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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHULMAN Justice

PART 1

ALRICH, BRADLEY C., ET AL.

-v-

NORTHERN LEASING SYSTEMS, INC., ET AL.

INDEX NO. 602803/07

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits 1-5	1
Answering Affidavits — Exhibits A+B	2
Replying Affidavits - Exh. 1-2 Sur-Reply Aff.	3
	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 19, 2010

MARTIN SHULMAN J.S.C.

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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BRADLEY C. ALDRICH, et al.,

Plaintiffs,

-against-

NORTHERN LEASING SYSTEMS, INC., et al.,

Defendants.

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Index No.: 602803/07

DECISION/ORDER

Martin Shulman, J.

In this purported class action, plaintiffs move by order to show cause pursuant to CPLR 907 and §3126 for an order precluding defendants from presenting evidence at trial and/or striking their answer for failure to respond to plaintiffs' discovery demands (motion sequence no. 002). Plaintiffs bring a second order to show cause to extend their time to file a motion for class certification pending the court's determination of their aforementioned discovery motion (motion sequence no. 003).[1] Not to be outdone, defendants bring their own discovery motion to compel plaintiffs to comply with their discovery demands or alternatively, to preclude plaintiffs from presenting evidence of their damages or strike the complaint (motion sequence no. 004).[2] Motion sequences 002, 003 and 004 are consolidated for disposition.

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[1] Upon signing plaintiffs' order to show cause the court issued an interim order extending plaintiffs' time to move for class certification pending the hearing of this motion. On the initial June 16, 2009 return date the court issued a further interim order extending plaintiffs' time to move until September 15, 2009. Thereafter, at the parties' counsels' request, the court held determination of these motions in abeyance while the parties attempted to settle this dispute by mediation, which ultimately proved unsuccessful.

[2] Defendants' motion also requests an award of counsel fees and expenses incurred as a result of their motion.

The complaint's remaining causes of action[3] allege defendants violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, *et seq.* and General Business Law ("GBL") §380, *et seq.* ("NY FCRA") based upon defendant Northern Leasing Systems, Inc.'s ("NLS") alleged practice of unlawfully accessing and/or making adverse entries in plaintiffs' credit reports. Plaintiffs, who are alleged to be the guarantors of certain equipment leases entered into between their small businesses and "NLS" and/or its affiliates, contend *inter alia* that their credit scores have been adversely affected by defendants' alleged actions.

Plaintiffs' Discovery Motion

The court first addresses plaintiffs' discovery motion. Plaintiffs served their first set of demands on August 17, 2007 and claim that defendants' September 17, 2007 responses thereto are insufficient since defendants refused to answer any interrogatories and produced only documents concerning the named plaintiffs. Defendants counter that plaintiffs made no objections to their responses to the first set of demands and took no action to conduct further discovery for 20 months.[4]

After the court issued its decision and order partially granting and denying the motion to dismiss, plaintiffs served their second set of demands on April 15, 2009 and notices of deposition on April 21, 2009. At the time plaintiffs served and filed the instant

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[3] By prior decision and order dated March 12, 2009 this court dismissed plaintiffs' causes of action for defamation and violation of GBL §349.

[4] During much of this period discovery was stayed pursuant to CPLR 3214(b) as a result of defendants' motion to dismiss the complaint.

discovery motion, defendants admittedly had not responded to the second set of demands or appeared for the noticed depositions.

After plaintiffs brought this discovery motion, defendants served responses to the outstanding second set of demands and subsequently made a limited access computer terminal available to plaintiffs' counsel permitting them to review and print documents and information pertaining to putative class members. Defendants note that at the time plaintiffs brought their discovery motion, their responses were only 8 days late and plaintiffs thus suffered no prejudice. Finally, defendants state that they are prepared to proceed with their depositions.

After reviewing defendants' responses and searching the newly available computer terminal, plaintiffs' counsel represented to the court at oral argument that defendants' responses were still unsatisfactory. At this point, the court directed the parties to submit reply affirmations to enable the court to determine exactly what, if anything, remained outstanding. Plaintiffs' reply notes the following alleged deficiencies:

- Defendants have not produced any communications or subscription contracts with any Credit Reporting Agency ("CRA"), or any documents regarding payments to or invoices received from any CRA;
- Defendants fail to produce documents concerning the individual defendants and defendants' employees who handled specific aspects of the named plaintiffs' cases (i.e., their backgrounds, training, experience, etc.);
- The computer terminal defendants set up "provides highly restricted access to isolated/copied data" (Chittur Reply Aff. at ¶2) rather than access to NLS's actual database, is not searchable and the records available on the terminal were not produced as they are kept in the regular course of business; and

- Defendants' interrogatory responses are deficient in light of the general and specific objections contained therein, which objections plaintiffs argue were waived since they were not timely served.

Not surprisingly, defendants dispute the foregoing. Defendants' counsel avers that: 1) the documents and information contained in the computer terminal have been provided as they are kept in the regular course of business; 2) the database contains information "relating to every lease that was generated by NLS between May 14, 2003 - the date of the earliest transaction described in the Complaint, and August 17, 2007 - the date on which the Complaint was filed";[5] 3) the database contains information relating to 137,455 leases and guaranties and includes every credit report in NLS's possession concerning same; and 4) the database contains communications with the lessees which are in NLS's custody and control.

Preliminarily, the court rejects plaintiffs' claim that defendants' general and specific objections to certain demands render their responses meaningless. The court also concludes that defendants' brief delay in responding to plaintiffs' second set of demands was not wilful and does not warrant the imposition of discovery sanctions. Having obtained an extension of time to bring their class certification motion, plaintiffs were not prejudiced by defendants' minor delay. Further, plaintiffs' demands were extensive and defendants required additional time to create the computer database ultimately made available to plaintiffs' counsel. Given these circumstances, the court further finds that defendants did not waive their right to assert legitimate objections to certain demands.

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[5] See Lillienstein Aff. in Further Opp. at ¶6.

Although plaintiffs' motion does not request an order compelling defendants' compliance with their demands, nonetheless, it is within this court's broad discretion to "make such orders . . . as are just", including an order to compel defendants' compliance with proper demands. Frustratingly, both parties' papers on this motion provide the court with little guidance in assessing the propriety of the demands and defendants' responses. In fact, the parties make virtually no substantive arguments as to the propriety of plaintiffs' demands and defendants' objections thereto.

With respect to plaintiffs' first set of demands, defendants properly treated the demand for interrogatories as a nullity since it was served in violation of CPLR 3132. As to the accompanying 34 document demands, the court's cursory review of defendants' responses (Exh. 3 to Plaintiffs' OSC) indicates that defendants substantially responded, in many instances raising valid objections to clearly overbroad[6] and/or irrelevant[7] demands. In the majority of their responses in which an objection is asserted, defendants nonetheless state that they will produce the requested

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[6] For example, requests for "[d]ocuments concerning your responses to every one of the Interrogatories above", "[d]ocuments relevant to any claim and/or defense herein" and "[d]ocuments which the defendant rely [sic] upon, and/or intend to rely upon, in this proceeding" are overly broad and unduly burdensome. *See, e.g.*, Plaintiffs' OSC at Exh. 2, document demands 1, 33 and 34. Further, both plaintiffs' first and second set of discovery demands seek documents from January 1, 1995 to date. No convincing reason is given for why a fifteen (15) year time period is relevant.

[7] Plaintiffs second set of discovery requests continue to pose interrogatories and request documents concerning alleged dunning phone calls defendants and/or their representatives made to plaintiffs. However, plaintiffs' cause of action pursuant to GBL §349 based upon alleged harassing phone calls was previously dismissed. As such, interrogatories 27-30 are irrelevant and improper.

documents.[8] Defendants concede that a privilege log is outstanding and plaintiffs' discovery motion is granted to the extent that defendants shall provide a privilege log on or before April 30, 2010.

Turning to the second set of demands to which defendants responded after plaintiffs brought the instant motion, plaintiffs' counsel's reply identifies defendants' objections to interrogatories 4 (defendants' net income from 6 years prior to this action), 11 (identity of defendants' "affiliates")[9], 12 (corporate relationships between all defendants and affiliates), 18 (identity and responsibilities of all persons authorized by defendants to access credit reports) and 31 (internal hierarchies of control/management between defendants and their affiliates)[10] as improper.

Plaintiffs proffer no explanation as to how private information such as defendants' net income is relevant to the issues raised in this action. Accordingly, defendants' objection to interrogatory 4 is sustained.

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[8] It is unclear from this record whether defendants ultimately produced the promised documents. The court can only assume from plaintiffs' reply that only those items detailed therein remain outstanding and limits its analysis accordingly.

[9] The term "affiliate" is defined as follows in plaintiffs' second set of demands: ". . . with respect to any Person, (i) any Person directly or indirectly controlling, controlled by or under common control with such Person, (ii) any Person owning or controlling 10% or more of the outstanding voting interests of such Person, (iii) any officer, director or general partner of such Person, or (iv) any Person who is an officer, director, general partner, trustee or holder of 10% or more of the voting interests of any Person described in clauses (i) through (iii) of this sentence."

[10] Plaintiffs' reply also identifies the responses to interrogatories 27 and 28 as being improper. However, as set forth in footnote 7 above, these demands pertain to the dismissed GBL §349 cause of action and as such are irrelevant.

In response to interrogatories 11, 12 and 31, all of which seek information regarding defendants' affiliates, defendants vehemently refuse to provide any such information as to these non-parties.[11] See Lillienstein Aff. in Further Opp. at ¶7. Plaintiffs contend that NLS impermissibly accessed and/or made adverse entries in the named plaintiffs' credit reports, despite the fact that some plaintiffs entered into leases with other entities presumably affiliated with NLS. Defendants are directed to respond to interrogatories 11, 12 and 31 on or before April 30, 2010. However, at this juncture, the court will not require production of documents pertaining thereto.

Turning to interrogatory 18, which requests the identities of all persons defendants authorized to access lessees'/guarantors' credit reports, this request is relevant to establishing whether defendants' alleged conduct was wilful. Accordingly, defendants are directed to respond to interrogatory 18 on or before April 30, 2010. However, as more fully set forth below, the court will not require production of documents pertaining to this request since plaintiffs' request for such documents as stated is overbroad.

Plaintiffs' reply also objects to defendants' failure to produce certain categories of documents. Defendants' reply does not address plaintiffs' claim that contracts and communications with CRA's, including documentation of payments and invoices, have not been provided. Nor is there any indication that such documents, which might prove to be relevant, have been produced. Accordingly, defendants are directed to produce documents responsive to this request on or before April 30, 2010. However, the court

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[11] The computer terminal made available to plaintiffs' counsel similarly limits access to documents and information relating to entities other than NLS.

sees no basis for production of these or any other documents from the period 1995 to date. The court finds that such records should be produced from 2003 (the earliest year referenced in the complaint) to date.

Plaintiffs' reply also claims that documents regarding the individual defendants and defendants' employees who handled specific aspects of the named plaintiffs' cases (i.e., their backgrounds, training, experience, etc.) are also outstanding. Specifically, the second request in plaintiffs' second set of demands seeks "[e]mployment/personnel files, . . . employment applications, performance reviews, complaints, disciplinary actions taken, compensation and other employment related documents" for each individual defendant, five (5) non-party NLS employees, every representative who communicated with plaintiffs and every representative who "approved, commented, investigated, responded to, or reviewed any communication or transaction concerning any of the Plaintiffs." While this category of documents is generally relevant, the request as worded is overbroad because it seeks, *inter alia*, entire personnel files, which contain personal and sensitive information. The motion is thus denied as to this request.

Finally, the court rejects plaintiffs' claim that they should be permitted unrestricted access to defendants' computer databases. As described by defendants' counsel, the database defendants have made available appears to more than adequately permit plaintiffs' counsel access to records pertaining to potential class members.

Accordingly, plaintiffs' motion is granted to the extent that defendants are directed to respond to plaintiffs' demands as indicated above and to appear for depositions as provided for below, and is otherwise denied.

Defendants' Discovery Motion

Turning to defendants' discovery motion, defendants seek to compel plaintiffs to respond to Defendants' First Request for Discovery and Inspection, provide complete responses to defendants' First Interrogatories dated May 15, 2009 and appear for depositions in New York.[12] The motion also seeks an order directing plaintiffs to provide a privilege log[13] and to pay defendants' expenses and attorneys' fees incurred as a result of this motion.

Plaintiffs responded to defendants' demands on or about June 18, 2009. See Lillienstein Aff. in Support at Exhs. C and E. Defendants claim plaintiffs' responses to interrogatories 2, 3, 4, 5, 7, 8, 9, 10, 11 and 12 are incomplete and the response is unverified. Defendants also claim that no documents were produced until July 17, 2009 when plaintiffs produced a mere 77 pages of documents (*Id.* at Exh. E), some of which were improperly redacted. In response to defendants' letter objection (*Id.* at Exh. F), on July 28, 2009 plaintiffs produced an additional 7 pages of documents, which defendants

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[12] Of the four named plaintiffs, only plaintiff Arnold is a New York resident. Plaintiff Weier is a California resident and plaintiffs Aldrich and Salas are Texas residents.

[13] Plaintiffs submit a privilege log as Exhibit 1 to their attorney's affirmation in opposition to defendants' discovery motion. Defendants do not claim in their reply that the log is deficient.

claim are unresponsive. Defendants further contend that the majority of plaintiffs' objections to their document demands are improper (see demands 2, 10, 13, 23-27).

In opposition, plaintiffs summarily contend that the majority of requests are irrelevant, burdensome and/or overbroad. More specifically, plaintiffs argue that the document demands and interrogatories relating to plaintiffs' claims for damages are "more properly the subject of expert analysis and report" and are premature. Chittur Opp. Aff. at ¶10. Finally, plaintiffs specifically object to producing their income tax returns and to being required to travel to New York to be deposed.

As to plaintiffs' responses to defendants' demand for discovery and inspection, at the outset, plaintiffs claim that they have produced documents in response to items 24, 26 and 27 to the extent they exist and are in plaintiffs' possession and/or control (Chittur Opp. Aff. at ¶18); 6). As such, the motion is moot with respect to these demands.

With respect to the following demands for discovery and inspection, the court finds that plaintiffs' objections lack merit for the reasons stated and plaintiffs are directed to respond to the following on or before April 30, 2010: 1) item 2 seeking communications between the parties, as opposed to communications between plaintiffs and their counsel, is not subject to the attorney client privilege, nor do plaintiffs establish the existence of any so-called "joint privilege"; 2) item 10 concerning plaintiffs' other equipment finance leases is not irrelevant, overbroad and burdensome as plaintiffs' familiarity with equipment finance leases is arguably relevant; 3) item 13 is not, as plaintiffs' counsel claims, "incomprehensible", and it is conceivable that plaintiffs may in fact be in possession of copies of the documents they provided to NLS or its

agent(s) at the time they executed their leases; 4) similarly, item 25 is not "incomprehensible" and although it may be unlikely for plaintiffs to possess communications between defendants and the CRA's pertaining to plaintiffs, plaintiffs must respond to the demand one way or the other.[14]

The court agrees with plaintiffs' objection to the portion of item 23 which requests documents reflecting credit ratings and/or histories of plaintiffs' businesses. Plaintiffs originally objected to this portion of demand 23 only on the grounds that it was overbroad, burdensome and irrelevant. In opposition to this motion, plaintiffs elaborate that business losses cannot be recovered under the FCRA. Defendants do not dispute the foregoing, nor do they establish that such documents are relevant.

The court also agrees that defendants have not established the necessity of obtaining plaintiffs' tax returns at this juncture. As held in *Gordon v Grossman*, 183 A.D.2d 669, 670 (1st Dept. 1992):

> It was an improvident exercise of discretion to compel disclosure of the defendant's tax returns. Because of their confidential and private nature, disclosure of tax returns is disfavored *(Matthews Indus. Piping Co. v Mobil Oil Corp.,* 114 AD2d 772). The party seeking disclosure must make a strong showing of necessity *(Lukowsky v Shalit,* 160 AD2d 641) and demonstrate that the information contained in the returns is unavailable from other sources *(Matthews Indus. Piping Co. v Mobil Oil Corp., supra; Briton v Knott Hotels Corp.,* 111 AD2d 62).

Here, defendants only summarily conclude that production of plaintiffs' tax returns is "relevant to any claim for damages." Lillienstein Aff. in Supp. at ¶29. In reply,

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[14] With respect to all of the foregoing, to the extent any responsive documents are in fact privileged, plaintiffs shall provide a privilege log. Further, if plaintiffs are not in possession of any responsive documents, they shall provide an affidavit to that effect.

defendants do not dispute or even address plaintiffs' argument that they fail to establish necessity. Accordingly, at this time defendants have made an insufficient showing of their inability to obtain the information sought from plaintiffs' tax returns from other sources.

To the extent defendants' motion seeks to compel plaintiffs to provide unredacted documents, the motion is granted. Without specifying the documents alleged to be improperly redacted, defendants argue that the confidentiality agreement the parties previously entered into eliminates the need for redactions, other than to protect documents subject to the attorney-client and attorney work product privileges. Plaintiffs dispute that the confidentiality agreement prohibits them from redacting private information but concede they "redacted entries in their credit reports concerning their other credit transactions . . ." Chittur Opp. Aff. at ¶22.

Though confidential in nature, the redaction of information from plaintiffs' consumer credit reports is inappropriate in this case wherein plaintiffs allege their credit scores were adversely affected by defendants' actions and they were unable to obtain credit or financing as a result. Plaintiffs' full credit reports are arguably relevant to their claims and the assessment of actual damages. For instance, a comparison of plaintiffs' credit scores and histories prior to and after defendants' alleged improper entries would prove instructive (i.e., a plaintiff whose credit report contains only negative information reported by defendants is likely to be more adversely affected than a plaintiff whose credit report reveals a history of other negative entries). Accordingly, plaintiffs shall produce unredacted copies of those documents previously produced.

With respect to their interrogatories, plaintiffs are directed to supply individual verifications and to supplement their responses as follows: 1) respond to each subpart of number 2; 2) respond to numbers 3, 4, 5 and 10; 4) respond to number 12, with the exception of that portion requesting that plaintiffs "set forth in detail the basis for Plaintiffs' belief that the request for credit was adversely affected by Defendants' actions"; and 5) supplement number 7 to give specific addresses. The court finds plaintiffs adequately responded to interrogatories 8 and 11.

Regarding paragraphs 81, 87, 93, 99, 105, 111, 117, 123 and 127 of the complaint, interrogatory number 9 requests that plaintiffs state the amount of damages each plaintiff suffered and the manner in which calculated. At the outset, the court previously dismissed plaintiffs' GBL §349 cause of action and as such, plaintiffs are not required to respond to the portion of this interrogatory pertaining to damages sought pursuant to GBL §349(h) (paragraph 127 of the complaint). As to the remainder of this demand, plaintiffs correctly state that expert reports may ultimately be needed to calculate damages. However, it is insufficient for plaintiffs to vaguely state that they will provide the requested information at an unspecified time determined by them to be appropriate. Accordingly, defendants' motion is granted to the extent that plaintiffs are directed to specify any actual damages, if any, incurred to date by each plaintiff as a result of defendants' alleged conduct, and the manner in which such damages have been preliminarily calculated. Such responses shall be supplemented as further information becomes available.

Finally, concerning depositions, plaintiffs have priority in deposing defendants since they noticed defendants' depositions first. *See, e.g., Scalone v. Phelps Mem'l*

Hosp. Ctr., 184 A.D.2d 65, 76-77 (2d Dept. 1992)("after a defendant has served his answer, the party who first notices a deposition gets priority"). Defendants argue that since plaintiffs have taken no action to depose them, they should be permitted to proceed with plaintiffs' depositions within New York County. Plaintiffs respond that they have been unable to proceed with defendants' depositions due to the alleged default in responding to plaintiffs' discovery demands. As the court has rejected the majority of plaintiffs' claims for the reasons stated above, plaintiffs are directed to proceed with defendants' depositions, which are to be completed on or before June 4, 2010.

After completion of defendants' depositions, plaintiffs' depositions shall proceed in New York County. As stated in *Farrakhan v. N.Y.P. Holdings Inc.*, 226 A.D.2d 133, 135-136 (1st Dept. 1996):

> It is well-settled that the trial court is vested with broad discretion in supervising pre-trial discovery (CPLR 3103 [a]; *Boutique Fabrice v Bergdorf Goodman,* 129 AD2d 529, 530; *Plattsburgh Distrib. Co. v Hudson Val. Wine Co.,* 108 AD2d 1043). Such discretion, however, is not unlimited (*Allen v Crowell-Collier Publ. Co.,* 21 NY2d 403, 406; *Conway v Bayley Seton Hosp.*, 104 AD2d 1018, 1019; *Boutique Fabrice v Bergdorf Goodman, supra,* at 530).
>
> As a general rule, a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result (*see, Mack v J.C. Penney Co.,* 81 AD2d 761; *Spatz v Wide World Travel Serv.*, 70 AD2d 835).

Here, plaintiffs' counsel concludes, without any supporting facts, that deposing the three (3) non-resident plaintiffs in New York will result in undue hardship, inconvenience and expense to these small business owners since it will require them to be away from their businesses and families for several days. This is insufficient.

Compare, *Wygocki v. Milford Plaza Hotel*, 38 A.D.3d 237 (1st Dept. 2007)(undue hardship found where plaintiff was a 76 year old resident of Northern Ireland and submitted a sworn letter from her doctor identifying her many physical ailments and concluding that travel to New York could exacerbate her problems). Plaintiffs' depositions shall be completed on or before June 18, 2010.

Plaintiffs' Motion for an Extension of Time to Move for Class Certification

As plaintiffs lacked the discovery needed to timely move for class certification, the motion for an extension of time is granted to the extent that plaintiffs shall have until July 30, 2010 to so move.

The court has considered the parties' remaining arguments, including the requests for reimbursement of fees and expenses incurred as a result of the discovery motions, and finds them lacking in merit. For all of the above reasons, it is hereby

ORDERED that plaintiffs' discovery motion is granted in part and denied in part as set forth herein; and it is further

ORDERED that defendants' motion is granted to the extent that plaintiffs shall: 1) supplement their responses to defendants' demand for discovery and inspection and interrogatories as set forth herein; and 2) appear for depositions in New York County after completion of defendants' depositions, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion to extend the time to move for class certification is granted and plaintiffs shall serve such motion on or before July 30, 2010; and it is further

ORDERED that, in the event that either party fails to timely comply with any of the discovery directives set forth herein, the non-defaulting party shall submit an affirmation detailing the default and shall submit an order on notice striking the defaulting party's pleading in its entirety

The parties are directed to appear for a compliance conference on May 11, 2010 at 9:30 a.m. at **60 Centre Street, Room 325**, New York, New York.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
March 19, 2010

Hon. Martin Shulman, J.S.C.