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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SONDRA RAMIREZ,  
Plaintiff,  
v.  
BAXTER CREDIT UNION,  
Defendant.

Case No. [16-cv-03765-SI](#)

**ORDER ON DEFENDANT’S MOTION  
TO DISMISS**

Re: Dkt. No. 23

On January 6, 2017, the Court held a hearing on defendant’s motion to dismiss. For the reasons set forth below, the Court GRANTS defendant’s motion, in part, with leave to amend.

**BACKGROUND**

Plaintiff Sondra Ramirez (“Ramirez”) filed this class action lawsuit on July 5, 2016, seeking damages and injunctive relief against defendant Baxter Credit Union (“BCU”) in connection with BCU’s overdraft charge policy. Compl. (Dkt. No. 1). Ramirez sues BCU, alleging the following causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment/restitution; (4) money had and received; (5) violation of the Electronic Fund Transfer Act (“EFTA”); and (6) violation of California’s Unfair Competition Law (“UCL”). Compl. ¶¶ 51-90.

During the class period, Ramirez was a BCU member. *Id.* ¶ 5. When Ramirez opened her BCU checking account, she affirmatively opted in to BCU’s overdraft protection, which BCU refers to as its “Courtesy Payment service.” *See id.* ¶¶ 22, 33; Def. Request for Judicial Notice

1 (“RJN”), Ex. 1 (Dkt. No. 39) at 3-4.<sup>1</sup> Ramirez’s Membership Enrollment Form included a  
2 federally mandated, segregated opt-in provision with the heading “What You Need to Know  
3 About Overdraft Fees.” Def. RJN, Ex. 1 (Dkt. No. 39) at 4. The opt-in states that “[a]n overdraft  
4 occurs when you do not have enough money in your account to cover a transaction, but [BCU]  
5 pay[s] it anyway.” *Id.* (emphasis in original). It further describes the credit union’s Courtesy  
6 Payment service, explaining that BCU automatically authorizes and pays overdrafts for certain  
7 transactions, including checks and automatic bill payments. *Id.* The opt-in notes that BCU “does  
8 not authorize and pay overdrafts for” ATM transactions and one-time debit card transactions,  
9 unless the applicant opts in immediately below. *Id.* (emphasis in original). The opt-in describes  
10 the amount of fees BCU charges for overdrafts (\$29 per overdraft), but does not describe how the  
11 credit union calculates a member’s balance for purposes of determining whether she has  
12 overdrafted her account. *See id.*

13 Ramirez and her joint applicant opted in to the Courtesy Payment service for ATM and  
14 one-time debit card transactions, and signed the Membership Enrollment Form below the opt-in  
15 provision. *Id.* In the signature block, the form states that “[b]y signing below you acknowledge  
16 that you have received and agreed to the terms and conditions contained on both sides of this form  
17 and in the Deposit Account Agreement, which includes . . . Fee disclosures . . . .” *Id.* Ramirez  
18 does not reference the Deposit Account Agreement in her complaint.

19 Ramirez alleges that the overdraft opt-in does not accurately describe BCU’s actual  
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21 <sup>1</sup> BCU requests that the Court take judicial notice of: (1) Ramirez’s Membership  
22 Enrollment Form; (2) the Deposit Account Agreement; and (3) a recent federal district court  
23 opinion. Def. RJN (Dkt. No. 24), Exs. 1-3. A document “may be incorporated by reference into a  
24 complaint if the plaintiff refers extensively to the document or the document forms the basis of the  
25 plaintiff’s claim. . . . The defendant may offer such a document . . . .” *U.S. v. Ritchie*, 342 F.3d  
26 903, 908 (9th Cir. 2003). The Ninth Circuit has “extended the ‘incorporation by reference’  
27 doctrine to situations in which the plaintiff’s claim depends on the contents of a document, the  
28 defendant attaches the document to its motion to dismiss, and the parties do not dispute the  
authenticity of the document, even though the plaintiff does not explicitly allege the contents of  
that document in the complaint.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (citations  
omitted). Further, a court can “take notice of proceedings in other courts, both within and without  
the federal judicial system, if those proceedings have a direct relation to matters at issue.” *U.S. ex*  
*rel. Robinson Ranchiera Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)  
(internal citations omitted). The Court finds these items appropriate for its consideration, and, in  
the absence of any opposition, GRANTS BCU’s request.

1 overdraft service. Compl. ¶ 22. She alleges that on January 16, 2016, she had a positive account  
2 balance of \$347.86 in her checking account. *Id.* ¶ 33. When Ramirez bought something  
3 for \$60.97 with her debit card, BCU assessed an overdraft fee against her account. *Id.* Plaintiff  
4 alleges that this is but one example of an ongoing course of conduct. *See id.* ¶¶ 33, 36.

5 This dispute, and others like it, hinge on how a financial institution calculates  
6 accountholders' account balances when determining whether an overdraft has occurred, and  
7 whether the institution adequately informs accountholders of these overdraft practices. A  
8 checking account has two balances: a "ledger" balance (or "actual" balance), which represents the  
9 official account balance at any given time, and an "available" balance, which represents the funds  
10 immediately available to the accountholder. *See id.* ¶ 24. Sometimes these two balances are the  
11 same, but often they are not. For instance, when an accountholder deposits a check, banks  
12 generally make only a portion of that check available immediately, with the remainder held for a  
13 certain time period while the funds clear. *See id.* The account's ledger balance might reflect the  
14 full amount of the deposit right away, but the available balance would include only a portion of  
15 that check deposit until the check clears. Or, as another example, when an accountholder uses his  
16 or her debit card to make a purchase in a store or online, the merchant might place a "credit hold"  
17 on those funds, with the actual debit against the account occurring one or two days later when the  
18 transaction settles. *See id.* The account's ledger balance would not reflect such a transaction until  
19 it settles, but the available balance would reflect the transaction immediately.

20 Ramirez alleges that, based on the opt-in language in her Membership Enrollment Form,  
21 BCU promised to use a member's ledger balance to determine when an overdraft occurs, when in  
22 actuality, the credit union uses a member's available balance. *Id.* ¶¶ 23-24. As a result, an  
23 accountholder may inadvertently overdraft his or her account by relying on the ledger balance.  
24 Ramirez alleges that by misleading its members in this manner, BCU has violated the EFTA  
25 provisions governing overdrafts and breached the overdraft opt-in contract. Defendant moves to  
26 dismiss the complaint in its entirety for failure to state a claim.

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1 **DISCUSSION**

2 Plaintiff alleges six causes of action: (1) breach of contract; (2) breach of the implied  
3 covenant of good faith and fair dealing; (3) unjust enrichment/restitution; (4) money had and  
4 received; (5) violation of the EFTA (Regulation E); and (6) violation of California’s Unfair  
5 Competition Law. Defendant moves to dismiss the complaint in its entirety. For the reasons set  
6 forth below, the Court GRANTS defendant’s motion in part, DENIES defendant’s motion in part,  
7 and defers ruling on plaintiff’s Unfair Competition claim.

8  
9 **I. Breach of Contract**

10 Plaintiff’s first claim is for breach of contract. Plaintiff alleges that defendant breached the  
11 opt-in agreement by charging overdraft fees based on her available account balance. Defendant  
12 argues that plaintiff’s contract claim is based solely on the opt-in form and ignores the terms of the  
13 Deposit Account Agreement that Ramirez assented to by signing the Membership Enrollment  
14 Form. *See* Mot. (Dkt. No. 23) at 10:5-6. Defendant argues that plaintiff’s contract claim fails  
15 because (1) the Courtesy Payment overdraft opt-in form cannot be read in isolation from the  
16 Deposit Account Agreement, and (2) the Deposit Account Agreement “plainly” states that  
17 overdraft fees will be assessed on a member’s “available balance.”<sup>2</sup> *Id.* at 10:11-15. Plaintiff  
18 counters that her breach of contract claim is based solely on the opt-in form, an entirely separate  
19 contract, and does not incorporate the terms of the Deposit Account Agreement.

20  
21 **A. The Operative Contract**

22 Under California law, when several contracts relating to the same subject matter are  
23 executed by the same parties, they are generally considered together as if contained in a single  
24 document.<sup>3</sup> *Versaci v. Superior Court*, 127 Cal. App. 4th 805, 814 (4th Dist. 2005) (citation

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26 \_\_\_\_\_  
<sup>2</sup> Defense counsel conceded at oral argument that nowhere in the Deposit Account Agreement is “available balance” defined.

27  
28 <sup>3</sup> Defendant argues that Illinois law applies to plaintiff’s state law claims because of a choice-of-law provision contained in the Deposit Account Agreement. The Deposit Account Agreement states that “membership, accounts and services are . . . governed by the applicable law

1 omitted); *see also* Cal. Civ. Code § 1642 (“Several contracts relating to the same matters, between  
2 the same parties, and made as parts of substantially one transaction, are to be taken together.”).  
3 While the contract need not explicitly state that it incorporates another document, the reference  
4 must be “clear and unequivocal.” *Versaci*, 127 Cal. App. 4th at 814 (quoting *Shaw v. Regents of*  
5 *Univ. of Cal.*, 58 Cal. App. 4th 44, 54 (1997)). Illinois law is in accord. In Illinois, “where  
6 different instruments are executed together as part of one transaction or agreement, they are to be  
7 read together and construed as constituting but a single instrument.” *Pecora v. Szabo*, 94 Ill. App.  
8 3d 57, 63 (2d Dist. 1981) (citation omitted).

9 Plaintiff argues that the opt-in form is a standalone agreement, and must be analyzed in  
10 isolation. While other district courts have found that the federally mandated opt-in form is a  
11 contract, on these facts, the Court sees no compelling reason to construe the agreements  
12 separately. *See Chambers v. NASA Fed. Credit Union*, No. 15-02013-JDB, 2016 WL 6155930  
13 (D.D.C. Oct. 21, 2016). In *Chambers*, for example, the court agreed that a similar “federally  
14 required [overdraft] opt-in agreement [was] itself a contract.” *Id.* at \*5. However, the court gave  
15 no indication that the opt-in agreement was to be read in isolation. Indeed, the court analyzed both  
16 the opt-in agreement and the plaintiff’s account agreement, ultimately dismissing the plaintiff’s  
17 breach of contract claim because “the relevant agreements unambiguously convey that the Credit  
18 Union will impose overdraft fees on debit transactions that overdraw the available balance.” *Id.*  
19 at \*7 (emphasis in original).

20 For purposes of plaintiff’s breach of contract claim, based on the allegations in the  
21 complaint, the Court finds that the opt-in form must be construed together with the Deposit  
22 Account Agreement. Plaintiff’s complaint focuses on the opt-in form as an independent  
23 agreement and makes no mention of the Deposit Account Agreement. However, plaintiff signed  
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25 of the state in which the branch or service center where you opened your account is located, or if  
26 you opened your account by mail, or our services that can be accessed online, the law of the State  
27 of Illinois . . . .” Def. RJN, Ex. 2 at 22-23. Plaintiff applies California law, arguing that because  
28 her claim focuses on the opt-in form as a distinct agreement, the Illinois choice-of-law provision  
does not apply. Opp’n at 28 n.6. The Court defers ruling on the choice-of-law issue at this time  
because, although it appears she did so online, the Court does not know how or where plaintiff  
opened her account.

1 the Membership Enrollment Form directly beneath the Courtesy Payment opt-in provision. The  
2 form states that “[b]y signing below you acknowledge that you have received and agreed to the  
3 terms and conditions contained on both sides of this form and in the Deposit Account Agreement,  
4 which includes Truth-in-Savings and Fee disclosures . . . .” Def. RJN, Ex. 1 at 4. Plaintiff pleads  
5 no facts regarding the Deposit Account Agreement or her execution of the Membership  
6 Enrollment Form. On these facts, the Court is left only with an executed enrollment form that  
7 expressly incorporates the terms of the Deposit Account Agreement. Accordingly, as pled, BCU’s  
8 opt-in form must be read in conjunction with its Deposit Account Agreement in order to fully  
9 comprehend the terms of the Courtesy Payment service.

10 **B. Breach of Contract**

11 The elements of a breach of contract claim under California and Illinois law are the same.  
12 The elements of a cause of action for breach of contract in either state are: (1) the existence of a  
13 valid contract; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach;  
14 and (4) resulting damages to the plaintiff. *See Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811,  
15 821 (2011); *accord Catania v. Local 4250/5050 of Communications Workers of Am.*, 359 Ill. App.  
16 3d 718, 724 (1st Dist. 2005).

17 Defendant argues that the Court should dismiss plaintiff’s breach of contract claim  
18 because, under the Deposit Account Agreement, it committed no breach. Mot. at 13-15. Plaintiff  
19 briefly argues that, even reading the opt-in form and account agreement together, the two do not  
20 adequately explain what a customer’s “available balance” is with respect to overdrafts. Opp’n  
21 (Dkt. No. 27) at 24-25. However, plaintiff’s complaint, the operative document at this stage,  
22 makes no allegations regarding the sufficiency of the Deposit Account Agreement with respect to  
23 overdrafts. Plaintiff has not adequately alleged a breach of the parties’ contract, which consists of  
24 the Membership Enrollment Form (including the opt-in form) and the Deposit Account  
25 Agreement. The Court makes no findings at this stage regarding the purported ambiguity (or lack  
26 thereof) of the Deposit Account Agreement as read in conjunction with the overdraft opt-in form.  
27 Accordingly, the Court DISMISSES plaintiff’s breach of contract claim, with leave to amend.  
28

1     **II. Breach of Covenant of Good Faith and Fair Dealing**

2             Plaintiff’s second cause of action alleges that BCU breached the implied covenant of good  
3 faith and fair dealing when BCU assessed overdraft fees while there was a sufficient ledger  
4 balance to cover the transaction, failed to provide an accurate description of its overdraft program  
5 for nonrecurring debit and ATM transactions, and failed to give customers an informed choice as  
6 to whether to opt in to the overdraft program for ATM and nonrecurring debit card transactions.  
7 Compl. ¶ 65. BCU argues that this claim should be dismissed because the covenant is not an  
8 independent cause of action under Illinois law. Mot. at 26:11-13.

9             “[W]hile Illinois contracts contain an implied obligation to act in good faith, this  
10 obligation does not provide a party with a separate, independent cause of action.” *Belsky v. Field*  
11 *Imports, Inc.*, No. 13 C 1758, 2013 WL 5819232, at \*6 (N.D. Ill. Oct. 29, 2013); *see also Zeidler*  
12 *v. A & W Rests., Inc.*, 301 F.3d 572, 575 (7th Cir. 2002) (“[W]e note that the district court  
13 correctly dismissed on the pleadings [plaintiffs’] remaining claim that [defendant] breached an  
14 independent covenant of good faith and fair dealing. The covenant is only an aid to interpretation,  
15 not a source of contractual duties or liability under Illinois law.”). Similarly, California law  
16 implies a covenant of good faith and fair dealing in every contract. *Waller v. Truck Ins. Exch.,*  
17 *Inc.*, 11 Cal. 4th 1 (1995). “The implied covenant imposes certain obligations on contracting  
18 parties as a matter of law—specifically, that they will discharge their contractual obligations fairly  
19 and in good faith.” *Mundy v. Household Fin. Corp.*, 885 F.2d 542, 544 (9th Cir. 1989). A key  
20 purpose of the covenant is “to prevent one contracting party from unfairly frustrating the other  
21 party’s right to receive the *benefits of the agreement actually made*. [Citation]. The covenant thus  
22 cannot be endowed with an existence independent of its contractual underpinnings.” *Guz v.*  
23 *Bechtel Nat’l, Inc.*, 24 Cal. 4th 317, 349 (2000) (emphasis in original) (internal citations and  
24 quotation marks omitted).

25             As set forth above, plaintiff has failed to state a claim for breach of contract. Plaintiff’s  
26 claim for breach of the implied covenant of good faith and fair dealing simply restates similar  
27 allegations to her breach of contract claim. *See, e.g., Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*,  
28 222 Cal. App. 3d 1371, 1394 (2d Dist. 1990) (citation and internal quotation marks omitted) (“A

1 breach of the implied covenant of good faith and fair dealing involves something beyond breach of  
2 the contractual duty itself . . . .”). Plaintiff’s allegations of bad faith on the part of BCU are  
3 conclusory. *See* Compl. ¶ 65. As such, plaintiff fails to state a claim for breach of the implied  
4 covenant of good faith and fair dealing. The Court GRANTS defendant’s motion to dismiss  
5 plaintiff’s second cause of action, with leave to amend.

6  
7 **III. Unjust Enrichment**

8 Plaintiff’s third cause of action is for unjust enrichment. Plaintiff alleges that BCU  
9 assessed erroneous overdraft fees, and that she thus conferred an undeserved benefit on BCU.  
10 Compl. ¶ 70. Defendant counters that plaintiff’s claim should be dismissed because plaintiff  
11 cannot bring an unjust enrichment claim where the parties have an enforceable express contract.  
12 Mot. at 27:1-3.

13 In both California and Illinois, the theory of unjust enrichment is inapplicable where there  
14 is an enforceable contract. “Unjust enrichment is ‘not a cause of action . . . or even a remedy, but  
15 rather a principle, underlying various legal doctrines and remedies. It is synonymous with  
16 restitution.’” *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (1st Dist. 2004) (citing *Melchior*  
17 *v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003)). “Thus, unjust enrichment is not a  
18 stand-alone claim under California law; it is a fall-back theory that would come into play only in  
19 the event of a finding of liability on some other non-contractual claim.” *Vicuna v. Alexia Foods,*  
20 *Inc.*, No. C 11–6119 PJH, 2012 WL 1497507, at \*3 (N.D. Cal. Apr. 27, 2012). Similarly, in  
21 Illinois, “[o]rdinarily, the remedy of unjust enrichment based on a quasi-contract is not available  
22 when an express contract exists concerning the same subject matter.” *C. Szabo Contracting, Inc.*  
23 *v. Lorig Constr. Co.*, 19 N.E.3d 638, 645 (Ill. App. Ct. 2014). The theory of unjust enrichment “is  
24 inapplicable when an express contract, oral or written, governs the parties’ relationship.” *Chicago*  
25 *Title Ins. Co. v. Teachers’ Retirement System of State of Ill.*, 7 N.E.3d 19, 24 (Ill. App. 2014).  
26 “However, while a claim for restitution is inconsistent and incompatible with a related claim for  
27 breach of contract or a claim in tort, at the pleading stage, a plaintiff is allowed to assert  
28 inconsistent theories of recovery.” *Vicuna*, 2012 WL 1497507, at \*3; *but see Guinn v. Hoskins*

1 *Chevrolet*, 361 Ill. App. 3d 575, 604 (1st Dist. 2005) (citation and internal quotation marks  
2 omitted) (“[W]hile a plaintiff may plead breach of contract in one count and unjust enrichment [in  
3 another], it may not include allegations of an express contract which governs the relationship of  
4 the parties, in the count[] for unjust enrichment.”).

5 At the pleading stage, plaintiff’s unjust enrichment claim is an alternative theory of  
6 recovery to her breach of contract claim. *See Rutherford Holdings, LLC v. Plaza Del Ray*, 223  
7 Cal. App. 4th 221, 231 (6th Dist. 2014). However, throughout plaintiff’s complaint, she refers to  
8 the “Opt-in Agreement” as a binding agreement, the terms of which govern the bank’s assessment  
9 of overdraft fees. In her unjust enrichment claim, Ramirez references the practice of unfair or  
10 inadequate overdraft disclosures. Further, Ramirez incorporates all preceding allegations in this  
11 claim, which include her theory that the parties had a valid contract and that BCU violated the  
12 agreement. Dismissal of this count is appropriate. *See Guinn*, 361 Ill. App. at 604-05.  
13 Accordingly, the Court GRANTS defendant’s motion to dismiss plaintiff’s third cause of action,  
14 with leave to amend.

15 **IV. Money Had and Received**

16 Plaintiff’s fourth cause of action is for money had and received. Plaintiff alleges that  
17 defendant has in its possession money which, in equity, belongs to plaintiff and other class  
18 members and should be refunded. Compl. ¶ 73. Defendant counters that plaintiff’s claim for  
19 money had and received should be dismissed because it rises and falls with plaintiff’s specific  
20 causes of action. Mot. at 27:16-17.

21 In California, “[a]n action for money had and received aims to recover money paid on a  
22 contract whose consideration has failed.” *Bhari Info. Tech. Sys. Pvt., Ltd. v. Allied Boston Bank*  
23 *Inc.*, No. C 05-01223 SI, 2005 WL 3481473, at \*4 (N.D. Cal. Dec. 20, 2005) (citing *Bank of Am.*  
24 *Nat’l Trust and Savings Ass’n v. Hayden*, 231 F.2d 595, 601 (9th Cir. 1956)). “The elements of a  
25 claim for money had and received in California are: (1) the defendant received money that was  
26 intended to be used for the benefit of the plaintiff; (2) the money was not used for the benefit of  
27 the plaintiff; and (3) the defendant has not given the money to the plaintiff.” *Gilbert v. Chase*  
28

1 *Home Fin. LLC*, No. 13-265-AWI, 2013 WL 3968229, at \*8 (E.D. Cal. Jul. 31, 2013) (citations  
2 omitted).

3 To state a claim for money had and received under Illinois law, the plaintiff must plausibly  
4 allege that BCU “received money which in equity and good conscience belongs to the plaintiff.”  
5 *Kaiser v. Fleming*, 315 Ill. App. 3d 921, 925 (2000). “A money had and received claim is an  
6 equitable action and is similar to a claim for unjust enrichment.” *Bueker v. Madison County*, 61  
7 N.E.3d 237, 256 (Ill. App. Ct. 2016). In order to state a claim for money had and received in  
8 Illinois, a plaintiff must allege that (1) she was compelled to pay money to the defendant, (2) the  
9 defendant had no legal right to demand the money, and (3) payment was necessary in order to  
10 avoid an injury to her business, person or property. *Peterson v. O’Neill*, 255 Ill. App. 400, 402  
11 (1930).

12 Although the law in California and Illinois differs with respect to this cause of action,  
13 plaintiff has failed to properly plead this claim under either state’s law. Accordingly, the Court  
14 GRANTS defendant’s motion to dismiss plaintiff’s fourth cause of action, with leave to amend.

15  
16 **V. Violation of the EFTA (Regulation E)**

17 Plaintiff’s fifth claim is for damages under the Electronic Fund Transfer Act (“EFTA”), 15  
18 U.S.C.A. § 1693m. Plaintiff alleges that BCU violated Regulation E of the EFTA, 12 C.F.R.  
19 § 1005.17, which governs how financial institutions obtain an accountholder’s consent to charge  
20 overdraft fees on ATM and nonrecurring debit card transactions. Compl. ¶¶ 78-79. Plaintiff  
21 alleges that BCU’s opt-in form insufficiently describes its overdraft policy by merely stating that  
22 “[a]n overdraft occurs when you do not have enough money in your account to cover a  
23 transaction, but we pay it anyway.” *See id.* (emphasis in original). In plaintiff’s view, the form  
24 describes overdrafts assessed based on an accountholder’s ledger balance, rather than his or her  
25 available balance. *Id.* Defendant counters that BCU’s opt-in form fully complies with  
26 Regulation E’s requirements, using language virtually identical to the model form contained in  
27 Regulation E. Mot. at 15:24-27.

28 In order to assess overdraft charges on ATM or nonrecurring debit card transactions,

1 Regulation E requires financial institutions to, among other things: (1) “[p]rovide[] the consumer  
2 with a notice in writing, or if the consumer agrees, electronically, segregated from all other  
3 information, describing the institution’s overdraft service”; (2) “[p]rovide[] a reasonable  
4 opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-  
5 time debit card transactions”; and (3) “[o]btain[] the consumer’s affirmative consent, or opt-in, to  
6 the institution’s payment of ATM or one-time debit card transactions[.]” 12 C.F.R. § 1005.17(b).  
7 If a financial institution does not obtain affirmative consent that meets all the requirements of  
8 Regulation E’s opt-in rule, then it is not permitted to charge overdraft fees on ATM and one-time  
9 debit card transactions. *Id.*

10 Regulation E further provides guidance for the content and form of the mandatory opt-in  
11 notice. *See* 12 C.F.R. § 1005.17(d). Opt-in notices “shall be substantially similar to” the model  
12 form provided in Appendix A to Regulation E. *Id.*; *see also id.*, Ch. X, Pt. 1005, App’x A. The  
13 opt-in notice must include the following information:

14 (1) Overdraft service. A brief description of the financial  
15 institution’s overdraft service and the types of transactions for which  
16 a fee or charge for paying an overdraft may be imposed, including  
ATM and one-time debit card transactions.

17 (2) Fees imposed. The dollar amount of any fees or charges  
18 assessed by the financial institution for paying an ATM or one-time  
19 debit card transaction pursuant to the institution’s overdraft service,  
20 including any daily or other overdraft fees. If the amount of the fee  
is determined on the basis of the number of times the consumer has  
overdrawn the account, the amount of the overdraft, or other factors,  
the institution must disclose the maximum fee that may be imposed.

21 (3) Limits on fees charged. The maximum number of  
22 overdraft fees or charges that may be assessed per day, or, if  
applicable, that there is no limit.

23 (4) Disclosure of opt-in right. An explanation of the  
24 consumer’s right to affirmatively consent to the financial  
25 institution’s payment of overdrafts for ATM and one-time debit card  
transactions pursuant to the institution’s overdraft service, including  
the methods by which the consumer may consent to the service; and

26 (5) Alternative plans for covering overdrafts. If the  
27 institution offers a line of credit subject to Regulation Z (12 CFR  
28 part 1026) or a service that transfers funds from another account of  
the consumer held at the institution to cover overdrafts, the  
institution must state that fact. An institution may, but is not  
required to, list additional alternatives for the payment of overdrafts.

1 12 C.F.R. § 1005.17(d).

2 Plaintiff contends that BCU violated Regulation E by failing to properly describe its  
3 overdraft service. *See id.* § 1005.17(d)(1); Compl. ¶¶ 78-79. BCU argues that it fully complied  
4 with Regulation E by using the model form almost verbatim, and that it is therefore protected by  
5 the EFTA safe harbor provision, 15 U.S.C. § 1693m(d)(2). Mot. at 15. BCU further argues that  
6 when construing the opt-in form together with the Deposit Account Agreement, BCU adequately  
7 described its overdraft service. *Id.* at 16.

8 First, defendant may not rely on the safe harbor provision under 15 U.S.C. § 1693m(d)(2).  
9 Section 1693m provides a safe harbor for “any failure to make disclosure in proper form if a  
10 financial institution utilized an appropriate model clause issued by the [Consumer Financial  
11 Protection] Bureau or the [Federal Reserve] Board[.]” 15 U.S.C. § 1693m(d)(2). However,  
12 plaintiff does not allege that BCU failed to disclose its Courtesy Payment service in the “proper  
13 form”; plaintiff alleges that BCU’s opt-in form does not contain the proper content. *See Pinkston-*  
14 *Poling v. Advia Credit Union*, No. 15-cv-1208-GJQ, 2016 WL 7473309, at \*3 (W.D. Mich.  
15 Dec. 29, 2016) (“[B]ecause [plaintiff] complains about the accuracy of the Opt-in Agreement’s  
16 description of [defendant’s] overdraft service, *i.e.*, its content or substance, and not the form of the  
17 notice, the safe harbor provision does not bar [plaintiff’s] EFTA claim.”); *see also Berenson v.*  
18 *Nat’l Fin. Servs., LLC*, 403 F. Supp. 2d 133, 151 (D. Mass. 2005) (“[T]he statutory language [of  
19 the safe harbor provision] suggests that this defense insulates an institution from a challenge as to  
20 the form—not the adequacy—of the disclosure.”).

21 Second, in this instance, the Court will not construe the opt-in form in conjunction with the  
22 Deposit Account Agreement. Regulation E specifically governs the requirements of the opt-in  
23 form on its own, and plaintiff has properly alleged that BCU’s opt-in form is facially deficient.  
24 Plaintiff has stated a claim under the EFTA, 15 U.S.C. § 1693m, because she properly alleges that  
25 BCU’s opt-in form does not adequately “descri[be] . . . the financial institution’s overdraft  
26 service[.]” 12 C.F.R. § 1005.17(b)(1)(i), (d)(1). An applicant might not know from reading the  
27 opt-in form that BCU assesses overdrafts based on an account’s available balance, as opposed to  
28 its ledger balance.

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Accordingly, the Court DENIES defendant’s motion to dismiss plaintiff’s EFTA claim.

**VI. California Unfair Competition Law**

Plaintiff’s sixth and final cause of action is for violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Profs. Code § 17200, *et seq.* Plaintiff’s UCL claim stems from the same course of conduct. She alleges that BCU unfairly assessed overdraft fees despite her account’s sufficient ledger balance and BCU failed to provide members with accurate information regarding its overdraft practices. Compl. ¶ 84.

The Court defers ruling on this cause of action because, at this time, it is not clear whether California or Illinois law governs plaintiff’s claims in this case. If Illinois law does indeed govern this dispute, then plaintiff cannot state a claim under the UCL. In plaintiff’s amended complaint, she must allege facts from which this Court can determine whether California or Illinois law controls.

**CONCLUSION**

For the foregoing reasons, the Court rules as follows:

Defendant’s motion to dismiss plaintiff’s first cause of action for breach of contract is GRANTED, with leave to amend.

Defendant’s motion to dismiss plaintiff’s second cause of action for breach of the implied covenant of good faith and fair dealing is GRANTED, with leave to amend.

Defendant’s motion to dismiss plaintiff’s third cause of action for unjust enrichment is GRANTED, with leave to amend.

Defendant’s motion to dismiss plaintiff’s fourth cause of action for money had and received is GRANTED, with leave to amend.

Defendant’s motion to dismiss plaintiff’s fifth cause of action for violation of the EFTA is DENIED.

The Court defers ruling on defendant’s motion to dismiss plaintiff’s sixth cause of action for violation of California’s Unfair Competition Law.

**If she wishes to amend her complaint in accordance with this order, plaintiff must file**

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**her amended complaint no later than January 27, 2017.**

This order resolves Dkt. No. 23.

**IT IS SO ORDERED.**

Dated: January 12, 2017



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SUSAN ILLSTON  
United States District Judge