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SEP 30 2004	
CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
BY 	DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL STOLLENWERK and)
ANDREA DEGATICA, husband and)
wife; MARK WILLIAM BRANDT,

Plaintiffs,

vs.

TRIWEST HEALTHCARE ALLIANCE,

Defendant.

No. CIV 03-0185-PHX-SRB

ORDER

This matter arises out of the burglary of Defendant TriWest Healthcare Alliance's ("Triwest") corporate office on December 14, 2002. During this burglary, computer hard drives containing the personal information of Plaintiffs Michael Stollenwerk, Andrea DeGatica, and Mark Brandt were stolen, leading Plaintiffs to file a class action lawsuit alleging violations of the Privacy Act of 1974 (Privacy Act), 5 U.S.C. § 552a *et seq.*, and the Arizona Consumer Fraud Act, Ariz. Rev. Stat. (A.R.S.) § 44-1521 *et seq.*, as well as claims for breach of contract and negligence under Arizona law. Pursuant to Fed. R. Civ. P. 9(b), 12(b)(6), and 41(b), Defendant seeks dismissal of Plaintiffs' Second Amended Complaint (Doc. 26). Defendant also moves to strike (Doc. 33) Count Five, the breach of contract claim, of that Complaint. The Court now rules on these motions, as well as Plaintiffs' pending Motion to Amend their Complaint (Doc. 21).



1 **I. BACKGROUND**

2 Defendant TriWest, a contractor and agent of the federal government, manages the
3 local region of the U.S. Department of Defense's health insurance program and, as a result,
4 possessed the personal information, including names, addresses, birth dates, and social
5 security numbers, of the beneficiaries of that program. Plaintiffs, current and former
6 members of the U.S. military and their dependents, are several such beneficiaries whose data
7 was stored in computerized and hard copy form at Defendant's facility in Phoenix, Arizona.

8 In May 2001, Defendant experienced a security breach wherein unauthorized
9 personnel entered the Phoenix facility. Defendant reported the incident to the Phoenix
10 Police Department, but Plaintiffs allege that no other action was taken to ensure the security
11 of the facility despite its apparent vulnerabilities. On December 14, 2002, unidentified
12 individuals again breached security and proceeded to burglarize the Phoenix facility,
13 removing computer hard drives containing Plaintiffs' personal information and other items.
14 Plaintiffs allege that the personal information of as many as 562,000 individuals was stolen.

15 Beginning on January 28, 2003, Plaintiff Brandt's personal data of the type stolen
16 from the Phoenix facility was used on at least six occasions to open or to attempt to open
17 unauthorized credit accounts in Plaintiff Brandt's name. Unknown individuals successfully
18 opened at least two credit accounts and generated more than \$7,000 in unauthorized charges
19 to these accounts. Plaintiffs Stollenwerk and DeGatica allege a different form of damages;
20 following the theft of their data, both have obtained both credit monitoring services and
21 identity theft insurance.

22 On January 28, 2003, Plaintiffs Stollenwerk and DeGatica filed their original
23 complaint in this action, alleging violations of the Privacy Act, the Ninth Amendment, and
24 Arizona tort and contract law.¹ Plaintiff Brandt later joined the lawsuit and Plaintiffs filed
25 and served their First Amended Complaint in May 2003. The First Amended Complaint
26 asserted claims for negligence, "gross negligence," "negligence per se," "res ipsa loquitur,"
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28 ¹The original complaint was never served on Defendant.

1 breach of the implied bailment contract, and violations of the Privacy Act, the Ninth
2 Amendment, and the Arizona Consumer Fraud Act. Defendant moved to dismiss the First
3 Amended Complaint pursuant to Rule 12(b)(6), and at oral argument of the motion on
4 October 20, 2003, the Court granted the motion to dismiss with leave to amend the
5 Complaint as to only the negligence, Arizona Consumer Fraud Act, and Privacy Act claims.

6 Plaintiffs filed their Second Amended Complaint on October 30, 2003. The Second
7 Amended Complaint alleges two counts of Privacy Act violations, one count of negligence,
8 one count of consumer fraud under the Arizona Consumer Fraud Act, and one count of
9 breach of a contract intended to benefit Plaintiffs. Plaintiffs sought the leave of the Court
10 to include Count Five, the breach of contract claim, in a belated Motion to Amend filed on
11 October 31, 2003. Defendant opposes the amendment of the Complaint to include the
12 breach of contract claim, and filed a Motion to Strike Count Five of the Second Amended
13 Complaint on December 23, 2003. Defendant had previously filed its Motion to Dismiss
14 the Second Amended Complaint on November 17, 2003 and the Court heard argument on
15 the Motion to Dismiss on April 5, 2004.

16 **II. LEGAL STANDARDS AND ANALYSIS**

17 **A. Motion to Dismiss**

18 Defendant seeks to dismiss each of Plaintiffs' five claims for relief pursuant to Rule
19 12(b)(6).² A Rule 12(b)(6) dismissal for failure to state a claim can be based on either: (1) the
20 lack of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim.
21 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean*
22 *Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In determining whether a
23 complaint states a valid claim, all allegations of material fact are taken as true and construed
24 in the light most favorable to the non-moving party. *Clegg v. Cult Awareness Network*, 18

25
26 ²Defendant also argues for dismissal of Plaintiffs' consumer fraud claim pursuant to
27 Rule 9(b) and for dismissal of Plaintiffs' breach of contract claim pursuant to Rule
28 41(b). The standard for dismissal under these rules will be addressed as necessary in
the subsections pertaining to the relevant claims, below.

1 F.3d 752, 754 (9th Cir. 1994). The complaint should not be dismissed unless it appears
2 beyond doubt that there is "no set of facts" which would entitle the complainant to relief
3 under the asserted claim. *Conley v. Gibson*, 355 U.S. 41, 45-46, 79 S. Ct. 99, 102 (1957);
4 *see also Balistreri*, 901 F.2d at 701.

5 **1. Privacy Act, 5 U.S.C. § 552a(e)(10) Security Measures**

6 Plaintiff complains of two separate and independent violations of the Privacy Act;
7 the first of these claims is brought for violation of 5 U.S.C. § 552a(e)(10) (Section
8 552a(e)(10)), which requires entities such as Defendant to "establish appropriate
9 administrative, technical, and physical safeguards to insure the security and confidentiality
10 of records and to protect against any anticipated threats or hazards to their security or
11 integrity" 5 U.S.C. § 552a(e)(10). Under the Privacy Act, an individual may bring a
12 private cause of action for damages based on a violation of any provision of 5 U.S.C.
13 Section 552a only where "the court determines that the agency acted in a manner which was
14 intentional or willful." 5 U.S.C. § 552a(g)(4)(A); *see also* 5. U.S.C. § 552a(g)(1)(D); *Covert*
15 *v. Harrington*, 876 F.2d 751, 756 (9th Cir. 1989). Defendant contends that Plaintiffs fail
16 to adequately allege facts from which to infer that Defendant willfully or intentionally
17 violated the Privacy Act.

18 In their Second Amended Complaint, Plaintiffs allege that Defendant was aware that
19 it had inadequate security following the May 2001 security breach and yet failed to take any
20 action to ensure the privacy of sensitive information contained in its records. Considering
21 Defendant's knowledge of its responsibility to safeguard Plaintiffs' information under the
22 Privacy Act, Plaintiffs argue that the failure to take additional security measures constituted
23 a willful and intention violation of Section 552a(e)(10). The Court disagrees, and finds that
24 Plaintiff pled no set of facts which would permit a reasonable jury to find a willful or
25 intentional violation of the Privacy Act. The Ninth Circuit has held that the willful or
26 intentional standard requires conduct "only somewhat greater than gross negligence."
27 *Covert*, 876 F.2d at 756, *quoting Albright v. United States*, 732 F. 2d 181, 189 (D.C. Cir.

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1 1984), although it has not elaborated on definitions of gross negligence, *Johnston v. Horne*,
2 875 F.2d 1415, 1422 (9th Cir. 1989), *overruled on other grounds by Irwin v. Dep't of*
3 *Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453 (1991). An agency acts willfully or
4 intentionally where it "flagrantly disregard[s] others' rights under the Act," *Albright*, 732
5 F.2d at 189, or commits a violation "so patently egregious and unlawful that anyone
6 undertaking the conduct should have known it unlawful," *Deters v. United States Parole*
7 *Comm'n*, 85 F.3d 655, 660 (D.C. Cir. 1996).

8 While Plaintiffs have alleged facts which might permit a finding of negligence, or
9 arguably even gross negligence, on the part of Defendant, the circumstances pled do not
10 amount to something greater than gross negligence, as required. This is particularly the case
11 where the May 2001 security breach, which allegedly should have alerted Defendant to its
12 need to amplify security, did not involve the theft of any personal information. As a matter
13 of law, the failure to take steps to upgrade security at the Phoenix facility, without more,
14 cannot be said to be in flagrant disregard of Plaintiffs' rights; thus, Defendant is entitled to
15 dismissal of Count One of Plaintiffs' Second Amended Complaint.

16 2. Privacy Act, Section 7(b) Warnings

17 Plaintiffs' second claim for a violation of the Privacy Act relates to Section 7(b), an
18 uncodified portion of the Privacy Act that requires government agencies requesting an
19 individual's social security number to "inform that individual whether that disclosure is
20 mandatory or voluntary, by what statutory or other authority such number is solicited, and
21 what uses will be made of it." Pub. L. No. 93-579, § 7(b); *see also* 5 U.S.C. § 552a,
22 Historical and Statutory Notes. Defendant advances four arguments for dismissal of Count
23 Two: first, that pleading a Section 7(b) violation "upon information and belief" is
24 insufficient to state a claim; second, that Plaintiffs again fail to adequately allege a willful
25 or intentional violation of the Privacy Act; third, that Plaintiffs are effectively seeking
26 impermissible damages disguised as injunctive relief; and fourth, that Plaintiffs fail to state
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1 a claim because they did not allege that they objected at the time of the collection of their
2 social security numbers.

3 Defendant contends that Plaintiffs failed to adequately allege noncompliance with the
4 disclosure requirements of Section 7(b), as Plaintiffs allege "upon information and belief"
5 that Defendant never made the appropriate disclosures. Pleading on information and belief
6 is not expressly authorized by the federal rules, but is permissible unless the matter pled is
7 within the personal knowledge of the pleader. 5 Wright & Miller, Federal Practice &
8 Procedure: Civil 3d § 1224. Thus, pleading on information and belief is not appropriate
9 where the information is a matter of public record or "not something peculiarly within the
10 knowledge of the defendants." *Bertucelli v. Carreras*, 467 F.2d 214, 215 n.4 (9th Cir.
11 1972).

12 Here, Plaintiffs allege that the enrollment forms that collected their social security
13 numbers did not contain the required Section 7(b) warnings, and further allege solely upon
14 information and belief that they otherwise never received the Section 7(b) warnings or
15 information regarding their rights under Section 7(b). (Second Amended Compl. ¶¶ 61-63.)
16 Defendant argues that Plaintiffs must have personal knowledge of whether they ever
17 received such warnings, and that allegations on information and belief regarding this subject
18 are therefore improper.³ The Court agrees. It is not sufficient to allege that the required
19 warnings were not included on the enrollment forms; in order to state a claim for relief
20 Plaintiffs must allege that they never received such warnings, since Section 7(b) does not
21 specify that the warnings must be given on the same document collecting the social security
22 number. Pub. L. No. 93-579, § 7(b); *see also* 5 U.S.C. § 552a, Historical and Statutory
23 Notes; *cf. Greater Cleveland Welfare Rights Org. v. Bauer*, 462 F. Supp. 1313, 1321 (N.D.
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25 ³The parties spend a great deal of time addressing the sufficiency of the form of
26 Plaintiffs' allegations about the lack of warnings on the enrollment forms themselves.
27 Since the absence of Section 7(b) warnings on the enrollment forms was not alleged
28 merely on information and belief, the Court finds it unnecessary to discuss these
arguments.

1 Ohio 1978) (finding that separate notification/release form would meet 7(b) requirements
2 so long as it possessed necessary content). Whether Plaintiffs received such warnings on
3 another document or in some other form is a matter inherently within the personal
4 knowledge of Plaintiffs. Pleading such a matter on information and belief is therefore
5 improper, and the facts so pled will not be considered in determining whether Plaintiffs have
6 stated a claim for relief. The Court must dismiss Count Two of Plaintiffs' Second Amended
7 Complaint in the absence of a proper allegation of failure to inform Plaintiffs of their rights
8 under Section 7(b). Discussion of Defendant's three remaining arguments for dismissal of
9 Count Two is unnecessary.

10 **3. Negligence**

11 According to Plaintiffs, Defendant's failure to safeguard their personal data also
12 constitutes negligence, for which they seek relief in Count Three of their complaint. In order
13 to state a valid claim for negligence, Plaintiffs must allege that they have suffered an actual
14 injury. *See Amfac Distrib. Corp. v. Miller*, 673 P.2d 792, 793 (Ariz. 1983). Defendant
15 contends that neither Plaintiffs Stollenwerk and DeGatica nor Plaintiff Brandt have made
16 sufficient allegations from which one might conclude that such injury has occurred.

17 **a. Plaintiffs Stollenwerk and DeGatica**

18 Plaintiffs Stollenwerk and DeGatica both allege that Defendant's negligence in
19 securing their personal information, and the resulting theft of that information, caused them
20 to purchase credit monitoring services and identity theft insurance. Although these two
21 Plaintiffs do not allege that their information has been subjected to unauthorized use thus
22 far, they maintain that the exposure of such sensitive information necessitated the purchase
23 of this coverage, and that they are entitled to damages to reimburse them for the expense.
24 Defendant disputes the classification of these voluntarily-incurred expenses as actual
25 damages, arguing that the acquisition of such services is based on the threat of future harm,
26 not any actual loss.

1 Defendant is correct that the mere threat of future harm is generally insufficient to
2 support a claim for negligence. *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct.
3 App. 1988). Plaintiffs, however, seek to recover out-of-pocket costs related to the detection
4 of future manifestations of injury resulting from exposure of their confidential personal
5 information by Defendant. Arizona law provides that such monitoring costs may be
6 considered compensable damages even in the absence of a present injury in some
7 circumstances. *Id.*, 752 P.2d at 33 (finding that plaintiffs exposed to asbestos are entitled
8 to medical surveillance to detect future illness even in the absence of present manifestation
9 of asbestos-related disease). Although such holdings have previously been related to
10 instances of exposure to toxic chemicals and asbestos likely to result in disease, the Court
11 finds that an exposure of personal information likely to result in the unauthorized use of
12 one's identity is sufficiently similar so as to justify the maintenance of a cause of action for
13 recovery of the cost of credit monitoring services.⁴ *Cf. Miranda v. Shell Oil Co.*, 26 Cal.
14 Rptr. 2d 655, 658 (Cal. Ct. App. 1993) (positing that costs of future surveillance are
15 recoverable in some instances besides toxic exposure, such as medical surveillance
16 following an automobile accident). Consistent with this theory, the United States Supreme
17 Court also recently suggested that "fees associated with running a credit report" might
18 qualify as actual damages in the context of an action under the Privacy Act. *Doe v. Chao*,
19 540 U.S. 614, 124 S. Ct. 1204, 1211 n. 10 (2004). In addition, permitting recovery for credit
20 monitoring services after the negligent exposure of confidential information serves the
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22 ⁴Plaintiffs also seek to recover for the cost of identity theft insurance. The Court
23 found no precedent in caselaw for categorizing the costs of insurance premiums as
24 actual damages following the mere exposure to harm, whether health insurance or
25 identity theft insurance. *But cf. Shirley K. Duffy, "Risk Assessment": A Methodology*
26 *for Deciding Claims for Increased Risk of Cancer*, 11 Penn State Envtl. L. Rev. 213,
27 231 (2003) (discussing insurance-based remedies for plaintiffs claiming increased risk
28 of harm following exposure to toxic substances). It is unnecessary to decide whether
insurance premiums could ever constitute actual damages, however, as Plaintiffs have
alleged actual damages sufficient to survive Defendant's motion to dismiss in the form
of credit monitoring costs.

1 public policy interest in fostering the early detection and limitation of identity theft, as well
2 as the interest in deterring agencies in possession of such information from negligently
3 maintaining its security. *Cf. Burns*, 752 P.2d at 33-34 (discussing similar policy reasons for
4 permitting recovery of medical surveillance costs).

5 Defendant seeks to distinguish *Burns* from the circumstances at hand, relying on
6 cases that it apparently interprets as requiring an actual present injury. *See Transamerica*
7 *Ins. Co. v. Doe*, 840 P.2d 288, 291 (Ariz. Ct. App. 1992) (finding that mere exposure to
8 HIV-infected blood could not sustain an action for damages); *DeStories v. City of Phoenix*,
9 744 P.2d 705, 708 (Ariz. Ct. App. 1987) (declining to order surveillance costs following the
10 plaintiffs' exposure to airborne asbestos). The Court views these cases in a different light:
11 *Transamerica* involved the plaintiffs' ability to maintain an action under the terms of their
12 insurance policy, and specifically acknowledged that the "recovery of damages for the costs
13 of medical testing and surveillance . . . can be a component of a tort action," *Transamerica*,
14 840 P.2d at 292 n.4, while *DeStories* held in favor of the defendant at the summary
15 judgment stage simply because the plaintiffs could not produce sufficient evidence that
16 increased medical surveillance was warranted based on their exposure, 744 P.2d at 711.

17 As in medical surveillance cases, the cost of credit monitoring services ultimately will
18 only be recoverable where the evidence shows that credit surveillance is "reasonable and
19 necessary" as determined by looking at the significance and extent of the exposure, the
20 seriousness of the harm to which the individuals were exposed, the relative increase in the
21 chance of incurring such harm after exposure, and the value of early detection of the injury.
22 *See Burns*, 752 P.2d at 33 (listing factors to consider when determining whether the cost of
23 medical surveillance is a compensable damage); *see also* Allan L. Schwartz, *Recovery of*
24 *Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or*
25 *Condition*, 17 A.L.R. 5th 327, § 2(a) (describing elements of medical monitoring cause of
26 action). Whether these criteria have been satisfied, of course, is a question for a finder of
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1 fact and cannot be determined on a Rule 12(b)(6) motion to dismiss. Plaintiffs Stollenwerk
2 and DeGatica have met the requirements for surviving a motion to dismiss, as they have
3 articulated actual damages alleged to have resulted from Defendant's negligence.

4 **b. Plaintiff Brandt**

5 Defendant also argues that Plaintiff Brandt's allegations of damages are insufficient,
6 as they require an improper inference of causation. The Second Amended Complaint states
7 that, approximately six weeks following the theft of Plaintiff's Brandt's confidential
8 information from the Phoenix facility, unidentified individuals attempted to open or
9 successfully opened unauthorized credit accounts in his name. The Ad Damnum Clause of
10 the Complaint specifies the dates and locations of each of these attempts, and also lists the
11 amount of unauthorized charges incurred on each account successfully opened. Defendant
12 bases its claims of insufficiency on Plaintiffs' failure to allege causation; Plaintiffs do not
13 allege that Defendant's records are the only source from which Brandt's personal information
14 may have been obtained.⁵ However, Defendant seeks to hold Plaintiffs to a higher standard
15 of pleading than the "short and plain statement" which is required by the Federal Rules of
16 Civil Procedure. Fed. R. Civ. P. 8; *see also Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248
17 (9th Cir. 1997). Although Plaintiffs may ultimately have difficulty proving that Defendant's
18 security breach led to the unauthorized use of Plaintiff Brandt's identity, the Court cannot
19 say that there is no set of facts that would entitle Plaintiffs to relief on such a claim. *See*
20 *Conley*, 355 U.S. at 45-46, 79 S. Ct. at 102.

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25 ⁵Incidentally, the Court notes that proof that Plaintiff Brandt's information could not
26 have been obtained elsewhere is not necessary to show causation; logically, proof that
27 Defendant's computer hard drives were the actual source of the information used to
28 create unauthorized accounts would be adequate.

1 Plaintiffs argue that they have made adequate statements regarding the time, place and
2 nature of the fraudulent activities by stating the "what, when, where, and how" of the alleged
3 misrepresentations. The Second Amended Complaint itself, however, belies this description.
4 Defendant is said to have falsely represented to Plaintiffs on two separate occasions that
5 their information would be secure and would not be released. Defendant allegedly made the
6 first set of misrepresentations to Plaintiffs at the time that it entered into the contract with
7 the Department of Defense, and the second set during the course of collecting the
8 information from Plaintiffs. While Plaintiffs allege that the misrepresentations concerned
9 the security of their information, they fail to set forth the medium of the misrepresentations
10 (e.g. oral or written) and how or where they were communicated to Plaintiffs, facts clearly
11 within Plaintiffs' knowledge.

12 Nor do Plaintiffs plead the falsity of the alleged misrepresentations with particularity.
13 A plaintiff must "set forth, as part of the circumstances constituting fraud, an explanation
14 as to why the disputed statement was untrue or misleading *when made*." *Yourish*, 191 F.3d
15 at 993 (quoting *GlenFed*, 42 F.3d at 1549) (emphasis added). The falsity of the challenged
16 representation may be proven "by pointing to inconsistent contemporaneous statements or
17 information (such as internal reports) which were made by or available to the defendants."
18 *Id.* (quoting *GlenFed*, 42 F.3d at 1549). Plaintiffs' complaint contains conclusory
19 allegations that Defendant did not intend to take adequate security measures to safeguard
20 Plaintiffs' information, but fails to plead any facts which would allow a jury to arrive at the
21 same conclusion.

22 In the absence of such facts and specificity regarding the place and nature of the
23 misrepresentations, Defendant has inadequate information to allow it "an opportunity to
24 defend against the claim, rather than simply deny [it has] done anything wrong." *Williamson*
25 *v. Allstate Ins. Co.*, 204 F.R.D. 641, 644 (D. Ariz. 2001) (quoting *Foster v. Allstate Ins. Co.*,

1 1995 WL 396646, at *2 (S.D. Cal. Oct. 7, 1993)). Count Four of Plaintiffs' Second
2 Amended Complaint must be dismissed for failure to state a sufficiently particular claim.⁶

3 **5. Breach of Contract**

4 Count Five of Plaintiffs' Second Amended Complaint seeks to recover for
5 Defendant's breach of its contract with the Department of Defense based on a third-party
6 beneficiary theory. Defendant sets forth three arguments for the dismissal of this claim, two
7 of which relate to the propriety of Plaintiffs' inclusion of the breach of contract claim in the
8 Second Amended Complaint following earlier rulings by this Court.⁷ Defendant's third
9 argument simply suggests that Plaintiffs have failed to state a claim on which relief can be
10 granted, as Plaintiffs do not possess third-party rights under the government contract
11 between Defendant and the Department of Defense. The Court will address this argument
12 first.

13 Under Arizona law, a third-party beneficiary generally may recover for breach of
14 contract where "(1) the contract itself indicates an intention to benefit the third party, (2) the
15 benefit contemplated is intentional and direct and (3) the contracting parties intend to
16 recognize the third party as the primary party in interest." *Flagstaff Med. Ctr., Inc. v.*
17 *Sullivan*, 962 F.2d 879, 892 (9th Cir. 1992). The Second Restatement of Contracts,
18 however, modifies this general rule: a "promisor who contracts with a government or
19 governmental agency to do an act or render a service for the public is not subject to
20 contractual liability to a member of the public for consequential damages resulting from .

21 _____
22 ⁶Defendant also contends that Plaintiffs' consumer fraud claim must be dismissed for
23 failure to allege that Defendant's misrepresentations were made "in connection with
24 the sale or advertisement" of its services, as required. A.R.S. § 44-1522(A); *see also*
25 *Waste Mfg. & Leasing Corp. v. Hambicki*, 900 P.2d 1220, 1223 (Ariz. Ct. App. 1995).
The Court does not reach this argument, but notes that Plaintiffs have failed to
26 respond to this assertion whatsoever in their papers.

27 ⁷These arguments are made pursuant to Fed. R. Civ. P. 41(b).

1 . . . failure to perform unless . . . the terms of the promise provide for such liability"
2 Restatement (Second) of Contracts § 313 (1981). Arizona follows this approach to third-
3 party beneficiary rights under government contracts. *Flagstaff Med. Ctr.*, 962 F.2d at 891.

4 Plaintiffs contend this approach is irrelevant to the matter at hand. They argue that
5 the contract between Defendant and the Department of Defense is not a contract to do
6 something "for the public" within the meaning of the Restatement since it provides benefits
7 exclusively for a particular class of beneficiaries: employees of the Department of Defense.
8 This reading of the Restatement is too narrow. A government contract which benefits some
9 individuals more directly than others is still a contract "for the public." *See Berberich v.*
10 *United States*, 5 Cl. Ct. 652, 656 (Cl. Ct. 1984) (applying Restatement (Second) § 313 with
11 respect to government contract benefitting residents of single town); *Martinez v. Socoma*
12 *Cos., Inc.*, 11 Cal. 3d 394, 406 (1974) (residents of low-income neighborhood); *Nguyen v.*
13 *U.S. Catholic Conference*, 547 F. Supp 1333, 1348 (W. D. Pa. 1982) (alien refugees);
14 *Drummond v. Trustees of the Univ. of Pa.*, 1993 WL 1156036, 1993 Phila. Cty. Rptr. LEXIS
15 141, *2 (Pa. Commw. Ct. Feb. 22, 1993) (scholarship recipients); *Clifton v. Suburban Cable*
16 *TV Co.*, 642 A.2d 512, 515 (Pa. Super. Ct. 1994) (prisoners). In a broad sense, providing
17 health insurance programs for current and former members of the military and their
18 dependents ensures a strong military and the safety of the country, benefitting the public at
19 large.

20 Since the contract in question falls within the coverage of the Restatement (Second)
21 § 313, Defendants are entitled to dismissal of the breach of contract claim unless Plaintiffs
22 adequately allege that the terms of the contract provide for Defendant's liability to third
23 parties. Rest. (Second) Contracts § 313(2)(a). The Second Amended Complaint states that
24 Plaintiffs were intended to be the primary beneficiaries of the contract, but nowhere does the
25 Complaint allege that the contract's *terms* display such an intent to grant individuals such as
26 Plaintiffs rights under the contract. *See Clifton*, 642 A.3d at 145 (discussing what the
27

1 language of the contract demonstrates about the parties' intent); *contra Flagstaff Med. Ctr.*,
2 962 F.2d at 891 (finding that express provision of statute granted third parties the right to
3 bring action to effectuate compliance with contract). Plaintiffs spend much time on their
4 ability to show that the terms did manifest such an intent, but without such an allegation in
5 the Second Amended Complaint, their evidence is without impact. Absent such an
6 allegation, Defendants are entitled to dismissal of Count Five of Plaintiff's Complaint. The
7 Court finds it unnecessary to address Defendant's two remaining arguments for dismissal.

8 **B. Other Pending Motions**

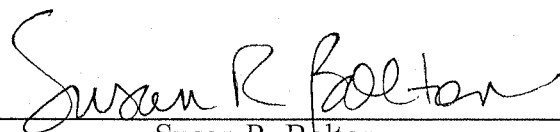
9 Also pending before the Court are Plaintiffs' Motion to Amend, which seeks
10 permission to plead Count Five of the Second Amended Complaint, and Defendant's Motion
11 to Strike Count Five. As the Court has dismissed Count Five for failure to state a claim for
12 relief, the Motions to Amend and Strike are denied as moot.

13 **IT IS ORDERED** granting Defendant's Motion to Dismiss the Second Amended
14 Complaint (Doc. 26) with respect to Counts One (Privacy Act Security Measures), Two
15 (Section 7(b) Warnings), Four (Consumer Fraud), and Five (Breach of Contract) of
16 Plaintiffs' Second Amended Complaint.

17 **IT IS FURTHER ORDERED** denying Defendant's Motion to Dismiss (Doc. 26)
18 with respect to Count Three (Negligence) of Plaintiffs' Second Amended Complaint.

19 **IT IS FURTHER ORDERED** denying as moot both Plaintiffs' Motion to Amend
20 (Doc. 21) and Defendant's Motion to Strike (Doc. 33).

21
22 DATED this 30 day of September, 2004.

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24 

25 Susan R. Bolton
26 United States District Judge