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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Leshae Ali,

10 Plaintiff,

11 v.

12 USAA Federal Savings Bank,

13 Defendant.  
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No. CV-16-00420-PHX-JAT

**ORDER**

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17 Pending before the Court is Plaintiff Leshae Ali's ("Plaintiff") Motion to Dismiss  
18 Defendant USAA Federal Savings Bank's ("Defendant") Counterclaim. (Doc. 18).  
19 Defendant filed an Opposition to the Motion to Dismiss, (Doc. 22), and Plaintiff filed a  
20 Reply in Support of Plaintiff's Motion to Dismiss, (Doc. 23). The Court now rules on the  
21 motion.

22 **I. BACKGROUND<sup>1</sup>**

23 This action concerns Plaintiff's savings account opened with Defendant prior to  
24 December 2015. (Doc. 1 at 3; Doc. 15 at 2). On December 11, 2015, Plaintiff noticed a  
25 substantial deficit in her account and suspected that she was a victim of fraud. (Doc. 1 at  
26 3). On the same day, Plaintiff called Defendant to report the suspected fraud and dispute  
27 the deficit in her account. (Id.)

28 <sup>1</sup> The Court recounts the factual background of this case as alleged by Plaintiff in  
her Complaint and Defendant in its Counterclaim. See (Docs. 1, 15).

1 With no response from Defendant, Plaintiff called Defendant again on January 14,  
2 2016. (Doc. 1 at 3; Doc. 15 at 3). Plaintiff alleges that Defendant’s representative advised  
3 her that the requisite steps were not taken to process the claim during the December 11th  
4 conversation. (Doc. 1 at 3). Plaintiff then asked Defendant’s representative to investigate  
5 the deficit and provide an explanation. (Doc. 1 at 4). On January 28, 2016, Plaintiff  
6 received a notice dated January 21, 2016 stating that the investigation was complete,  
7 there were no fraudulent transactions, and Plaintiff could call to request copies of  
8 documents and information used to make the determination. (Id.)

9 On February 1, 2016, Plaintiff called Defendant to request the documents and  
10 information referenced in the letter. (Id.) Plaintiff alleges that Defendant’s representative  
11 told Plaintiff that she was not likely entitled to receive any documentation and would  
12 follow up within forty-eight hours if she was in fact entitled to the information. (Doc. 1 at  
13 4; Doc. 15 at 4). Plaintiff called Defendant two days later and Defendant’s representative  
14 informed her that she was not entitled to receive any documentation. (Doc. 1 at 4).

15 In making this determination, Defendant alleges that “Plaintiff authorized a third  
16 party to deposit sums into, withdraw sums from, and/or otherwise access the Accounts by  
17 providing her account information and login credentials” to that third party. (Doc. 15 at  
18 7). As a result, Defendant argues it owed Plaintiff no duty of disclosure under the  
19 Electronic Funds Transfer Act (“EFTA”). (Id.) Defendant further alleges that because the  
20 allegedly fraudulent withdrawals were authorized, Plaintiff’s unpaid, overdrawn accounts  
21 constitute a breach of the Consumer Agreement signed by both parties upon initiation of  
22 the savings account. (Doc. 15 at 7–8).

23 Plaintiff filed her Complaint to recover damages under EFTA on February 15,  
24 2016. (Doc. 1). Then, on April 6, 2016, Defendant filed an Amended Answer to  
25 Complaint and Counterclaim (“Counterclaim”) alleging an Arizona state law breach of  
26 contract claim. (Doc. 15). In its Counterclaim, Defendant asserts supplemental  
27 jurisdiction arising out of the federal question jurisdiction asserted in the Complaint. (Id.)  
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1 On April 27, 2016, Plaintiff moved to dismiss the Counterclaim for lack of subject-matter  
2 jurisdiction. (Doc. 18).

3 **II. LEGAL STANDARDS**

4 **A. Subject-Matter Jurisdiction**

5 Federal Rule of Civil Procedure (“Rule”) 12(b)(1) allows a party to move to  
6 dismiss a claim based on “lack of subject-matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). A  
7 Rule 12(b)(1) subject-matter jurisdiction challenge may be raised at any time by the  
8 parties or the Court. Fed. R. Civ. P. 12(h)(3).

9 The Court is “free to hear evidence regarding jurisdiction and to rule on that issue  
10 prior to trial, resolving factual disputes where necessary. In such circumstances, no  
11 presumptive truthfulness attaches to [a claimant’s] allegations, and the existence of  
12 disputed material facts will not preclude the trial court from evaluating for itself the  
13 merits of jurisdictional claims.” *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.  
14 1987) (internal quotations and citations omitted). However, if the jurisdictional issue is  
15 dependent on the resolution of factual issues relating to the merits of the case, the Court  
16 applies the Rule 12(b)(6) standard to the Rule 12(b)(1) motion, and assumes that all of  
17 the allegations in the claim are true. *Id.* “Dismissal is then appropriate where it appears  
18 beyond doubt that the [claimant] can prove no set of facts in support of his claim which  
19 would entitle him to relief.” *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)  
20 (internal quotations omitted)).

21 **B. Supplemental Jurisdiction over Counterclaims**

22 The Court has supplemental jurisdiction over a counterclaim if the counterclaim is  
23 so related to the complaint “that they form part of the same case or controversy.”  
24 28 U.S.C. § 1367(a) (2012). Under Rule 13, a party must state compulsory counterclaims  
25 and may state permissive counterclaims in the party’s initial pleading. Fed. R. Civ. P.  
26 13(a)–(b). A compulsory counterclaim is a claim against the other party at the time of  
27 service that “arises out of the transaction or occurrence that is the subject matter of the  
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1 opposing party's claim," Fed. R. Civ. P. 13(a), while a permissive counterclaim is any  
2 counterclaim that is not compulsory. Fed. R. Civ. P. 13(b).

3 Although the Ninth Circuit has not expressly ruled on the applicability of the  
4 compulsory and permissive counterclaim framework to § 1367 supplemental jurisdiction  
5 claims, it has acknowledged a district court's supplemental jurisdiction over compulsory  
6 counterclaims. See, e.g., *Gibson v. Chrysler Corp.*, 261 F.3d 927, 938 (9th Cir. 2001).  
7 Defendant asks the Court to expand the scope of supplemental jurisdiction past the  
8 existing scope of Rule 13 compulsory counterclaims and allow supplemental jurisdiction  
9 over some permissive counterclaims. See (Doc. 22 at 6–8); see also *Randall v. Nelson &*  
10 *Kennard*, No. CV-09-387-PHX-LOA, at \*4 (D. Ariz. Aug. 26, 2009) (quoting *Campos v.*  
11 *W. Dental Srvs., Inc.*, 404 F. Supp. 2d 1164, 1168 (N.D. Cal. 2005)) (“[T]he standard for  
12 supplemental jurisdiction is broader than the standard for a counterclaim to be  
13 compulsory.”); *Avery v. First Resolution Mgmt. Corp.*, No 06-1812 HA, 2007 WL  
14 1560653, at \*7–8 (D. Or. May 25, 2007), *aff'd*, 568 F.3d 1018 (9th Cir. 2009)  
15 (acknowledging that the supplemental jurisdiction “same case or controversy” test is  
16 broader than the compulsory counterclaim “same transaction or occurrence” test). But see  
17 *Hart v. Clayton-Parker & Assocs., Inc.*, 869 F. Supp. 774, 776 (D. Ariz. 1994) (equating  
18 the supplemental jurisdiction inquiry to the compulsory counterclaim inquiry).  
19 Accordingly, the Court recognizes the widened scope of § 1367 and adopts Defendant's  
20 argument that the Court can have supplemental jurisdiction over some permissive  
21 counterclaims.

22 Courts in the Ninth Circuit can determine whether the “claims arise out of the  
23 same transaction or occurrence” when “the essential facts of the various claims are so  
24 logically connected that considerations of judicial economy and fairness dictate that all of  
25 the issues be resolved in one lawsuit.” *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d  
26 1246, 1249 (9th Cir. 1987) (internal quotations omitted).

27 To determine whether two claims are “logically connected,” courts should  
28 consider if “the facts necessary to prove the two claims substantially overlap,” and

1 whether the “collateral estoppel effect of [] the first action would preclude the [claimant]  
2 from denying the truth of [the opposing party’s] statements.” Id. at 1251; see also *Union*  
3 *Paving Co. v. Downer Corp.*, 276 F.2d 468, 470 (9th Cir. 1960) (parties that fail to plead  
4 a claim that arises out of the same transaction or occurrence as the opponent’s claim will  
5 be “held to have waived [the counterclaim] and [are] precluded by res judicata from ever  
6 suing upon them again”). The Court can determine if the facts substantially overlap by  
7 comparing the facts alleged in the Complaint with the facts alleged in the Counterclaim.  
8 See *Easter Seals, Inc. v. Life, Inc.*, No. CV-09-1506-PHX-JAT, 2010 WL 892189, at \*1–  
9 2 (D. Ariz. Mar. 10, 2010).

### 10 **III. ANALYSIS**

11 Plaintiff has moved to dismiss the Counterclaim for lack of subject-matter  
12 jurisdiction. The Complaint and Counterclaim both allege that Plaintiff is an account  
13 holder at Defendant’s bank. (Doc. 1 at 3; Doc. 15 at 7). In addition, both parties allege  
14 that Plaintiff’s account reflected a substantial deficit. (Doc. 1 at 3; Doc. 15 at 7–8).  
15 However, the cause of this deficit is in dispute. Plaintiff alleges that she is a victim of  
16 fraud. (Doc. 1 at 3). Plaintiff argues that her subsequent report of this fraud to Defendant  
17 triggered error resolution procedures under § 1693f(f)(6) and (7) of EFTA, regardless of  
18 whether Defendant found a legitimate error. (Id.; Doc. 32 at 3). Plaintiff further alleges  
19 that “Defendant did not comply with its duties after Plaintiff provided notice of her  
20 ‘belief’ that there was an ‘error’ regarding her account and after she requested  
21 documentation regarding Defendant’s decision that there was no error.” (Doc. 23 at 4).

22 Conversely, Defendant alleges that Plaintiff authorized a third party to make the  
23 electronic transfers. (Doc. 15 at 7–8). Defendant further alleges that because the  
24 transaction was authorized, the transaction falls outside the scope of an “error”<sup>2</sup> and

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26 <sup>2</sup> To the extent that Defendant argues that the transaction falls outside the scope of  
27 “error,” Defendant argues that “being defrauded by a third party and convinced to make  
28 transactions on the accounts, or giving the third party access to her accounts to conduct  
transactions, is not the same as an unauthorized electronic fund transfer, which is the  
subject of EFTA.” (Doc. 22 at 5). The Court understands this argument to concern

1 Defendant is exempt from fulfilling its error resolution procedures under § 1693f(d).  
2 (Doc. 22 at 5). As a result, Defendant alleges that Plaintiff breached the Consumer  
3 Agreement by failing to pay for the negative balance. (Id.)

4 Under EFTA, a “financial institution” has a duty to investigate consumer-alleged  
5 “errors” in consumer accounts and notify the consumer of the results of such  
6 investigation. 15 U.S.C. § 1693f(a) (2012). EFTA defines seven instances of “error” that  
7 give rise to the error resolution procedures, including “a consumer’s request for  
8 additional information concerning an electronic fund transfer or any documentation  
9 required by this subchapter,” and “any other error described in regulations of the  
10 Bureau.”<sup>3</sup> Id. § 1693f(f)(6)–(7).

11 A financial institution’s duty under EFTA is triggered when a consumer: (1)  
12 notifies the bank of the account number and holder; (2) “indicates the consumer’s belief  
13 that the documentation . . . contains an error and the amount of such error;” and (3) “sets  
14 forth the reasons for the consumer’s belief.” Id. § 1693f(a). Should a financial institution  
15 determine there was no error, “it shall deliver or mail to the consumer an explanation of  
16 its findings within 3 business days after the conclusion of its investigation.” Id.  
17 § 1693f(d). In addition, if the consumer requests additional information, the financial  
18 institution must “promptly deliver or mail to the consumer reproductions of all  
19 documents which the financial intuition relied on to conclude that such error did not  
20 occur.” Id.

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21 “unauthorized transactions” as described by § 1693f(f)(1).  
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23 <sup>3</sup> “Error” also includes “an unauthorized electronic fund transfer.” 15 U.S.C.  
24 § 1693f(f)(1) (2012). An “unauthorized electronic fund transfer” is defined as “an  
25 electronic fund transfer from a consumer’s account initiated by a person other than the  
26 consumer without actual authority to initiate such transfer and from which the consumer  
27 receives no benefit.” Id. § 1693a(12). The term does not include a transfer authorized by  
28 the account holder; a transfer “initiated with fraudulent intent by the consumer or any  
person acting in concert with the consumer”; or transfers that are considered “errors  
committed by a financial institution.” Id. However, because Plaintiff’s cause of action is  
limited to § 1693f(f)(6) and (7), (see Doc. 32 at 3), the Court will not address a cause of  
action under § 1693f(f)(1).

1 Plaintiff alleges she reported an error as defined by § 1693f(f)(6) and (7) when she  
2 requested additional information and documentation. (Doc. 32 at 3). As a result, the  
3 determination of whether the transactions were authorized by Plaintiff (as alleged in the  
4 Counterclaim) has no bearing on whether Defendant committed a procedural error under  
5 EFTA. Rather, Defendant’s error can potentially exist under § 1693f(f)(6) and (7) simply  
6 because Plaintiff requested additional information and documentation and allegedly did  
7 not receive that documentation. Thus, the claims are distinct and do not rely on one  
8 another’s outcome.

9 Moreover, the state contract Counterclaim would unnecessarily congest the EFTA  
10 claim at issue. Namely, Plaintiff’s EFTA claim would involve very limited discovery and  
11 focus primarily on the communication between Plaintiff and Defendant, whereas the  
12 Counterclaim would involve significantly more discovery on separate issues including  
13 third party fraud and Plaintiff’s account management. The facts that do overlap between  
14 the claims are limited to the parties involved and the existence of Plaintiff’s account with  
15 Defendant. Further, because the sphere of discovery in each claim is distinct, should  
16 Defendant pursue its Counterclaim in state court, the findings made by that court would  
17 not risk judicial inconsistency. Thus, the respective discovery of the claims would not  
18 substantially overlap and there is little risk of collateral estoppel. The claims are not  
19 logically connected and accordingly are not part of the same transaction or occurrence.  
20 As a result, the claim is not compulsory.

21 Recognizing the widened scope of § 1367, a permissive Counterclaim could  
22 possibly have supplemental jurisdiction if the Counterclaim was still part of the same  
23 case or controversy as the Complaint. Under this widened scope, the Court can extend  
24 “supplemental jurisdiction beyond compulsory claims to encompass permissive claims  
25 that are so related to claims in the action within such original jurisdiction.” Avery, No 06-  
26 1812 HA, 2007 WL 1560653, at \*7–8 (D. Or. May 25, 2007), *aff’d*, 568 F.3d 1018 (9th  
27 Cir. 2009) (quoting Campos, 404 F. Supp. 2d at 1169) (internal quotations omitted).  
28 However, here, the claims are too disparate to be considered so related that they form part

1 of the same case or controversy. Plaintiff’s claim is limited to Defendant’s procedural  
2 error reporting duties under EFTA, while Defendant’s claim focuses on whether Plaintiff  
3 breached her contract through an allegedly authorized third-party transaction. As  
4 explained above, the factual findings and related discovery are unlikely to overlap despite  
5 originating out of the same consumer account. Thus, the Court lacks supplemental  
6 jurisdiction because the Counterclaim is not compulsory and is not part of the same case  
7 or controversy as the Complaint.<sup>4</sup>

8 **IV. CONCLUSION**

9 Because the Court has found that the permissive Counterclaim does not arise out  
10 of the same case or controversy as the Complaint, supplemental jurisdiction does not  
11 exist.<sup>5</sup>

12 Accordingly,

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22 <sup>4</sup> To the extent that the parties argue the Court should or should not exercise  
23 supplemental jurisdiction under 28 U.S.C. § 1367(c), (Doc. 18 at 10–12; Doc. 22 at 9–  
24 10), these arguments are no longer relevant. Because the Counterclaim is permissive and  
25 does not arise out of the same case or controversy as the Complaint, supplemental  
jurisdiction does not exist under § 1367(a) and the discretionary inquiry under § 1367(c)  
is not applicable.

26 <sup>5</sup> In response to oral arguments held on September 14, 2016, the Court ordered  
27 Plaintiff to provide a more definite statement regarding her cause of action under  
28 15 U.S.C. § 1693f(f). See (Doc. 31). In response, Plaintiff limited her pleading to a cause  
of action under 15 U.S.C. § 1693f(f)(6) and (7). (Doc. 32 at 3). If Plaintiff ever amends  
her pleadings to include a cause of action under 15 U.S.C. § 1693f(f)(1), Defendant will  
be permitted to plead its Counterclaim again (subject to any motion to dismiss Plaintiff  
might file).

