



Demand for a Bill of Particulars—A Very Powerful Tool

What discovery methods do you consider when you are strategizing about the most effective method to obtain the information you need to pin down your opponent? If you are defending a contract case, think about serving a Demand for Bill of Particulars. A Demand for Bill of Particulars is NOT a discovery device, but an extension of the complaint or a cross-complaint [complaint]. It is a cost-effective method with a turnaround time of 10 days and if the court finds that any of the line items are deficient it can strike the entry and preclude plaintiff/cross-complainant [plaintiff] from proving the debt is owed. Unlike interrogatories and deposition responses where contradictory evidence can be admitted by the plaintiff, the Bill of Particulars is conclusive as to the items and amounts claimed and no other evidence is admissible at trial.

What is a Demand for Bill of Particulars?

The Demand for a Bill of Particulars presumes that the plaintiff suing has a “book” or “contemporaneous ledger” or an “account” to support any charges when the complaint was filed and provides a court process to require that it be presented upon demand. The account, unlike the pleading in a complaint, is supposed to “furnish a defendant with the details of the items charged against him...” *Meredith v. Marks* (1963) 212 Cal. App. 2d 265, 269. This procedure dates back to early common law when plaintiff sued on an alleged account, and the pleadings gave no specifics as to the nature of the claim –i.e., whether contract, quasi-contract etc. The courts allowed a “Demand for Bill of Particulars” to enable the defendant to discover what is being claimed and to prepare for trial. Weil and Brown, *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) ¶8:1765.

California has codified the procedure in Code of Civil Procedure §454 titled **Pleading of Accounts** that reads as follows:

It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular.

If the pleading is verified the account must be verified by the affidavit of the party to the effect that he believes it to be true; or if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney has his office or from some cause unable to make the affidavit, by the affidavit of the agent or attorney.

The Code of Civil Procedure also makes it clear that a Bill of Particulars is not a discovery device and is outside the Discovery Act. It is considered as an **“amplification” of the complaint**, and it has the effect of a pleading. It also limits plaintiff to the items and amounts specified in the Bill of Particulars. See *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) ¶8:1778 citing *Baroni v. Musick* (1934) 3 Cal. App. 2d. 419, 421.

It is undeniable that there is some overlap in the information actually obtained from a Bill of Particulars as would be provided in discovery. Its use enables defendants who have been sued generally on a contract claim or on an account to force plaintiff to itemize the basis of the account upon which the complaint is based. See *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) ¶8:1765 As the First District Court of Appeals stated in *Dobbins v. Hardister* (1966) 242 C2d 787 at page 795

“While modern discovery devices may serve the same purpose as a bill of particular, it should be noted the primary purpose of discovery is the production of evidence for use at trial while that of a bill of particulars is to amplify the complaint ‘in order to make it easier for the defendant to prepare his pleading.’”

Furthermore, answers to interrogatories or deposition questions can be used as evidence against the plaintiff at trial; but they are not preclusive (contradictory evidence is admissible). However, a Bill of Particulars is conclusive as to the items and amounts claimed; i.e., no other evidence is admissible at trial. See Weil and Brown *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) ¶8:1766

Type of Cases Where you can Serve a Bill of Particulars?

In order to determine if a demand can be made is whether your case involves an *“account.”* According to *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) ¶8:1769 *“on account”* means:

“...any action in contract or quasi-contract consisting of one or more items and pleaded in general terms. The most requested case is where the complaint contains one or more of the common counts:

- *Open book accounts;*
- *Labor and materials furnished under a contract;*
- *For monies loaned;*

- For “money had and received.”

While CCP §454 does not specify the specific level of detail required, plaintiff is obligated to provide a “**copy of the account.**” However, Code of Civil Procedure §337a, titled “**Book Account**” states that the definition of account

“...means 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.

Preliminarily this requirement is temporal, it is the account that plaintiff kept at the time the services were rendered, not a statement of re-created so-called time, which may be appropriate in response to an interrogatory that requests “state all time for services performed”, etc.

“The bill should also include a copy of the ledger account, and a copy of each invoice supporting the charges indicated on the account. The Court will determine the sufficiency of the bill of particulars in response to the demand.”
See *Butler Bros v. Connoly* (1962) 204 Cal.App.2nd 22, 26.

Furthermore, unlike discovery, the delivery of the bill effectively limits the plaintiff’s evidence of the items specified therein. See *Gilmore v. Hill* (1957) 152 Cal. App.2d 881. **Therefore, unlike a more typical pleading challenge, such as a Demurrer or Motion to Strike, the court cannot simply defer the examination of the plaintiff’s claims to the discovery process.** The Bill exists separate from the discovery process, and in a case where plaintiff has sued on an account, the court must require that the account be produced which contains sufficient details to allow defendant the opportunity to understand what services plaintiff supposedly performed “*on account.*”

Bear in mind that a record that was created for purposes of litigation is not “*an account*”. In *Tsemetzin v. Coast Federal Sav. & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1343, for opposition to a Motion for Summary Judgment, Plaintiff attempted to show an open book account in opposition. After reciting the three-part test of CCP §337a, the Court stated:

“The four-page exhibit apparently prepared by Plaintiff for use in opposing [the motion], on its face, fails to meet the three part test [of CCP §337a requiring (1) a bound book, or (2) on a sheet or sheets fastened into a book, or (3) on cards...of a permanent character... kept in a reasonably permanent form.” (id.) **The court concluded that the failure to have kept these business records as business records, meant that the subsequently created listing was not evidence of a “book account.”** [Emphasis Added]

The foundation that must be laid for the introduction of “*business records*” include: (1) the books or records are books of account, (2) kept in the regular course of business, (3) the business is of character in which it is proper and customary to keep such books, (4) the entries are either original entries or the first permanent entries of the transaction, (5) made at the time or within a

reasonable proximity to the time of the transaction, and (6) the persons making them had personal knowledge of the transactions. *Gough v. Security Trust & Sav Bank* (1958) 162 Cal.App.2d 90, 93, citing *Chan Kiu Sing v. Gordon* 171 Cal.28, *Kains v. First National Bank* 30 Cal.App.2d 447).

Documents created for the lawsuit is also not a “*permanent business record*” within the meaning of CCP §337(a) and should be stricken by the court upon a motion to strike. See Ev.C. §§1270-1272.

If Plaintiff’s Bill of Particulars is Improper, Evasive and/or Incomplete; You must Bring a Motion or You Waive Your Objections

A. A Motion for Further Bill of Particulars

According to Code of Civil Procedure §454, if the information in the Bill of Particulars is **too general or incomplete**, the defendant may make a noticed motion for a further bill. See Weil and Brown *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) ¶8:1780. However, defendant’s failure to bring such a motion is a waiver of their objection to the sufficiency of the information furnished describing the account. Weil and Brown *Cal. Prac. Guide: Civil Procedure Before Trial* (TRG 2019) ¶8:1780.1 citing *McCarthy v. Mt. Tecarte Land & Water Co. v. Santa Barbara National Bank* (1966) 247 Cal. App. 2d. 427, 433. Thus, since the information supporting the account is presumptively in plaintiff’s possession, and it is defendant’s opportunity afforded by law to obtain detail of this claim from the information that was kept in Plaintiffs books and records.

B. A Motion to Strike

The Bill of Particulars is not a single pleading. Rather, each entry is considered a separate claim, Plaintiffs may move to strike each entry on the ground that it is deficient and not supported by ledger, book account, invoice or any other business record.

Because the Bill of Particulars is a pleading, each line item is a separate claim for purposes of a motion to strike. When determining whether to bring a motion to strike a line item you need to review the line item as to whether or not the line item (1) was contemporaneously created and (2) is reflected in any invoice, business records or ledgers.

C. Opposition to Motions

Plaintiff has the burden of showing they have the proper business records to support their Bill of Particulars and the claim documented thereby. The foundation that must be laid for the introduction of “*business records*” include: (1) the books or records are books of account, (2) kept in the regular course of business, (3) the business is of character in which it is proper and customary to keep such books, (4) the entries are either original entries or the first permanent entries of the transaction, (5) made at the time or within a reasonable proximity to the time of the transaction, and (6) the persons making them had personal knowledge of the transactions. *Gough v. Security Trust & Sav Bank* (1958) 162 Cal.App.2d 90, 93, citing *Chan Kiu Sing v Gordon* 171 Cal.28, *Kains v. First National Bank* 30 Cal.App.2d 447).

However, if documentation of the transaction is not available, or if primary sources are not available, the plaintiff is required to explain how the business is run, how the time and debt were actually recorded. *Butler Bros. v Connolly* (1962) 204 Cal.App.2d 22. In *Butler Bros. v.*

Connolly (1962) 204 Cal.App.2d 22, plaintiff was the owner and the defendant a manager of a store. Plaintiff noticed serious shortages of inventory and sued defendant, the manager of the store. In response to a demand for Bill of Particulars, Plaintiff provided an itemized statement using business records of most of the specific items that were falsified in the defendant's inventory report, but then further **explained the inability** to provide additional information and supplied the methodology of determining how the numbers in the bill of particulars were calculated as to the inventory loss and financial damage. Significantly, the explanation directly connected the business practices and business records to the Defendant's fraud (which hid the actual loss). This was found to be sufficient to show the value of the "*book account*" that was the subject of the complaint.

Be Prepared to Educate the Court

The Demand for a Bill of Particulars is a centuries old procedure dating back to early common law. While commonly used in other jurisdictions, California Judges may not even have heard of the procedure prior to seeing your motion. Be prepared to educate the court that Bill of Particulars is **not a discovery device**, but an "amplification" of the pleadings. Also advise the court that that plaintiff is **conclusively bound** by their Bill of Particulars and no other evidence is admissible at trial including any discovery responses or testimony unless the court grants plaintiff an order to amend their Bill of Particulars.

Likely because of the power of the motion to strike a Bill of Particulars, and its effect on the plaintiff's ability to present evidence at trial, you will face judges that view the procedure as a substitute for discovery and will try to argue that your arguments in favor of striking the bill are, in essence, a substitute for a jury's decision on the credibility of the documentation provided. The fact that the case law in this area is fairly old, leads to a visceral reaction to let the jury decide rather than engage in the effort necessary to actually address the remedy provided in the code. Nevertheless, if there is enough at stake, the preclusive effect of a stricken Bill of Particulars, may be a benefit that is worth the cost.