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

PRESENT: _____ Justice **PART** 3

Index Number : 650562/2011
LEVIN, OFRA
VS.
HSBC BANK USA, N.A.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 650562
MOTION DATE 12/23/2011
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	2
Replying Affidavits _____	3

Cross-Motion: ☐ **Yes** ☒ **No**

Upon the foregoing papers, it is ordered that this motion

[illegible] WITH ACCOMPANYING [illegible]

Dated: 6-26-12

_____ J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE
----------X

OFRA LEVIN, 33 SEMINARY LLC and BINGHOUSING INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

HSBC BANK USA, N.A. and HSBC USA INC.,

Defendants.
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Index No. 650562/2011
Motion Date: 12/23/2011
Motion Seq. No.: 001

BRANSTEN, J.

Defendants HSBC Bank USA, N.A. and HSBC USA Inc., (collectively, "HSBC") move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. Plaintiffs Ofra Levin ("Levin"), 33 Seminary LLC ("33 Seminary") and Binghousing Inc. ("Binghousing") (collectively, "Plaintiffs") oppose.

I. BACKGROUND[1]

A. HSBC's Overdraft Program

HSBC provides debit cards to its checking account customers, who include individual consumers and small businesses. Compl., ¶ 2. Customers can use their debit cards to make purchases or withdraw money from ATM machines. *Id.* HSBC is notified of debit card

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[1] Unless otherwise noted, the facts herein are drawn from the Class Action Complaint (the "Complaint"). Affirmation of Joseph E. Strauss ("Strauss Affirm."), Ex. A ("Compl."). The court accepts these facts as true only for the purposes of deciding the instant motion. *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120 (1st Dep't 1998).

transactions instantaneously. HSBC can immediately determine whether customers have sufficient funds in their accounts to cover the transactions. HSBC can either accept or decline the transactions at that time.

If a customer does not have sufficient funds in his or her account to pay for a transaction, the transaction is considered an "overdraft." *Id.* at ¶ 3. As part of its overdraft protection program, HSBC will, at its discretion, honor overdraft payments. *Id.* Instead of declining overdrafts or informing customers that certain transactions will result in overdraft fees, HSBC routinely honors such overdrafts. *Id.* at ¶ 6. If HSBC honors an overdraft, it charges the customer a $35 fee for each overdraft. *Id.* at ¶ 3. HSBC does not alert its customers at the time a transaction is made that the transaction will cause an overdraft. *Id.* at ¶ 7.

Plaintiffs allege that HSBC uses a computer program that is designed to manipulate customers' transaction records in order to maximizes overdraft fees. Generally, this means that HSBC posts transactions from largest to smallest. This practice is also called "high-to-low" posting. A transaction is "posted" when HSBC either debits an expenditure from the customer's account or credits a deposit to a customer's account.

HSBC does not debit funds from a customer's account at the moment a transaction is made. Instead, HSBC takes several days' worth of transactions and orders them from

highest to lowest dollar amount before posting them to the customer's account. *Id.* at ¶ 12. If the account is overdrawn once all of these transactions are posted, then the customer incurs overdraft fees.

HSBC charges customers the same $35 fee for each overdraft, regardless of the amount of the transaction. This means that, using high-to-low posting, customers' funds are depleted as quickly as possible, which leads to overdraft fees on multiple small transactions. *Id.* at ¶ 45.

The court provides a hypothetical as an example: Suppose a customer had $100 in her account. She made several purchases over three consecutive days. On day one, she used her debit card to make a $5 purchase. On day two, she made a $15 purchase. On day three, she made a purchase for $110. If the transactions were posted in chronological order, her account would not have been overdrawn when she made the $5 and $15 purchases and she would only incur one $35 fee for the $110 overdraft. If, however, the transactions were posted from largest to smallest, the $110 purchase would have overdrawn her account before the $5 and $15 transactions were processed. She would therefore incur a fee for each of the three transactions for a total of $105 in fees even though she had sufficient funds in her account at the time she made the $5 and $15 purchases.

Customers cannot easily avoid these overdraft fees even if they closely track their income and spending. Compl., ¶ 54. Customers do not know when transactions will be debited from their account, nor do they know when HSBC will post deposits or credits for returned items. *Id.*

Prior to July 1, 2010, HSBC automatically enrolled consumers in its overdraft protection program without giving them the opportunity to opt out of the program. *Id.* at ¶ 17. Plaintiffs claim that HSBC forced customers to participate in its overdraft program and adopted high-to-low posting for the sole purpose of recovering as many overdraft fees as possible from its customers. *Id.* at ¶ 16.

B. HSBC's Account Holder Agreement

The terms of HSBC's checking accounts are contained in a standard account holder agreement called the "Rules for Deposit Accounts" (the "Rules"). Compl., Ex. B, p. 3 (the "Rules"). HSBC distributes the Rules to all customers who open a new HSBC checking account. The Rules explain that:

> An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts through our standard overdraft practices or through an overdraft protection plan. Through our standard overdraft practices, we authorize and pay overdrafts for checks and we can also cover overdrafts for preauthorized automatic bill payments. Under our standard overdraft practices, we will charge you the fee listed in our Terms & Charges disclosure. We pay overdrafts at our discretion, which means we do not guarantee that we will

> always authorize and pay any type of transaction. If we do not authorize and pay an overdraft, your transaction will be declined. For consumer accounts, we do not authorize and pay overdrafts for the following types of transactions: ATM transactions and everyday debit card transactions.

Rules, p. 3.

Under the heading "Payment of Your Items for Your Account," HSBC states "the Bank generally pays the largest debit items drawn on a depositor's account first." HSBC provides no other information about or explanation of this policy. Rules, p. 4.

C. The Individual Plaintiffs

1. *Ofra Levin*

Plaintiff Ofra Levin is a checking account customer of HSBC. Compl., ¶ 63. HSBC issued Levin a debit card when she opened her checking account in September of 2008. *Id.* On June 4, 2010, Levin had a balance of $21.33 in her checking account. *Id.* at ¶ 65. On June 5, 2010, she made a purchase on her debit card for $19.40. *Id.* at ¶ 66. If HSBC had deducted the amount of this transaction at the time of the purchase, Levin would have had a balance of $1.93 remaining in her account. *Id.* On June 8, 2010, Levin made a debit card purchase of $88.01.

HSBC did not debit the funds for Levin's June 5th and June 8th transactions at the time those transactions were made. If the transactions had been posted in chronological

order, then Levin would have incurred only one overdraft fee. HSBC instead posted the transactions to Levin's account from highest to lowest on June 9th. This resulted in the assessment of two overdraft charges against Levin for $35 each. *Id.* at ¶ 65.

Fees Levin Would Have Incurred if Transactions Had Been Posted Chronologically

Date Posted	Date of Transaction	Debits	Deposits	Fees	Balance
					$21.33
6/5/2010	6/5/2010	19.40			1.93
6/8/2010	6/8/2010	88.01			-86.08
6/9/2010				35.00	-121.08

Fees Levin Incurred upon USBC's Posting Transactions from High to Low

Date Posted	Date of Transaction	Debits	Deposits	Fees	Balance
					$21.33
6/9/2010	6/8/2010	88.01			-66.68
6/9/2010	6/5/2010	19.40			-86.08
6/9/2010				2 x (35.00)	-156.08

HSBC never informed Levin that she could opt out of HSBC's overdraft program. *Id.* at ¶ 67. Nor did HSBC notify Levin when she made her debit card transactions that her

account was overdrawn or that she would be charged a fee as a result of her transactions. *Id.* at ¶ 68.

2. *33 Seminary*

Plaintiff 33 Seminary opened a checking account with HSBC in September of 2008. *Id.* at ¶ 70. HSBC issued 33 Seminary a debit card at that time. *Id.*

Between October 29, 2009 and November 2, 2009, 33 Seminary made twelve transactions on its account. On October 29, 2009, 33 Seminary made three debit card purchases for $38.44, $17.66 and $15.31, respectively. On October 30, 2009, 33 Seminary made five purchases on its debit card for $31.96, $21.72, $20.39, $14.47 and $12.60. On November 2, 2009, 33 Seminary deposited $500 in its account, and wrote three checks for $3,800, $691.00 and $668.00.

On November 3, 2009, HSBC posted 33 Seminary's transactions from October 29, 2009 to November 2, 2009. Had HSBC posted 33 Seminary's transactions in chronological, rather than high-to-low, order, 33 Seminary would only have incurred one overdraft fee for $35. HSBC actually posted the November 2nd deposit first, then posted the remainder of 33 Seminary's transactions from highest to lowest. HSBC then charged 33 Seminary with nine overdraft charges totaling $315. *Id.* at ¶ 72.

Fees 33 Seminary Would Have Incurred if Transactions Had Been Posted Chronologically

Date Posted	Date of Transaction	Debits	Deposits	Fees	Balance
					$4,281.18
11/2/2009	10/29/2009	38.44			4,242.74
11/2/2009	10/29/2009	17.66			4,225.08
11/2/2009	10/29/2009	15.31			4,209.77
11/2/2009	10/30/2009	31.96			4,177.81
11/2/2009	10/30/2009	21.72			4,156.09
11/2/2009	10/30/2009	20.39			4,135.70
11/2/2009	10/30/2009	14.47			4,121.23
11/2/2009	10/30/2009	12.60			4,108.63
11/2/2009	11/2/2009		500.00		4,608.63
11/2/2009	11/2/2009	3,800.00*			808.63
11/2/2009	11/2/2009	691.00*			117.63
11/2/2009	11/2/2009	668.00*			-550.37
11/3/2009				35.00	-585.37

* Transactions by check

Fees 33 Seminary Incurred upon USBC's Posting Transactions from High to Low

Date Posted	Date of Transaction	Debits	Deposits	Fees	Balance
					$4,281.18
11/2/2009	11/2/2009		500.00		4781.18
11/2/2009	11/2/2009	3,800.00*			981.18
11/2/2009	11/2/2009	691.00*			290.18
11/2/2009	11/2/2009	668.00*			-377.82
11/2/2009	10/29/2009	38.44			-416.26
11/2/2009	10/30/2009	31.96			-448.22
11/2/2009	10/30/2009	21.72			-469.94
11/2/2009	10/30/2009	20.39			-490.33
11/2/2009	10/29/2009	17.66			-507.99
11/2/2009	10/29/2009	15.31			-523.30
11/2/2009	10/30/2009	14.47			-537.77
11/2/2009	10/30/2009	12.60			-550.37
11/3/2009				9 x (35.00)	-865.37

* Transactions by check

As with Levin, HSBC did not inform 33 Seminary that it could opt-out of HSBC's overdraft program. HSBC also did not notify 33 Seminary that it would incur overdraft fees if it made the transactions which caused its account to be overdrawn.

3. *Binghousing*

Plaintiff Binghousing opened a checking account with HSBC in September of 2008. HSBC issued Binghousing a debit card at that time. Binghousing made three transactions over the two-day period of November 15, 2009 to November 16, 2009. On November 15, 2009, Binghousing made two debit card transactions. The first was a $260.00 cash withdrawal from an ATM machine and the second was a $4.89 purchase. On November 16, 2009, Binghousing wrote a check for $50.00.

If HSBC had used chronological, rather than high-to-low, posting, Binghousing would have incurred one $35.00 overdraft fee. HSBC posted all three transactions from high to low on November 17, 2009. HSBC's posting method resulted in two overdraft fees for a total of $70.00.

Fees Binghousing Would Have Incurred if Transactions Had Been Posted Chronologically

Date Posted	Date of Transaction	Debits	Deposits	Fees	Balance
					$308.83
11/16/2009	11/15/2009	260.00**			48.83
11/16/2009	11/16/2009	4.89			43.94
11/16/2009	11/16/2009	50.00*			-6.06
11/17/2009				35.00	-41.06

* Transactions by check
** ATM withdrawals

Fees Binghousing Incurred upon USBC's Posting Transactions from High to Low

Date Posted	Date of Transaction	Debits	Deposits	Fees	Balance
					$308.83
11/16/2009	11/15/2009	260.00**			48.83
11/16/2009	11/16/2009	50.00*			-1.17
11/16/2009	11/15/2009	4.89			-6.06
11/17/2009				2 x (35.00)	-76.06

* Transactions by check
** ATM Withdrawals

Again, HSBC did not inform Binghousing that it could opt-out of HSBC's overdraft program. HSBC also did not notify Binghousing that it would incur overdraft fees if it made the transactions which caused its account to be overdrawn.

II. STANDARD OF LAW

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court accepts the facts alleged in the non-moving party's pleading as true and accords the non-moving party the benefit of every possible favorable inference. *Id.*

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.*

On a motion to dismiss pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). The "pleadings must be liberally construed and the facts alleged accepted as true." *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120 (1st Dep't 1998).

III. ANALYSIS

A. Preemption

Defendants argue that Plaintiffs' claims, which are all founded upon New York state law, are pre-empted by federal law. Specifically, Defendants contend that the National Bank Act and the regulations promulgated thereunder by the Office of the Comptroller of the Currency foreclose Plaintiffs' state law causes of action. Plaintiffs assert that all of their causes of action are claims of general applicability, which regulations promulgated by the Office of the Comptroller of the Currency (the "OCC") have expressly exempted from preemption.

The Supremacy Clause of the United States Constitution provides that federal laws "shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const., Art. VI, cl. 2. The Supremacy Clause "thereby vests in Congress the power to

supersede not only State statutory or regulatory law but common law as well. The preemption question is ultimately one of congressional intent." *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 39 (1996).

Preemption can either be express or implied. *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996). "Express preemptive intent is discerned from the plain language of a statutory provision." *Doomes v. Best Tr. Corp.*, 17 N.Y3d 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 . . . or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 356-57 (2006) (internal citations and quotation marks omitted).

1. *Preemption and National Banks*

"Business activities of national banks are controlled by the National Bank Act (NBA or Act), 12 U.S.C. § 1 *et seq.*, and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC). *See* §§ 24, 93a, 371(a)." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007). The NBA "vest[s] in nationally chartered banks enumerated

powers and 'all such incidental powers as shall be necessary to carry on the business of banking.' 12 U.S.C. § 24 Seventh." *Id.* at 11.

"NBA and OCC regulations do not preempt the field of national bank regulation." *New York State Div. Human Rights v. H&R Block Tax Servs.*, 71 A.D.3d 540, 544 (1st Dep't 2011). Because neither express nor field preemption applies to the regulation of national banks, Plaintiffs' state law claims will only be preempted if they conflict with federal law. *Balbuena*, 6 N.Y.3d at 356-57.

Congress created with the enactment of the NBA a "mixed state/federal regime[] in which the Federal Government exercises general oversight while leaving state substantive law in place." *Cuomo v. Clearing House Assn., L.L.C.*, 557 U.S. 519, 519 (2009). "[F]ederal control shields national banking from unduly burdensome and duplicative state regulation." *Id.* The United States Supreme Court has "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett*, 517 U.S. at 32. Nonetheless, "[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Id.*

Regulations enacted by the OCC, which is the agency responsible for regulating national banks, can also preempt conflicting state law. "OCC oversees the operations of

national banks and their interactions with customers." *Watters*, 550 U.S. at 11. Federal regulations such as those promulgated by the OCC "have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S.141, 153 (1982). "Congress has expressly recognized the OCC's power to preempt particular state laws by issuing opinion letters and interpretive rulings, subject to certain notice-and-comment procedures." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005).

a. OCC Regulation of Debit Accounts

HSBC claims that OCC regulations and interpretive letters expressly permit it to engage in the behavior that underlies Plaintiffs' claims. HSBC argues that Plaintiffs' claims are, therefore, preempted by federal law. Plaintiffs contend that its claims are valid under state law, and are not preempted by federal law because they do not conflict with OCC regulations or the NBA.

Pursuant to OCC regulations "[a] national bank may receive deposits and engage in any activity incidental to receiving deposits." 12 C.F.R. § 7.4007(a). "A national bank may exercise its deposit-taking powers without regard to state law limitations concerning . . . (2) [c]hecking accounts; [and] (3) [d]isclosure requirements." 12 C.F.R. § 7.4007(b). However, "[s]tate laws on the [] subjects [of contracts and torts] are not inconsistent with the deposit-taking powers of national banks to the extent consistent with the decision of the Supreme Court in [*Barnett*]." 12 C.F.R. § 7.4007(c).

OCC regulations also authorize national banks to "charge [their] customers non-interest fees, including deposit account service charges." 12 C.F.R. § 7.4002(a). Furthermore, "[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." 12 C.F.R. § 7.4002(b)(2).

The OCC has also recognized that:

> [t]he process by which a bank honors overdraft items is typically part of the Bank's administration of a depositor's account. Creating and recovering overdrafts have long been recognized as elements of the discretionary deposit account services that banks provide. Where a customer creates debits on his or her account for amounts in excess of the funds available in that account, a bank may elect to honor the overdraft and then recover the overdraft amount as part of its posting of items and clearing of the depositor's account. These activities are part of or incidental to the business of receiving deposits.

OCC Interpretive Letter #1082, at *3, 2007 WL 5393636 (May 17, 2007).

OCC has implicitly permitted national banks to utilize high-to-low posting for checks in certain circumstances. The OCC stated in an interpretive letter that national banks' power to assess fees under 12 C.F.R. § 7.4002(a):

> necessarily includes the authorization to decide how they are computed. . . . The number of items presented against insufficient funds is determined by the order of posting a bank uses. For example, the high-to-low posting order . . . will result in the [b]ank's payment of the depositor's largest checks first. If the depositor has written a number of checks against insufficient funds that are

> presented on the same day, the high-to-low posting order may result in a greater number of checks being presented against insufficient funds than if the [b]ank used a different posting order.

OCC Interpretive Letter # 916, at *1, 2001 WL 1285359 (May 22, 2001). The OCC concluded that "the bank may therefore post checks in the order it desires." *Id.*

2. *Plaintiffs Claims are Not Preempted*

HSBC posits that, because the OCC expressly permits national banks to post checks from high-to-low, national banks may also post debit transactions from high-to-low. HSBC further contends that choosing the posting order of debit transactions is an "activity incidental to receiving deposits" relegated to the discretion of national banks pursuant to 12 C.F.R. § 7.4007(a).

Plaintiffs argue that their state law claims for unjust enrichment, conversion, breach of the covenant of good faith and fair dealing and deceptive business practices under General Business Law § 349 are not preempted by federal law because the state and federal laws at issue are not in "irreconcilable conflict." *Barnett*, 517 U.S. at 31. Plaintiffs additionally assert that its state law claims do not conflict with the OCC's interpretations of OCC regulations as expressed in its interpretive letters.

"In contrast to findings of federal preemption in cases involving specific state regulations that conflict with the NBA, causes of action sounding in contract, consumer protection statutes and tort have repeatedly been found by federal courts [and the U.S.

Supreme Court] not to be preempted." *Baldanzi v. WFC Holdings Corp.*, 2008 U.S. Dist. LEXIS 95727, at *5 (S.D.N.Y. 2008). Additionally, as explained above, 12 C.F.R. 7.4007(c) provides that state claims based on contracts or torts are not preempted if they "are not inconsistent with" and "only incidentally affect" federally authorized deposit-taking powers.

Plaintiffs' state law claims for unjust enrichment, conversion, breach of the covenant of good faith and fair dealing and deceptive business practices under General Business Law § 349 are based upon state laws of general application that both the U.S. Supreme Court and OCC regulations have exempted from preemption absent irreconcilable conflict with federal law. To determine whether the state and federal laws at issue here are in conflict with one another, the court must examine (1) if compliance with the state and federal laws is "a physical impossibility;" or (2) if "the state law [] stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett*, 517 U.S. at 31 (internal quotations omitted).

The New York contract, tort and consumer protection laws upon which Plaintiffs base their claims do not prohibit any behavior required by the NBA or the OCC regulations. Nor do such state laws require national banks to do anything prohibited by federal law. National banks can thus simultaneously comply with the state and federal laws at issue in this case.

Additionally, Plaintiffs' state law claims do not conflict with, or more than incidentally affect, the powers relegated to national banks by the NBA, OCC regulations and

the OCC's interpretive letters. HSBC asserts that OCC regulations and interpretive letters explicitly grant HSBC the power to charge overdraft fees as part of its deposit-taking powers. HSBC further argues that Plaintiffs' claims would significantly curtail that power. Plaintiffs, however, do not question HSBC's ability to charge overdraft fees or to determine the amount of those fees. Plaintiffs challenge only HSBC's allegedly deceptive implementation of its overdraft program. Plaintiffs argue that HSBC is acting in bad faith in order to maximizes the number of overdraft fees that it receives at its customers' expense. The NBA and OCC regulations do not grant banks permission to act in bad faith towards their customers. State laws prohibiting this behavior, therefore, do not significantly impair any powers granted to the national banks by federal law.

The OCC interpretive letters (the "Letters") do not indicate otherwise. In one Letter, the OCC warns national banks that they could be subject to litigation under state consumer protection laws if they engage in deceptive acts or practices. OCC Advisory Letter AL 2002-3, 2002 OCC CB LEXIS 16 (March 22, 2002). This indicates that the OCC has contemplated the possibility that national banks may face state law consumer protection claims and that it is of the opinion those claims will not necessarily be preempted.

Furthermore, Plaintiffs' claims are not foreclosed by the OCC interpretive letter which appears to permit national banks to use high-to-low posting for checks. In that Letter, the

OCC indicates that a bank may use high-to low posting for checks issued "in a given 24-hour cycle." OCC Interpretive Letter #916, 2001 WL 1285359 (May 22, 2001). The letter does not mention the posting of debit charges or cash withdrawals, and does not address the high-to-low posting of multiple days' transactions. The OCC explained that the bank that requested the interpretive letter, which was a California bank, would need to comply with the California Uniform Commercial Code's ("UCC") good faith requirement in addition to OCC regulations in implementing its overdraft policy. *Id.* The OCC did not indicate that claims under the state law good faith requirement would be preempted. The OCC therefore implicitly acknowledged that national banks could face challenges under generally applicable state laws if they implement their overdraft policy in an unfair or deceptive manner.

Plaintiffs' state law claims do not conflict with or significantly impair HSBC's rights under the NBA or OCC regulations. HSBC's motion to dismiss Plaintiffs' claims as preempted is denied.

B. Plaintiffs' Claims under State Law

Defendants alternatively challenge Plaintiffs' claims for breach of contract, unjust enrichment, conversion and deceptive business practices under General Business Law § 349 on substantive grounds. The court considers each claim in turn.

1. *Commercial Plaintiffs' Claims under the UCC*

HSBC assert that the claims of commercial plaintiffs 33 Seminary and Binghousing are barred by the New York Uniform Commercial Code ("UCC").[2] HSBC contends that New York's UCC § 4-A-504 explicitly permits high-to-low posting of "electronic fund transfers." HSBC further argues that, under UCC § 4-303(2), banks can post checks in whatever order they wish. Seminary and Binghousing's overdraft fees resulted from HSBC posting checks before debit transactions, not from HSBC ordering debit transactions from high to low.

Plaintiffs contend that UCC § 4-A-504 does not apply to the type of debit card transactions at issue here. Plaintiffs additionally argue that, even if the UCC gives banks considerable latitude in choosing the order in which it posts transactions, it does not permit HSBC to act in bad faith.

a. Electronic Transfers under UCC § 4-A-504

Article 4-A of the UCC "governs a specialized method of payment referred to in the Article as a funds transfer but also commonly referred to in the commercial community as a wholesale wire transfer." Comment to UCC § 4-A-102. When a bank receives multiple wire transfer orders, UCC § 4-A-504(1) permits banks to pay them "in any sequence."

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[2] The parties agree that Levin is not affected by the UCC provisions mentioned herein. The UCC does not apply to consumer debit transactions, which are governed exclusively by the Electronic Fund Transfer Act of 1978. 15 U.S.C §1693; *see also* Comment to UCC § 4-A-108.

"Transactions covered by Article 4A typically involve very large amounts of money in which several transactions involving several banks may be necessary to carry out the payment." Comment to UCC § 4-A-104. Article 4-A does not regulate "consumer transaction[s] involving relatively small amounts of money." *Id.*

Nothing in the language of UCC § 4-A-104 indicates that it applies to small debit card transactions such as those at issue in this case. Furthermore, HSBC has not cited, and the court has not located, any cases interpreting Article 4-A as governing debit card transactions. Article 4-A applies only to wire transfers of funds between banks, and is therefore not applicable to the transactions carried out by Binghousing and 33 Seminary.

HSBC argues that, even if Article 4-A is inapplicable, the court should apply the principles enumerated therein "by analogy." Specifically, HSBC asks the court to apply UCC § 4-A-504(1), which permits banks to pay wire transfers "in any sequence." In support of this argument, HSBC points to the comments to UCC § 4-A-108, which provide that "a court might apply appropriate principles from Article 4A by analogy" to portions of consumer funds transfers not covered by the Electronic Funds Transfer Act ("EFTA").

The comments to UCC § 4-A-108 are not referring to the type of transaction made by Binghousing and 33 Seminary. They are instead referring to "the part of the [consumer] funds transfer that is not subject to the EFTA." Comment to UCC § 4-A-108. Consumer funds transfers are carried out by individual consumers, and are thereby exempted from

UCC regulation under the EFTA. Binghousing and 33 Seminary's commercial debit card transactions are not consumer funds transfers. HSBC's argument is without support. The court therefore declines to apply article 4-A of the UCC by analogy to 33 Seminary and Binghousing's debit card transactions.

b. Order of Check Posting under UCC § 4-303(2)

UCC § 4-303(2) addresses the order in which banks can pay "items" submitted to the bank for payment. An "item [is] any instrument for the payment of money even though it is not negotiable but does not include money." UCC § 4-401(1)(g). UCC § 4-303(2) provides that "items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank."

The parties agree that UCC § 4-401 applies only to checks, not debit card transactions. Defendants contend that 33 Seminary and Binghousing's claims are premised on the reordering of checks, not just debit card transactions. Plaintiffs argue that, despite a "drafting error" in the complaint alleging the wrongful reordering of "debit and check transactions," 33 Seminary and Binhousing's claims are based solely on the reordering of debit card transactions, not checks. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss or, in the Alternative, to Strike Allegations of the Complaint ("Plaintiffs' Memo"), p. 22, n. 25. It is unclear from looking at the summarizations of 33 Seminary and Binhousing's checking account transaction information as stated in the complaint how either

33 Seminary or Binhousing could have overdrawn their accounts absent the high-to-low posting of check transactions in addition to debit card transactions. The court will therefore examine the viability of Plaintiffs' claims with the assumption that the claims involve check and debit card transactions.

Comment 6 to UCC § 4-303 explains that:

> [a]s between one item and another no priority rule is stated, other than the convenience of the bank. This rule is justified because of the impossibility of stating a rule that would be fair in all cases. . . . Further, where the drawer has drawn all the checks, he should have funds available to meet all of them and has no basis for urging one should be paid before another. . . . Under subsection (2) the bank obviously has the right to pay items for which it is itself liable ahead of those for which it is not.

Although the UCC permits banks to post items in an order that they find "convenient," it does not give banks license to act in bad faith towards their customers. The California UCC specifically address bad faith and high-to-low posting. The comments to California UCC § 4-303 explain that:

> The only restraint on the discretion given to the payor bank under subsection (b) [of § 4303] is that the bank act in good faith. For example, the bank could not properly follow an established practice of maximizing the number of returned checks for the sole purpose of increasing the amount of returned check fees charged to the customer.

HSBC argues that this good faith restraint is unique to California. However UCC § 1-203 provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." The New York UCC permits banks to honor

checks in a manner that is sensible and convenient, and does not impose a specific order of posting transactions, i.e., chronological or low-to-high. However, a bank may not simply ignore its customers' reasonable expectations and choose its posting order for the express purpose of charging inordinate overdraft fees. UCC § 1-203; *see also Gutierrez v. Wells Fargo Bank, N.A.*, 622 F. Supp. 2d 946, 952 (2009) (holding that "[UCC §] 4303(b) does not permit the bank to post checks, much less debit card transactions, in any order it wishes.") This does not necessarily mean that HSBC's manner of posting checks was in bad faith. Whether HSBC acted in bad faith when choosing its posting method for checks is a factual question not to be decided on this motion to dismiss.

HSBC's motion to dismiss 33 Seminary and Binghousing's claims as barred by the UCC is denied.

2. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

Plaintiffs claim that HSBC breached the covenant of good faith and fair dealing implicitly contained in the Rules by implementing its overdraft policy in an abusive manner. HSBC asserts that Plaintiffs' breach of contract claim must fail because Plaintiffs allege only a breach of the covenant of good faith and fair dealing, not the breach of an actual term of the contract. HSBC also argues, somewhat contradictorily, that Plaintiffs' claim for breach of the covenant of good faith and fair dealing is impermissibly duplicative of Plaintiffs' breach of contract claim. HSBC alternatively contends that it could not have acted in bad

faith in posting debit transactions from high to low because the Rules explicitly granted it the authority to do so.

Plaintiffs mislabel their cause of action for breach of the implied covenant of good faith and fair dealing as a breach of contract claim. Plaintiffs do not, in fact, raise any claims for breach of contract.

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995).

A plaintiff may bring a claim for breach of the covenant of good faith and fair dealing independently of any other claims for breach of contract. "Ordinarily, the covenant of good faith and fair dealing is breached where a party has complied with the literal terms of the contract, but has done so in a way that undermines the purpose of the contract and deprives the other party of the benefit of the bargain." *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 2008 NY Slip Op 1418 at *8 (2008). Plaintiff's claim for breach of the covenant of good faith and fair dealing is not duplicative of any other claim for breach of contract. Plaintiffs allege only that HSBC breached the covenant of good faith and fair dealing, they do not claim that HSBC breached the written terms of the contract.

"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." *Dalton*, 87 N.Y.2d at 389.

The Rules state that "the Bank generally pays the largest debit items drawn on a depositor's account first." Rules, p. 4. Plaintiffs do not argue that HSBC cannot, in any circumstances, use high-low posting. Plaintiffs, instead, challenge the way in which HSBC uses high-to-low posting. Plaintiffs allege that the contractual provision governing the posting of transactions gives HSBC discretion in the manner in which it implements its posting and overdraft policies, and that HSBC exercised this discretion in bad faith.

"Where the contract contemplates the exercise of discretion, [the covenant of good faith and fair dealing] includes a promise not to act arbitrarily or irrationally [or in bad faith] in exercising that discretion." *Dalton*, 87 N.Y.2d at 389.

The Rules leaves 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.

Plaintiffs allege that HSBC exercised this discretion in bad faith by choosing to post transactions in a way that maximized fees regardless of whether sufficient funds were available to cover debit transactions at the time they were made. Furthermore, Plaintiffs

claim that Defendants implemented their posting and overdraft policies in a way that made it nearly impossible for customers to track their available balance in order to avoid those fees.

Plaintiffs have adequately alleged their cause of action for breach of the covenant of good faith and fair dealing. HSBC's motion to dismiss that claim is denied.

3. *Conversion*

Plaintiffs allege that HSBC converted Plaintiffs' funds by "wrongfully collect[ing] overdraft fees from Plaintiffs and . . . [taking] specific and readily identifiable funds from their accounts in payment of these fees." Compl., ¶ 96. Plaintiff's conversion claim is based on the same facts as its cause of action for breach of contract.

HSBC argues that Plaintiffs' conversion claim fails because funds deposited in a bank account cannot be the subject of a conversion claim. HSBC asserts that Plaintiffs do not hold title to the funds in their bank accounts. Instead, HSBC contends that "the funds deposited into Plaintiffs' accounts represent a contractual obligation of the bank. As such, Plaintiffs have no entitlement to any specifically identifiable funds." Memorandum of Law in Support of Motion of Defendants HSBC Bank USA, N.A. and HSBC USA Inc. to Dismiss Or, in the Alternative, To Strike Allegations of the Complaint, ("Defendants' Memo"), p. 19.

HSBC argues, in the alternative, that Plaintiffs' conversion claim should be dismissed because it is impermissibly duplicative of the cause of action for breach of contract.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (2006).

"Money, specifically identifiable and segregated, can be the subject of a conversion action." *Manufacturers Hanover Trust Co. v. Chemical Bank*, 160 A.D.2d 113, 124-25 (1st Dep't 1990) (internal citations omitted). Plaintiffs need not show that they hold title to the property in question. They need only establish "(1) [a] possessory right or interest in the property; and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Colavito*, 8 N.Y.3d at 50.

However, "[a] cause of action for conversion cannot be predicated on a mere breach of contract. [If the] conversion claim allege[s] no independent facts sufficient to give rise to tort liability and [it is], thus, . . . nothing more than a restatement of [the] breach of contract claim." *Fesseh v. TD Waterhouse Investor Servs.*, 305 A.D.2d 268, 269 (2003) (internal citations and quotation marks omitted). Plaintiffs' conversion claim is premised on identical facts and demands the same relief as their breach of contract claim. Plaintiffs' claim for conversion is consequently dismissed as duplicative of their cause of action for breach of contract.

The court notes that Plaintiffs include a single line in their brief stating that "[t]o the extent the Rules may be deemed a contract, it is one of adhesion and, therefore, unconscionable and unenforceable." Plaintiffs' Memo, p. 21. Plaintiffs do not plead this claim in the complaint. Nor do Plaintiffs elaborate upon this allegation in their brief beyond this one conclusory sentence. This is insufficient to salvage its cause of action for conversion. The claim is, however, dismissed without prejudice and with leave to replead.

4. *Unjust Enrichment*

Plaintiffs allege that HSBC was "unjustly enriched [] at Plaintiffs' expense . . . and is required, in equity and good conscience, to compensate them fully for the damages that they have suffered as a result of HSBC's actions." Compl., ¶ 100.

Defendants argue that Plaintiffs' claim for unjust enrichment is duplicative of its cause of action for breach of contract.

"[A] party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter." *Cox v. NAP Constr. Co., Inc.*, 10 N.Y.3d 592, 608 (2008). HSBC does not question the validity of the Rules. The Rules indisputably govern Plaintiffs' checking accounts and the overdraft policy HSBC implemented in regards to those accounts. Plaintiffs' unjust enrichment claim is therefore duplicative of the cause of action for breach of contract. As with Plaintiffs' conversion

claim, Plaintiffs' claim for unjust enrichment is dismissed without prejudice and with leave to replead.

5. *Deceptive Business Practices under General Business Law § 349*

Plaintiffs claim that HSBC's method of posting of debit card transactions is a deceptive business practice that violates General Business Law ("GBL") § 349.

> A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act. Whether a representation or an omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances. A deceptive practice, however, need not reach the level of common-law fraud to be actionable under section 349.

Stutman v. Chemical Bank, 95 N.Y.2d 24, 29 (2000) (internal citations omitted).

HSBC claims that its overdraft policy, and particularly its practice of posting transactions from high to low, was not "misleading in a material way." *Id.* HSBC argues that it disclosed its policy in the Rules, wherein HSBC disclosed that HSBC "generally pays the largest debit items drawn on a depositor's account first." Contract, p. 4.

Plaintiffs contend that this is misleading because HSBC *always* posts transactions from high to low. Additionally, Plaintiffs allege that consumers would not understand HSBC's statement to mean that HSBC would hold transactions made over several days and then post them from high-to low. A reasonable consumer would expect to be able to accurately track his own expenditures to avoid overdraft charges. Plaintiffs allege this is

nearly impossible given HSBC's overdraft and posting policies. Plaintiffs sufficiently allege that HSBC engaged in a business practice that would mislead a reasonable customer. *Stutman*, 95 N.Y.2d at 29. Plaintiffs have fulfilled all of the criteria required to bring a claim under GBL § 349.

Defendant's motion to dismiss Plaintiffs' claim for deceptive business practices under GBL § 349 is denied.

HSBC alternatively moves to strike Plaintiffs' prayer for relief to the extent that Plaintiffs seek statutory or punitive damages under GBL § 349. Plaintiffs admit that they seek neither statutory or punitive damages. HSBC's motion to strike prayer for relief is therefore denied as moot.

The court's order follows on the next page.

IV. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that Defendants HSBC Bank, USA, N.A. and HSBC USA Inc.'s motion to dismiss is granted to the extent that Plaintiffs Ofra Levin, 33 Seminary LLC and Binghousing Inc.'s claims for unjust enrichment and conversion are dismissed without prejudice; and it is further

ORDERED that Plaintiffs are granted leave to serve an amended complaint so as to replead the claims for unjust enrichment and conversion within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that Plaintiffs fail to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Defendants shall serve an answer to the complaint within 20 days after Plaintiff's time to serve and file an amended complaint has expired; and it is further

ORDERED that defendant HSBC's motion to dismiss Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing and for unfair business practices under GBL § 349 is denied; and it is further

ORDERED that defendant HSBC's motion to dismiss Plaintiffs' prayer for relief to the extent that it seeks statutory or punitive damages under GBL § 349 is denied as moot; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on August 7, 2012, at 10 a.m.

Dated: New York, New York
June 26, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.