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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Melonieece Gaskin,

10 Plaintiff,

11 v.

12 BMO Harris Bank NA,

13 Defendant.
14

No. CV-23-01919-PHX-SMB

ORDER

15 Pending before the Court is Defendant's Motion to Dismiss (Doc. 12). Plaintiff
16 filed a response (Doc. 16), to which Defendant replied (Doc. 17). Plaintiff also filed a
17 Motion and Request for an Evidentiary Hearing (Doc. 18). Defendant responded to this
18 Motion (Doc. 20), and Plaintiff replied (Doc. 21). The Court will grant Defendant's
19 Motion (Doc. 12) and deny Plaintiff's Motion (Doc. 18).

20 **I. FACTUAL BACKGROUND**

21 This case arises from a failed banking relationship. Plaintiff is the Chief Executive
22 Officer of a mortgage brokerage and formerly conducted her business banking through
23 BMO Harris Bank ("BMO"). (Doc. 11; Doc. 16 at 8.) The following facts are alleged in
24 Plaintiff's First Amended Complaint ("FAC") (Doc 11.) On August 30, 2023, Gaskin
25 visited BMO's Deer Valley branch to withdraw \$9,790.55 from her business account via a
26 cashier's check. (*Id.* at 2.) The branch manager, Lashan Corry, advised Plaintiff that "her
27 account was being placed on hold by the back office" until further investigation due to the
28 number of wire transactions received in a short period of time. (*Id.* at 3.) Plaintiff states

1 that she received four wire transfers between August 2023 and September 2023. (*Id.*)
2 Plaintiff provided the wire confirmations for each of these transactions to Corry. (*Id.*)
3 However, Corry explained that the funds would not be released until September 5, 2023,
4 once the back office completed their investigation. (*Id.*)

5 Later the same day, Plaintiff visited the BMO branch in Mesa and spoke to a
6 different representative. (*Id.* at 3–4.) At this location, she was informed that Corry had
7 “placed the block on the Plaintiffs[’] account.” (*Id.* at 4.) Plaintiff then spoke with BMO’s
8 wire department, who stated that “they were working to get the block cleared from the
9 account.” (*Id.*) Plaintiff subsequently received two calls from Corry in which Corry stated
10 that she “was provided the clearance to remove the block from the account” and “she will
11 be working to remove the block from the account.” (*Id.*) The next day, Corry called
12 Plaintiff and confirmed that the account was unlocked. (*Id.*) On that call, Corry explained
13 that suspicious activity regarding the source of funds caused Corry to place the block on
14 the account. (*Id.*) Plaintiff told Corry that prior to the account being blocked, she
15 conducted debit card, ACH, and Zelle transactions and never received any notice of fraud.
16 (*Id.*)

17 After her account was unlocked, Plaintiff was able to withdraw funds and receive
18 additional wire transactions. (*Id.*) This continued until September 14, 2023, when her
19 debit card was declined. (*Id.* at 5.) Plaintiff called BMO and was placed on hold multiple
20 times, but eventually learned that her account was again frozen by an internal employee,
21 with no notes indicating the reason. (*Id.*) Plaintiff then contacted Corry but was transferred
22 to another BMO employee who told her that BMO was investigating Plaintiff due to
23 possible wire fraud and would not provide any further information. (*Id.*) Later that day,
24 Plaintiff visited the BMO branch in Queen Creek and spoke with the branch manager,
25 Frank Witczak. (*Id.*) Witczak advised Plaintiff that he would investigate the cause of the
26 issue. (*Id.*)

27 Five days later, Plaintiff received a call from David Purpura, the Director of
28 Customer Advocacy and Governance at BMO. (*Id.* at 6.) Purpura informed Plaintiff that

1 the freeze had been lifted and that she could use her account. (*Id.*) He also told Plaintiff
2 that the second freeze occurred because a third-party financial institution had inquired with
3 BMO regarding a wire transaction sent to Plaintiff. (*Id.*) Plaintiff also learned that BMO
4 emailed each of her wire originators on August 31, 2023 asking them to confirm their
5 authority and their relationship to Plaintiff. (*Id.*) In response, Plaintiff returned to the
6 Queen Creek BMO branch, had all her funds wired to a new account at a different bank,
7 and closed her account. (*Id.* at 7.)

8 Plaintiff then filed this lawsuit. (Doc. 1.) In her FAC, Plaintiff alleges violations
9 of the Expedited Funds Availability Act (“EFAA”), racial discrimination in violation of 42
10 U.S.C. § 1981, breach of contract, conversion, and unjust enrichment. (Doc. 11 at 1.) For
11 these claims, Plaintiff seeks a declaratory judgment and damages for her “medical
12 expenses, hospital bills, lost wages or loss of earning capacity” tied to her “pain and
13 suffering, emotional distress, and loss of enjoyment” in an amount “not less than
14 \$50,000,000.00.” (*Id.* at 11.) Defendant now moves to dismiss the FAC (Doc. 12), while
15 Plaintiff seeks an evidentiary hearing (Doc. 18).

16 **II. LEGAL STANDARD**

17 To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet
18 the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a “short and plain statement of the
19 claim showing that the pleader is entitled to relief,” so that the defendant has “fair notice
20 of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,
21 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This
22 requirement is met if the pleader sets forth “factual content that allows the court to draw
23 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
24 *v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of
25 action, supported by mere conclusory statements, do not suffice.” *Id.* Plausibility does not
26 equal “probability,” but requires “more than a sheer possibility that a defendant has acted
27 unlawfully.” *Id.* A dismissal under Rule 12(b)(6) for failure to state a claim can be based
28 on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a

1 cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
2 1988). A complaint that sets forth a cognizable legal theory will survive a motion to
3 dismiss if it contains sufficient factual matter, which, if accepted as true, states a claim to
4 relief that is “plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
5 570). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s
6 liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to
7 relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

8 In ruling on a Rule 12(b)(6) motion to dismiss, the well-pled factual allegations are
9 taken as true and construed in the light most favorable to the nonmoving party. *Cousins v.*
10 *Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). However, legal conclusions couched as
11 factual allegations are not given a presumption of truthfulness, and “conclusory allegations
12 of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Pareto*
13 *v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). A court ordinarily may not consider evidence
14 outside the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *See United States v.*
15 *Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). “A court may, however, consider materials—
16 documents attached to the complaint, documents incorporated by reference in the
17 complaint, or matters of judicial notice—without converting the motion to dismiss into a
18 motion for summary judgment.” *Id.* at 908.

19 **III. DISCUSSION**

20 **A. Motion to Dismiss**

21 The Court will address Defendant’s Motion first. Defendant argues that all of
22 Plaintiff’s claims are unsupported by the facts and deficient as a matter of law. (Doc. 12
23 at 3.) Plaintiff counters that she has provided sufficient evidence to prove her claims. (Doc.
24 16.) The Court will analyze each claim in turn.

25 1. *Expedited Funds Availability Act*

26 The EFAA provides:

27 [I]n any case in which . . . funds are received by a depository institution by
28 wire transfer for deposit in an account at such institution, such cash or funds
shall be available for withdrawal not later than the business day after the

1 business day on which such cash is deposited or such funds are received for
2 deposit.

3 12 U.S.C. § 4002(a)(1)(B). The Act specifically provides that banks are civilly liable to
4 individuals who suffer injury because of an EFAA violation. 12 U.S.C. § 4010(a). A civil
5 action may be brought “within one year after the date of the occurrence of the violation
6 involved.” 12 U.S.C. § 4010(d). However, the EFAA does not prohibit account freezes
7 resulting from suspicious activity, and a bank is not liable under the EFAA for freezing an
8 account. *Little Donkey Enter. Wash., Inc. v. U.S. Bankcorp.*, 136 F. App’x 91, 92 (9th Cir.
9 2005) (“Merely placing a hold on or freezing funds in an account after the deposits have
10 been made available is not a violation of the Funds Act and thus does not support a claim
11 for civil liability under 12 U.S.C. § 4010.”).

12 Here, Plaintiff alleges that Defendant violated the EFAA by placing a freeze on her
13 account, which did not allow her to withdraw any funds. (Doc. 11 at 4–6.) However, an
14 account freeze is not an EFAA violation. 12 U.S.C. § 4002; *Little Donkey*, 136 F. App’x
15 at 92. To allege an EFAA violation, Plaintiff would need to allege that BMO held a
16 *particular deposit* beyond the timeframe allowed by the statute. But Plaintiff alleges her
17 account was frozen and that she was unable to withdraw *any* funds. (Doc. 11 at 4–6.) This
18 allegation does not state a claim under the EFAA. Accordingly, the Court will deny this
19 claim without prejudice.

20 2. Section 1981

21 Plaintiff next alleges that Defendant violated 42 U.S.C. § 1981. (Doc. 11 at 1.)
22 Section 1981 provides relief when racial discrimination impairs a contractual relationship.
23 *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). To plausibly allege a § 1981
24 claim, a plaintiff “must show intentional discrimination on account of race.” *Evans v.*
25 *McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989). In addition, “a plaintiff must initially plead
26 and ultimately prove that, but for race, it would not have suffered the loss of a legally
27 protected right.” *Comcast Corp. v. Nat’l Ass’n of African American-Owned Media*, 589
28 U.S. 327, 341 (2020).

1 Here, it appears that Plaintiff’s section 1981 claim is premised upon her allegation
2 that there is “systemic discrimination and racism that continues to prevent racial minorities
3 from fully and fairly utilizing the financial services industry.” (Doc. 11 at 2.) Plaintiff also
4 states that she is an African American woman, and that Corry is also an African American
5 woman. (*Id.*; Doc. 16 at 1.) Defendant argues that these allegations are insufficient to state
6 a claim under section 1981. (Doc. 12 at 4–5.) Further, Defendant argues that the Deposit
7 Agreement that Plaintiff signed allows Defendant to freeze her account under the presented
8 circumstances. (*Id.* at 5.) The Court agrees with Defendant.

9 To begin, Plaintiff does not specifically allege any intentional discrimination. She
10 also does not identify any injuries flowing from a *specific* racially motivated breach of a
11 contract. *See Domino’s Pizza*, 546 U.S. at 479–80. Instead, she makes a *general* allegation
12 regarding systemic racial discrimination and references her race. (Doc. 11 at 2.) That is
13 insufficient to state a section 1981 claim. *See Iqbal*, 556 U.S. at 678. Moreover, Plaintiff
14 received a Deposit Agreement with Defendant when she opened her account.¹ (Doc. 11 at
15 3; Doc. 12 at 5.) This Deposit Agreement contains a provision which provides that
16 Defendant “may restrict use of your Account in the event . . . we suspect you may be the
17 victim of fraud or that any transaction is fraudulent or may involve illegal activity, until
18 the dispute, uncertainty, or suspicion is resolved to our satisfaction.” (Doc. 12-1 at 18.)
19 This is precisely what occurred here. Plaintiff contractually agreed to this procedure and
20 has not plead any racially motivated breach of any other portion of the contract.
21 Accordingly, the Court will dismiss Plaintiff’s section 1981 claim without prejudice.

22 3. *Breach of Contract*

23 Under Arizona law, a claim for breach of contract has three elements: (1) the
24 existence of a contract between the plaintiff and defendant; (2) a breach of the contract by
25 defendant; and (3) resulting damage to the plaintiff. *Frank Lloyd Wright Found. v. Kroeter*,
26 697 F. Supp. 2d 1118, 1125 (D. Ariz. 2010). Here, the FAC fails to identify any contractual

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28 ¹ The Court will consider the Deposit Agreement as part of the pleadings for purposes of
evaluating this Motion. *See Ritchie*, 342 F.3d at 908; *Swartz v. KPMG LLP*, 476 F.3d 756,
763 (9th Cir. 2007).

1 provision that Defendant breached. (*See generally* Doc. 11.) Additionally, the Deposit
2 Agreement specifically allows Defendant to freeze a customer’s account for suspicious
3 activity. (Doc. 12-1 at 18.) Plaintiff agreed to this term when she opened the account. For
4 these reasons, the Court will dismiss the breach of contract claim with prejudice.

5 4. *Conversion*

6 Arizona law defines conversion as “an act of wrongful dominion or control over
7 personal property in denial of or inconsistent with the rights of another.” *Case Corp. v.*
8 *Gehrke*, 91 P.3d 362, 365 (Ariz. Ct. App. 2004) (quoting *Sears Consumer Fin. Corp. v.*
9 *Thunderbird Prods.*, 802 P.2d 1032, 1034 (Ariz. Ct. App. 1990)). For a plaintiff to prevail
10 on a conversion claim, they “must have had the right to immediate possession of the
11 personal property at the time of the alleged conversion.” *Id.* “A conversion claim cannot
12 be maintained to collect on a debt that could be satisfied by money generally, but money
13 can be the subject of a conversion claim if the money ‘can be described, identified or
14 segregated, and an obligation to treat it in a specific manner is established.’” *Hannibal-*
15 *Fisher v. Grand Canyon Univ.*, 523 F. Supp. 3d 1087, 1098 (D. Ariz. 2021) (quoting
16 *Autoville, Inc. v. Friedman*, 510 P.2d 400, 402 (Ariz. Ct. App. 1973)).

17 The FAC fails to plead these elements. As previously mentioned, Plaintiff still
18 ultimately had access to the funds in her account and was able to withdraw them. (Doc. 11
19 at 7.) Additionally, Defendant did not wrongfully hold Plaintiff’s funds in any way
20 inconsistent with her rights to access those funds. Rather, Defendant acted in accordance
21 with a mutually agreed upon contractual term. (*See* Doc. 12-1 at 18.) Defendant asserts
22 that they had a reason to suspect suspicious activity, and therefore froze the account
23 pursuant to the Deposit Agreement. (*See* Doc. 12 at 6.) This falls short of conversion.
24 Accordingly, Plaintiff has failed to plead a conversion claim, and the Court will dismiss
25 this claim with prejudice.

26 5. *Unjust Enrichment*

27 To establish a claim for unjust enrichment, a plaintiff must show that (1) she
28 conferred a benefit upon defendant, (2) defendant’s benefit is at plaintiff’s expense, and

1 (3) it would be unjust to allow defendant to keep the benefit. *Murdock–Bryant Const., Inc.*
2 *v. Pearson*, 703 P.2d 1197, 1202 (Ariz. 1985); *Pyeatte v. Pyeatte*, 661 P.2d 196, 202 (Ariz.
3 Ct. App. 1982). However, the mere receipt of a benefit is insufficient. *Pyeatte*, 661 P.2d
4 at 203. Rather, retention of the benefit without compensation must be unjust. *Id.*

5 Here, Plaintiff does not and cannot plead these elements. Most crucially, Defendant
6 did not keep any benefit at Plaintiff’s expense. Defendant never seized or kept any of
7 Plaintiff’s funds. Instead, Defendant temporarily froze Plaintiff’s account. Once the
8 account was no longer frozen, Plaintiff withdrew all her funds and transferred them to
9 another bank. (Doc. 11 at 7.) Plaintiff never alleges that Defendant kept any of her money.
10 (*See id.*) Therefore, this claim fails, and the Court will dismiss it with prejudice.

11 **B. Motion and Request for Evidentiary Hearing**

12 Plaintiff also requests the Court set an evidentiary hearing. (Doc. 18 at 1.) Plaintiff
13 states that she has “audio and video recordings along with written witness statements from
14 third parties that will support her claim.” (*Id.*) Defendant counters that Plaintiff’s request
15 is improper and not supported by any legal authority. (Doc. 20 at 1.) The Court agrees
16 with Defendant.

17 Plaintiff has not provided the Court with any basis warranting an evidentiary hearing
18 or an order to show cause. If Plaintiff wishes to request oral argument on any motions
19 pending before the Court, she must do so in her own motion or in her response to one of
20 Defendant’s motions. *See Jones v. Mohave Cnty.*, No. CV-11-8093-PCT-JAT, 2012 WL
21 79882, at *1 n.1 (D. Ariz. Jan. 11, 2012) (denying a similar request). Accordingly, the
22 Court will deny Plaintiff’s Motion (Doc. 18).

23 **C. Leave to Amend**

24 Federal Rule of Civil Procedure 15(a) requires that leave to amend be “freely give[n]
25 when justice so requires.” Leave to amend should not be denied unless, “the proposed
26 amendment either lacks merit or would not serve any purpose because to grant it would be
27 futile in saving the plaintiff’s suit.” *Universal Mortg. Co. v. Prudential Ins. Co.*, 799 F.2d
28 458, 459 (9th Cir. 1986). Therefore, “a district court should grant leave to amend even if

1 no request to amend the pleading was made, unless it determines that the pleading could
2 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,
3 1127 (9th Cir. 2000) (cleaned up). Here, the allegation of other facts will not cure the
4 breach of contract, conversion, and unjust enrichment claims. However, given the early
5 stage of this litigation, allowing amendment will likely help clarify the remaining EFAA
6 and section 1981 claims. Accordingly, the Court will grant Plaintiff leave to amend her
7 complaint as to these remaining claims.

8 **IV. CONCLUSION**

9 For the above reasons,

10 **IT IS HEREBY ORDERED granting** Defendant’s Motion to Dismiss (Doc. 12).
11 Plaintiff’s EFAA and section 1981 claims are dismissed without prejudice. Plaintiff’s
12 breach of contract, conversion, and unjust enrichment claims are dismissed with prejudice.

13 **IT IS FURTHER ORDERED denying** Plaintiff’s Motion and Request for an
14 Evidentiary Hearing (Doc. 18).

15 **IT IS FURTHER ORDERED** granting Plaintiff leave to amend her EFAA and
16 section 1981 claims. If Plaintiff intends to file a second amended complaint, it must be
17 filed no later than twenty (20) days after the date of this Order.

18 Dated this 3rd day of May, 2024.

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22 Honorable Susan M. Brnovich
23 United States District Judge
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