Supreme Court, New York.
New York County
Dovid FELD, individually and on behalf of all others similarly situated, Plaintiff,
v.
APPLE BANK FOR SAVINGS, Defendant.
No. 651565/2011.
March 13, 2013.

Trial Order

[This opinion is uncorrected and not selected for official publication.]

Eileen Bransten, Judge.
The following papers, numbered 1 to 3, were read on this motion.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	w.
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: [ ] Yes X No

This motion is decided in accordance with the accompanying memorandum decision.

Dated: March 13, 2013

<<signature>>

Hon. Eileen Bransten

Motion Seq. Nos.: 002, 003

Motion Date: 4/16/12

This decision was first signed on November 19, 2012, but, through no fault of chambers, the original version appears to have

been process.

Eileen Bransten, J.:

Motion sequence numbers 002 and 003 are consolidated herein for purposes of disposition.

In sequence 002, defendant Apple Bank for Savings ("Apple Bank") moves, pursuant to CPLR 3211(a)(1) and (a)(7) and 22 NYCRR § 130-1.1, for an order dismissing the first amended putative class action complaint in its entirety, and awarding Apple Bank sanctions, including reimbursement of its litigation expenses incurred in defending this action. In sequence 003, plaintiff Dovid Feld, individually and on behalf of all others similarly situated, moves, pursuant to 22 NYCRR § 202.8(c), for an order striking certain affidavits and exhibits submitted in support of Apple Bank's motion papers.

I. Background

In the first amended complaint, Feld alleges that, at various times from June 6, 2005 through the present, Apple Bank, a New York-chartered savings bank, engaged in unlawful and improper practices in the imposition of overdraft fees on its savings deposit and checking account customers. Feld alleges that these practices by Apple Bank include: applying courtesy overdraft payments and loans to its savings deposit customers without prior customer approval; imposing overdraft charges when its deposit tickets indicate that sufficient funds are available to cover the debit; charging usurious rates of interest by the imposition of overdraft charges; re-ordering checks and automated clearing house ("ACH") payments to manufacture more overdraft charges than would have been imposed had the withdrawals been processed chronologically; comingling various types of withdrawals to manufacture overdraft charges; using shadow lines of credit without disclosing their existence to its customers; stating in documents provided to its customers that it may pay customer overdrafts when, in fact, its internal and nondisclosed policies require such payment; and charging account fees to manufacture overdraft charges.

On these allegations, Feld asserts causes of action for breach of contract, breach of the implied duties of good faith and fair dealing, violations of General Business Law (GBL) § 349, and violations of the usury laws, including General Obligations Law (GOL) § 5-501 and Banking Law § 14-a.

II. Analysis

A. *Feld's Motion to Strike (Motion Sequence Number 003)*

Feld's motion to strike Apple Bank's affidavits is denied in its entirety. The section cited by Feld provides, in relevant part, that "[a]ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law." 22 NYCRR § 202.8 (c). In their affidavits, the affiants set forth, at most, factual allegations in support of Apple Bank's alleged compliance with controlling banking regulations, and briefly summarize legal arguments set forth in greater detail in Apple Bank's memoranda of law. To the extent that Apple Bank may have failed to follow the technical requirements of the statute, such deviation is minor, and does not justify striking the affidavits, annexed exhibits, or any portion of the motion papers.

Moreover, a court may review factual affidavits furnished in support of a motion to dismiss. *See Leon v. Martinez*, 84 N.Y.2d

83, 88 (1994); *Godfrey v. Spano*, 13 N.Y.3d 358, 374 (2009).

Feld's argument that this court may not consider the documentary exhibits annexed to the affidavits is without merit. Apple Bank has moved to dismiss the first amended complaint on the ground of documentary evidence, in addition to a failure to state a cause of action upon which relief may be granted. *See Am. Indus. Contr. Co. v Travelers Indem. Co.*, N.Y.2d 1041, 1043 (1977); CPLR 3211(a)(1), (a)(7).

B. Apple Bank's Motion to Dismiss (Motion Sequence Number 002)

Apple Bank now seeks to dismiss this action in its entirety on the grounds that Feld has not incurred all the types of fees and practices of which he complains, that Apple Bank fully disclosed in writing all its fees and procedures relating to overdrafts, when Feld first enrolled as a customer on July 28, 1999, and, that, at all relevant times thereafter, Apple Bank closely adhered to those disclosed practices.

In opposition, Feld contends that the first amended complaint states legally viable causes of action, and moves to strike the affidavits with annexed exhibits of Connie Moyer, Esq., Apple Bank's vice president and assistant general counsel, Stanley Minkowski, an employee in Apple Bank's AVP Legal Process Department, and David Tannenbaum, Esq., Apple Bank's attorney, submitted on behalf of Apple Bank, arguing that they contain impermissible facts and legal argument and conclusions, in violation of 22 NYCRR § 202.8 (c).

1. Standard if Law

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *see* CPLR 3211(a)(7)). "We ... determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 N.Y.2d at 87-88. However, " 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence,' are not presumed to be true and [are not] accorded every favorable inference." *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999), *aff'd* 94 N.Y.2d 659 (2000) (quoting *Kliebert v. McKoan*, 228 A.D.2d 232, 232 (1st Dep't 1996), *lv denied* 89 N.Y.2d 802 (1996); CPLR 321 l(a)(1).

2. Breach of Contract

Apple Bank moves to dismiss the first cause of action for breach of contract, contending that the contemporaneous objective documentary evidence demonstrates that the conduct cited by Feld is expressly authorized by the parties' written agreement.

In opposition, Feld contends that the claim is legally cognizable on the grounds that Feld has adequately alleged that Apple Bank did not fully disclose its overdraft policies and procedures, and that the procedures that were disclosed were engineered as a profit center for the bank and applied in a manner to unfairly and deceptively create the maximum profit for Apple Bank at its customers' expense.

The signature card admittedly signed by Feld on July 28, 1999, when he first opened an Apple Bank checking account, provides

that "I/We have received a copy of Apple Bank for Savings' rules, regulations and disclosures concerning this account, and agree to be bound thereby, including any amendments thereto" ("Feld Signature Card"). Feld's consent to, and acceptance of, Apple Bank's service charges as a term and condition of opening the account is conclusively evidenced by Feld's signature on the signature card. *See* Dietrich v. Chemical Bank, 115 Misc.2d 713, 715 (Sup. Ct. N.Y. Cty. 1981) *aff'd* 92 A.D.2d 786 (1st Dep't 1983).

Moreover, there is no dispute that, on the date that he opened the checking account, Feld received a copy of a brochure entitled, "All About Your Apple Bank Accounts" (the "brochure") setting forth the Apple Bank rules, regulations, and disclosures applicable to the type of account opened by Feld, and that Apple Bank updated the brochure during the time that Feld maintained an account with the Bank. "A contract can be comprised of separate writings or documents if the writings make it clear that they are to be read in conjunction with other writings to determine the intent of the parties." *Id.* In the amended complaint, Feld admits that he entered into banking agreements with Apple Bank. *See* Amended Complaint, ¶ 101.

The brochure provides, in relevant part, that "[b]y signing the signature card for your account, and by simply maintaining the account, you agree to be bound by the terms, conditions, policies and rules concerning the account, as set forth in this brochure or otherwise applied by the Bank, in its discretion." (Brochure at 13 [Rev. Mar. 1998]; Brochure at 13 [Rev. Sept. 2001]; Brochure at 13 [Rev. Dec. 2003]; Brochure at 13 [Rev. Nov. 2005]; Brochure at 13 [Rev. Mar. 2008]; *see* Brochure at 13 [Rev. Aug. 2010]).

The brochures, as revised, set forth Apple Bank's overdraft policy, and provide, in relevant part, that "[y]ou must maintain a sufficient available balance in your account to cover the withdrawals you make. If you overdraw the account the Bank may refuse to pay the item(s) that cause the overdraft." (Brochure at 8 [Rev. Mar. 1998]; Brochure at 8 [Rev. Sept. 2001]).

Later versions of the Brochure, issued well before Feld incurred the first of the overdraft charges at issue here, clarify Apple Bank's overdraft charge policies as follows:
You must maintain a sufficient available balance in your account to cover the withdrawals you make. If you overdraw the account, the Bank may at its discretion, pay or refuse to pay the item(s) that cause the overdraft. The Bank will charge you a fee for all overdrafts whether paid or returned. You will be notified by mail of any non-sufficient funds items paid or returned that you may have; however, the Bank has no obligation to notify you before we pay or return any item.

(Brochure at 8 [Rev. Dec. 2003]; Brochure at 8 [Rev. Nov. 2005]; Brochure at 8 [Rev. Mar. 2008]; *see* Brochure at 9 [Rev. Aug. 2010]).

The brochures further provide that:
The Bank may impose maintenance and service charges on your account. The charges, and the terms under which they are imposed, may be changed from time to time. We will tell you about any changes. If the changes are:
1. Unfavorable - We will give you written notice at least 30 days prior to making the change.
2. Favorable - We will post a notice of change in all offices of the Bank.
Any changes will be binding on you and the account when such notice is provided. NOTE: Certain charges may be changed without prior notice

(Brochure at 11 [Rev. Mar. 1998]; Brochure at 11 [Rev. Sept. 2001]; Brochure at 11 [Rev. Dec. 2003]; Brochure at 11 [Rev.

Nov. 2005]; Brochure at 11 [Rev. Mar. 2008]; *see* Brochure at 12 [Rev. Aug. 2010]).

In addition, the brochures provide that:
Apple Bank may change these rules and regulations and add new rules and regulations from time to time. The Bank may also change the ... maintenance and service charges and fees ... Each of the changes will be binding on you and the account when we post a notice in the branch or when we mail you written notice of the change. Copies of revised policies will also be available at all our branches.

(Brochure at 20 [Rev. Mar. 1998]; Brochure at 20 [Rev. Sept. 2001]; Brochure at 20 [Rev. Dec. 2003]; Brochure at 20 [Rev. Nov. 2005]; *see* Brochure at 22 [Rev. Mar. 2008]; Brochure at 23 [Rev. Aug. 2010]).

There is no dispute that Apple Bank also provided Feld with a booklet entitled, "Maintenance and Service Charges" ("charges booklet") when he opened the account, and provided him with updated charges booklets, as Apple Bank increased the fees for, among other things, uncollected and/or insufficient/nonsufficient fund debits ("NSF").

These provisions demonstrate that, contrary to Feld's allegations, Feld agreed that Apple Bank could, and would, exercise its discretion regarding whether to pay or decline to pay an item, and would charge him a fee, regardless of its decision.

A reading of the brochures demonstrates that, at all relevant times, Apple Bank fully disclosed and explained the methodology that it used in making funds available after deposit, depending on the type of deposit. *See* Brochure at 32-39 [Rev. Mar. 1998]; Brochure at 32-40 [Rev. Sept. 2001]; Brochure at 32-40 [Rev. Dec. 2003]; Brochure at 33-40 [Rev. Nov. 2005]; Brochure at 34-41 [Rev. Mar. 2008]; Brochure at 36-42 [Rev. Aug. 2010].

These procedures and policies are in compliance with Regulation CC (), which sets forth various time schedules by which banks must make deposited funds available. *See Fischer & Mandell LLP v. Citibank, N.A.*, 2009 WL 1767621, *6, 2009 U.S. Dist LEXIS 54184, *15-17 (S.D.N.Y. 2009); 12 C.F.R. § 229.10; 12 C.F.R. § 229.13(h); 12 U.S.C. § 4002. Moreover, section 4-303 (b) of the Uniform Commercial Code (UCC) grants a bank broad discretion with regard to re-ordering of checks,[FN1] as follows, "items may be accepted, paid, certified or charged to the indicated account of its customer in any order" convenient to the bank, subject to certain limitations not relevant here. UCC § 4-303(b).

> FN1. Notably, the cases Feld cites in support of his argument that the re-ordering of transactions is legally impermissible all involve debit card transactions such as ATM withdrawals or point of sale transactions. *See, e.g., Gutierrez v. Wells Fargo Bank, N.A.*, F.Supp.2d 1080 (N.D. Cal. 2010); *see also In re Checking Account Overdraft Litig.*, 694 F.Supp.2d 1302 (S.D. Fla. 2010). This case does not involve the "re-ordering" of debit card transactions, but rather the alleged re-ordering of ACH and Electronic Fund Transfer ("EFT") transactions. The UCC explicitly permits banks to charge "funds-transfer[s]" such as ACH transactions to a customer's account "in any sequence." N.Y. UCC § 4-303(2). Consequently, cases involving the re-ordering of debit card transactions are inapplicable to the instant case.

As explained in comment 7 to UCC § 4-303 (b),
As between one item and another no priority rule is stated. This is justified because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other variables. Further, the drawer has

drawn all the checks, the drawer should have funds available to meet all of them and has no basis for urging one should be paid before another

UCC § 4-303(b), Cmt.7.

New York law similarly provides that
a banking institution shall disclose in writing to its depositors the order in which it pays items drawn against a depositor's account. By way of illustration, and without limitation, such disclosure may inform the depositor that the banking institution pays the largest items first, the smallest item first, or by the number of the item or in the order received. Such disclosure shall be given to the depositor at the time the account is opened and 30 days prior to the time the payment policy is changed

NYCRR § 32.4.

For example, with respect to Feld's claims based on allegations that his deposit ticket omitted material information regarding funds availability, the brochures, here, clearly provide such information, as follows:
Some deposits are available to pay checks to others or for cash withdrawals as soon as we receive the deposit or register it on your records. The availability of other deposits is delayed until the next business day after the day of your deposit, or longer. The length of the delay varies with the type of deposit, the method by which you make the deposit, and the location of the bank on which any deposited check is drawn ...
During any delay in availability, you may not withdraw the funds in cash and we will not use the funds to pay checks that you have written. Of course, we reserve the right, in our sole discretion to permit such a transaction.

See Brochure at 32 [Rev. Mar. 1998]; Brochure at 32 [Rev. Sept. 2001]; Brochure at 32 [Rev. Dec. 2003]; Brochure at 32 [Rev. Nov. 2005]; Brochure at 34-35 [Rev. Mar. 2008]; *see* Brochure at 36-37 [Rev. Aug. 2010]; *see* 12 C.F.R. § 229.10. The brochures also provide that certain funds will be available after 5 p.m. on the second business day after a deposit is made. (Brochure at 32 [Rev. Mar. 1998]; Brochure at 32 [Rev. Sept. 2001]; Brochure at 32 [Rev. Dec. 2003]; Brochure at 32 [Rev. Nov. 2005]; Brochure at 34-35 [Rev. Mar. 2008]; *see* Brochure at 36-37 [Rev. Aug. 2010]; 12 C.F.R. § 229.10 [c] [1]). Feld has failed to cite to any federal or state banking rule or regulation requiring the funds availability information be printed on the deposit ticket.

Similarly, to the extent that Feld's claims are based on allegations of improper re-ordering of withdrawals, the claims are fatally defective. There is no dispute that, at the time Feld opened his checking account at Apple Bank, he received a pamphlet entitled, "About Your Apple Edge Now Checking Account." (the "Apple Edge pamphlet.") In relevant part, the Apple Edge pamphlet provides that, "[o]n any given business day, when two or more checks are presented for payment against your account, Apple Bank will pay such checks in descending order by amount - highest to lowest dollar amount." (Apple Edge Pamphlet [Rev. June 1999]). The brochures also include this language, and further provide, in relevant part, that "[b]ecause Apple Bank gives check processing priority to the highest dollar amount of checks you have written, you might sustain check charges if or when checks presented on any give business day are returned for insufficient funds or uncollected funds or paid against uncollected funds." Brochure at 10 [Rev. Nov. 2005]; *see* Brochure at 10 [Rev. Mar. 2008]; *see* Brochure at 11 [Rev. Aug. 2010].

Beginning in May 2006, Apple Bank advised Feld in his bank statement that:
NYS Banking Board requires disclosure of the order in which ACH/EFT [Automated Clearing House/Electronic Funds

Transactions] debits and checks are processed for payment Apple will process ACH/EFT debits and checks presented against your account as follows: on any given day, when ACH/EFT debits and checks are present for payment, we will process ACH/EFT debits first, following by checks. Processing will be in descending order, highest to lowest dollar amount

("Feld May 2006 Apple Bank Account Statement.")

Thus, the documentary evidence conclusively demonstrates that, at all relevant times, Apple Bank fully disclosed in writing to Feld its policies and procedures regarding withdrawal processing, payment, and imposition of overdraft charges, and that these policies and procedures do not violate federal or state banking law. Where the clear and unambiguous language of the documents relied upon by the moving parties establishes the existence of the bank's legitimate policies and procedures, the plaintiffs claim for breach of contract should be dismissed. *Howard L. Jacobs P.C. v. Citibank*, 61 N.Y.2d 869, 871 (1984); *Perl v. Smith Barney*, 230 A.D.2d 664, 665 (1st Dep't 1996), *lv denied* 89 N.Y.3d 803 (1996); *Gephardt v. Morgan Guar. Trust Co. of N.Y.*, 191 A.D.2d 229, 229 (1st Dep't 1993), *lv denied* 82 N.Y.2d 656 (1993). Therefore, to the extent that the first cause of action is based on allegations of breach of express contractual obligations, the claim is fatally defective.

For these reasons as well, to the extent that the first cause of action is based on allegations of breach of the covenant of good faith and fair dealing implicit in all contracts, the claim is fatally defective. The covenant is **"breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement."** ***Gettinger Assoc., L.P. v. Abraham Kamber Co. LLC*, 83 A.D. 3d 412, 414 (1st Dep't 2011)** (internal quotation marks and citation omitted). However, where, as here, the claim is entirely duplicative of the claim for breach of express contractual obligations previously dismissed for legal insufficiency, the claim for breach of the implied contractual covenants is also fatally defective. *See Glatt v. Mariner Partners, Inc.*, 66 A.D.3d 440, 441 (1 st Dep't 2009); *Logan Advisors, LLC v. Patriarch Partners, LLC*, 63 A.D.3d 440,443 (1st Dep't 2009). Moreover, as held above, a banking institution may re-order a customer's withdrawals.

Therefore, that branch of Apple Bank's motion to dismiss the first cause of action for breach of contract is granted, and that claim is dismissed.

3. Alleged Violation of General Business Law § 349

Next, Apple Bank seeks to dismiss the second cause of action for conduct in violation of GBL § 349, contending that its applicable practices and procedures were fully disclosed at all relevant times.

The statute provides, in relevant part, that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." GBL § 349(a). To state a claim for relief under GBL § 349, a plaintiff must allege "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000). The alleged deception must be "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85* N.Y.2d 20, 26 (1995).

Feld has failed to allege in the amended complaint that Apple Bank misrepresented or concealed the amount of the overdraft

charges, or that it misrepresented or concealed the circumstances under which a customer would incur such charges.

In addition, Apple Bank fully disclosed all practices and procedures applicable to Feld's claims, at all relevant times. Where the documentary evidence conclusively establishes defenses to the plaintiff's cause of action for conduct in violation of GBL § 349, the claim must be dismissed. *Morales v. AMS Mtge. Servs., Inc.*, 69 A.D.3d 691, 693 (2d Dep't 2010). As held above, the documentary evidence demonstrates that Apple Bank did not misrepresent or conceal the amount of each type of the overdraft charges, nor did it misrepresent or conceal the circumstances under which an Apple Bank customer would incur such charges. Further, and as held above, even assuming the truth of Feld's factual allegations regarding Apple Bank's implementation of its disclosed practices and procedures in connection with overdraft fees, Apple Bank's conduct conformed in all respects to these disclosed practices and procedures.

Contrary to Feld's contention, Apple Bank was under no obligation to disclose on deposit tickets the time of day that a particular deposit will become available for all purposes. With respect to information provided on deposit tickets, Regulation CC merely requires that "[a] bank shall include on all preprinted deposit slips furnished to its customers a notice that deposits may not be available for immediate withdrawal." 12 CFR § 229.18(a). The Apple Bank deposit tickets issued to Feld comply with this regulation.

Contrary to Feld's contentions, Apple Bank permitted its customers to opt out of the courtesy overdraft protection it offered, and did not apply overdraft fees on automated teller machine ("ATM") point of sale debit card transactions. The New York State Banking Department has recommended that banking institutions must permit customers to opt out of the program, and should not offer the overdraft protection service for non-check transactions. *See* State of New York Banking Dept. Laws, Regulations & Interpretations, Letter from Superintendent Diana L. Taylor to Federal Banking Regulators Regarding the Proposed Guidance on Overdraft Protection Programs, Aug. 6, 2004; 70 Fed Reg. 9127 (Feb. 24, 2005). The documentary evidence demonstrates that Apple Bank followed both recommendations. *See* Apple Bank Memo Jul 23, 2004.

For these reasons, that branch of Apple Bank's motion to dismiss the second cause of action for violations of GBL § 349 is granted, and that claim is dismissed.

4. Usurious Lending Practices

Apple Bank seeks to dismiss the third cause of action for violation of GOL § 5-501 and New York Banking Law 14-a, contending that the overdraft charges are not interest subject to the usury laws.

In opposition, Feld contends that this claim is legally viable, on the ground that the overdraft charge is actually interest on a loan made by Apple Bank.

A transaction is usurious under civil law when it imposes an interest rate exceeding 16% per annum (*see* GOL § 5-501(1); New York Banking Law § 14-a(1), and is criminally usurious when it imposes an interest rate exceeding 25% per annum. *See* Penal Law §§ 190.40, 190.42. Section 14-a(2) of the New York Banking Law defines interest as "any and all amounts paid or payable, directly or indirectly, by any person, to or for the account of the lender in consideration for the making of a loan or forbearance."

The Apple Bank overdraft charges incurred by Feld are not interest subject to the usury laws, as a matter of law. There is no dispute that Apple Bank assessed a one-time overdraft fee for each NSF item, whether it chose to honor or reject the item. The fee was imposed because an NSF item occurred, and not because Apple Bank honored the NSF item, even where Feld did not have funds sufficient to cover the transaction. Thus, the charge was not incurred in consideration of an extension of credit by Apple Bank to Feld. Therefore, the overdraft charge does not meet the statutory definition of interest. *See* First Bank v. Tony's Tortilla Factory, 877 S.W.2d 285, 287-288, 23 UCC Rep. Serv. 2d 837 (Tex 1994); *Video Trax v. NationsBank, N.A.*, 33 F. Supp... 2d 1041, 1053 (S.D. Fla 1998), *aff'd* 205 F.3d 1358 (11th Cir. 2000), *cert denied* 531 US 822 [2000]).

Therefore, the third cause of action is fatally defective on its face. The branch of the motion to dismiss the third cause of action is granted, and the claim is dismissed.

C. Defendant's Motion for Imposition of Sanctions

Last, that branch of Apple Bank's motion for the imposition of sanctions is denied. Conduct can only be found frivolous, and, therefore, sanctionable, where "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." 22 NYCRR § 130-1.1(c)(1). Although Feld's arguments were not persuasive, they were not so completely without merit so as to be frivolous, as that word is defined by 22 NYCRR § 130-1.1 (c). *See* Lewis v Stiles, 158 A.D.2d 589, 590-591 (2d Dep't 1990).

III. Conclusion

Accordingly, it is

ORDERED that motion sequence no. 002 is granted to the extent that the complaint is dismissed in its entirety with costs and disbursements as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion sequence no. 003 is denied in all respects.

Dated: New York, New York

March 13, 2013

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Hon. Eileen Bransten, J.S.C.

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