EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Justin Creager, et al., Plaintiffs, vs. Bank of America NA, Defendant.	No. CV-21-02101-PHX-SPL **ORDER**

Before the Court is Defendant's Motion to Dismiss. (Doc. 22). Defendant requests that the Court dismiss Plaintiffs' Second Amended Complaint (Doc. 18), in its entirety and with prejudice, pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6). The Motion has been fully briefed and is ready for review. (Docs. 18, 22, 25 & 26).

I. BACKGROUND

Defendant is a financial institution incorporated in Delaware and headquartered in North Carolina. (Doc. 18 at 7). The Arizona Department of Economic Security ("DES") is a state agency that administers numerous benefits programs and services for Arizona residents. (*Id*. at 8). At some point prior to 2020, Defendant entered into a contract with DES under which Defendant agreed to provide DES benefit recipients with Bank-issued prepaid debit cards linked to individual Bank depository accounts. (*Id*. at 4). Thus, instead of distributing benefits directly to recipients, DES would deposit benefits payments into the recipients' accounts and the recipients could access and use those benefits with their DES Debit Cards. (*Id*. at 9).

Plaintiffs are a group of 47 individuals who applied and were found eligible for unemployment and other public benefits through various DES programs after the COVID19 pandemic began. (*Id*. at 3). Plaintiffs assert that they were issued DES Debit Cards linked to their individual accounts, and that they initially did receive their benefits. (*Id*. at 3–4). However, Plaintiffs allege that Defendant failed to protect their benefits from fraud, failed to conduct a reasonable inquiry into their claims, failed to provide provisional credit, and froze their accounts. (*Id*. at 3-7).

On December 9, 2021, Plaintiffs filed their original Complaint with this Court. (Doc. 1). On April 1, 2021, Plaintiffs filed an Amended Complaint. (Doc. 7). On November 4, 2022, this Court dismissed the First Amended Complaint for failure to state a claim. (Doc. 16). On November 15, 2022, Plaintiffs filed a Second Amended Complaint, which remains the operative document. (Doc. 18). The Second Amended Complaint largely resembles the First Amended Complaint (Doc. 7) but adds a brief description of the individual experiences of the 47 Plaintiffs in interacting with Defendant. (*Id*.). Plaintiffs have asserted five claims against Defendant: (1) violations of 15 U.S.C. § 1693f and 15 U.S.C. § 1693c of the Electronic Funds Transfer Act ("EFTA") ("Claims 1A & 1B"), (2) negligence and negligence per se ("Claim 2"), (3) breach of contract ("Claim 3"), breach of implied contract ("Claim 4"), and breach of the implied covenant of good faith and fair dealing ("Claim 5"). On January 6, 2023, Defendant filed a Motion to Dismiss for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6). (Doc. 22). Plaintiffs filed a Response on February 10, 2023. (Doc. 25). Defendant filed a Reply on March 10, 2023. (Doc. 26). This Court now rules.

II. LEGAL STANDARD

"To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet the requirements of Rule 8." *Jones v. Mohave Cty.*, No. CV 11-8093-PCT-JAT, 2012 WL 79882, at *1 (D. Ariz. Jan. 11, 2012); *see also Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 203 (5th Cir. 2016) (Rule 12(b)(6) provides "the one and only method for testing" whether pleading standards set by Rule 8 and 9 have been met); *Hefferman v. Bass*, 467 F.3d 596, 599–600 (7th Cir. 2006) (Rule 12(b)(6) "does not stand alone," but implicates Rules 8 and 9). Rule 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To satisfy this standard, a complaint must "simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (internal quotation marks and citation omitted).

Although Rule 8 does not require "detailed factual allegations," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 557). A pleading may violate Rule 8 when it "says too little" *and* when it "says too much." *Knapp v. Hogan*, 738 F.3d 1106, 1109 (9th Cir. 2013) (emphasis omitted).

A court may dismiss a complaint for failure to state a claim under Rule 12(b)(6) for two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A claim is facially plausible when it contains "factual content that allows the court to draw the reasonable inference" that the moving party is liable. *Iqbal*, 556 U.S. at 678. Factual allegations in the complaint should be assumed true, and a court should then "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. Facts should be viewed "in the light most favorable to the non-moving party." *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013). "Nonetheless, the Court does not have to accept as true a legal conclusion couched as a factual allegation." *Jones*, 2012 WL 79882, at *1 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

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III. DISCUSSION

Defendant argues that dismissal of Plaintiffs' claims is appropriate under both Rule 8 and Rule 12(b)(6). (Doc 22 at 2). Defendant asserts that the Second Amended Complaint has again failed to "allege sufficient individualized facts to support any asserted claims" and thus should be dismissed with prejudice. (*Id.*). Plaintiffs counter that because the Second Amended Complaint contains allegations from 47 individual people with "specific counts in compliance with the [Court's] order" the case should not be dismissed. (Doc. 25 at 5). Upon review, the Court finds the Second Amended Complaint to be insufficient due to a lack of factual allegations to support Plaintiffs' claims, and because some claims are barred as a matter of law.

A. *Claim 1A: 15 U.S.C. § 1693f of the EFTA*

1. Failure to plead within the statute of limitations under § 1693m(g)

15 U.S.C. § 1693f of the EFTA requires financial institutions to "investigate the alleged error, determine whether an error has occurred, and report or mail the results of such investigation and determination to the consumer within ten business days." Plaintiffs asserting a cause of action under the EFTA must file their claims "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1693m(g). A statutory limitations period commences when the plaintiff has "a complete and present cause of action" and thus "can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997) (quotation and citation omitted).

In the present case, 13 Plaintiffs claims are time-barred under § 1693m(g). The Complaint was filed on December 9, 2021. (Doc. 1). Thus, only Plaintiffs who assert that Defendant failed to investigate their claims and notify them *after* December 9, 2020, are within the one-year time limit. Plaintiffs who assert that Defendant failed to act in accordance with § 1693f *prior* to that date are dismissed as more than one year elapsed from the alleged wrongdoing and the filing of the Complaint. *See* § 1693m(g). (Doc. 18 at 26 Justin Creager, 27 Brian Winkler, 28–29 Kizzy Williams, 29–30 Amanda Maddeaux, 33–34 Kyle Marcwardt, 35–36 Nina Urso, 42–43 Ignacio Montano, 48–49 Marcella Wells, 50–51 Amanda Blanke, 59–60 Denielle Warwood, 63 Annie Arellano, 66–67 Demetris Mills, and 67 Adan Hernandez).

2. Failure to allege a qualifying error under § 1693f

Under § 1693f, financial institutions are required to take action upon receiving notice of a qualifying error by a consumer. The statute defines a qualifying error as any of the following: "(1) an unauthorized electronic fund transfer; (2) an incorrect electronic fund transfer from or to the consumer's account; (3) the omission from a periodic statement of an electronic fund transfer affecting the consumer's account which should have been included; (4) a computational error by the financial institution; (5) the consumer's receipt of an incorrect amount of money from an electronic terminal; (6) a consumer's request for additional information or clarification concerning an electronic fund transfer or any documentation required by this subchapter; or (7) any other error described in regulations of the Bureau." 15 U.S.C. § 1693f. A consumer's notice must indicate why they believe an error occurred and include to the extent possible the type, date, and amount of the error. 12 C.F.R. § 1005.11(b)(1)(iii).

Notably, "account freezes" are not qualifying errors under § 1693f. *Hardin v. Bank of Am., N.A.*, No. 2:22-CV-10023, 2022 WL 3568568, at *3 (E.D. Mich. Aug. 18, 2022) ("[T]he EFTA does not regulate account freezes; it regulates electronic funds transfers."). The corresponding regulation also does not define account freezes as a qualifying error covered under the EFTA. *See* 12 C.F.R. § 1005.11(a)(1); *Hardin*, 2022 WL 3568568, at *3 ("[T]he regulation does not define account freezes as an 'error' covered under the EFTA."). Further, "[a] bare allegation that 'fraud' occurred and was subsequently reported to the financial institution is insufficient to support an inference that the consumer reported a qualifying error." *In re Bank of Am. Cal. Unemployment Benefits Litig.*, No. 21-MD-2992-LAB-MSB, 2023 WL 3668535, at *7 (S.D. Cal. May 25, 2023) (citing *Hardin*, 2022 WL 3568568, at *3). Finally, "an allegation that a third party applied for benefits in another consumer's name or gained access to a consumer's account, while likely fraudulent, doesn't constitute a 'qualifying error' under the statute." *Id*. (citing 15 U.S.C. § 1693f(f);

12 C.F.R. § 1005.11(a)).

In the present case, 13 Plaintiffs fail to state a qualifying error. Eight Plaintiffs allege that Defendant froze their account but provide no other facts suggesting misconduct on the part of Defendant. (Doc. 18 at 33–34 Kyle Marcwardt, 42–43 Ignacio Montano, 43–44 Ivan Vasquez, 48–49 Marcella Wells, 50–51 Amanda Blanke, 56 Jessica Peralta, 64 Danielle Drayton, 67 Adan Hernandez). As the EFTA does not regulate account freezes, and these Plaintiffs give no other description of a potential qualifying error under the statute, they have failed to state a claim and are dismissed.

Five other Plaintiffs merely state that they experienced "fraud" on their account and that they reported it to Defendant. (Doc. 18 at 38–39 Marcos Limas, 40 Lance Webb, 58–59 Rudy Orosco, 61–62 Jessi Sanchez, 62–63 Joey Lyon). This bare allegation is insufficient as it does not provide any factual indication that an unauthorized electronic funds transfer covered by the statute occurred. *See In re Bank of Am. Cal. Unemployment Benefits Litig.*, 2023 WL 3668535 at *7 ("Individual Plaintiffs who allege they 'experienced fraud on [their] account[s]' and reported the fraud to [the bank], but didn't report a qualifying error, therefore haven't stated claims under the EFTA." (first and second alterations in original)). Merely stating that "fraud" occurred, without any further explanation, is insufficient to support an inference that Plaintiffs reported a qualifying error, and accordingly these Plaintiffs have failed to state a claim.

Finally, one plaintiff has merely alleged that "a fraudulent person began receiving DES benefits under her name." (Doc. 18 at 41 Jordan Wells). This type of identity theft likely was fraudulent if true, but without further explanation it is impossible to determine whether the activity is a qualifying error under the statute. *See In re Bank of Am. California Unemployment Benefits Litig.*, 2023 WL 3668535 at *7. The EFTA only regulates electronic funds transfers, and the Court is not able to surmise if that is what occurred here based on this lack of explanation. Due to this deficiency, this Plaintiff has also failed to state a claim.

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3. Failure to allege a violation of § 1693f

15 U.S.C. § 1693f requires that a financial institution investigate any qualifying error reported by the consumer within ten business days of receiving notice of such error. The financial institution must then "report or mail the results of such investigation and determination to the consumer." *Id*. If the financial institution did not make a "good faith investigation" of the alleged error, did not "have a reasonable basis for believing that the consumer's account was not in error," or "knowingly and willfully concluded that the consumer's account was not in error when such conclusion could not reasonably have been drawn from the evidence available to the financial institution" then a plaintiff may be entitled to treble damages under § 1693f(e). "The EFTA authorizes a private right of action against a bank that 'fails to comply' with any provision of the [EFTA], including the provision limiting a consumer's liability for unauthorized transfers." *Widjaja v. JPMorgan Chase Bank, N.A.*, 21 F.4th 579, 584 (9th Cir. 2021) (holding that when "a bank concludes that the EFTA authorizes liability in excess of the default cap, the consumer must allege facts plausibly suggesting that the bank's conclusion is wrong in order to state a claim that the bank has violated § 1693g.").

The 25 remaining Plaintiffs who successfully pled a qualifying error within the statute of limitations have nonetheless failed to state a claim under 1693f. In reality, all 47 Plaintiffs suffer from the same deficiency, that is a "[t]hreadbare recital[ ] of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. It is true that if Defendant's investigation was either not in "good faith," took longer than 10 days, or resulted in an unreasonable conclusion, Plaintiff may have a valid claim against Defendant under § 1693f. However, Plaintiffs fail to provide the factual detail necessary to support these allegations. Each Plaintiff simply states that they identified some form of fraud, reported it to Defendant, and then experienced some form of "illegal" freezing of their account (*e.g.*, Doc. 18 at 67). Thus, Plaintiffs fail to tip the analysis from "possible" to "plausible." *Iqbal*, 556 U.S. at 679. None of the Plaintiffs give supporting facts as to why Defendant's investigation was not in good faith, took longer than 10 days, or reached an unreasonable conclusion. Instead, Plaintiffs list a litany of violations in their claim for relief which just repeat all the ways Defendant could have violated § 1693f. (Doc. 18 at 68–69) Creating such an expansive list without tying the elements of the statute to specific factual allegations for each Plaintiff is insufficient under Rule 8. *See Mountcastle v. SunTrust Bank*, CIV.A. MJG-12-0885, 2013 WL 588981, at *4 (D. Md. Feb. 12, 2013) ("Plaintiff has not alleged facts establishing a plausible claim for treble damages on the facts of his Complaint, he does not allege details establishing any bad faith on [the bank's] part or discuss the results of [the bank's] investigation. Plaintiff has not alleged facts that, if true, would present a plausible claim under section 1693f(e) of the EFTA.").

B. *Claim 1B: 15 U.S.C. § 1693c of the EFTA*

1. <u>Failure to plead within the statute of limitations under § 1693m(g)</u>

The same 13 Plaintiffs who are time-barred under § 1693f are similarly time barred under § 1693(c). (Doc. 18 at 26 Justin Creager, 27 Brian Winkler, 28–29 Kizzy Williams, 29–30 Amanda Maddeaux, 33–34 Kyle Marcwardt, 35–36 Nina Urso, 42 Ignacio Montano, 48–49 Marcella Wells, 50–51 Amanda Blanke, 59–60 Denielle Warwood, 63 Annie Arellano, 66–67 Demetris Mills, and 67 Adan Hernandez). While § 1693c imposes a slightly different time requirement on financial institutions to notify consumers, 21 days instead of 10 days, this does not change the result for any of the previously mentioned Plaintiffs. None of these 13 Plaintiffs filed their claim within one year of Defendant's alleged failure to notify them under § 1693c and accordingly these claims are dismissed.

2. <u>Failure to plead a change in the terms or conditions</u>

Under 15 U.S.C. § 1693c, financial institutions must disclose the terms and conditions of electronic fund transfers on a consumer's account when the consumer contracts with the financial institution for service. Financial institutions are also responsible for notifying consumers "in writing at least twenty-one days prior to the effective date of any change in any term or condition of the consumer's account" if that change "would result in greater cost or liability for such consumer or decreased access to the consumer's account." § 1693c(b). However, the financial institution may implement a change without prior notice "when such change is immediately necessary to maintain or restore the security of an electronic fund transfer system or a consumer's account." *Id.*

Plaintiffs argue that they experienced decreased access to their accounts due to Defendant freezing their account without prior notice. (Doc. 18 at 71). However, Plaintiffs misunderstand what is considered a "change" under § 1693c. Freezing an account is not prohibited by Section 1693c(b) as it is permitted by the parties' Account Agreement. (Doc. 22–1, Ex. 1 at 2 § 2). Had Defendant unilaterally changed the terms and conditions relating to the parties' rights and obligations under the Account Agreement provision governing the freezing of accounts, notice would have been required. *See* 15 U.S.C. § 1693c(b). Here though, Plaintiffs' allegations only demonstrate Defendant froze Plaintiffs' accounts upon suspected fraudulent activity, which is permissible under the original Account Agreement. (Doc. 22–1, Ex. 1 at 2 § 2). This action did not require prior notice because there was no change to the provision from the parties' initial agreement. (*Id.*). Since Plaintiffs fail to identify any change or alteration to the terms and conditions of their initial agreement with Defendant, they have failed to state a claim under § 1693c.

C. *Claim 2: Negligence and Negligence Per Se*

Under the economic loss rule in Arizona, contracting parties are limited to contractual remedies for the recovery of economic losses which are unaccompanied by physical injury to persons or other property. *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.*, 223 P.3d 664, 667, ¶ 12 (Ariz. 2010). Plaintiffs that complain to have not received the anticipated benefit of a bargain are based in contract law and should be governed under such. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986) ("[L]oss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law."). "Underlying the rule is the principle that contract law and tort law each protect distinct interests—contract law enforces parties' expectancy interests and provides redress for a contracting party who fails to receive the benefit of the bargain, and tort law seeks to protect the public from harm to person or property by evaluating the objective reasonableness of a defendant's conduct and compensating victims for actual harm resulting from that conduct." *Sports Imaging of Ariz., L.L.C. v. 1993 CKC Tr.*, No. 1 CA-CV 05-0205, 2008 WL 4448063, at *19 (Ariz. Ct. App. Sept. 30, 2008).

"Negligence per se is not a cause of action separate from common law negligence. It is a doctrine under which a plaintiff can establish the duty and breach elements of a negligence claim based on a violation of a statute that supplies the relevant duty of care." *Craten v. Foster Poultry Farms Inc.*, 305 F. Supp. 3d 1051, 1054 n.2 (D. Ariz. 2018).

In the present case, all 47 Plaintiffs were in a contractual relationship with Defendant. (Doc. 18 at 74 "Each Plaintiff entered into a Cardholder Agreement with the Bank . . . ."). In fact, Plaintiffs claim that all of Defendant's alleged negligence flowed from this contractual relationship. (Doc. 18 at 72). For example, Plaintiff asserts that Defendant breached their duty by "(a) failing to maintain, store, share, transmit, or otherwise use their personal information and Cardholder Information in a secure manner. . . ." (*Id.*). This issue, like all other alleged breaches of duty, is directly addressed by the Account Agreement. (Doc. 22–1, Ex. 1 at 2 § 10 "Please contact us at the numbers listed below AT ONCE if you believe your Card has been lost or stolen, or if you believe that someone may use or has used your PIN assigned to your Card without your permission."). Further, Plaintiffs' contentions only exist because they were cardholders subject to the Account Agreement. Finally, none of Plaintiffs assertions involve physical injury to their person or property resulting from this contractual relationship. (Doc. 18 at 26–67). Instead, Plaintiffs have only plead that they suffered financial harm from Defendant's banking policies. (*Id.*). Thus, the economic loss doctrine applies here, and Plaintiffs have failed to state a claim.[1]

Plaintiffs' assertions under the Gramm-Leach-Biley Act, 15 U.S.C. § 6801 et seq.,

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[1] The Court recognizes that the full scope of Arizona's economic loss doctrine has yet to be resolved, but believes it is fully applicable here. The harm allegedly suffered by Plaintiffs is not one that is separate and distinct from any harm that would foreseeably result from Defendant's failure to perform as the parties' contract required.

as a basis for negligence per se fails for the same reason as above. (Doc. 18 at 73). The Court declines to rule on the applicability of that statute as a means of establishing duty and breach here as it does not change the fact that Plaintiffs have only plead that Defendant caused them financial loss, thus implicating the economic loss doctrine.

D. *Claim 3: Breach of Contract*

To state a cause of action for breach of contract in Arizona, a plaintiff must plead facts alleging "(1) a contract exists between the plaintiff and the defendant; (2) the defendant breached the contract; and (3) the breach resulted in damage to the plaintiff." *Dylan Consulting Servs. LLC v. SingleCare Servs. LLC*, No. CV-16-02984-PHX-GMS, 2018 WL 1510440, at *2 (D. Ariz. Mar. 27, 2018); *ChartOne, Inc. v. Bernini*, 83 P.3d 1103, 1111 (Ariz. Ct. App. 2004). "A court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

In the present case, a contract existed between Plaintiffs and Defendant in the form of an "Account Agreement." (Doc. 18 at 74). Plaintiffs point to three relevant portions of the Account Agreement in making their claims (Doc. 18 at 74-76):

(1) Section 9: "Under the Bank of America 'zero liability' policy, you may incur no liability for unauthorized use of your Card up to the amount of the unauthorized transaction, provided you notify us within a reasonable time of the loss or theft of your Card, Card number or PIN or its unauthorized use, subject to [certain listed] terms and conditions." (Doc. 22–1, Ex.1 at 2 § 9).

(2) Section 11: "We will determine whether an error occurred within 10 business days after we hear from you—and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your Account within 10 business days for the amount you think is in error, so that you will have the money during the time it takes us to complete our investigation." (*Id*. at 3 § 11).

(3) Section 2: "We will add funds to your Account . . . in accordance with instructions from the DES . . . . Funds are available for your use on the day we have been instructed by the DES to fund your Account. . . . If we suspect irregular, unauthorized, or unlawful activities may be involved with your Account, we may 'freeze' (or place a hold on) the balance pending an investigation of such suspected activities." (*Id.* at 2 § 2).

Plaintiffs allege that Defendant breached this contract by: "(a) failing to timely and reasonably investigate and resolve their fraud claims; (b) failing to reimburse them for unauthorized transactions; (c) failing to provide them with provisional credit when the Bank's investigation into their fraud claims exceeds 10 business days; (d) failing to limit their liability for unauthorized transactions; (e) freezing or blocking their DES Debit Card Accounts without a reasonable basis for suspecting irregular, unauthorized, or unlawful activities in the Account, and beyond the length of time necessary for a reasonable investigation; (f) freezing or blocking their DES Debit Card Accounts for reasons other than those specified in the Cardholder Agreement; (g) failing to make funds available to them for their use on the day the Bank has been instructed by the DES to fund their Accounts; and (h) otherwise failing to make funds available to them in accordance with DES's instructions." (Doc. 18 at 75-76). The Court will address each of these allegations in turn.

First, none of the 47 Plaintiffs provide any individualized factual support for the claim that Defendant failed to "timely and reasonably investigate and resolve their fraud claims." (Doc. 18 at 26-67). Moreover, under Section 9 of the Account Agreement, it is within Defendant's sole discretion whether the "facts and circumstances . . . reasonably support a claim of unauthorized use." (Doc. 22–1, Ex.1 at 2 § 9). If the transaction is not found to be "unauthorized," then the portion of the Account Agreement detailing Defendant's "Zero Liability' Policy for Unauthorized Transactions" does not apply. (*Id.*). Section 11 similarly provides Defendant with great flexibility in investigating a consumer's allegation of error, which again, allows Defendant to "determine whether an error occurred" before its responsibilities under the provision are triggered. (*Id*. at 3 § 11). Plaintiffs' factual allegations challenge none of these issues regarding Defendant's investigations. Thus, Plaintiffs have not sufficiently alleged that Defendant failed to fulfill its obligations under the Agreement. *See Cal. Unemployment Benefits Litig.*, 2023 WL 3668535, at *27 ("Based on the plain language of the contract, Plaintiffs can't allege [the bank] breached its obligations under the Account Agreement simply by disagreeing with the outcome.").

Next, Plaintiffs allege their accounts were frozen without a "reasonable basis," beyond the time reasonably necessary for an investigation, and for reasons other than those specified in the Agreement. (Doc. 18 at 75-76) This, however, misstates the requirements of the contract. The Account Agreement does not require a "reasonable basis" to freeze an account, but only a "suspicion" of fraudulent activity. (Doc. 22–1, Ex.1). Further, there is no time limit imposed by the terms of the contract. (*Id*.). Defendant is permitted to freeze accounts until the end of its investigations if it deems necessary. (*Id*. at 2 § 2). Accordingly, Plaintiffs' assertion that their accounts were frozen beyond the time necessary for an investigation is insufficient to support allegations of breach of contract. Plaintiffs' claims relating to breach of contract due to account freezing are dismissed. *See Hardin*, 2022 WL 3568568, at *5 (dismissing the plaintiffs' breach of contract claims relating to a bank's freezing of their accounts because the contract did not include a reasonable basis requirement, only a suspected fraud requirement, and because the contract did not contain a time limit for how long the bank could freeze an account if the investigation was pending).

Finally, Plaintiffs assert that Defendant did not make funds available while their accounts were frozen. (Doc. 18 at 76). Per the Account Agreement, Defendant is not required to do so while Plaintiffs' accounts are frozen. (Doc. 22–1, Ex.1) Plaintiffs fail to allege facts or circumstances in which Defendant failed to make available funds for a situation other than when their accounts were frozen. Without identifying such circumstances, "the Court will dismiss breach of contract claims that stem from

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[Defendant's] 'failing to make funds available to [Plaintiffs].'" *Hardin*, 2022 WL 3568568, at *5; *see also Cal. Unemployment Benefits Litig.*, 2023 WL 3668535, at *27 ("In addition to Section 2's funding language, the Account Agreement also contains numerous provisions that allow [Defendant] to restrict access to accounts . . . . Adopting Plaintiffs' interpretation would render large portions of the Account Agreement [to] no effect.").

E. *Breach of Implied Contract*

Under Arizona law, "[t]here can be no implied contract where there is an express contract between the parties in reference to the same subject matter." *Hannibal-Fisher v. Grand Canyon Univ.*, 523 F. Supp. 3d 1087, 1095 (D. Ariz. 2021) (alteration in original) (quoting *Chanay v. Chittenden*, 563 P.2d 287, 290 (Ariz. 1977)); *accord Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 408 (9th Cir. 1992) (finding that under Arizona law there could be no implied contract where there was an express contract).

Here, Plaintiff alleges various breaches of an implied contract with Defendant to provide DES Debit Card services. (Doc. 18 at 76). The Court finds that no implied contract exists here, however, as the Account Agreement clearly addresses the conduct at issue with its express terms. (Doc. 22–1, Ex. 1). The Account Agreement specifically addresses the investigation and resolution of unauthorized transaction claims. (*Id.*). For example, the Agreement states "[i]f we suspect irregular, unauthorized, or unlawful activities may be involved with your Account, we may 'freeze' (or place a hold on) the balance pending an investigation of such suspected activities." (*Id.* at 2 § 2) As a result, Plaintiffs' implied contract claim fails. *See Hardin*, 2002 WL 3568568, at *6.

F. *Breach of Implied Covenant of Good Faith and Fair Dealing*

"In Arizona, there is an implied covenant of good faith and fair dealing in every contract." *Kincaid v. Wells Fargo Bank, N.A.*, No. CV-10-579-PHX-DGC, 2010 WL 2899058, at *3 (D. Ariz. 2010) (citing *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 38 P.3d 12, 28 (Ariz. 2002)). "The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement." *Wells Fargo Bank*, 38 P.3d at 28. Allegations of a breach of the implied covenant of good faith that merely allege "[b]reach of an express term in a contract" cannot form the basis for such a claim. *Ireland Miller, Inc. v. Shee Atika Holdings Phoenix, LLC*, 2010 WL 2743653, at *3 (D. Ariz. 2006) (quotation omitted); *see also Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002). "The implied covenant of good faith and fair dealing is not a vehicle for creating contractual terms that the parties did not otherwise agree to; it protects the existing terms from subversion." *11333 Inc. v. Certain Underwriters at Lloyd's, London*, 261 F. Supp. 3d 1003, 1024 (D. Ariz. 2017) (citing *Rawlings v. Apodaca*, 726 P.2d 565, 569 (Ariz. 1986)).

Here, Plaintiff alleges that Defendant breached the implied covenant of good faith and fair dealing by failing to deal with the alleged fraud, failing to timely investigate unauthorized transactions, failing to issue provisional credit while investigating claims, and improperly freezing accounts. (Doc. 18 at 78-79). However, all of these contentions are specifically covered by the terms of the Account Agreement. (Doc. 22 at Ex. 1). Since these allegations are completely duplicative of the parties' express contract, the Court dismisses them.

Plaintiffs also allege that Defendant ignored certain safeguards, such as issuing debit cards with EMV chip technology, which also violates the covenant of good faith and fair dealing. (Doc. 18 at 78). First, the Court finds that Plaintiffs' allegations about what Defendant could have done to improve their services contradicts and expands the scope of the express terms of the Account Agreement. Since the parties did not agree to such additional terms or services in the contract, they are not covered by the covenant of good faith and fair dealing. *See Rawlings*, 726 P.2d at 153 (implied covenant of good faith and fair dealing depends on existence of an "agreement or contractual relationship"). Second, Plaintiffs fail to provide sufficient factual allegations which point to how Defendant's services prevented them from receiving the benefit of the bargain. For example, Plaintiffs outline generalized accusations about Defendant's "highly flawed 'claim fraud filter'" (Doc. 18 at 20) and their "practice of denying reasonable customer service" (*Id*. at 22). Yet not a single Plaintiff alleges that the filter was applied to them, or that Defendant's customer service did anything outside of what was provided for in the Account Agreement. The individual Plaintiffs merely allege that they did not like the result from customer service. Indeed, the factual background for this claim again appears to be from the portions copied from the previously mentioned California lawsuit. As a result, Plaintiffs have failed to state a claim.

IV. CONCLUSION

All told, "whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. When a complaint fails to comply with Rule 8(a), it may be dismissed pursuant to Rule 41(b). *Hearns v. San Bernadino Police Dep't*, 530 F.3d 1124, 1129 (9th Cir. 2008). Dismissal under Rule 41(b) operates as an adjudication on the merits and the action is dismissed with prejudice, unless the Court provides otherwise. Fed. R. Civ. P. 41(b). A district court should normally grant leave to amend unless it determines that the pleading could not possibly be cured by allegations of other facts. *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990).

Here, the Second Amended Complaint was a perfunctory attempt to fix the deficiencies of the First Amended Complaint, which merely added brief narratives to each Plaintiff without almost any factual detail explaining what happened. Moreover, what little factual detail was added revealed that many of the claims were barred by time or by law. While Plaintiffs only need to allege enough facts to "plausibly give rise to an entitlement to relief," that has not occurred here. *Iqbal*, 556 U.S. at 679. Therefore, the Second Amended Complaint fails to satisfy the pleading standards set forth by Rule 8 and 12(b)(6), and its dismissal is both warranted and necessary.

Some Plaintiffs' claims cannot be cured with further amendment and are thus futile. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."). Specifically, Plaintiffs whose claims fall outside of the statute of limitations period of the EFTA under "Claim 1A" and

"Claim 1B," (Doc. 18 at 26 Justin Creager, 27 Brian Winkler, 28–29 Kizzy Williams, 29–30 Amanda Maddeaux, 33–34 Kyle Marcwardt, 35–36 Nina Urso, 42–43 Ignacio Montano, 48–49 Marcella Wells, 50–51 Amanda Blanke, 59–60 Denielle Warwood, 63 Annie Arellano, 66–67 Demetris Mills, and 67 Adan Hernandez), all Plaintiffs' negligence and negligence per se claims ("Claim 2"), all Plaintiffs' breach of contract claims ("Claim 3"), all Plaintiffs' implied contract claims ("Claim 4"), and all Plaintiffs' implied covenant of good faith and fair dealing claims ("Claim 5"), cannot be saved through additional facts. These claims are dismissed with prejudice.

This leaves "Claim 1A" and "Claim 1B" for 34 of the Plaintiffs. (Doc. 18 at 28 Joaquin Gomez, 30–31 Themia Cook, 31–32 Iris Corbert, 32–33 Kelly Smith, 34–35 Jamie Rentz, 35 Dustin Hamilton, 36–37 Nicohle Goss, 37–38 Alisha De Cou, 38–39 Marcos Limas, 39 Ruben Casillas, 40 Lance Webb, 40–41 Waikeena Rodrigues, 41–42 Jordon Wells, 43–44 Ivan Vasquez, 44–45 Jonathan Catron, 45–46 Elijah Coates, 46–47 Malissa Shiflett, 47–48 Nicole Martinez, 49–50 Tawnie Rotondo, 51 Rayanna Corona, 52–53 Nicole Rizzi, 53–54 Carl Freeman, 54–55 Desmond Cooper, 55–56 Alexis Guzman, 56 Jessica Peralta, 56–57 Georginna Ferguson, 57–58 Keyania Allison, 58–59 Rudy Orosco, 60–61 Chad Baker, 61–62 Jessi Sanchez, 62–63 Joey Lyon, 64 Danielle Drayton, 64–65 Mary Murphy, 65–66 Sylvia Flores). As these Plaintiffs could potentially cure their claims with additional factual allegations, they shall be granted leave to file a Third Amended Complaint that is consistent with this Order. Plaintiffs are advised, however, that failure to meaningfully address the deficiencies pointed out by this Order will result in a dismissal of Plaintiffs' Third Amended Complaint without leave to amend.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss (Doc. 22) is **granted**.

IT IS FURTHER ORDERED that Claims 1A and 1B of the Second Amended Complaint are **dismissed with prejudice** as to Plaintiffs Justin Creager, Brian Winkler, Kizzy Williams, Amanda Maddeaux, Kyle Marcwardt, Nina Urso, Ignacio Montano, Marcella Wells, Amanda Blanke, Denielle Warwood, Annie Arellano, Demetris Mills, and

Adan Hernandez.

IT IS FURTHER ORDERED that Claims 2-5 are **dismissed with prejudice** as to all Plaintiffs.

IT IS FURTHER ORDERED that Claims 1A and 1B are **dismissed without prejudice** as to Plaintiffs Joaquin Gomez, Themia Cook, Iris Corbert, Kelly Smith, Jamie Rentz, Dustin Hamilton, Nichole Goss, Alisha De Cou, Marcus Limas, Ruben Casillas, Lance Webb, Waikeena Rodrigues, Jordon Wells, Ivan Vasquez, Jonathan Catron, Elijah Coates, Malissa Shiflett, Nicole Martinez, Tawnie Rotondo, Rayanna Corona, Nicole Rizzi, Carl Freeman, Desmond Cooper, Alexis Guzman, Jessica Peralta, Georginna Ferguson, Keyania Allison, Rudy Orosco, Chad Baker, Jessi Sanchez, Joey Lyon, Danielle Drayton, Mary Murphy, and Sylvia Flores. These Plaintiffs are granted leave to amend. Should they choose to do so, Plaintiffs shall file a Third Amended Complaint—sufficiently addressing the concerns identified in this Order—by no later than **October 20, 2023**. Plaintiffs are advised that their claims will be dismissed with prejudice if their Third Amended Complaint fails to address the deficiencies pointed out by this Order.

IT IS FURTHER ORDERED that, if Plaintiffs elect not to file a Third Amended Complaint by **October 20, 2023**, the Clerk of Court shall enter judgment dismissing this action without further order of this Court.

Dated this 25th day of September, 2023.

Honorable Steven P. Logan
United States District Judge