SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

JOSEFINA VALLE and WILFREDO VALLE, individually and on behalf of all others similarly situated,	:	
Plaintiffs,	:	Index No. 653936/2012
-against-	:	DECISION AND ORDER
POPULAR COMMUNITY BANK f/k/a BANCO POPULAR NORTH AMERICA a/k/a BANCO POPULAR NORTH AMERICA,	:	Motion Sequence No. 002
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

Plaintiffs Josefina Valle and Wilfredo Valle (Plaintiffs) bring this purported class action individually and on behalf of all others similarly situated against Popular Community Bank, also known as Banco Popular North America (BPNA). The three-count first amended class action complaint (Amended Complaint) challenges BPNA's overdraft fee, maintenance fee, and "high-to-low ordering" policies in effect from 2006 to the present, asserting causes of action for (1) breach of the implied covenant of good faith and fair dealing, (2) deceptive business practices under New York General Business Law (GBL) § 349, and (3) violations of New York's usury laws, including General Obligation Law (GOL) § 5-501 and Banking Law §§ 14-a, 108.

BPNA now moves to dismiss the Amended Complaint, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7).

Factual Allegations

It is undisputed that plaintiff Josefina Valle has maintained a savings account with BPNA (Account) since 1999, and that her son, Wilfredo Valle, is a beneficiary of the Account. Amended Complaint, ¶¶ 12, 13; Randazzo aff, ¶¶ 5, 6. According to BPNA, when opening the Account, Josefina Valle executed a signature card, which provided, in relevant part: "It is agreed by the undersigned that this account shall be governed by the rules and regulations now in force in the branches of [BPNA] and by such rules and regulations as it may hereafter adopt." Randazzo aff, ¶ 6 and exhibit 1.

Neither party identifies the operative agreement or the applicable "rules and regulations" in the instant action. Plaintiffs allege that BPNA's customer deposit agreement, entitled "Personal and Business Banking Disclosure," dated May 2000 (2000 Agreement), was "near in time to when Plaintiffs opened their [BPNA] account." Amended Complaint, ¶ 34. BPNA submits the affidavit of Michael Randazzo (Randazzo), BPNA's senior vice president and director of operations. Randazzo aff, ¶ 1. Randazzo concedes that, prior to 2002, BPNA "disclosed its item processing order" in the 2000 Agreement. *Id.*, ¶ 16. He also claims that, in 2006, BPNA made relevant disclosures in a document entitled "Personal Banking Disclosure and Agreement," which was last revised in 2004 (2004 Agreement). *Id.*, ¶ 12. The 2004 Agreement was subsequently revised in January 2007, April 2008, and July 2010 (2007 Agreement, 2008 Agreement, and 2010 Agreement, respectively). *Id.*, ¶¶ 13-15. Randazzo submits copies of all of these agreements as documentary evidence. *Id.*, exhibit 8-12.

Plaintiffs claim that in the 2000 Agreement, BPNA "reserved complete discretion . . . to make overdraft [l]oans, and impose Overdraft Charges." Amended Complaint, ¶ 34. The 2000 Agreement's overdraft policy disclosure (Overdraft Policy) provided, in pertinent part:

> "2. We may, at our option, or pursuant to an agreement with you, pay a payment order which creates an overdraft in your account; provided, however, that the payment of one or several overdrafts shall not bind us to pay for subsequent overdrafts.
>
> "3. In the event that we honor a payment order that is not a check or item which creates an overdraft in the account, you agree to deposit sufficient funds to cover the over draft, plus interest for the amount in overdraft at the maximum rate permitted by law or regulation from the date of the overdraft until the date in which the complete payment is made and any applicable charges.
>
> . . .
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> "5. If there are insufficient funds in the account and the account is not covered by an overdraft guarantee, it is subject to a return item charge . . . . The payment orders drawn against unavailable funds may also be subject to charges in the account."

Randazzo aff, exhibit 12 at 5; Amended Complaint, ¶¶ 34, 36. According to Plaintiffs, BPNA "represented that it 'may' make overdraft loans, when its policy was to make such overdraft loans in all, many or most instances when an account holder had insufficient funds to pay a debit or withdrawal." Amended Complaint, ¶ 35.

The 2000 Agreement also contained a "Notice of Payment Order," which described BPNA's item-ordering policy (Ordering Policy) as follows:

> "We will pay all checks, drafts, or orders of payment issued by you and presented for collection on the day they are presented, starting with the largest dollar amount and proceeding to the lowest dollar amount. The policy of the Bank is to pay in descending order . . . This ensures that your larger and perhaps more important checks, such as your mortgage or rent are paid before your smaller checks."

Randazzo aff, exhibit 12 at 15. Plaintiffs do not appear to rely on this provision to state their claim, but rather, they appear to rely on a similar provision found in the 2008 Agreement, again

without specifying the precise agreement at issue. *See* Amended Complaint, ¶ 39. However, Plaintiffs allege that they never received the 2004, 2007, 2008, and 2010 Agreements. *Id.*, ¶ 37.

Plaintiffs claim that the 2008 Agreement also stated the Overdraft Policy, which "maintained [BPNA's] discretion to make overdraft loans and impose Overdraft Charges." *Id.* Plaintiffs point to a provision of the 2008 Agreement, which stated:

> "If you have non-sufficient funds to cover a return item, we *may* overdraw your account. In the event that we honor a payment order that is not a check or item which creates an overdraft in the account, you agree to deposit sufficient funds to cover the overdraft, plus interest for the amount in overdraft at the maximum rate permitted by law or regulation from the date of the overdraft until the date in which the complete payment is made, and any applicable charges."

Id., ¶ 38 (emphasis added); Randazzo aff, exhibit 10 at 28. This language also appeared in the 2004, 2007, and 2010 Agreements. Randazzo aff, exhibit 8 at 22, exhibit 9 at 24, exhibit 11 at 30. Notably, this provision is found in the section entitled, "Returned Items." *Id.*, exhibit 8 at 22, exhibit 9 at 24, exhibit 10 at 27, exhibit 11 at 30. Plaintiffs claim that this language "misstated in bad faith that Defendant 'may' make overdraft loans and impose Overdraft Charges when Defendant [knew] it would do so in all, most or many cases, and failed to fully, completely, truthfully and/or accurately disclose Defendant's overdraft policies and procedures." Amended Complaint, ¶ 37.

In addition to the "Returned Items" provision, the 2004 Agreement contained a "Non-Sufficient Funds Fee" provision, which stated, in pertinent part: "When you do not have enough available funds in your . . . savings account to cover a check or other debit, we consider the check or debit a non-sufficient or unavailable funds item." Randazzo aff, exhibit 8 at 23. The provision explained that the debit would be honored if the customer had enough coverage under BPNA's overdraft protection plan, but regardless of the customer's overdraft protection,

BPNA charged "a non-sufficient client funds fee." *Id.* Similar language existed in the 2007 and 2008 Agreements. *Id.*, exhibit 9 at 25, exhibit 10 at 28. The 2010 Agreement did not contain a similar provision, presumably due to the federal regulatory changes discussed below.

Plaintiffs allege that BPNA's Ordering Policy of high-to-low reordering – which entailed the clearing of withdrawals, made in a single day or over multiple days, from the highest amounts to the lowest amounts – maximized the number of overdraft charges imposed on BPNA's customers. Amended Complaint, ¶ 52. According to Plaintiffs, in the 2008 Agreement, BPNA "gave itself complete discretion to re-order customer withdrawals and debits, including ATM withdrawals and debits," and it "applied that discretion in bad faith to injure Plaintiffs and Class members." *Id.*, ¶ 39. Plaintiffs were allegedly injured by the imposition of multiple overdraft charges on the Account, including on September 5, 2007 and April 19, 2012. *Id.*, ¶ 52. For example, Plaintiffs allege that on September 2, 2007, the Account had a positive balance of $247.28. *Id.*, ¶ 82. Plaintiffs made two withdrawals that day, first for $162 and later for $42. *Id.* Plaintiffs made another ATM withdrawal on September 4, 2007, for $141.50. *Id.* BPNA allegedly re-ordered these withdrawals, from highest to lowest, and cleared them all on September 4, 2007, which resulted in two overdraft charges, instead of one, imposed on Plaintiffs' Account on September 5, 2007. *Id.*

According to BPNA, the Ordering Policy for consumer accounts was fully disclosed in the 2004 Agreement, which provided, in pertinent part:

> "We *may* accept, pay, certify, or charge to the indicated account checks and other items that we process on any given day in any order we choose. We may establish different processing priorities or categories for checks and other items . . . We may change the order at any time without notice to you unless required by law. When you do not have enough available funds in your account to cover all of the items presented that day, some methods may result in more

> insufficient funds fees than other methods. We may choose our processing method in our sole discretion, regardless of whether additional fees may result.
>
> . . .
>
> "We currently process checks and other items according to certain priorities. Within each priority, we *generally* process checks and other items from the highest to lowest dollar amount."

Randazzo aff, ¶ 12, exhibit 8 at 21-22 (emphasis added). Each subsequent revision contained the same or similar language regarding the Ordering Policy. *Id.*, ¶¶ 13-15, exhibit 9 at 23, exhibit 10 at 27, exhibit 11 at 29-30.

Randazzo states that BPNA's Overdraft Policy for savings account customers did not change from 2006 to June 2010. *Id.*, ¶ 10. During that time, it charged a one-time $10 fee when a customer attempted an ATM withdrawal against insufficient funds. *Id.*, ¶ 10 and exhibits 5 and 6; Amended Complaint, ¶ 7. The fee went into effect on November 15, 2004 and was disclosed to Plaintiffs in their September 30 and October 31, 2004 account statements, as follows: "FOR ALL SAVINGS CUSTOMERS: PLEASE BE ADVISED THAT THE FOLLOWING PRICING WILL BE EFFECTIVE BEGINNING NOVEMBER 15, 2004: NSF ITEM RETURNED OR PAID INTO OVERDRAFT, UNCOLLECTED OR UNAVAILABLE - $10.00." Randazzo aff, ¶ 10 and exhibit 7.

BPNA allegedly changed its overdraft protection program in 2010, after the Federal Reserve amended 12 CFR § 205.17 (Regulation E). *Id.*, ¶¶ 7, 8. Regulation E prohibited financial institutions from "assess[ing] a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service," unless the customer was first notified of the overdraft protection program and affirmatively consented to it. 12 CFR § 205.17 (b). Because the Federal Deposit Insurance Corporation insures BPNA,

the New York state-chartered bank is subject to Regulation E. Amended Complaint, ¶ 112; Randazzo aff, ¶ 2; 12 CFR § 362.1 (a) ("restrict[ing] and prohibit[ing] [FDIC-]insured State banks and their subsidiaries from engaging in activities and investments that are not permissible for national banks and their subsidiaries"). The regulation went into effect on July 1, 2010 for new deposit customers and on August 15, 2010 for existing customers. 12 CFR § 205.17 (c).

BPNA allegedly informed its customers of its new opt-in overdraft protection program by mailing a "Debit Card Coverage" brochure with the May 31, 2010 account statements. Randazzo aff, ¶ 8 and exhibit 2. The brochure explained the overdraft fees and that, unless customers opted-in by phone, in person or by mail, as of June 21, 2010, BPNA would no longer honor overdrafts for one-time debit card transactions and ATM withdrawals. *Id.*, exhibit 2. Plaintiffs' May 31, 2010 account statement referenced the brochure. *Id.*, exhibit 3. Randazzo states that once a customer opted-in, BPNA mailed a written notice to the customer confirming his or her authorization and explaining that the customer could withdraw the authorization at any time. *Id.*, ¶ 9. BPNA submitted a notice of authorization, dated January 7, 2011, addressed to Plaintiffs. *Id.*, exhibit 4. Plaintiffs allege, however, that BPNA "did not obtain the mandatory, affirmative consent from Plaintiffs in compliance with revised Regulation E, or the New York banking requirement and regulations" (Amended Complaint, ¶ 119), and that they never received the brochure. *Id.*, ¶ 33. In addition, Plaintiffs submit BPNA-produced spreadsheets, which identify Plaintiffs' opt-in date as July 25, 2012, over 18 months after the authorization notice. Tusa affirmation, exhibit F at BPNA0002125, exhibit G at BPNA0002175.

Effective November 1, 2010, Plaintiffs' account was converted to a "Relationship Savings" account, which was subject to a $4 maintenance fee in certain circumstances. Randazzo aff, ¶ 18 and exhibit 14; Amended Complaint, ¶ 107. This fee was disclosed to

Plaintiffs in their August 31 and September 30, 2010 account statements, as follows: "On 11/1/2010, your popular savings account will be converted to the new relationship savings. If there is no regular scheduled deposit (at least one per month) or if the minimum daily ledger balance falls below $250, then there is a $4 monthly fee." Randazzo aff, ¶ 18 and exhibit 14. According to Plaintiffs, Josefina Valle set up a direct deposit into the Account; however, due to BPNA's overdraft charges, Plaintiffs' account balance dropped below $250, resulting in a $4 maintenance fee on September 30, 2012. Amended Complaint, ¶ 107.

BPNA alleges that effective January 25, 2012, it began charging a daily $5 overdraft fee to New York customers for each day after the fifth business day that an account remained overdrawn. Randazzo aff, ¶ 17; Amended Complaint, ¶ 7. This fee was disclosed to Plaintiffs in their November 30 and December 31, 2011 account statements. Randazzo aff, ¶ 17 and exhibit 13. The account statements provide, in pertinent part: "a $5 daily fee will be assessed if your account is overdrawn for 5 or more consecutive days." *Id.*

From November 16, 2006 through July 31, 2012, BPNA allegedly imposed 182 overdraft charges on Plaintiffs' Account, for a total of $1,445 in fees. Amended Complaint, ¶¶ 72, 73. All were imposed for having insufficient funds for ATM withdrawals. *Id.*, ¶ 72. Randazzo states that, based on BPNA's examination of Plaintiffs' account statements, each of the ATM withdrawals, between November 31, 2006 and October 31, 2012, was at "a non-proprietary ATM (i.e. not owned or operated by BPNA)." Randazzo aff, ¶ 11.

According to Plaintiffs, each overdraft charge violated New York usury laws. Amended Complaint, ¶ 74. Plaintiffs assert that on March 6, 2012, BPNA imposed a $10 overdraft fee for the previous day's ATM withdrawal of $21.75. *Id.*, ¶ 77. From March 12 through March 29,

2012, BPNA imposed 14 additional overdraft charges of $5 per day, totaling $70 for the withdrawal made on March 5, 2012. *Id.*, ¶ 78.

In July 2012, Plaintiffs allegedly complained to BPNA concerning the overdraft charges and were issued a new ATM card that would not permit overdraft withdrawals. *Id.*, ¶ 120.

Plaintiffs commenced the instant action on November 14, 2012. Plaintiffs allege that from November 14, 2006 to the present, BPNA engaged in the following "unlawful, deceptive and bad faith" practices in "its imposition of overdraft loan interest and fees on customer deposit accounts:" (1) failing to obtain customer approval prior to making overdraft loans and imposing overdraft charges, (2) failing to disclose, prior to the completion of a transaction, that an ATM withdrawal or debit card transaction would cause the account to be overdrawn, (3) re-ordering customer withdrawals, "high-to-low," to create or maximize overdraft charges, (4) failing to provide timely notices and disclosures mandated by New York banking regulations, including sections 6.8 (e), 32.4, and 13.4 (1) of Title 3 of the New York Code, Rules and Regulations (NYCRR) (collectively, NY Banking Regulations), (5) charging interest rates, in the form of overdraft charges, in excess of the New York usury laws, and (6) charging monthly maintenance fees after BPNA's unlawful overdraft policies cause an account to fall below the minimum required balance. Amended Complaint, ¶¶ 2, 3.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *CBS Corp. v Dumsday*, 268 AD2d 350, 352 (1st Dept 2000). "[T]he pleadings must be liberally construed and the facts alleged accepted as true" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]), but "allegations

consisting of bare legal conclusions . . . are not entitled to any such consideration." *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999) (internal quotation marks and citations omitted).

Where a motion to dismiss is based on documentary evidence, pursuant to CPLR 3211 (a) (1), dismissal "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) (internal quotation marks and citation omitted); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (stating that the documentary evidence must "utterly refute[] plaintiff's factual allegations"). The evidence "must be unambiguous and of undisputed authenticity." *Fontanetta v John Doe 1*, 73 AD3d 78, 86 (2d Dept 2010).

A. Preemption

BPNA argues that Plaintiffs' causes of action for breach of the implied covenant of good faith and fair dealing and unfair business practices under GBL § 349 are preempted by federal law, to the extent these claims are based on the NY Banking Regulations and the Ordering Policy. BPNA argues that Plaintiffs' cause of action based upon usury law violations, is also preempted by federal law. Specifically, BPNA argues that, because 3 NYCRR § 6.8 (d) permits state-chartered banks like BPNA to impose overdraft fees "to the same extent, and subject to the same conditions, as national banks," and federal regulations allow national banks to establish fees without regard to state disclosure requirements, and to order transactions according to their sound discretion, Plaintiffs' claims against BPNA are preempted to the same extent they would be against a national bank. *See* 12 CFR § 7.4007 (b) ("[a] national bank may exercise its deposit-taking powers without regard to state law limitations concerning . . . (3) [d]isclosure requirements"); 12 CFR § 7.4002 (a) (authorizing national banks to "charge [their] customers

non-interest charges and fees, including deposit account service charges"); 12 CFR § 7.4002 (b) (2) (providing that "[t]he establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound business principles").

Preemption is either express or implied. *Barnett Bank of Marion County, N.A. v Nelson,* 517 US 25, 31 (1996). "Express preemptive intent is discerned from the plain language of a statutory provision." *Doomes v Best Tr. Corp.*, 17 NY3d 594, 601 (2011).

> "'Implied preemption' takes two forms. The first, referred to as 'field preemption,' occurs if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.' The second type, 'conflict preemption,' establishes that 'a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found where compliance with both federal and state regulations is a physical impossibility.'"

Balbuena v IDR Realty LLC, 6 NY3d 338, 356 (2006) (internal citations omitted).

Here, BPNA's argument relies upon the plain language of 3 NYCRR § 6.8 (d), but BPNA has not cited to any legal authority in support of its broad interpretation of this provision. Nor did the court's independent research reveal any. A review of the "Regulatory Impact Statement" reveals that, in amending Part 6 of Title 3 of NYCRR to add section 6.8, the New York Banking Department (Banking Department) intended to allow state banks like BPNA to charge overdraft fees to the same extent as federal banks, notwithstanding New York's usury laws. NY Reg, Sept. 21, 2005 at 6 ("whether national banks charge one fee when accepting a check that overdraws an account, a daily fee, or both, such fees would not be subject to [New York's] caps on interest rates or the criminal usury ceiling. Consequently, use of the wild card authority is necessary to permit State-chartered institutions to charge daily fees to the same

extent as national banks."). The section's purpose is further elucidated in the superintendent's findings, which focus on national banks' ability to charge fees. The superintendent expressly found that:

> "title 12, Code of Federal Regulations, section 7.4002 provides that *national banks may impose charges and fees* on their customers, and title 12, Code of Federal Regulations, Section 557.12 (f) allows *Federal savings associations to impose charges and fees regardless of any State laws*. The Office of the Comptroller of the Currency and the Office of Thrift Supervision, in interpreting these sections, permit national banks and Federal savings associations, respectively, *to impose greater daily charges in connection with overdraft protection programs than is otherwise allowed under New York Banking Law* for banks and trust companies, savings banks and savings and loan associations."

3 NYCRR § 6.8 (c) (emphasis added).

The express language of subsection (d) also makes clear that the regulation is intended to allow state-chartered banks to impose overdraft fees to the same extent as federally-chartered banks, and nothing more. The section provides:

> "State-chartered banks and trust companies, and savings banks and savings and loan associations may impose charges, in addition to the charge provided for in section 32.1(a) of this Title, for paying or accepting checks or other written orders drawn on, or effectuating electronic transactions from, accounts containing insufficient funds in cases in which the drawer of the check or other written order, or the account holder seeking to effectuate the electronic transaction, does not have a written agreement for an overdraft line of credit pursuant to section 108(5), 235(8-b) or 380(2) of the Banking Law *to the same extent, and subject to the same conditions, as national banks and Federal savings associations, respectively*."

3 NYCRR § 6.8 (d) (emphasis added). In short, nothing contained in section 6.8 (d) supports the conclusion that state-chartered banks may ignore all New York banking regulations that merely touch upon the imposition of fees (such as by requiring disclosures of fees) in favor of federal regulations. Rather, subsection (d) simply limits certain New York restrictions on the

amounts and types of fees that state-chartered banks may charge. Moreover, if the court were to adopt BPNA's interpretation, then subsection (e), adopted as an amendment of section 6.8 in order to "[e]nsure[] that consumers whose accounts are covered by the newly permissible bounce protection charges are promptly and clearly notified of that fact" (NY Reg, Jan. 12, 2011 at 83), would be preempted and rendered inoperative in its entirety. This interpretation is prohibited by rules of statutory construction, as it would read the purported preemptive language out of context, to the exclusion of the statutory language as a whole. *See People v Giordano*, 87 NY2d 441, 448 (1995) ("[u]nder well-established principles of interpretation, effect and meaning should be given to the entire statute and every part and word thereof" [internal quotation marks omitted]).

For the foregoing reasons, BPNA fails to provide any legal basis for the application of express preemption; nor do BPNA's arguments suggest any basis for applying implied preemption. *Doomes*, 17 NY3d 594 at 601; *Balbuena*, 6 NY3d at 356; *accord Levin v HSBC Bank USA, N.A.*, 2012 WL 7964121, 2012 NY Misc LEXIS 6062 (Sup Ct, NY County, June 26, 2012, Index No. 650562/2011) (holding that state law claims based upon bank's overdraft fees and ordering practices were not preempted). Accordingly, BPNA's motion to dismiss Plaintiffs' claims as preempted is denied.

B. Implied Covenant of Good Faith and Fair Dealing

Every contract contains an implied covenant of good faith and fair dealing. *Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 (1st Dept 2010). "This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *511 W. 232nd Owners Corp.*, 98 NY2d at 153 (internal quotation marks and citations omitted). The covenant "encompass[es]

any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Id.* (internal quotation marks and citations excluded). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995). "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship." *Id.* (internal quotation marks and citation omitted). In order to survive a motion to dismiss, "the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 (2d Dept 1999); *Jaffe v Paramount Communications*, 222 AD2d 17, 23 (1st Dept 1996).

i. NY Banking Regulations and Regulation E

BPNA argues that it provided all required disclosures and that Plaintiffs authorized BPNA's overdraft coverage. Moreover, BPNA argues, even if it failed to comply with disclosure requirements, Plaintiffs have not alleged how this failure caused them to be injured. With respect to the disclosure required by 3 NYCRR § 6.8 (e), BPNA argues that the claim is time-barred.

Plaintiffs counter that BPNA's "documentary evidence" may not be considered because: (1) Plaintiffs dispute ever receiving revised versions of the deposit agreements (Randazzo aff, exhibits 8-11), (2) whether Plaintiffs' account statements (*id.*, exhibits 3, 5-7, 13, and 14) were ever sent or received constitutes a question of fact, and (3) the letter confirming Plaintiffs' opt-in, dated January 7, 2011 (*id.*, exhibit 4), is contradicted by Plaintiffs' assertion that they never consented, BPNA's admission that it cannot locate Plaintiffs' written consent (Tusa

affirmation, exhibit D at 7), BPNA-produced documents indicating that Plaintiffs opted-in on July 25, 2012 (*id.*, exhibits F, G), and Plaintiffs' allegation that they opted-out in July 2012. Plaintiffs also argue that, because BPNA did not have their affirmative consent, every overdraft imposed after August 15, 2010 violated Regulation E and was done in bad faith. In addition, Plaintiffs argue that, before the amendment of Regulation E, New York banking regulations required BPNA to obtain customers' consent for overdraft protection, which BPNA failed to do. With respect to 3 NYCRR § 6.8 (e), Plaintiffs contend that their claim is timely because a new breach occurred each time BPNA charged an overdraft fee.

Here, the cause of action for breach of the implied covenant of good faith and fair dealing is based upon BPNA's alleged failure to: (1) obtain customer approval prior to making overdraft loans to, and imposing overdraft charges on, its deposit customers, (2) provide disclosures mandated by 3 NYCRR § 6.8 (e), which requires that a bank explain the parameters, costs and limitations of its overdraft protection program in a separate, conspicuous disclosure, (3) provide the written notice mandated by 3 NYCRR § 32.4, which requires a bank to explain the order in which it pays items drawn against a depositor's account, (4) provide the disclosures mandated by 3 NYCRR § 13.4 (1), which requires a bank to disclose when a savings account becomes subject to service charges, or failed to do so in the manner and form required by 3 NYCRR §§ 13.2 and 13.3.

As a preliminary matter, these allegations merely allege violations of banking regulations without any factual allegations connecting them to the parties' agreement.

> "New York courts have repeatedly affirmed that a party may be in breach of an implied duty of good faith and fair dealing, even if it is not in breach of its express contractual obligations, when it exercises a contractual right as part of a scheme to realize gains

> that the contract implicitly denied or to deprive the other party of the fruit of its bargain."

Gross v Empire Healthchoice Assur., Inc., 16 Misc 3d 1112(A), 2007 NY Slip Op 51390 (U), *4 (Sup Ct, NY County, 2007), citing *Dalton*, 87 NY2d at 389-90. Here, not only is there no allegation of an express breach, but Plaintiffs do not allege how BPNA's failure to comply with banking regulations deprives Plaintiffs of a contractual right or garners to BPNA a benefit implicitly denied by contract. Instead, Plaintiffs impermissibly seek to use allegations of regulatory noncompliance to "create new duties," without identifying the contract out of which these duties arise or any connection to an implied right under such a contract. *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302 (1st Dept 2003).

The only authority Plaintiffs submit to support its legal theory addresses the situation where a disclosure, which does not comply with regulatory or statutory requirements, is allegedly made in such a way that it constitutes a breach of the implied covenant of good faith and fair dealing. For example, in *Lonner v Simon Prop. Group, Inc.*, the plaintiff alleged that the disclosure of a monthly dormancy fee imposed on the defendant-issued gift card was concealed and in small print, in violation of applicable laws. 57 AD3d 100, 102 (2d Dept 2008). The court found that the complaint sufficiently stated a claim, because "a factfinder [could] conclude[] that the [fee] disclosure statement was not clear or conspicuous as required by [law] . . . or, alternatively, see it as a violation of the implied duty of good faith and fair dealing." *Id.* at 108 (internal quotation marks and citation omitted). The court specifically found that "[t]he amended complaint allege[d] that the terms of the fee disclosure [were] not clear and conspicuous, but rather, unclear and hidden, which is sufficient to maintain a claim based upon a breach of the implied covenant of good faith and fair dealing." *Id.*; *see also Sims v First*

Consumers Natl. Bank, 303 AD2d 288, 290 (1st Dept 2003) (stating that "plaintiffs allege, and should be afforded an opportunity to convince a factfinder, that an average reader could not readily locate the disclosures within the material provided").

Here, the Amended Complaint contains no factual allegations regarding the disclosures' shortcomings or how such shortcomings breached the implied covenant of good faith and fair dealing. Instead, the Amended Complaint relies entirely on the bare, conclusory allegations that BPNA failed to "timely provide the written notice" and, with respect to 3 NYCRR § 13.4 (1), that the disclosures were not "in the manner and form required by 3 NYCRR §§ 13.2 and 13.3." Amended Complaint, ¶¶ 3, 134. Therefore, *Lonner* and *Sims* are distinguishable on their facts, and Plaintiffs fail to state a claim based on BPNA's violations of New York banking regulations.

This portion of Plaintiffs' claim is also refuted by documentary evidence, which establishes that BPNA provided notice of its overdraft fees and policies, as required by the NY Banking Regulations. Before instituting the fees, BPNA advised Plaintiffs of the one-time $10 overdraft fee, the $5 daily fee that would be applied until the Account was no longer overdrawn, and the $4 maintenance fee that would be applied if the Account's balance fell below the required minimum. Randazzo aff, ¶¶ 10, 17, 18 and exhibits 5-7, 13, 14; *see also* 3 NYCRR § 6.8 (e) (requiring explanation of overdraft protection charges in a separate, conspicuous disclosure); 3 NYCRR § 13.4 (1) (requiring a bank to disclose when a savings account becomes subject to service charges). These disclosures appeared prominently on the first page, in all capital letters, of Plaintiffs' account statements. Randazzo aff, exhibits 7, 13, 14. In addition, the 2000 Agreement disclosed the overdraft policy, stating that BPNA "may, at [its] option, or pursuant to an agreement with you, pay a payment order which creates an overdraft in your account," and BPNA informed customers that they would be responsible to repay the overdraft

along with applicable interest and charges. *Id.*, exhibit 12 at 5; 3 NYCRR § 6.8 (e). Later disclosures provided that, whether an overdraft was honored or declined, BPNA "charge[s] you a non-sufficient client funds fee." Randazzo aff, exhibit 8 at 2, exhibit 9 at 25, and exhibit 10 at 28. Likewise, BPNA disclosed its Ordering Policy. *Id.*, ¶ 16, exhibit 12 at 15; *see also* 3 NYCRR § 32.4 (requiring an explanation of the order in which the bank pays items drawn against a depositor's account). The 2000 Agreement provided, in unambiguous terms, that: "[t]he policy of the Bank is to pay in descending order." Randazzo aff, exhibit 12 at 15; 3 NYCRR § 32.4. Later versions of this disclosure provided BPNA "generally process[es] checks and other items from highest to lowest dollar amount." Randazzo aff, exhibit 8 at 21-22, exhibit 9 at 23, exhibit 10 at 27, exhibit 11 at 29-30.

To the extent Plaintiffs contend that these documents are not documentary evidence, the argument is without merit. *See Lopez v Fenn*, 90 AD3d 569, 572-73 (1st Dept 2011) (finding IOLA account statements constituted documentary evidence warranting dismissal of plaintiff's conversion claim); *Fontanetta*, 73 AD3d at 84-85 ("contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence'"). Nor is the court persuaded by Plaintiffs' contention that issues of fact exist with respect to whether or not Plaintiffs received these disclosures. The Amended Complaint does not allege that BPNA failed to furnish Plaintiffs with their account statements, which expressly notified Plaintiffs of the fees and policies. Indeed, many of Plaintiffs' allegations, detailing what fees were imposed and when, could not have been made without these statements. *See e.g.* Amended Complaint, ¶¶ 14, 73, 75-78, 82-88, 92-93. In addition, while Plaintiffs allege that they never received later versions of the 2000 Agreement, they do not deny receiving the 2000 Agreement itself, which disclosed the Ordering and Overdraft Policies. Therefore, documentary evidence establishes that

Plaintiffs received notice of BPNA's policies and fees. *See Perl v Smith Barney*, 230 AD2d 664, 665 (1st Dept 1996) (dismissing complaint that alleged assessment of fees without prior notice, where, among other things, "Smith Barney provided unambiguous notice through prominent disclosure on plaintiff's December 1992 statement that all accounts closing after February 15, 1993 would be subject to a $50 transfer fee"); *Berardino v Ochlan*, 2 AD3d 556, 557 (2d Dept 2003) (finding documentary evidence refuted party's allegation that his father was not notified of a reduction in policy's cash value, where "[v]arious policy illustrations provided to [the father], which he did not specifically deny receiving and one of which he signed, indicated that the cash value of the new policy would be reduced"). Accordingly, the cause of action for breach of the implied covenant of good faith and fair dealing, with respect to the NY Banking Regulations, is also dismissed based upon documentary evidence.

The court notes that Plaintiffs fail to provide any authority for their contention that, prior to the amendment of Regulation E, New York law required BPNA to obtain Plaintiffs' affirmative consent to enroll them in its overdraft protection program. Plaintiffs rely on a variety of sources, but all are advisory rather than mandatory. *See* Joint Guidance on Overdraft Programs, 70 Fed Reg 9127, 9127 (Feb. 24, 2005) ("[t]his *guidance* is intended to assist insured depository institutions in the responsible disclosure and administration of overdraft protection services" [emphasis added]); Letter from NY Banking Dept, Aug. 6, 2004, Diana L. Taylor (stating that "banking institutions *should* either offer the program on an 'opt-in' basis or . . . 'opt-out' [basis]" [emphasis added]); NY Banking Dept. Best Practices for Issuers of Debit Cards-Reissue, Jan. 2004 (stating that "any 'overdraft' feature *should* be optional" [emphasis added]).

Regulation E established the opt-in requirement for overdraft protection programs, effective on July 1, 2010 for new deposit customers and on August 15, 2010 for existing customers. 12 CFR § 205.17 (c). Regulation E required financial institutions to "[p]rovide[] the consumer with a notice in writing" and "a reasonable opportunity for the consumer to affirmatively consent, or opt in . . . and . . . [a] confirmation of the consumer's consent in writing . . . ." 12 CFR § 205.17 (b).

Here, the documentary evidence demonstrates that Plaintiffs' May 31, 2010 account statement referenced the "Debit Card Coverage" brochure, which informed customers of the new opt-in policy for the overdraft protection program. Randazzo aff, ¶ 8 and exhibits 2, 3. However, Plaintiffs specifically deny that they received the brochure. Amended Complaint, ¶ 33. The evidence does not "'flatly contradict[]'" this allegation, as it is possible that the brochure was not include with the statement. *Maas*, 94 NY2d at 91. In addition, BPNA's letter to Plaintiffs, confirming their opt-in, fails to conclusively establish BPNA's compliance with Regulation E. On the one hand, the letter is dated January 7, 2011. Randazzo aff, exhibit 4. On the other hand, BPNA-produced spreadsheets indicate that Plaintiffs did not opt in until July 25, 2012.[1] Tusa affirmation, exhibit F at BPNA0002125, exhibit G at BPNA0002175. In addition, Plaintiffs allege that BPNA did not obtain their consent and that, in July 2012, they complained about the overdraft fees and obtained a new debit card that would not permit overdrafts. Amended Complaint, ¶¶ 119, 120. Therefore, factual issues exist as to when and if BPNA obtained Plaintiffs' affirmative consent to participate in the overdraft protection program.

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[1] It is irrelevant that BPNA is unable to locate Plaintiffs' written opt-in, since Regulation E does not require the affirmative consent to be in writing, but merely provides that the overdraft disclosure "includ[e] the methods by which the consumer may consent to the service." *See* 12 CFR § 205.17 (d) (4).

However, this does not salvage Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. Although the claim is replete with factual allegations, Plaintiffs still fail to allege "any facts to demonstrate that [BPNA] deprived [them] of any rights [they] had under the Agreement." *Jaffe*, 222 AD2d at 23. Instead, they allege regulatory violations and merely add that BPNA acted in bad faith. Amended Complaint, ¶¶ 3, 134. Therefore, Plaintiffs fail to state a claim for breach of the implied covenant of good faith and fair dealing based on BPNA's alleged violation of Regulation E.[2]

ii. The 2000 Agreement and the 2008 Agreements

BPNA contends that its Overdraft and Ordering Policies were expressly permitted by contract. BPNA also argues that Plaintiffs fail to allege independent misconduct for the maintenance fee claim. Plaintiffs counter that, to the extent BPNA expressly stated its Overdraft and Ordering Policies in its customer agreements, BPNA retained discretion over these policies and exercised that discretion in bad faith to injure its customers.

As a preliminary matter, the parties never identify the operative agreement. The Amended Complaint relies on provisions in the 2000 Agreement, but merely alleges that the agreement was "near in time" to when Plaintiffs became BPNA customers in 1999. Amended Complaint, ¶ 34. The Amended Complaint also relies on the 2008 Agreement, but alleges that

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[2] The court need not address the statute of limitations argument with respect to the portion of Plaintiffs' claim that is based upon 3 NYCRR § 6.8 (e), having found the claim barred on other grounds, but notes that the action was timely commenced well within the limitations period. The six-year statute of limitations for the breach of the implied covenant of good faith and fair dealing (*Liberman v Worden*, 268 AD2d 337, 339 [1st Dept 2000]) begins to run from the time of the breach, rather than the injury. *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-403 (1993) ("'settled law marks accrual [for an action sounding in contract] from the contractual breach'"); *Robb v Low*, 99 AD3d 614, 614 (1st Dept 2012) (affirming dismissal of breach of contract and implied covenant of good faith and fair dealing as time-barred because "plaintiff's claim accrued . . . when defendant breached"). The duty to disclose the overdraft policy arose on April 10, 2007, "90 days after the [regulation's] effective date" of January 10, 2007. 3 NYCRR § 6.8 (e); NY Reg, Jan. 10, 2007at 1. The six-year statute of limitations for breach of the implied covenant of good faith and fair dealing expired on April 10, 2013. Plaintiffs commenced this action on November 14, 2012.

Plaintiffs never received a copy of it. *Id.*, ¶ 37. BPNA acknowledges this omission, stating that "Plaintiffs fail to attach a copy of the 1999 Agreement and, instead, treat the May 2000 Agreement as the operative agreement" (BPNA's brief at 6), but BPNA also fails to identify the operative agreement. Instead, BPNA argues that Plaintiffs "executed a signature card by which they expressly agreed that 'this account shall be governed by the rules and regulations now in force in the branches of [BPNA] and to such other rules and regulations as it may hereafter adopt.'" *Id.* (quoting Randazzo aff, exhibit 1). BPNA explains that "[it] informs its customers of applicable changes in BPNA policies via their account statements and other means, including mailings, online postings, and branch postings." *Id.* BPNA argues that "Plaintiffs agreed when executing the signature card that subsequent disclosures become binding terms of their contract." *Id.*

BPNA never argues in its moving brief that Plaintiffs' failure to identify the operative agreement warrants dismissal of their claims, but impermissibly raises the argument for the first time in a footnote of its reply brief. BPNA's reply brief at 3 n 1; *see Ritt v Lenox Hill Hop.*, 182 AD2d 560, 562 (1st Dept 1992) ("the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion"); *Dannasch v Bifulco*, 184 AD2d 415, 416-17 (1st Dept 1992) (reversing summary judgment where defendant, in its reply papers, asked the court to consider dismissal of the action on further grounds). Although BPNA argues that all disclosures became part of the parties' agreement, it does not elaborate on this argument. BPNA's brief at 6, 9. In addition, although BPNA describes its notification methods, nothing contained in the parties' submissions establishes that Plaintiffs were actually notified of the revisions to the 2000 Agreement. Ultimately, because BPNA does not raise this issue in its moving papers, and

because it is undisputed that each version of the customer deposit agreement was effective at some point during the relevant period, the court "accord[s] [Plaintiffs] the benefit of every possible favorable inference" and determines only whether Plaintiffs' allegations with respect to the 2000 Agreement and the 2008 Agreement state a cause of action. *CBS Corp.*, 268 AD2d at 352.

The parties rely on two recent cases addressing issues similar to those presently before the court: *Feld v Apple Bank for Sav.*, 2013 WL 2457716, 2013 NY Misc LEXIS 2315 (Sup Ct, NY County, Mar. 13, 2013, Index No. 651565/2011), *affd* 116 AD3d 549 (1st Dept 2014); and *Levin*, 2012 WL 7964121, 2012 NY Misc LEXIS 6062. In *Feld*, the plaintiff alleged that Apple Bank imposed overdraft fees without prior customer approval, charged usurious interest, re-ordered checks and automated clearinghouse (ACH) payments to manufacture more overdraft charges, and stated that it "may" pay overdrafts, when, in fact, its internal policy required such payment. *Feld*, 2013 WL 2457716 at *1, 2013 NY Misc LEXIS 2315 at *2. Among the plaintiff's causes of action were breach of contract, breach of the implied duties of good faith and fair dealing, and violations of GBL § 349. *Feld*, 2013 WL 2457716 at *2, 2013 NY Misc LEXIS 2315 at *2. The brochure describing the bank's overdraft policy provided, in relevant part, that: "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." *Feld*, 2013 WL 2457716 at *4, 2013 NY Misc LEXIS 2315 at *8. Apple Bank also advised Feld 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, 2013 WL 2457716 at *7, 2013 NY Misc LEXIS 2315 at *15. The trial court dismissed the claims, finding that Apple Bank fully disclosed its practices, which did not violate state or federal law. *Feld*, 2013 WL 2457716 at *7, 2013 NY Misc LEXIS 2315 at *15-16. The court also found that the claim for breach of the implied covenant of good faith and fair dealing was duplicative of the breach of contract claim. *Feld*, 2013 WL 2457716 at *8, 2013 NY Misc LEXIS 2315 at *16-17.

On appeal, the plaintiff argued that the claim for breach of the implied covenant of good faith and fair dealing was sufficiently pleaded with respect to Apple Bank's representation that it "may" provide overdraft protection, when it in fact always did. *Feld*, 116 Ad3d at 550. In affirming the dismissal, the First Department found that the plaintiff "misplaced his reliance on *Broder v MBNA Corp.* (281 AD2d 369 [1st Dept 2001])," reasoning that:

> "In *Broder* there was an issue of fact as to whether a purported lower promotional interest rate was deceptive and violative of the implied covenant of good faith and fair dealing under a credit card agreement. Although it stated that it may do so, the credit card issuer in *Broder* did not allocate payments to satisfy promotional balances with lower interest rates before cash advance balances that carried higher interest rates. To that extent, the cardholders in *Broder* were deprived of the opportunity to take advantage of the promoted lower interest rate. By contrast, the complaint here does not set forth any difference in the fees and charges that plaintiff would have incurred had defendant decided to reject his checks for insufficient funds instead of paying the overdrafts."

Id. at 550-51 (internal citations omitted).

In *Levin*, the plaintiffs alleged that HSBC routinely honored overdrafts and manipulated the order in which it cleared them, from largest to lowest, in order to maximize overdraft fees. *Levin*, 2012 WL 7964121 at *2, 2012 NY Misc LEXIS 6062 at *2-3. The "'Rules for Deposit Accounts'" provided that "'the Bank generally pays the largest debit items drawn on a depositor's account first.'" *Levin*, 2012 WL 7964121 at *3, 2012 NY Misc LEXIS 6062 at *5. The court held that the plaintiffs stated a cause of action for breach of the implied covenant of good faith and fair dealing, having alleged that HSBC, in choosing to post transactions in a manner that maximized fees, exercised its discretion in bad faith and "made it nearly impossible for customers to track their available balance in order to avoid those fees." *Levin*, 2012 WL 7964121 at *15, 2012 NY Misc LEXIS 6062 at *31. Specifically, the court found that:

> "The Rules [for Deposit Accounts] leave[] room for HSBC to choose how and when it posts transactions. The Rules do not state that HSBC always posts from high-to-low. Nor do the Rules explain the time period over which transactions will be posted from high to low. HSBC therefore had discretion concerning the manner in which Plaintiffs' transactions were posted."

Levin, 2012 WL 7964121 at *14, 2012 NY Misc LEXIS 6062 at *30-31.

Here, Plaintiffs challenge two discrete BPNA policies: (1) the Overdraft Policy, which indicates that BPNA may honor overdrafts, when, in fact, it consistently does so, and (2) the Ordering Policy, which provides for the ordering of overdraft items from highest to lowest. A version of each policy is contained in the 2000 and the 2008 Agreements.

To the extent Plaintiffs' cause of action is based on the 2000 Agreement's Overdraft Policy, which provided that BPNA "may" make overdraft loans (Randazzo aff, exhibit 12 at 5), Plaintiffs fail to state a claim for breach of the implied covenant of good faith and fair dealing. As in *Levin*, the provision indicates that BPNA retained discretion over the policy. However, the

court's holding in *Levin* hinged upon the bank's alleged abuse of discretion in its high-to-low ordering practice, not its policy of making overdraft loans, rendering *Levin* distinguishable on its facts with respect to the Overdraft Policy as applied to the 2000 Agreement. Moreover, in *Levin*, the court's conclusion was based upon the plaintiffs' allegation that customers could not track their available balances and avoid additional overdraft fees, whereas here, Plaintiffs fail to allege how the challenged practice "prevent[ed] performance of the contract or . . . with[e]ld its benefits from [Plaintiffs]." *Aventine Inv. Mgt.*, 265 AD2d at 514. To the extent that Plaintiffs' claim is based on the 2008 Agreement's Overdraft Policy, the allegations are analogous to those in *Feld* and fail to state a claim. Although the 2008 Agreement provided that in case of non-sufficient funds, BPNA "may overdraw your account," it expressly provided that BPNA would charge a fee regardless of whether or not it honored the overdraft. Randazzo aff, exhibit 10 at 28. Therefore, Plaintiffs cannot allege "any difference in the fees and charges that [they] would have incurred had [BPNA] decided to reject [their ATM withdrawals] instead of paying the overdrafts." *Feld*, 116 AD3d at 551. Plaintiffs fail to allege how they were deprived of the benefits of their agreement under either the 2000 Agreement or the 2008 Agreement. Accordingly, Plaintiffs' breach of the implied covenant of good faith and fair dealing cause of action, to the extent it is based on BPNA's Overdraft Policy, is dismissed.

The 2008 Agreement's Ordering Policy failed to expressly state the manner in which overdrafts would be allocated. The 2008 Agreement provided: "We *may* accept, pay, certify, or charge to the indicated account checks and other items that we process on *any* given day in *any* order we choose . . . [W]e *generally* process checks and other items from highest to lowest dollar amount." Randazzo aff, exhibit 10 at 27 (emphasis added). In this manner, BPNA retained discretion over how and when to order overdrafts and, according to Plaintiffs, abused this

discretion. Plaintiffs allege injury as a result of this practice, in that they incurred more overdraft fees than they would have incurred if BPNA had exercised its discretion to employ a chronological or a low-to-high clearing method. Amended Complaint, ¶ 81. Therefore, to the extent that Plaintiffs' cause of action is based on the Ordering Policy of the 2008 Agreement, it states a claim for breach of the implied covenant of good faith and fair dealing. *See Levin*, 2012 WL 7964121 at *14, 2012 NY Misc LEXIS 6062 at *30-31. However, the 2000 Agreement states that it was "[t]he policy of the Bank . . . to pay in descending order." Randazzo aff, exhibit 12 at 15. Nothing in that provision can be construed to allow for the exercise or abuse of discretion. Although Plaintiffs do not appear to rely on the 2000 Agreement's Ordering Policy, to the extent that they rely on the 2000 Agreement as the operative agreement, their claim for breach of the implied covenant of good faith and fair dealing fails and is dismissed.

Finally, Plaintiffs' allegations with respect to the $4 maintenance fee fail to state a claim for breach of the implied covenant of good faith and fair dealing. The fee was disclosed and Plaintiffs do not allege any bad faith conduct with respect to the imposition of the maintenance fee. Instead, Plaintiffs allege that the overdraft fees were imposed in bad faith in order to decrease Plaintiffs' account balance and to generate the maintenance fee. This merely restates Plaintiffs' claims with respect to the overdraft fees. At most, then, the maintenance fee is a further injury suffered as a result of BPNA's alleged bad faith overdraft policies.

iii. Notice of Insufficient Funds

Plaintiffs' allegations regarding BPNA's failure to notify customers of insufficient funds prior to the conclusion of a transaction do not state a cause of action for breach of the implied covenant of good faith and fair dealing. Plaintiffs fail to identify any implied obligation to provide such notice or allege how the failure to do so "ha[d] the effect of destroying or injuring

[their] right . . . to receive the fruits of the contract." *511 W. 232nd Owners Corp.*, 98 NY2d at 153; *see also Trump on the Ocean, LLC v State of New York*, 79 AD3d 1325, 1326 (3d Dept 2010) (finding breach of the implied covenant of good faith and fair dealing cause of action fails where "claimant has not alleged any applicable term of the [agreement] to support [the implied obligation]"). Moreover, because all of Plaintiffs' transactions were at non-proprietary ATMs (Randazzo aff, ¶ 11), it is not clear whether such notice was possible, and the Amended Complaint does not plead otherwise. As the Federal Reserve explained in the official staff commentary to amended Regulation E, it was not addressing real-time notices in the final rule because it "[did] not believe that it [was] technologically feasible to provide real-time opt-ins at many locations . . . particularly at non-proprietary ATMs and merchant POS terminals." 74 Fed Reg 59033 at 59049 (2009).

For the foregoing reasons, BPNA's motion to dismiss the first cause of action for the breach of the implied covenant of good faith and fair dealing is granted to the extent that the claim is based on noncompliance with the NY Banking Regulations and Regulation E, the Overdraft Policy, the 2000 Agreement's Ordering Policy, the maintenance fees, and the failure to provide notice of insufficient funds. The motion is denied to the extent that the cause of action is based on the 2008 Agreement's Ordering Policy.

C. New York GBL § 349

To state a cause of action for deceptive business practices under GBL § 349, Plaintiffs must allege that (1) BPNA's conduct was consumer-oriented, (2) the act was misleading in a material way, and (3) Plaintiffs suffered injury as a result of the act. *Stutman v Chemical Bank*, 95 NY2d 24, 29 (2000). "Consumer-oriented conduct does not require a repetition or pattern of deceptive behavior . . . but instead [Plaintiffs] must demonstrate that the acts or practices have a

broader impact on consumers at large. Private contract disputes, unique to the parties . . . would not fall within the ambit of the statute." *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 (1995). The "objective [test for] deceptive acts and practices [is] whether representations or omissions [are] . . . likely to mislead a reasonable consumer acting reasonably under the circumstances . . . , which may be determined as a matter of law or fact (as individual cases require)." *Id.* at 26.

i. NY Banking Regulations and Regulation E

BPNA argues that it disclosed its fees and practices, and that Plaintiffs fail to allege that BPNA's conduct was consumer-oriented. Plaintiffs repeat their arguments regarding the inadequacy of BPNA's documentary evidence. In addition, they argue that a claim of adequate disclosure is insufficient to defeat a cause of action based on GBL § 349 at the pleading stage, because whether conduct is materially misleading is a question of fact.

As discussed above, documentary evidence establishes that BPNA has provided the disclosures required by the NY Banking Regulations. Also, as discussed above, Plaintiffs rely on distinguishable cases where the plaintiffs made specific allegations regarding the inadequacy of the disclosures at issue. *See Sims*, 303 AD2d at 289-90 (finding allegations regarding the typeface and location of fee disclosure raised questions of fact with regard to whether conduct was misleading or deceptive); *Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 213 (2d Dept 2008) (finding allegations that fee disclosure was not clear and conspicuous due to impermissibly small type size sufficient to state GBL § 349 claim); *Lonner*, 57 AD3d at 110-11 (finding allegations adequately stated GBL § 349 claim where complaint "allege[d] . . . the inadequate font size in which the dormancy fee provision was printed"). Therefore, these cases fail to bolster Plaintiffs' GBL § 349 claim.

Moreover, whether conduct is materially misleading "may be determined as a matter of law or fact (as individual cases require)." *Oswego*, 85 NY2d at 26. Here, the Amended Complaint does not allege that the disclosures were misleading, but rather, that there were none. Amended Complaint, ¶¶ 3, 141. As discussed above, the documentary evidence conclusively refutes this allegation. To the extent that Plaintiffs allege that the 3 NYCRR § 13.4 (l) disclosure was not made in the manner and form required by 3 NYCRR §§ 13.2 and 13.3, this conclusory allegation fails state a cause of action under GBL § 349. *See Golub v Tanenbaum-Harbor Co. Inc.*, 88 AD3d 622, 623 (1st Dept 2011) (finding plaintiff's "conclusory allegations" regarding defendant's practices with other clients insufficient to state consumer-oriented conduct); *Ho Jo Contr. Co. v Schultz Ford*, 148 AD2d 582, 584 (2d Dept 1989) (finding that "the vague allegations in the complaint with regard to . . . [GBL § 349] fail to state a claim upon which relief can be granted").

To the extent Plaintiffs' claim is based on 3 NYCRR § 6.8 (e), it is also partially time-barred. A GBL § 349 claim is governed by the three-year statute of limitations (*Cole v Equitable Life Assur. Socy. of U.S.*, 271 AD2d 271, 272 [1st Dept 2000]), and the private right of action under section 349 (h) accrues "when plaintiff has been injured by a deceptive act or practice." *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 (2001). Here, under the continuous wrong doctrine, Plaintiffs were injured each time they incurred the overdraft fee without the appropriate disclosure. *Covington v Walker,* 3 NY3d 287, 292 (2004) (the "continuous wrong doctrine" applies "where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed," but rather, "continuous injuries create separate causes of action"); *see also Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 141 (1993) ("hold[ing] that separate causes of action accrued as

installments of the loan indebtedness became due and payable"). Accordingly, Plaintiffs' claims are time-barred with respect to any injuries they suffered prior to November 14, 2009, three years before this action was commenced.

BPNA's documentary evidence, the "Debit Card Coverage" brochure sent to customers with their May 31, 2010 account statements, demonstrates BPNA's policy of compliance with Regulation E. Randazzo aff, ¶ 8 and exhibits 2, 3. To the extent Plaintiffs allege that they never received the brochure with their account statement, this allegation does not aid Plaintiffs' GBL § 349 claim. First, the allegation does not establish a materially misleading consumer-oriented omission perpetuated on the public at large, but rather, it frames the issue as a private dispute, based upon BPNA's failure to provide the required disclosure to Plaintiffs only. *See New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321 (1995) (finding that the plaintiff failed to state a GBL § 349 claim where the action was "essentially a 'private' contract dispute . . . unique to these parties"). Second, since the May 31, 2010 account statement referred to the brochure, BPNA's failure to enclose the disclosure with the statement does not constitute a deceptive act, as Plaintiffs could have obtained the information by simply requesting the brochure from BPNA. *See State of N.Y. Workers' Compensation Bd. v 26-28 Maple Ave., Inc.*, 80 AD3d 1135, 1137 (3d Dept 2011) (finding that third-party complaint failed to sufficiently allege a deceptive act, where information could have been reasonably obtained from another source). None of the allegations or documentary evidence submitted by Plaintiffs demonstrate consumer-oriented conduct, but merely raise the issue of if and when BPNA obtained the opt-in from Plaintiffs.

Moreover, the complaint contains no allegations of how these alleged deceptive acts injured Plaintiffs. While Plaintiffs argue that, but for the lack of disclosures, BPNA would not have been able to impose the fees without their informed consent (Plaintiffs' brief at 13), this

allegation is not only absent from the Amended Complaint, but confuses the deceptive conduct with the injury. *See Small v Lorillard Tobacco Co.*, 94 NY2d 43, 56 (1999) (rejecting plaintiffs' theory "that consumers who buy a product that they would not have purchased, absent a manufacturer's deceptive commercial practices, have suffered an injury under [GBL § 349]," and finding that in "set[ting] forth deception as both act and injury" plaintiffs failed to demonstrate "either pecuniary or 'actual' harm"). Accordingly, Plaintiffs fail to state a claim under GBL § 349 based upon the NY Banking Regulations or Regulation E.

ii. The 2000 Agreement and the 2008 Agreement

Plaintiffs allege that the 2000 Agreement's Overdraft Policy was misleading, because while it stated that BPNA "may" honor overdrafts, in fact, BPNA always did. Plaintiffs allege that this was BPNA's standard policy (Amended Complaint, ¶ 32), and BPNA states that it provided standard disclosures to all of its new customers. Randazzo aff, ¶ 12. As such, Plaintiffs state misleading, consumer-oriented conduct with respect to the 2000 Agreement. *See Oswego*, 85 NY2d at 25, 26. However, Plaintiffs fail to do so for the 2008 Agreement's Overdraft Policy, which provided that fees would be charged regardless of whether an overdraft was honored or not. *See Sands v Ticketmaster-N.Y., Inc.*, 207 AD2d 687, 687 (1st Dept 1994) (dismissing GBL § 349 claim where the "'challenged business practices' . . . [were] *fully* disclosed").

In any event, it is not clear how Plaintiffs were injured by either version of the Overdraft Policy. Although reliance is not an element of a GBL § 349 claim (*Stutman*, 95 NY2d at 29), plaintiffs must show that the deceptive act caused an injury. *Oswego*, 85 NY2d at 26. Here, aside from conclusory allegations (Amended Complaint, ¶¶ 142-44), Plaintiffs fail to explain how they were injured by the allegedly misleading Overdraft Policies. Furthermore, they do not

allege seeing the 2000 Agreement or the 2008 Agreement. In fact, Plaintiffs specifically allege that they never received the 2008 Agreement. "If the Plaintiff[s] did not see any of these statements, they could not have been the cause of [their] injury, there being no connection between the deceptive act and the [P]laintiff[s'] injury." *Gale v International. Bus. Machines Corp.*, 9 AD3d 446, 447 (2d Dept 2004). For this reason, Plaintiffs fail to state a claim based on the Overdraft Policies of the 2000 and the 2008 Agreements, or the Ordering Policy of the 2008 Agreement.

Plaintiffs rely upon *Broder*, where the court found that "a question of fact exist[ed] as to whether the solicitation materials, including, in particular, the use of the word 'may' rather than 'will,' were intentionally deceptive." 281 AD2d at 371. However, the court also found that a question of fact existed with respect to "whether the use of the word 'may' . . . would lead a reasonable cardholder to believe that defendant would allocate payments in a way that would provide the maximum benefits of the low APR offer on cash advances." *Id.* As such, there was a clear causal link between the misrepresentation and the injury, the plaintiff being deprived of the lower APR. A similar causal link is not alleged in the instant action. Therefore, *Broder* is distinguishable on its facts.

As explained above, although Plaintiffs do not appear to rely on the 2000 Agreement's Ordering Policy, to the extent that they do rely on the 2000 Agreement as the operative agreement, it does not give rise to a GBL § 349 claim. The high-to-low ordering practice was expressly disclosed and BPNA did not retain any discretion in the ordering of overdraft items. Therefore, there was no misleading conduct. *See Sands*, 207 AD2d at 687.

With respect to the $4 dollar maintenance fee, as explained above, Plaintiffs do not allege any deceptive conduct. As such, Plaintiffs fail to state a GBL § 349 claim based on the imposition of the maintenance fee.

iii. Notice of Insufficient Funds

With respect to Plaintiffs' allegation that BPNA failed to notify them that their Account had insufficient funds and that a transaction would result in overdraft fees, Plaintiffs fail to allege deceptive conduct. Assuming such a notification was feasible, Plaintiffs had other readily available means of ascertaining their account balance. *See State of N.Y. Workers' Compensation Bd.*, 80 AD3d at 1137.

For the foregoing reasons, BPNA's motion to dismiss the second cause of action is granted.

D. New York Usury Laws (GOL § 5-501 and Banking Law §§ 14-a, 108)

BPNA seeks to dismiss the third cause of action for violations of GOL § 5-501 and Banking Law §§ 14-a, 108, contending that the overdraft charges are not interest subject to the usury laws. In opposition, Plaintiffs argue that New York banking regulations recognize that payments of overdrafts are loans and point to the 2000 Agreement, which acknowledged that payments of overdrafts were loans and obligated customers to repay those loans with interest, at the maximum rate allowed by law.

The First Department addressed these issues in *Feld*, holding that:

> "[O]verdraft charges are not interest. If an instrument provides that the creditor will receive additional payment in the event of a contingency *beyond the borrower's control*, the contingent payment constitutes interest within the meaning of the usury statutes. Even assuming a debtor-creditor relationship between the parties, the contingency of an account overdraft would have been within plaintiff's control."

116 AD3d at 553 (internal quotation marks and citations omitted). Therefore, the overdraft charges at issue here are not interest under New York usury law and the 2000 Agreement. Accordingly, BPNA's motion to dismiss the third cause of action is granted.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent of dismissing:

(1) those portions of the first cause of action that seek recovery based on noncompliance with the NY Banking Regulations and Regulation E, the Overdraft Policy, the 2000 Agreement's Ordering Policy, the maintenance fees, and the failure to provide notice of insufficient funds; and

(2) the second and third causes of action; and

the motion is denied to the extent the first cause of action is based on the 2008 Agreements Ordering Policy; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel is directed to appear for a status conference in Room 218, 60 Centre Street, New York, on September 3, 2014, at 10:30 a.m.

Dated: August 4, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER