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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 ANDREA F. DURKEE, on behalf of  
12 herself and all others similarly situated,  
13 Plaintiffs,  
14 v.  
15 BANK OF AMERICA, N.A., and DOES  
16 1-100, inclusive,  
17 Defendant.

Case No.: 20-cv-00347-DMS-LL

**ORDER GRANTING MOTION TO  
DISMISS**

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19 Pending before the Court is Defendant Bank of America's motion to dismiss Plaintiff  
20 Andera F. Durkee's First Amended Complaint ("FAC"). Plaintiff filed a response in  
21 opposition, and Defendant filed a reply. For the following reasons, the Court grants  
22 Defendant's motion to dismiss.

23 **I.**

24 **BACKGROUND**

25 On November 25, 2019, Plaintiff was traveling in Cabo San Lucas, Mexico and  
26 withdrew \$100.00 pesos, or \$5.32 U.S. dollars, from an ATM. (FAC ¶ 21). The ATM  
27 machine assessed her a \$50.00 pesos Value Added Tax ("VAT") and a \$8.00 pesos  
28 withdrawal fee. (*Id.*). Plaintiff refers to these as "Usage Fees." (*Id.* at ¶ 2). Plaintiff was

1 also assessed additional fees by Defendant, including a \$5.00 U.S. dollar Non-Bank of  
2 America ATM Fee and a \$0.25 U.S. dollar International Transaction Fee (“ITF”). (*Id.*).  
3 In sum, Plaintiff was charged \$8.11 U.S. dollars in fees for her withdrawal of \$5.32 U.S.  
4 dollars’ worth of pesos. (*Id.* at ¶ 22).

5 Plaintiff alleges that Defendant “unlawfully inflated the amount of the ITF” and  
6 violated the applicable terms of the Deposit Agreement and Disclosures and Personal  
7 Schedule of Fees. (*Id.* at ¶¶ 2, 11). Specifically, Plaintiff alleges that the ITF “is supposed  
8 to be . . . 3% of the dollar amount that was withdrawn at a foreign ATM.” (*Id.* at ¶ 21).  
9 Instead, Defendant assessed the ITF on the amount withdrawn plus the amount of Usage  
10 Fees. (*Id.* at ¶ 23). As a result, the ITF was \$0.25, instead of \$0.16. (*Id.* at ¶ 3). The  
11 applicable provisions of the Personal Schedule of Fees states:

International Transaction Fee	3% of the U.S. dollar amount of the transaction	<ul style="list-style-type: none"><li>* Fee applies if you use your card to purchase goods or services in a foreign currency or in U.S. dollars with a foreign merchant (a “Foreign Transaction”). Foreign Transactions include internet transactions made in the U.S. but with a merchant who processes the transaction in a foreign country.</li><li>* Fee also applies if you use your card to obtain foreign currency from an ATM. Visa® or Mastercard® converts the transaction into a U.S. dollar amount, and the International Transaction Fee applies to that converted U.S. dollar amount. ATM fees may also apply to ATM transactions. See ATM Fees section.</li><li>* See disclosure information that accompanied your card for more information about this fee.</li></ul>
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17 Based on these alleged facts, Plaintiff filed suit against Defendant, on behalf of  
18 herself and all others similarly situated. In her FAC, Plaintiff alleges (1) breach of contract;  
19 (2) breach of the implied covenant of good faith and fair dealing; and (3) conversion.  
20 Plaintiff seeks declaratory relief, actual damages, punitive damages, attorney’s fees and  
21 costs. Defendant now moves to dismiss Plaintiff’s FAC for failure to state a claim.

22  
23 **II.**  
24 **LEGAL STANDARD**

25 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the  
26 legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro*  
27 *v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). In deciding a motion to dismiss, all material  
28 factual allegations of the complaint are accepted as true, as well as all reasonable inferences

1 to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996).  
2 A court, however, need not accept all conclusory allegations as true. Rather it must  
3 “examine whether conclusory allegations follow from the description of facts as alleged by  
4 the plaintiff.” *Holden v. Hagopian*, 978 F.3d 1115, 1121 (9th Cir. 1992) (citation omitted).  
5 A motion to dismiss should be granted if a plaintiff’s complaint fails to contain “enough  
6 facts to state a claim to relief that is plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
7 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that  
8 allows the court to draw the reasonable inference that the defendant is liable for the  
9 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550  
10 U.S. at 556).

### 11 III. 12 DISCUSSION

13 The parties agree that the relevant language in the contract imposes an ITF of “3%  
14 of the U.S. dollar amount of the transaction.” (FAC, Ex. 1 at 13). The primary issue that  
15 divides the parties is whether a ‘transaction’ constitutes the amount of money Plaintiff  
16 withdrew from the ATM or whether it includes both the amount of money withdrawn and  
17 the Usage Fees the foreign ATM applied. Defendant argues the latter, whereas Plaintiff  
18 argues the former. Defendant further contends Plaintiff’s claim for breach of implied  
19 covenant of good faith and fair dealing fails because the contract expressly permitted  
20 Defendant’s actions and Plaintiff’s claim for conversion is defective as a matter of law.  
21 The Court considers these arguments in turn.

#### 22 A. Breach Of Contract

23 In California, “[t]he essential elements of a breach of contract claim are: ‘(1) the  
24 contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach,  
25 and (4) the resulting damages to plaintiff.’ ” *Hamilton v. Greenwich Investors XXVI, LLC*,  
26 126 Cal. Rptr. 4th 1602, 1614 (Cal. Ct. App. 2011) (quoting *Reichert v. Gen. Ins. Co.*, 442  
27 P.2d 377, 381 (Cal. 1968)). In interpreting a contract, “courts look first to the plain and  
28 ordinary meaning of the agreement.” *Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins.*

1 Co., 88 F. Supp. 3d 1156, 1162 (S.D. Cal. 2015) (citing *Perez-Encinas v. AmerUS Life Ins.*  
2 *Co.*, 468 F. Supp. 2d 1127, 1133 (N.D. Cal. 2006)). “If contractual language is clear and  
3 explicit, it governs.” *Bank of the W. v. Superior Court*, 833 P.2d 1254, 1264 (Cal. 1992)  
4 (citing Cal Civ. Code § 1638)). If the contractual language is ambiguous, “it must be  
5 interpreted in the sense in which the promisor believed, at the time of making it, that the  
6 promisee understood it.” *Id.* at 1264–65 (internal quotation omitted). “A contract is  
7 ambiguous where, upon examining the contract as a whole, it is capable of two or more  
8 reasonable meanings.” *Tri-Union Seafoods*, 88 F. Supp. 3d at 1162. The Court, therefore,  
9 must look to the language of the agreement to determine whether it is unambiguous.

10 The applicable provision of the contract states: the ITF’s ‘Fee Amount’ is “3% of  
11 the U.S. dollar amount of the transaction. (FAC, Ex. 1, at 13). Under the header ‘Other  
12 Important Information About This Fee’, the contract reads: “fee applies if you use your  
13 card to purchase goods or services in a foreign currency or in U.S. dollars with a foreign  
14 merchant (a ‘Foreign Transaction’).” (*Id.*). The contract further states: “Fee also applies  
15 if you use your card to obtain foreign currency from an ATM. Visa or Mastercard converts  
16 the transaction into a U.S. dollar amount, and the [ITF] applies to that converted U.S. dollar  
17 amount. ATM fees may also apply to the ATM transactions.” (*Id.*). The contract then  
18 refers the reader to the ‘ATM Fees section’, which discusses the Defendant-imposed ATM  
19 fees, including the \$5.00 Non-Bank of America Teller Withdrawal Fee that was assessed  
20 on Plaintiff’s foreign ATM withdrawal.

21 Plaintiff argues that the “commonsense meaning” of the term ‘transaction’  
22 “encompass[es] an accountholder’s withdrawal amount, not additional Usage Fees added  
23 on by the ATM owner.” (ECF No. 15 at 9). Plaintiff contends that the term ‘transaction’  
24 frequently appears alongside ‘withdrawals and transfers’ in the contract. (*Id.* at 11–12  
25 (citing FAC, Ex. 1 at 10, 11, 13)). Used in this context, Plaintiff argues, ‘transaction’  
26 necessarily means the withdrawal of money, not the fees imposed on the withdrawal.  
27 Plaintiff also argues that the order of the relevant contractual provisions demonstrates that  
28 “first foreign currency is obtained, then Visa/Mastercard converts the transaction, then

1 [Defendant] applies the ITF to that amount, and finally, ‘ATM fees may also apply to the  
2 ATM transactions.’ ” (*Id.* at 10 (quoting FAC, Ex. 1. at 13)). Plaintiff emphasizes that the  
3 mention of ATM fees comes after the application of the ITF, which shows Defendant does  
4 not consider ‘fees’ to be encompassed within an ‘ATM transaction’. Furthermore, Plaintiff  
5 argues, it would be reasonable for Defendant’s customers to assume that the ITF is not  
6 assessed on the foreign ATM’s fees because the fee is not assessed on the ATM fees  
7 imposed by Defendant. Lastly, Plaintiff cites the Merriam-Webster Dictionary’s definition  
8 of ‘transaction’: “something transacted; especially: an exchange or transfer of goods,  
9 services, or funds.” (FAC ¶ 27). Plaintiff argues that this definition supports her  
10 interpretation because Usage Fees are “a precursor or corollary to the actual ‘transaction’—  
11 the foreign currency cash withdrawal.” (*Id.*).

12 In the alternative, Plaintiff argues that the contract’s language is at best ambiguous—  
13 ‘transaction’ can be reasonably read to support either party’s interpretation. Plaintiff  
14 contends that given this ambiguity, the Court must deny Defendant’s motion to dismiss for  
15 failure to state a claim. *See Monaco v. Bear Stearns Residential Mortg. Corp.*, 554 F. Supp.  
16 2d 1034, 1040 (C.D. Cal. 2008) (“Where the language leaves doubt as to the parties’ intent,  
17 the motion to dismiss must be denied.”) (internal citation omitted).

18 Defendant disagrees with Plaintiff’s interpretation. Defendant contends that the ITF  
19 is clearly assessed on the amount withdrawn plus the Usage Fees because the contract states  
20 “VISA or Mastercard converts the transaction into a U.S. dollar amount, and the [ITF]  
21 applies to that converted U.S. dollar amount.” (Mot. at 10 (citing FAC, Ex. 1 at 13)).  
22 Defendant argues that because the Usage Fees are “necessarily and undisputedly converted  
23 to U.S. dollars[,]” the Usage Fees are included in the transactional amount on which the  
24 ITF is assessed. (*Id.*). Defendant further argues that the dictionary definition of  
25 ‘transaction’ supports its interpretation: a foreign ATM’s Usage Fees are assessed in  
26 ‘exchange’ for, or are involved in the ‘transfer’ of, the withdrawal of money. (*Id.* at 11).  
27 Finally, Defendant notes that the language stating “ATM Fees may also apply” clearly  
28 refers to the ATM Fees imposed by Defendant, not Usage Fees imposed by foreign ATMs.

1 Defendant argues this language also supports its interpretation: the ITF is not assessed on  
2 Defendant-imposed ATM Fees because those fees are not assessed in foreign currency,  
3 whereas the ITF is assessed on the Usage Fees because those fees are assessed in foreign  
4 currency. (*Id.* at 12–13).

5 Defendant’s interpretation of the contract is the sole reasonable interpretation. The  
6 contract unambiguously states: “[The ITF] also applies if you use your card to obtain  
7 foreign currency from an ATM. Visa or Mastercard converts the transaction into a U.S.  
8 dollar amount, and the [ITF] applies to that converted U.S. dollar amount.” (FAC, Ex.1 at  
9 13). Contrary to Plaintiff’s assertion and conclusory allegations, it is not the commonsense  
10 meaning of transaction to refer only to the withdrawal of money. As Defendant notes, the  
11 dictionary definition Plaintiff provides proves quite the opposite: a ‘transaction’ is an  
12 exchange or transfer. Here, the foreign ATM gives its user her money *in exchange for*  
13 Usage Fees. Furthermore, the Usage Fees are assessed in the foreign currency and must  
14 be converted to U.S. dollars. Since the ITF applies to the converted U.S. dollar amount, it  
15 is only reasonable to assume the ITF applies to the entire converted transaction—the  
16 amount withdrawn plus the Usage Fees. The phrase ‘ATM fees may also apply’ does not  
17 change the Court’s conclusion. The very next sentence refers the reader to Defendant’s  
18 ATM fee section, suggesting the language concerns only the ATM fees imposed by  
19 Defendant. (*Id.*). It would be unreasonable to assume that just because the ITF is not  
20 assessed on Defendant’s ATM fees, it is not assessed on the foreign ATM fees, specifically  
21 when the contract explicitly states otherwise. The Court, therefore, finds no ambiguity in  
22 the contract’s meaning. *See Schertzer v. Bank of Am.*, --- F. Supp. 3d ----, 2020 WL  
23 1046890, at \*14 (S.D. Cal. 2020) (“[O]nly one interpretation of the fee disclosure  
24 reasonably makes sense.”) (citing *Castandea v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th  
25 Cir. 1981)).

26 Furthermore, implicit in Plaintiff’s argument is the proposition that the contract must  
27 state, in exact words, ‘the ITF is assessed on the amount withdrawn plus the fees imposed  
28 by the foreign ATM.’ This argument asks too much. *See La Jolla Beach & Tennis Club,*

1 *Inc. v. Indus. Indem. Co.*, 884 P.2d 1048, 1053 (Cal. 1994) (“Courts will not adopt a  
2 strained or absurd interpretation in order to create an ambiguity where no exists.”); *Am.*  
3 *Alt. Ins. Corp. v. Superior Court*, 37 Cal. Rptr. 3d 918, 923 (Cal. Ct. App. 2006) (“If  
4 contractual language is clear and explicit and does not an involve an absurdity, the plain  
5 meaning governs.”). It is enough that the contract’s language has only one reasonable  
6 interpretation: the ITF applies to the transaction—the amount withdrawn plus the Usage  
7 Fees—converted into U.S. dollars. Defendant’s motion to dismiss Plaintiff’s breach of  
8 contract claim is accordingly granted.

### 9 **B. Breach Of Implied Covenant Of Good Faith And Fair Dealing**

10 The implied covenant of good faith and fair dealing is present in all contracts. *See*  
11 *Marsu B.V. v. Walt Disney Co.*, 185 F.3d 932, 937 (9th Cir. 1999). “In essence, the  
12 covenant is implied as a *supplement* to the express contractual covenants, to prevent a  
13 contracting party from engaging in conduct which (while not technically transgressing the  
14 express covenants) frustrates the other party's rights to the benefits of the contract.” *Love*  
15 *v. Fire Ins. Exch.*, 271 Cal. Rptr. 246, 256 (Cal. Ct. App. 1990) (emphasis in original). A  
16 breach of the implied covenant claim must “stand independently” and cannot be based “on  
17 essentially the same allegations as [a] breach of contract claim.” *Schertzer*, 2020 WL  
18 1046890, at \*14.

19 Here, Plaintiff does not sufficiently plead a breach of the implied covenant of good  
20 faith and fair dealing. Like the plaintiff in *Schertzer*, Plaintiff has based her implied  
21 covenant claim on the same allegations as her breach of contract claim. Plaintiff does not  
22 provide any additional factual allegations pertaining to Defendant engaging in conduct that  
23 frustrates her contractual rights, other than Defendant’s allegedly unlawful inflation of the  
24 ITF. (FAC ¶¶ 55–62). Therefore, Plaintiff’s claim fails for the same reason her breach of  
25 contract claim fails: Defendant’s assessment of the ITF did not violate the contract’s terms.  
26 *See Barkan v. Health Net. of Cal., Inc.*, No. CV 18-6691, 2019 WL 1771653, at \*5 (C.D.  
27 Cal. Feb. 7, 2019) (dismissing plaintiff’s breach of implied covenant clam that was  
28

1 “premised on the same allegations” as plaintiff’s breach of contract claim). Defendant’s  
2 motion to dismiss Plaintiff’s breach of implied covenant claim is accordingly granted.

3 **C. Conversion**

4 Plaintiff’s sole remaining claim alleges conversion. California law provides that  
5 “conversion is the wrongful exercise of dominion over the property of another.” *Farmers*  
6 *Ins. Exch. v. Zerin*, 61 Cal. Rptr. 2d 707, 709 (Cal. Ct. App. 1997) (quoting *Oakdale Village*  
7 *Grp. v. Fong*, 50 Cal. Rptr. 2d 810, 812 (Cal. Ct. App. 1996)). “The elements of a claim  
8 for conversion are: (1) the plaintiff’s ownership or right to possession of the property at the  
9 time of the conversion, (2) the defendant’s conversion by a wrongful act or disposition of  
10 property rights, and (3) damages.” *Prakashpalan v. Engstrom, Lipscomb & Lack*, 167 Cal.  
11 Rptr. 3d 832, 857 (Cal. Ct. App. 2014) (internal quotations omitted).

12 Plaintiff’s conversion claim relies on the same factual allegations as her breach of  
13 contract claim. Plaintiff alleges Defendant “has wrongfully collected inflated ITFs from  
14 Plaintiff and the Class members” and “continues to retain these funds unlawfully without  
15 Plaintiff’s or Class members’ consent.” (FAC ¶¶ 66, 68). Given the Court’s conclusion  
16 that Defendant’s assessment of the ITF was within the terms of the contract, Plaintiff’s  
17 conversion claim fails. Plaintiff cannot allege Defendant assessed the fee ‘by a wrongful  
18 act.’ As such, Defendant’s motion to dismiss Plaintiff’s conversion claim is granted.

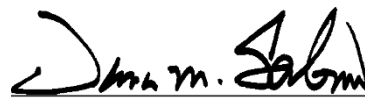
19 **IV.**

20 **CONCLUSION AND ORDER**

21 For the reasons set out above, Defendant’s motion to dismiss Plaintiff’s FAC is  
22 granted with prejudice.

23 **IT IS SO ORDERED.**

24 Dated: August 5, 2020

25   
26 Hon. Dana M. Sabraw  
27 United States District Judge  
28