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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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TONYA GUNTER, individually, and on  
behalf of all others similarly situated,

Plaintiff,

v.

UNITED FEDERAL CREDIT UNION,  
DOES 1-5 inclusive and ROE  
CORPORATIONS 6-10 inclusive,

Defendants.

Case No. 3:15-cv-00483-MMD-WGC

ORDER

(Def.'s Motion to Dismiss — dkt. no. 25)

**I. SUMMARY**

Plaintiff Tonya Gunter (“Gunter”) filed a class action suit against defendant United Federal Credit Union (“UFCU”) alleging that the credit union had breached contracts and violated state law through its practice of charging overdraft fees to customers. (ECF No. 1.) UFCU moved to dismiss Gunter’s complaint (ECF No. 18), and Gunter filed an amended complaint asserting a breach of contract claim and a claim for violation of the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693 *et seq.* (“EFTA” or “the Act”) (ECF No. 24.) UFCU now moves for dismissal of Gunter’s amended complaint for failure to state a claim. (ECF No. 25 (“Motion”).)

The Court has reviewed Gunter’s response (ECF No. 31) and UFCU’s reply (ECF No. 33).<sup>1</sup> The Court also heard oral argument on May 16, 2016. (ECF. No. 52.) For the reasons discussed below, UFCU’s Motion is denied.

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<sup>1</sup>Gunter also filed a Notice of New Authority in support of her opposition to UFCU’s Motion. (ECF No. 56.) UFCU objects to Gunter’s Notice of New Authority as a violation of the local rules and requests it be stricken. (ECF No. 57.) LR 7-2(g) prohibits (*fn. cont...*)

1 **II. BACKGROUND**

2 The case centers on a dispute over overdraft fees. Gunter is a customer of UFCU,  
3 where she maintains a checking and savings account. (ECF No. 24 at 3.) UFCU offers,  
4 and Gunter uses, a debit card connected to her checking account. (*Id.* at 4.) UFCU also  
5 provides a service called Courtesy Pay, wherein the credit union will cover some  
6 purchases even though a customer does not have enough funds in her account to pay  
7 for an item. The credit union then charges the customer an overdraft fee. (*Id.* at 6.) The  
8 details of Courtesy Pay are laid out in an agreement which the parties refer to as the  
9 Account Agreement. (ECF No. 24-1.) Pursuant to a federal regulation, UFCU also sent  
10 its customers a document the parties refer to as the Opt-In Agreement, which describes  
11 Courtesy Pay and requires customers to choose whether or not to enroll in the service.  
12 (ECF No. 24-2.)

13 The parties dispute the terms of the Account Agreement underlying Courtesy Pay,  
14 specifically the method by which the credit union assesses whether a customer has the  
15 available funds to pay for purchase. Gunter alleges that the Account Agreement means  
16 UFCU may only assess overdraft fees if the customer’s actual or ledger balance is too  
17 low to cover a purchase, but in practice UFCU uses an “artificial internal calculation” and  
18 charges fees even if customers have available funds. (*Id.* at 7.) UFCU argues that the  
19 Account Agreement allows it to “determine the amount of available funds” in a  
20 customer’s account in order to determine how to apply Courtesy Pay, and that its  
21 method, which accounts for pending transactions, is an appropriate and accurate  
22 method for determining the amount of money in a customer’s account. (ECF No. 25 at 6;  
23 ECF No. 33 at 3-4.)

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(...*fn. cont.*)

27 supplemental filings, including supplemental authorities, without leave of court. This is  
28 the second time Gunter has failed to comply with the local rules. UFCU’s request to  
strike ECF No. 56 is granted.

1     **III.     LEGAL STANDARD**

2             A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which  
3 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide  
4 “a short and plain statement of the claim showing that the pleader is entitled to relief.”  
5 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While  
6 Rule 8 does not require detailed factual allegations, it demands more than “labels and  
7 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v.*  
8 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).  
9 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550  
10 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient  
11 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at  
12 678 (internal citation omitted).

13             In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to  
14 apply when considering motions to dismiss. First, a district court must accept as true all  
15 well-pled factual allegations in the complaint; however, legal conclusions are not entitled  
16 to the assumption of truth. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a  
17 cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.  
18 Second, a district court must consider whether the factual allegations in the complaint  
19 allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the  
20 plaintiff’s complaint alleges facts that allow a court to draw a reasonable inference that  
21 the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does  
22 not permit the court to infer more than the mere possibility of misconduct, the complaint  
23 has “alleged — but not shown — that the pleader is entitled to relief.” *Id.* at 679 (internal  
24 quotation marks omitted). When the claims in a complaint have not crossed the line from  
25 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

26             A complaint must contain either direct or inferential allegations concerning “all the  
27 material elements necessary to sustain recovery under *some* viable legal theory.”

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1 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,  
2 1106 (7th Cir. 1989) (emphasis in original)).

#### 3 **IV. DISCUSSION**

##### 4 **A. Breach of Contract**

5 In her first cause of action, Gunter seeks to assert a claim for breach of contract  
6 or in the alternative for a breach of the implied covenant of good faith and fair dealing. A  
7 plaintiff asserting a breach of contract claim under Nevada law must allege the following  
8 elements: (1) the formation of a valid contract; (2) performance or excuse of  
9 performance by the plaintiff; (3) material breach by the defendant; and (4) damages.  
10 *Bernard v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev.1987). “An implied covenant of  
11 good faith and fair dealing exists in every Nevada contract and essentially forbids  
12 arbitrary, unfair acts by one party that disadvantage the other.” *Frantz v. Johnson*, 999  
13 P.2d 351, 362 n. 4 (Nev. 2000). A breach of the covenant arises “where the terms of a  
14 contract are literally complied with but one party to the contract deliberately  
15 countervenes the intention and spirit of the contract.” *Hilton Hotels Corp. v. Butch Lewis*  
16 *Prods., Inc.*, P.2d 919, 923 (Nev.1991).

17 In the absence of ambiguity, contract interpretation is an issue of law for the court,  
18 and may be decided on a motion to dismiss. *P.J. Maffei Bldg. Wrecking Corp. v. United*  
19 *States*, 732 F.2d 913, 916 (Fed.Cir.1984). A contract term is ambiguous if it is  
20 “reasonably susceptible to more than one interpretation.” *Shelton v. Shelton*, 78 P.3d  
21 507, 510 (Nev.2003).

22 Gunter alleges that she entered into a contract with UFCU governed by the  
23 Account Agreement and the Opt-In Agreement. (ECF. No. 24 at 7.) She further alleges  
24 that she has been improperly assessed overdraft fees in violation of the terms of those  
25 agreements. Specifically, she alleges on July 23, 2015, UFCU charged her eight  
26 overdraft fees of \$30 each, even though she had sufficient funds in her account to cover  
27 all of her transactions. (*Id.* at 8.)

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1           UFCU argues that the express terms of the contract in this case are clear and it  
2 has abided by them. (ECF No. 25 at 6.) In other words, UFCU argues that Gunter has  
3 not alleged any behavior that would, even if taken as true, amount to a breach of  
4 contract.

5           The Account Agreement states that UFCU may, at their discretion “honor  
6 withdrawal requests that overdraw [a customer’s] account,” and “charge fees for  
7 overdrafts.” (ECF No. 24-1 at 5.) The Agreement goes on to describe Courtesy Pay as “a  
8 service that allows [UFCU] to pay an item presented for payment against your checking  
9 account even if it causes the account to become overdrawn.” (*Id.* at 7.) In a different  
10 portion of the Agreement, which UFCU points to in support of its argument, the credit  
11 union retains the right to “determine the amount of available funds in [a customer’s]  
12 account for the purpose of deciding whether to return an item for insufficient funds at any  
13 time between the time [UFCU] receive[s] the item and when [UFCU] return[s] the item or  
14 send a notice in lieu of return.” (*Id.* at 5).

15           This language does not address how the credit union determines when an  
16 overdraft has occurred vis a vis the available funds in a customer’s account. While  
17 UFCU is correct in arguing that the Court may dismiss a breach claim if a plaintiff’s  
18 allegations are directly refuted by the express terms of a contract, that is not the case  
19 here. The Account Agreement is ambiguous on this point, and Gunter has offered a  
20 plausible interpretation. She has therefore alleged each element of a properly plead  
21 breach of contract claim. UFCU’s Motion does not address Gunter’s alternative claim for  
22 breach of the implied covenant of good faith and fair dealing. Therefore UFCU’s Motion  
23 is denied in regards to Gunter’s first cause of action.

24           However, as noted at oral argument, Gunter has not alleged that she was a party  
25 to the Opt-In agreement. To the extent she seeks to rely on the Opt-In Agreement in  
26 showing a breach, the complaint is insufficient. Therefore the Court will grant Gunter  
27 leave to amend, if she so chooses, to include allegations that Gunter was a party to both  
28 the Account Agreement and the Opt-In Agreement.

1           **B.     Electronic Fund Transfer Act**

2           The EFTA “provide[s] a basic framework establishing the rights, liabilities and  
3 responsibilities of the participants” in electronic banking. 15 U.S.C. § 1693. The EFTA  
4 also charges the Federal Reserve Board with devising rules to carry out the purposes of  
5 the Act. 15 U.S.C. § 1693b. One such rule, 12 C.F.R. §1005.17, requires a “brief  
6 description of the financial institution’s overdraft service and the types of transactions for  
7 which a fee or charge for paying an overdraft may be imposed, including ATM and  
8 onetime debit card transactions.” 12 C.F.R. § 1005.17(d)(1). 15 U.S.C. § 1693m imposes  
9 civil liability on any person who fails to comply with the provisions of the EFTA.

10           Gunter’s second cause of action alleges that UFCU failed to comply with 12  
11 C.F.R. § 1005.17 because it did not “truthfully and accurately provide the conditions  
12 under which an overdraft fee” would be assessed. (ECF No. 24 at 14.)

13           This second claim turns on the same dispute as Gunter’s breach of contract  
14 claim, namely that UFCU’s method of calculating funds in order to determine whether an  
15 overdraft occurred is inconsistent with the conditions described in its Account Agreement  
16 and Opt-In Agreement. UFCU argues that the Opt-In form accurately describes its policy  
17 and practice, while Gunter argues that it does not.

18           As discussed above, the means of determining whether a customer overdrew her  
19 account is not clearly defined in the Account Agreement. The Opt-In Agreement  
20 describes an overdraft as a situation wherein the credit union pays even though the  
21 customer “do[es] not have enough money in [their] account to cover” the transaction.  
22 (ECF No. 24-2.) This language is similarly ambiguous in regards to how the credit union  
23 determines whether there is enough money in a customer’s account. Therefore, if  
24 Gunter’s proposed interpretation of the Account Agreement is correct, she may also be  
25 correct in arguing that UFCU did not provide an accurate description of its overdraft  
26 practices in its Opt-In Agreement, as required by 12 C.F.R. § 1005.17.

27           For these reasons, UFCU’s Motion to Dismiss is denied with respect to Gunter’s  
28 second cause of action.


1 **V. CONCLUSION**

2 Accordingly, it is hereby ordered that UFCU's Motion to Dismiss (ECF No. 25) is  
3 denied.

4 It is further ordered that Gunter's Notice of New Authority (ECF No. 56) is  
5 stricken.

6 It is further ordered that Gunter is granted leave to amend her Amended  
7 Complaint (ECF No. 24) to include allegations that she was party to the Opt-In  
8 Agreement, if she so chooses. The Second Amended Complaint must be filed fourteen  
9 (14) days from entry of this order.

10 DATED THIS 22<sup>nd</sup> day of June 2016.

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15 MIRANDA M. DU  
16 UNITED STATES DISTRICT JUDGE  
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