafash dba Bapaz Garments account, Starnet
13 failed to supply sufficient evidence from which the Court could reasonably determine the amount
14 due on the account. Therefore, Starnet’s Book Account claim fails.

15 **B. Account Stated**

16 “An account stated is an agreement, based on prior transactions between the parties, that the
17 items of an account are true and that the balance struck is due and owing.” *Maggio*, 196 Cal. App.
18 3d at 752, 241 Cal. Rptr. 883 (citation omitted). “An account stated need not cover all the dealings
19 or claims between the parties. There may be a partial settlement and account stated as to some of
20 the transactions.” *Gleason v. Klamer*, 103 Cal. App. 3d 782, 790 (1980) (citing *Cal. Milling Corp.*
21 *v. White*, 229 Cal. App. 2d 469, 477, 40 Cal. Rptr. 301 (1964)).

22 There are three essential elements of a claim for account stated: “(1) previous transactions
23 between the parties establishing the relationship of debtor and creditor; (2) an agreement between
24 the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by
25 the debtor, express or implied, to pay the amount due.” *Zinn v. Fred R. Bright Co.*, 271 Cal. App.
26 2d 597, 600, 76 Cal. Rptr. 663, 665-66 (1969).

27 “The key element in every context is agreement on the final balance due.” *Maggio*, 196
28 Cal. App. 3d at 753, 241 Cal. Rptr. 883 (citing 1 WITKIN, SUMMARY OF CALIFORNIA LAW,

1 *Contracts* § 917, p. 820 (9th ed. 1987)). “In the usual situation, it comes about by the creditor
2 rendering a statement of the account to the debtor. If the debtor fails to object to the statement
3 within a reasonable time, the law implies his agreement that the account is correct as rendered.”
4 *Zinn*, 271 Cal. App. 2d at 600, 76 Cal. Rptr. 663; *see also Maggio*, 196 Cal. App. at 753, 241 Cal.
5 Rptr. 883 (“When a statement is rendered to a debtor and no reply is made in a reasonable time, the
6 law implies an agreement that the account is correct as rendered.”) (citations omitted).
7 “Accordingly an account fails to become stated when the essential element of assent is lacking; and
8 assent is not present when proper objections are made by the party sought to be charged.” *Hansen*
9 *v. Fresno Jersey Farm Dairy Co.*, 220 Cal. 402, 408, 31 P.2d 359 (1934) (citation omitted).

10 It is the creditor's burden to prove that an alleged debt is an account stated. *See Maggio*,
11 *Inc. v. Neal*, 196 Cal. App. 3d 745, 753, 241 Cal. Rptr. 883 (1987) (“Our conclusion is simply
12 another way of saying that [the creditor] did not satisfy its burden of proving [the debtor's] debt
13 was an account stated.”). Whether an alleged debt is an account stated is a question of fact. *See*
14 *Fogarty v. McGuire*, 170 Cal. App. 2d 405, 409, 338 P.2d 992 (1959) (“Whether these conditions
15 exist is usually a question to be determined by the trier of fact from all the circumstances of the
16 case, and in reaching that determination reasonable inferences can be drawn in support of the claim
17 of either party if there is any credible evidence warranting such action.”) (citations omitted).

18 Here, the Court found that Mousa Kafash never agreed that he or Bapaz Garments owed
19 Starnet any amount and disputed, from the beginning of Starnet’s collection activities, the amount
20 Starnet contended was due. *See Exs. 19, 20, 21, 22, 23*. Indeed, Peter Kafash maintained that
21 Bapaz Garments had paid Starnet for all goods received. Because Starnet failed to carry its burden
22 to prove that Mousa Kafash agreed that any balance was due on his account, the key element of an
23 account stated claim, Starnet’s claim fails.

24 **C. Reasonable Value of Goods Sold and Delivered**

25 California recognizes a “common count¹⁵ of quantum valebant for the reasonable value of
26 goods sold and delivered.” *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 792, 256 P.2d 947, 958 (1953).

27 ¹⁵ “A common count is not a specific cause of action . . . ; rather, it is a simplified form of pleading
28 normally used to aver the existence of various forms of monetary indebtedness” *McBride v.*
Boughton, 123 Cal. App. 4th 379, 394, 20 Cal. Rptr. 3d 115, 127 (2004) (citations omitted).

1 Quantum valebant is a type of quasi-contract action. *See Jogani v. Superior Court*, 165 Cal. App.
2 4th 901, 905-06, 81 Cal. Rptr. 3d 503 (2008); *see also* 4 WITKIN, CALIFORNIA PROCEDURE § 567
3 (5th ed. 2008) (“The count on quantum valebant is similar to that on quantum meruit, except that it
4 seeks recovery of the reasonable value of goods sold.”) (internal citations omitted). “Quasi-
5 contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake
6 the performances in question, nor are they promises.” *Weitzenkorn*, 40 Cal. 2d at 794, 256 P.2d at
7 959 (quotation omitted). “They are obligations created by law for reasons of justice.” *Id.*
8 (quotation omitted).

9 “The theory of quasi-contractual recovery is that one party has accepted and retained a
10 benefit with full appreciation of the facts, under circumstances making it inequitable for him to
11 retain the benefit without payment of its reasonable value.” *Day v. Alta Bates Med. Ctr.*, 98 Cal.
12 App. 4th 243, 248, 119 Cal. Rptr. 2d 606, 609 (2002) (quoting *Truestone, Inc. v. Simi W. Indus.*
13 *Park II*, 163 Cal. App. 3d 715, 724, 209 Cal. Rptr. 757 (1984)) (quotation marks omitted); *see also*
14 *Weitzenkorn*, 40 Cal. 2d at 794, 256 P.2d at 959 (“Quasi contractual recovery is based upon benefit
15 accepted or derived for which the law implies an obligation to pay. Where no benefit is accepted
16 or derived there is nothing from which such contract can be implied.”) (quoting *Rowell v. Crow*, 93
17 Cal. App. 2d 500, 503, 209 P.2d 149, 151 (1949)) (quotation marks omitted).¹⁶

18 According to the Judicial Council of California Advisory Committee on Civil Jury
19 Instructions, a plaintiff must prove four elements to recover on a claim for goods delivered: (1) that
20 defendant requested, by words or conduct, that plaintiff deliver goods for defendant’s benefit; (2)
21 that plaintiff delivered the goods as requested; (3) that defendant has not paid plaintiff for the
22 goods; and (4) the reasonable value of the goods that were provided. JUDICIAL COUNCIL OF CAL.
23 CIV. JURY INSTRUCTION No. 371 (2010). Thus, a defendant’s non-payment for goods received is an
24 essential element of a claim for goods delivered. *See* 1-9 MB Practice Guide: CA Contract
25 Litigation 9.26 (listing what the plaintiff must establish in order to sustain a quantum valebant
26

27 ¹⁶ This claim can also be characterized as an unjust enrichment claim. “[T]he elements for a claim
28 of unjust enrichment [are] receipt of a benefit and unjust retention of the benefit at the expense of
another.” *Lectrodryer v. Seoulbank*, 77 Cal. App. 4th 723, 726, 91 Cal. Rptr. 2d 881 (2000) (citing
First Nationwide Savings v. Perry, 11 Cal. App. 4th 1657, 1662-63, 15 Cal. Rptr. 2d 173 (1992)).

1 claim, including that defendant did not pay for the goods received); *cf Weitzenkorn*, 40 Cal. 2d at
2 792, 256 P.2d 947 (finding that a claim for the reasonable value of goods sold and delivered
3 includes a defendant’s refusal to pay); *Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 460, 61
4 Cal. Rptr. 2d 707 (1997) (holding that one of the essential allegations of a common count is
5 nonpayment).

6 As outlined in the Court’s findings of fact, neither Mousa Kafash nor Bapaz Garments
7 received the goods listed on Proform Invoices K-100567 and K-100568 (P.’s Exs. 4, 5). Bapaz
8 Garments did, however, receive the goods listed on Commercial Invoice K-100567/568, P.’s Ex. 6,
9 and did not dispute that their reasonable value was \$69,673.32, the amount shown on the invoice.
10 Nevertheless, because Starnet failed to prove by a preponderance of the evidence that Mousa
11 Kafash did not pay \$69,673.23 for the goods he received, Starnet’s claim for the reasonable value
12 of goods and services fails.

13 **D. Undisclosed Principal**

14 Because the Court finds that Starnet has not proven any of its claims, it need not address
15 whether Mousa Kafash was an agent of an undisclosed principal. Nevertheless, the Court notes
16 that if it had to reach the issue, it would likely find that Mousa Kafash is not such an agent.
17 According to several California Courts of Appeal, “[t]he rule is well established that, where one
18 deals with another believing him to be a principal, and subsequently learns that he was dealing with
19 an agent of an undisclosed principal, he may recover either from the person with whom he dealt or
20 from the undisclosed principal.” *J & J Builders Supply v. Caffin*, 248 Cal. App. 2d 292, 295, 56
21 Cal. Rptr. 365 (1967) (quotation and quotation marks omitted); *see also Carlesimo v. Schwebel*, 87
22 Cal. App. 2d 482, 486, 197 P.2d 167 (1948); *Grosso v. Monfalcone, Inc.*, 13 Cal. App. 2d 405, 56
23 P.2d 1266 (1936); *Rigney v. De La Salle Inst.*, 10 Cal. App. 2d 492, 496, 52 P.2d 579 (1935).

24 It appears that under California law, the agent has the burden of showing that it disclosed
25 the identity of the principal. “If a person would excuse himself from responsibility on the ground
26 of agency, he must show that he disclosed his principal at the time of making the contract, and that
27 he [the agent] accepted on his [the principal's] behalf, so as to enable the party with whom he deals
28 to have recourse to the principal in case the agent had authority to bind him.” *J & J Builders*, 248

1 Cal. App. 2d at 295, 56 Cal. Rptr. 365 (quotation and quotation marks omitted). It does not,
2 however, appear that an agent must prove that the third-party knew of the identity of the principal.
3 Rather, a showing that the third-party should have known is sufficient. According to one
4 California Court of Appeal, “[t]he true rule is that . . . the directors or officers are personally liable
5 unless the third person knew, or in the exercise of reasonable care should have known, that he was
6 dealing with a corporation.” *Carlesimo*, 87 Cal. App. 2d at 486, 197 P.2d 167.

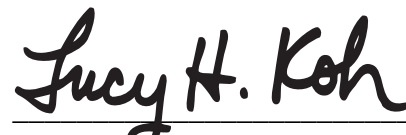
7 Here, Mousa Kafash, as CEO of Bapaz Garments Corp., is an agent of Bapaz Garments
8 Corp. Thus, if Mousa Kafash did business with Starnet without disclosing that he was an agent of
9 Bapaz Garments Corp., Starnet may seek to recover from Mousa Kafash. However, the Court
10 finds that even though Starnet did not know that Bapaz Garments was a corporation, Starnet has
11 not proven by a preponderance of the evidence that Mousa Kafash and not Peter Kafash did
12 business with Starnet. Starnet’s sole witness, Kurt Miller, testified that he only interacted with
13 Mousa Kafash to collect the alleged debt. Starnet provided no evidence that anyone at Starnet
14 spoke with Mousa Kafash during the purchasing process. In addition, Starnet did not provide
15 testimony as to how the account file bearing Mousa Kafash’s name was created. Miller testified
16 that the Mousa Kafash account was created before Miller started working at Starnet.

17 **CONCLUSION**

18 For the foregoing reasons, the Court finds in favor of Defendant and against Plaintiff on all
19 three of Plaintiff’s causes of action. Therefore, Plaintiff’s requests for relief are DENIED. The
20 Clerk shall enter judgment for Defendant.

21 **IT IS SO ORDERED.**

22
23 Dated: March 8, 2011



LUCY H. KOH
United States District Judge