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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

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

(Pl.'s Motion for Class Certification and
Appointment of Counsel – ECF No. 64;
Def.'s Motion for Partial Summary
Judgment – ECF No. 67)

I. SUMMARY

Before the Court is Plaintiff Tonya Gunter's Motion for Class Certification and Appointment of Counsel ("Class Certification Motion") (ECF No. 64) and Defendant United Federal Credit Union's ("United") Motion for Partial Summary Judgment ("Motion") (ECF No. 67). The Court has reviewed these documents as well as the parties' respective responses and replies. (ECF Nos. 69, 80, 81, 84.) Defendant's Motion is denied, and Plaintiff's Class Certification Motion is granted for the reasons discussed below.

II. BACKGROUND

Gunter has a checking account with United, a credit union. Gunter alleges that United charged her overdraft fees when she had sufficient funds in her checking account to cover the transactions. (ECF No. 64 at 7.) Although her actual balance was high enough to cover the transactions, her available balance was not. (*See id.* at 7-8.)

1 United authorizes overdrafts based on the “available balance” of accounts rather
2 than “actual balance.”¹ (See ECF No. 69 at 3.) Actual balance refers to the amount of all
3 funds currently in a client’s account. (*Id.*) Available balance refers to the actual balance
4 less holds, such as debit holds. Debit holds occur when clients use a debit card like a
5 credit card, i.e., by swiping it and signing a receipt. It usually takes a few days for these
6 transactions to post and reduce the actual balance of an account. (See *id.*) In the
7 meantime, the hold renders the amount of the transaction unavailable. The hold does
8 not alter the actual balance. (See *id.*)

9 Gunter contends that United’s practice violates its contractual agreements with its
10 clients and that United failed to properly disclose its practice in violation of federal law.
11 (ECF No. 64 at 8.)

12 Regarding her contractual claim, Gunter argues that United’s practice violates two
13 kinds of contracts that govern United’s relationships with its clients. The first are United’s
14 “account agreements,” contracts that govern the relationship between United and its
15 clients with checking accounts. (See *id.*) Gunter alleges that the account agreements
16 only permit United to authorize overdrafts based on actual balance—not available
17 balance. (See *id.* at 9.) The second are United’s “opt-in agreements,” contracts that
18 permit United to provide overdraft services. (*Id.*) Gunter alleges that the opt-in
19 agreements do not adequately disclose that United will authorize overdrafts based on
20 available (rather than actual) balance. (*Id.* at 10.)

21 As such, Gunter seeks to certify a class (“Positive Balance Class”) consisting of
22 the following individuals to prosecute her breach of contract claim:

23 [T]hose members of [United] who were charged an overdraft fee between
24 October 3, 2011, and the present for a transaction posted by the MISER
25 system when at the time the transaction posted the class member’s actual
balance was equal to or greater than the transaction causing the overdraft.

26 (ECF No. 64 at 18.)

27
28 ¹The parties also use the term “ledger balance” as a synonym for actual balance.

1 Gunter further contends that United failed to adequately disclose its practice
2 pursuant to Regulation E, a federal regulation implementing the Electronic Fund Transfer
3 Act. (ECF No. 64 at 27.) Regulation E requires financial institutions to obtain affirmative
4 consent from clients before authorizing overdrafts. Requirements for Overdraft Services,
5 12 C.F.R. § 1005.17 (2017). Regulation E also prescribes the form and contents of the
6 disclosure financial institutions use to obtain affirmative consent. *Id.* Here, United's
7 disclosure was contained in its opt-in agreement, and Gunter alleges that the opt-in
8 agreement fails to satisfy Regulation E's requirements. (ECF No. 64 at 27.)

9 As such, Gunter seeks to certify a second class (Regulation E Class) consisting of
10 the following individuals to prosecute her Regulation E claim:

11 [T]hose members of [United] who opted in to [United's] debit card overdraft
12 service and were charged an overdraft fee for an ATM or debit card
transaction at any time between August 15, 2010, through the present.

13 (ECF No. 64 at 18-19.)

14 **III. DEFENDANT'S MOTION**

15 **A. LEGAL STANDARD**

16 Summary judgment is appropriate when the pleadings, the discovery and
17 disclosure materials on file, and any affidavits "show that there is no genuine issue as to
18 any material fact and that the moving party is entitled to a judgment as a matter of law."
19 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is genuine "if the evidence
20 is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson*
21 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and a dispute is material if it could
22 affect the outcome of the suit under the governing law. *Id.*

23 Summary judgment is not appropriate when "reasonable minds could differ as to
24 the import of the evidence." *See id.* at 250-51. "The amount of evidence necessary to
25 raise a genuine issue of material fact is [that which is] enough 'to require a jury or judge
26 to resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*,
27 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*,
28 391 U.S. 253, 288-89 (1968)). Decisions granting or denying summary judgment are

1 made in light of the purpose of summary judgment: “to avoid unnecessary trials when
2 there is no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t*
3 *of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).

4 The moving party bears the burden of showing that there are no genuine issues
5 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once
6 the moving party satisfies the requirements of Rule 56, the burden shifts to the party
7 resisting the motion to “set forth specific facts showing that there is a genuine issue for
8 trial.” *Anderson*, 477 U.S. at 256. In evaluating a summary judgment motion, a court
9 views all facts and draws all inferences in the light most favorable to the nonmoving
10 party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008). If a party relies on an affidavit or
11 declaration to support or oppose a motion, it “must be made on personal knowledge, set
12 out facts that would be admissible in evidence, and show that the affiant or declarant is
13 competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4). The nonmoving
14 party “may not rely on denials in the pleadings but must produce specific evidence,
15 through affidavits or admissible discovery material, to show that the dispute exists,” *Bhan*
16 *v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than
17 simply show that there is some metaphysical doubt as to the material facts.” *Orr v. Bank*
18 *of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith*
19 *Radio Corp.*, 475 U.S. 574, 586 (1986)). “The mere existence of a scintilla of evidence in
20 support of the plaintiff’s position will be insufficient” *Anderson*, 477 U.S. at 252.

21 **B. DISCUSSION**

22 United moves for summary judgment on Gunter’s claim that United violated the
23 Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. §§ 1693-1693r (2015). (ECF No. 67 at
24 1.) The EFTA’s implementing regulations require financial institutions to describe the
25 overdraft services they offer and obtain customers’ affirmative consent before
26 authorizing overdrafts. 12 C.F.R. § 1005.17. Gunter argues that United violated the
27 EFTA and its implementing regulations by failing to specify whether United authorized
28 overdrafts based on clients’ actual balance or available balance. (ECF No. 80 at 19.)

1 United argues that it complied with Regulation E's notice requirements and should
2 receive the protection of the EFTA's safe harbor provisions. (ECF No. 67 at 13-14.) The
3 Court disagrees with United.

4 **1. Regulation E**

5 Regulation E, 12 C.F.R. pt. 205 (2017), implements the EFTA, which protects
6 individual consumer rights by providing "a basic framework establishing the rights,
7 liabilities, and responsibilities of participants in electronic fund . . . transfer systems." 15
8 U.S.C. § 1693(b) (2015). The EFTA is a "remedial statute accorded a broad, liberal
9 construction in favor of the consumer." *Bultemeyer v. Fitness All., LLC*, No. CV-12-2619-
10 PHX-LOA, 2014 WL 667585, at *3 (D. Ariz. Feb. 20, 2014) (citing *Clemmer v. Key Bank*
11 *Nat'l Ass'n*, 539 F.3d 349, 350 (6th Cir. 2008)).

12 Regulation E requires financial institutions to obtain affirmative consent from their
13 clients before assessing overdraft charges on ATM or one-time debit card transactions.
14 See 12 C.F.R. § 1005.17(b). To obtain affirmative consent, financial institutions must
15 provide clients with an opt-in notice describing the overdraft service among other things.
16 *Id.* § 1005.17(b)(1)(i)-(iv).

17 The opt-in notice must conform to Regulation E's requirements. *Id.* § 1005.17(d).
18 The opt-in notice must be "substantially similar" to a model form, Model Form A-9. *Id.*;
19 see also *id.* pt. 1005 app. A. The opt-in notice must include *inter alia* a "brief description
20 of the financial institution's overdraft services." *Id.* § 1005.17(d)(1). The notice cannot
21 contain "any information not specified or otherwise permitted by" paragraph (d), which
22 requires and permits the inclusion of certain information not relevant here. *Id.*
23 § 1005.17(d).

24 **2. Safe Harbor**

25 The EFTA imposes civil liability for noncompliance with Regulation E but also
26 contains two safe harbor provisions. See 15 U.S.C. § 1693m (2015). One applies to "any
27 act done . . . in good faith in conformity with any . . . regulation." *Id.* § 1693m(d)(1).
28 Summary judgment cannot be granted under this safe harbor because it requires

1 resolution of a genuine issue of material fact—whether United acted in good faith when it
2 failed to completely disclose the terms of the overdraft service. Neither party has yet
3 addressed whether United acted in good faith in any detail.

4 The other safe harbor applies to “any failure to make disclosure in proper form if a
5 financial institution utilized an appropriate model clause issued by the Bureau or the
6 Board.” *Id.* § 1693m(d)(2). United may not rely on the second safe harbor provision
7 because Gunter does not allege that United failed to make disclosure in “proper form.”
8 Rather, Gunter alleges that United’s opt-in agreement does not contain the proper
9 content. *Ramirez v. Baxter Credit Union*, No. 16-CV-03765-SI, 2017 WL 118859, at *7
10 (N.D. Cal. Jan. 12, 2017); *Pinkston-Poling v. Advia Credit Union*, 227 F. Supp. 3d 848,
11 852 (W.D. Mich. 2016); *see also Berenson v. Nat’l Fin. Servs., LLC*, 403 F. Supp. 2d
12 133, 151 (D. Mass. 2005) (“[T]he statutory language [of the safe harbor provision]
13 suggests that this defense insulates an institution from a challenge as to the form—not
14 the adequacy—of the disclosure.”).

15 United argues that Regulation E precludes additional language that would explain
16 United authorizes overdrafts based on clients’ available balance rather than actual
17 balance. (ECF No. 67 at 15-16.) While it is true that Regulation E prohibits financial
18 institutions from including “any information not specified in or otherwise permitted by”
19 paragraph (d), Regulation E requires the opt-in notice to contain “[a] brief description of
20 the financial institution’s overdraft service and the types of transactions for which a fee or
21 charge for paying an overdraft may be imposed, including ATM and one-time debit card
22 transactions.” 12 C.F.R. § 1005.17(d)(1). United could have explained that it authorizes
23 overdrafts based on available balance rather than actual balance without violating
24 Regulation E because Regulation E expressly requires financial institutions to describe
25 their overdraft services. Presumably that description must be accurate and not
26 misleading. United implicitly contends that it would have faced liability for including such
27 a description because its opt-in agreement must be “substantially similar” to Model Form
28 A-9, *id.* § 1005.17(d), but such a description would not destroy substantial similarity. In

1 fact, such a description would further the purpose of the regulation to help consumers
2 understand the overdraft services their financial institutions offer. Electronic Fund
3 Transfers, 74 Fed. Reg. 59,033, 59,035 (Nov. 17, 2009) (codified at 12 C.F.R.
4 § 1005.17).

5 **IV. PLAINTIFF’S CLASS CERTIFICATION MOTION**

6 **A. LEGAL STANDARD**

7 “The class action is ‘an exception to the usual rule that litigation is conducted by
8 and on behalf of the individual named parties only.’” *Wal-Mart Stores, Inc. v. Dukes*, 564
9 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). The
10 party seeking class certification “must affirmatively demonstrate his compliance with the
11 rule.” *Id.* at 350. “[C]ertification is proper only if the ‘trial court is satisfied, after a rigorous
12 analysis, that the prerequisites of Rule 23(a) have been satisfied.’” *Id.* at 350-51 (quoting
13 *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). The four Rule 23(a)
14 requirements are numerosity, commonality, typicality, and adequacy of representation.
15 *Id.* at 349; Fed. R. Civ. P. 23(a). The party seeking class certification need not
16 demonstrate that there is an administratively feasible means of identifying absent class
17 members.² *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017).

18 “In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class
19 certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”
20 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). “To qualify for certification
21 under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a)
22 prerequisites.” *Id.* at 615. First, “common questions must ‘predominate over any
23 questions affecting only individual members.’” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
24 1022 (9th Cir. 1998) (quoting Fed. R. Civ. P. 23(b)(3)). Second, “class resolution must be
25 ‘superior to other available methods for the fair and efficient adjudication of the
26 controversy.’” *Id.* (quoting Fed. R. Civ. P. 23(b)(3)).

27 ²The parties debate ascertainability in some detail without referencing the Ninth
28 Circuit’s decision in *Briseno*. (ECF No. 69 at 12-15; ECF No. 81 at 11-15.)

1 The moving party must affirmatively demonstrate that he or she meets the above
2 requirements. *Parsons v. Ryan*, 754 F.3d 657, 674 (9th Cir. 2014) (citing *Dukes*, 564
3 U.S. at 350). However, a court should not “‘turn class certification into a mini-trial’ on the
4 merits.” *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015) (quoting *Ellis v.*
5 *Costco Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011)).

6 **B. DISCUSSION**

7 **1. Rule 23(a) Requirements**

8 **a. Numerosity**

9 Rule 23(a)(1) requires that the class be so numerous that joinder of all class
10 members is impracticable. Fed. R. Civ. P. 23(a)(1). “The numerosity requirement
11 requires examination of the specific facts of each case and imposes no absolute
12 limitations.” *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 330 (1980). “Additionally, it is
13 not necessary to state the exact number of class members when the plaintiff’s
14 allegations ‘plainly suffice’ to meet the numerosity requirement.” *In re Cooper*
15 *Companies Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009).

16 The numerosity requirement is satisfied here because United’s Rule 30(b)(6)
17 witness testified that a large number of its clients opted in to its overdraft services.³ (ECF
18 No. 64 at 20.) Even if a small percentage of these clients meet the class criteria, there
19 could easily be hundreds or thousands of class members.

20 **b. Commonality**

21 “[C]ommonality requires that the class members’ claims ‘depend upon a common
22 contention’ such that ‘determination of its truth or falsity will resolve an issue that is
23 central to the validity of each claim in one stroke.’” *Mazza v. Am. Honda Motor Co.*, 666
24 F.3d 581, 588 (9th Cir. 2012) (quoting *Dukes*, 564 U.S. at 350). These common
25 questions may center on “shared legal issues with divergent factual predicates [or] a
26 common core of salient facts coupled with disparate legal remedies.” *Hanlon*, 150 F.3d

27 ³The actual numbers were filed under seal pursuant to the protective order. (ECF
28 No. 50.)

1 at 1019. “[A] class meets Rule 23(a)(2)'s commonality requirement when the common
2 questions it has raised are ‘apt to drive the resolution of the litigation,’ no matter their
3 number.” *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting
4 *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 962 (9th Cir. 2013)).

5 Members of the proposed Positive Balance Class share the same legal questions
6 and predicate facts. All proposed class members were subject to the same contractual
7 language regarding overdraft fees in their account agreements and opt-in agreements.
8 (ECF No. 64 at 21.) Although United clients have been subject to different account
9 agreements over the years, the language regarding overdrafts has remained consistent.
10 (*Id.* at 8 n.2.) And all proposed class members were charged an overdraft fee based on
11 their available balance instead of their actual balance. (See ECF No. 64 at 18.) Thus, all
12 proposed class members share the legal question of whether United breached its
13 contractual obligations regarding overdraft fees when it authorized overdraft fees based
14 on those clients’ available (rather than actual) balance.

15 Members of the proposed Regulation E Class also share the same legal
16 questions and predicate facts. All proposed class members opted in to the overdraft
17 service. (ECF No. 64 at 18.) All proposed class members were charged an overdraft fee
18 even though United failed to properly disclose its method for assessing overdraft fees.
19 (*Id.*) Thus, all proposed class members share the same legal question of whether United
20 violated Regulation E when it failed to disclose its method for assessing overdraft fees.

21 c. Typicality

22 The commonality and typicality requirements, though distinct, tend to merge.
23 *Dukes*, 564 U.S. at 349 n.5. Both requirements aid the court in determining whether
24 maintaining a class is feasible and “whether the named plaintiff’s claim and the class
25 claims are so interrelated that the interests of the class members will be fairly and
26 adequately protected in their absence.” *Id.* The question a court must ask when
27 evaluating typicality is “whether other members have the same or similar injury, whether
28 the action is based on conduct which is not unique to the named plaintiffs, and whether

1 other class members have been injured by the same course of conduct.” *Ellis*, 657 F.3d
2 at 984 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Claims
3 need not be absolutely identical; they need only be “reasonably co-extensive with those
4 of absent class members.” *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036,
5 1042 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1020).

6 United argues that Gunter’s claims are not typical of the proposed Regulation E
7 Class because Gunter has been subject to only two of four different account agreements
8 United has used with its clients. (ECF No. 69 at 7-8.) The four account agreements
9 correspond to the four different database systems United has used with its clients during
10 the relevant time period: Symitar, MISER, Ultradata, and ITI. (*Id.* at 8.) Gunter was
11 subject to the Symitar agreement and later the MISER agreement. (*Id.*) United contends
12 that these account agreements contain different disclosures that lead to different
13 defenses. (*Id.*) United fails, however, to identify these differences or explain how they
14 necessitate different defenses. (*See id.*) Moreover, United’s 30(b)(6) witness has
15 testified that the operative language in the account agreements regarding overdraft
16 services has been consistent throughout the relevant time period. (ECF No. 64 at 8 n.2.)
17 As a result, the Court finds United’s argument unpersuasive.

18 United next argues that Gunter’s claims are not typical of the proposed classes
19 because Gunter signed an account agreement with Clearstar (a credit union
20 subsequently acquired by United) that included a disclosure that fees for overdrawing
21 accounts would be based on clients’ available balance. (ECF No. 69 at 9.) But Gunter’s
22 breach of contract claim remains typical of the Positive Balance Class because she
23 alleges she became subject to the MISER account agreement, an agreement that
24 contained no such disclosure. (*See* ECF No. 81 at 5-6.) Transactions that took place in
25 Symitar pursuant to the Clearstar account agreement are irrelevant to the Positive
26 Balance Class. (*See id.*; ECF No. 64 at 18.) Gunter’s Regulation E claim remains typical
27 of the Regulation E Class because that claim is based on the adequacy of United’s opt-

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1 in agreement. Other agreements are irrelevant to the question of whether United violated
2 Regulation E.⁴

3 United further argues that Gunter's claims are not typical of either proposed class
4 because United has few clients who overdrafted as much as Gunter. (ECF No. 69 at 10.)
5 But Gunter's unusually frequent overdrafts suggest that she has suffered from United's
6 practice more than most—not that her claims are qualitatively different.

7 United additionally argues that Gunter's claims are not typical of the proposed
8 Positive Balance Class because that class excludes former Griffith Savings Bank
9 ("Griffith") account holders as well as Gunter herself. The Positive Balance Class
10 contains "those members of [United] who were charged an overdraft fee between
11 October 3, 2011, and the present for a transaction posted by the MISER system when at
12 the time the transaction posted the class member's actual balance was equal to or
13 greater than the transaction causing the overdraft." (ECF No. 64 at 18.) United argues
14 that Gunter does not fit within this definition because "her account remained on Symitar
15 until the end of January 2012." (ECF No. 69 at 11.) Gunter is a member of the proposed
16 class, though, because she was charged overdraft fees that were posted by the MISER
17 system. "On July 23, 2015, Plaintiff incurred eight overdraft fees of \$30 each for
18 purported overdraft transactions." (ECF No. 60 at ¶ 23.) United processed those
19 transactions in the MISER system because Gunter's account had been transferred from
20 Symitar to MISER at that point. (See ECF No. 69 at 11.) United argues that the former
21 Griffith account holders do not fit the definition of the class because their accounts were
22 on the Fiserve ITI system until May 2012. (ECF No. 69 at 11.) It is true that some former
23 Griffith clients with similar claims to Gunter will not be part of the class. For instance,
24 former Griffith clients who only overdrafted once in April 2012 and never again will not be
25 part of the Positive Balance Class because those transactions would have been posted
26 by ITI instead of MISER. That fact does not defeat the typicality of Gunter's claims,

27 ⁴United argues that the account agreements and opt-in agreements are integrated
28 contracts but fails to identify any language that integrates them. (See ECF No. 69 at 7.)

1 however. Typicality does not require Gunter to seek out and include in her proposed
2 class all individuals who might share her claims. Gunter need only show that her breach
3 of contract claim is typical of the breach of contract claims that could be brought by
4 members of the proposed class as she defines it, which she has done.

5 **d. Adequacy of Counsel**

6 The adequacy of counsel is considered under Rule 23(a)(4) and Rule 23(g). See
7 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122 (9th Cir. 2014) (noting that
8 “named plaintiff’s and class counsel’s ability to fairly and adequately represent unnamed
9 [plaintiffs]” are “critical requirements in federal class actions under Rules 23(a)(4) and
10 (g)”). “Resolution of two questions determines legal adequacy: (1) do the named
11 plaintiffs and their counsel have any conflicts of interest with other class members and
12 (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf
13 of the class?” *Hanlon*, 150 F.3d at 1020.

14 Class counsel assert that they have “significant class action, litigation, and trial
15 experience, are competent, and have been competent in representing the Classes.”
16 (ECF No. 64 at 22.) Class counsel further represent that their firms “have extensive
17 experience in consumer class actions, and in particular, expertise in overdraft fee
18 litigation.” (*Id.*) United does not dispute these assertions, and class counsel has been
19 preliminarily successful in cases similar to this one. *Ramirez v. Baxter Credit Union*, No.
20 16-CV-03765-SI, 2017 WL 118859, at *7 (N.D. Cal. Jan. 12, 2017) (denying in part
21 motion to dismiss with respect to EFTA claim in similar case prosecuted by McCune
22 Wright LLP and The Kick Law Firm among others); *Pinkston-Poling v. Advia Credit*
23 *Union*, 227 F. Supp. 3d 848, 857 (W.D. Mich. 2016) (denying motion to dismiss in similar
24 case prosecuted by McCune Wright LLP and The Kick Law Firm among others);
25 *Chambers v. NASA Fed. Credit Union*, 222 F. Supp. 3d 1, 17 (D.D.C. 2016) (denying in
26 part motion to dismiss in similar case prosecuted by McCune Wright LLP and The Kick
27 Law Firm among others).

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1 The named plaintiff, Tonya Gunter, and her counsel do not appear to have any
2 conflicts of interest with other proposed class members. Gunter's interests are "wholly
3 aligned" with the other proposed class members "because she was charged overdraft
4 fees when [her] account had a positive ledger balance." (ECF No. 64 at 22.) Counsel
5 represents that "[s]he understands that she is pursuing this case on behalf of all Class
6 members similarly situated and understands she has a duty to protect the absent Class
7 members. She has actively participated in the litigation by frequently conferring with
8 class counsel about the case and its status, assisting class counsel by gathering
9 documents and other information, responding to written discovery, and being prepared
10 and willing to testify at deposition and trial on behalf of the Class if necessary." (ECF No.
11 64 at 22.) Counsel's interest appears to be aligned with the class given their pursuit of
12 these kinds of lawsuits in other forums. United does not dispute these assertions.

13 2. Rule 23(b) Requirements

14 Plaintiff seeks to satisfy the third prong of Rule 23(b). Under that provision, a
15 class action may be maintained if Rule 23(a) is satisfied and "the court finds that the
16 questions of law or fact common to class members predominate over any questions
17 affecting only individual members, and that a class action is superior to other available
18 methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).
19 Matters pertinent to these findings including "the class members' interests in individually
20 controlling the prosecution or defense of separate actions; the extent and nature of any
21 litigation concerning the controversy already begun by or against class members; the
22 desirability or undesirability of concentrating the litigation of the claims in the particular
23 forum; and the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)-
24 (D).

25 a. Predominance

26 The predominance requirement is satisfied "[w]hen common questions present a
27 *significant aspect of the case* and they can be resolved for all members of the class in a
28 single adjudication" *Hanlon*, 150 F.3d at 1022.

1 The legal question presented by the proposed Positive Balance Class—whether
2 United breached its contractual agreements—predominates over any individual
3 characteristics of the proposed class members. The individual issue of which account
4 agreement the proposed class members signed is immaterial as all proposed class
5 members were subject to the same contractual language regarding overdraft fees in their
6 account agreements and opt-in agreements. (ECF No. 64 at 21.) Although United’s
7 clients have signed different account agreements over the years, the language regarding
8 overdrafts has remained consistent. (*Id.* at 8 n.2.) Other individual issues such as how
9 frequently clients overdrafted, the amount of their charges, the nature of their
10 transactions, and the source of the holds that reduced their available balance are legally
11 irrelevant to the question Gunter presents on behalf of the proposed class.

12 The legal question presented by the proposed Regulation E Class—whether
13 United violated Regulation E—also predominates over any individual characteristics of
14 the proposed class members. Although some proposed class members received print
15 disclosure forms and others could opt in by telephone without receiving the disclosure
16 notice, (ECF No. 64 at 15-16), the legal question predominates over this factual
17 difference. And that question is whether United’s failure to disclose its practice—either
18 because the opt-in agreement was ambiguous or because the client received no
19 disclosure at all as in the case of some who opted in by phone—violated Regulation E.

20 **b. Superiority**

21 In order to determine superiority, the Court looks to the (1) class members’
22 interest in controlling separate actions; (2) the existence and extent of any current
23 litigation; (3) the desirability of the forum; and (4) the difficulties in managing a class
24 action. Fed. R. Civ. P. 23(b)(c)(A)-(D).

25 As to prong (1), the proposed class members have little interest in controlling
26 separate actions because the individual damages are quite small—as low as \$30.00.
27 (ECF No. 64 at 30.) Such small damages cannot justify or sustain individual lawsuits. As
28 to prong (2), there is no evidence that United is already engaged in litigation relating to

1 its overdraft practices that would render this class action duplicative or risk inconsistent
2 outcomes on similar legal questions. As to prong (3), the forum is appropriate because
3 United serves clients in the forum state, and United has failed to contest the forum's
4 desirability.

5 United has thrown its weight behind prong (4), arguing that it is impossible for
6 Plaintiff's expert to identify all the members of both proposed classes. While there is no
7 administrative feasibility prerequisite to class certification, courts must still consider the
8 likely difficulties in managing a class action. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d
9 1121, 1127–28 (9th Cir. 2017). As to the proposed Regulation E Class, United argues
10 that those proposed class members cannot be identified because the data source
11 Gunter's expert, Arthur Olsen ("Olsen"), plans to use to identify proposed class members
12 is underinclusive.⁵ (ECF No. 69 at 13-14.) Although Olsen seeks to identify essentially all
13 clients of United who were charged an overdraft fee since August 15, 2010, for the
14 proposed Regulation E Class (see ECF No. 64 at 18), the data source Olsen intends to
15 use—the MISER database—does not include transactions from certain time periods for
16 some of United's clients. Specifically, the MISER database does not include transactions
17 from January 1, 2012, to May 2012 for former Griffith clients that United acquired.⁶ (ECF
18 No. 69 at 11.) The MISER database also does not include transactions from October 1,
19 2011, to January 27, 2012, for former Clearstar clients that United acquired.⁷ (*Id.*)
20 Consequently, the MISER database cannot yield all "members of [United] who opted in
21

22 ⁵United argues that Olsen's expert report failed to comply with Fed. R. Civ. P.
23 26(a)(2)(B)(v), which requires expert reports to contain "a list of all other cases in which,
24 during the previous 4 years, the witness testified as an expert at trial or by deposition."
25 Gunter implicitly concedes that Olsen's report failed to disclose Olsen's involvement in a
26 case where the motion to certify a class was denied. (ECF No. 81 at 15-16.) Gunter also
27 provided a list of all cases in which Olsen has testified. (ECF No. 81-7.) United's
28 challenge to Olsen's report is not a proper issue before the Court. Moreover, Gunter has
apparently cured the deficiencies with respect to Olsen's report.

⁶Transactions relating to former Griffith clients were logged in a database called
Fiserve ITI, but that database has been lost or no longer exists. (ECF No. 69 at 15.)

⁷Transactions relating to former Clearstar clients were logged in a database called
Symitar that remains accessible. (ECF No. 81 at 14.)

1 to [United's] debit card overdraft service and were charged an overdraft fee for an ATM
2 or debit card transaction at any time between August 15, 2010, through the present."
3 (ECF No. 64 at 18-19.) For instance, a former Clearstar client who opted in to United's
4 overdraft service and was charged an overdraft fee only once in November 2011 and
5 never again would not appear in any searches of the MISER database.

6 But Olsen plans to use other data sources to identify the former Clearstar and
7 Griffith clients who are part of the proposed class: the Symitar database and
8 Nonsufficient Funds ("NSF") reports. The Symitar database will yield former Clearstar
9 clients who are part of the class because it contains the transactions of former Clearstar
10 clients from September 25, 2009, to January 27, 2012. (See ECF No. 69 at 11.) This
11 time span contains the earliest relevant date for the proposed class—August 15, 2010.
12 NSF reports will yield former Griffith clients who are part of the class because those
13 reports contain information that will allow Olsen "to determine when a Courtesy Pay
14 overdraft fee or [NSF] fee is assessed on an ATM or debit card transaction." (ECF No.
15 81 at 14.) The incomplete MISER database appears to pose no obstacle to identifying
16 members of the proposed Regulation E Class.

17 Turning to the proposed Positive Balance Class, United argues those proposed
18 class members cannot be identified because the MISER database does not include
19 "every daily ACH and check exception report." (ECF No. 69 at 14.) United argues that
20 this data is necessary to "to accurately assess the balance at the time of presentment."
21 (*Id.*) Gunter responds that the proposed Positive Balance Class may be defined without
22 reference to daily ACH and check exception reports. (ECF No. 81 at 13.) The proposed
23 Positive Balance Class would contain United clients who were charged an overdraft fee
24 posted by the MISER system when their ledger balance at the time of the transaction
25 was equal to or greater than the transaction causing the overdraft. (ECF No. 64 at 18.)
26 Daily ACH and check exception reports are irrelevant to this determination because they
27 do not affect ledger balance. (See ECF No. 81 at 13; ECF No. 81-6 at 4.)

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1 As to both potential classes, United argues that the lack of ITI data prevents
2 Olsen from identifying proposed class members. But ITI data is irrelevant to the Positive
3 Balance Class because the Positive Balance Class only includes transactions posted by
4 the MISER system. (See ECF No. 64 at 18.) And ITI data is not necessary to identify
5 members of the proposed Regulation E Class because Olsen will use the NSF reports to
6 identify which former Griffith clients are class members. (ECF No. 81 at 14.)

7 **V. CONCLUSION**

8 The Court notes that the parties made several arguments and cited to several
9 cases not discussed above. The Court has reviewed these arguments and cases and
10 determines that they do not warrant discussion as they do not affect the outcome of the
11 motions before the Court.

12 It is therefore ordered that United's Motion for Partial Summary Judgment (ECF
13 No. 67) is denied.

14 It is further ordered that Gunter's Class Certification Motion (ECF No. 64) is
15 granted.

16 DATED THIS 25th day of September 2017.

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19 _____
20 MIRANDA M. DU
21 UNITED STATES DISTRICT JUDGE
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