Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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ELLEN LEFKOWITZ, individually and on behalf of all Persons similarly situated
Plaintiff,

-against-

Index No.: 4179/12
Motion Date: 7/11/12
Motion Cal. No.: 33
Seq. No. 1

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION
Defendant.

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The following papers numbered 1 to 9 read on this motion by defendant for an order pursuant to CPLR 3211 (a) (1), (5), (7) and (10) dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavit-Exhibits.....	1-4
Memorandum of Law.....	5-6
Memorandum of Law in Opposition.....	7
Reply Memorandum of Law.....	8-9

Upon the foregoing papers it is ordered that this motion by defendant for an order pursuant to CPLR 3211 (a) (1), (5),(7), and (10) dismissing the complaint is granted for the following reasons:

According to the pertinent sections of the complaint and the undisputed evidence, this action involves plaintiff's challenge to Astoria's collection of overdraft fees from its checking account customers. Astoria is a federal savings and loan association organized under federal law and plaintiff is a former holder of three checking accounts at Astoria, upon which the disputed fees were charged. Plaintiff first incurred an overdraft fee due to a POS transaction or ATM withdrawal in January 2008 in Account No. 1. On the next business day, and in accordance with Astoria's standard practices, Astoria mailed an Unavailable/Insufficient Funds Overdraft Notice ("Overdraft Notice") to plaintiff advising her of the overdraft and resulting overdraft fee charged to her account. Plaintiff continued to overdraw her Checking Accounts on multiple occasions, thereby incurring multiple overdraft fees. After the imposition of each overdraft fee, Astoria mailed an Overdraft Notice to plaintiff advising her of the overdraft and resulting fee charged to her account. The overdrafts and resulting fees were also set forth on

plaintiff's account statements that she received monthly from Astoria.

At the opening of each Checking Account, plaintiff acknowledged in writing that each account was subject to, among other things, Astoria's Checking Account Rules & Regulations (the "Account Agreement") which set forth the terms and conditions governing the account. Plaintiff further acknowledged receipt of the Account Agreement and accompanying documents that, together, governed the accounts and in fact, plaintiff does not dispute the existence of the Account Agreement, nor does she dispute that the Account Agreement governed her Checking Accounts. In a section entitled "Payment of Checks and Other Items," the Account Agreement expressly disclosed to plaintiff that transactions in her account may be "paid in the order of highest to lowest amounts, which can affect the total amount of overdraft fees you may incur." The Account Agreement further disclosed how overdrafts are created, their fees, and how Plaintiff could "opt out" of the overdraft service. In July of 2010, in compliance with a change in Regulation E (12 C.F.R. pt. 205 et seq.), Astoria sent a notice to plaintiff reminding her of Astoria's overdraft practices and informing her that, in order for Astoria to continue paying charges that caused her account to be overdrawn, plaintiff would have to affirmatively "opt-in" to the Overdraft Convenience program – which Plaintiff did on or about August 24, 2010.

Plaintiff brought the instant action seeking to represent a class of Astoria customers who, like her, initiated an electronic funds transfer with an ATM or debit card issued by Astoria and incurred an overdraft fee as a result of Astoria's practices of "re-sequencing debit card transactions from highest to lowest or of charging overdraft fees to the account of a customer who did not consent to overdraft protection." Specifically, plaintiff seeks damages and injunctive relief for (1) breach of contract and breach of the covenant of good faith and fair dealing; (2) unconscionability; (3) conversion; (4) unjust enrichment; and (5) violations of New York General Business Law § 349 ("GBL § 349").

Defendant now seeks to dismiss the complaint on the grounds that the claims are preempted by federal banking law, disproven by the documentary evidence, fail to state a cause of action, and cannot proceed in the absence of a necessary party. In the alternative, defendant claims that plaintiff's Third and Fifth Causes of Action for conversion and violation of GBL § 349 are time-barred to the extent they relate to overdraft fees incurred prior to February 27, 2009, and plaintiff's First, Second, and Fourth Causes of Action for breach of contract and breach of the implied covenant of good faith and fair dealing, unconscionability, and unjust enrichment are time-barred to the extent they relate to overdraft fees incurred prior to February 27, 2006. Plaintiff has opposed this motion.

The branch of defendant's motion seeking to dismiss the claims because they are preempted by federal banking law is granted. The Supremacy Clause of the United States Constitution "vests in Congress the power to supersede not only State statutory or regulatory law but common law as well" (Guice v Charles Schwab & Co., 89 NY2d 31, 39, [1996], *cert denied* 520 US 1118 [1997]). As a general rule, the question of preemption is ultimately one of congressional intent, which may be express or implied (*id.*). In order to determine that intent, the United States Supreme Court has identified three types of preemption: (1) "express

preemption," where Congress explicitly defines the extent to which its enactment preempts state law, (2) "field preemption," where Congress regulates a field so pervasively that an intent to occupy the field exclusively may be inferred, and (3) "conflict preemption," where the state and federal law actually conflict so that it is impossible for a party to simultaneously comply with both, or the state law stands as an obstacle to the execution of the full purposes and objectives of Congress (*see* Barnett Bank v Nelson, 517 US 25 [1996]; Hines v Davidowitz, 312 US 52 [1941]; City of New York v Job-Lot Pushcart, 88 NY2d 163 [1996], *cert denied sub nom.* JA-RU v City of New York, 519 US 871 [1996]; Rosario v Diagonal Realty, LLC, 8 NY3d 755 [2007]; Guice v Charles Schwab & Co., *supra*.)

In addition, federal administrative agency regulations promulgated pursuant to the congressional delegation of quasi-legislative authority may also preempt state law (*see* Guice v Charles Schwab & Co., *supra*.) Although it is settled that preemption of State law by Federal statute or regulation is not favored absent persuasive reasons to the contrary (*see* Guice v Charles Schwab & Co., *supra*), a State law can be deemed preempted if it conflicts with Federal law or frustrates the accomplishment of the purposes of the Federal scheme (*see Malone v White Motor Corp.*, 435 US 497, 504 [1978]; Florida Avocado Growers v Paul, 373 US 132, 142-143 [1963]; Brenner v Nomura Sec. Int'l, 228 AD2d 67, 70 [1996]).

Here, while there is generally a presumption against preemption, courts abandon that presumption where the area of law at issue has "a history of significant federal presence." United States v. Locke, 529 U.S. 89, 108 (2000). Banking is one such area. *See, e.g.*, Barnett Bank v. Nelson, 517 U.S. 27, 32-33 (1996) Astoria was chartered as a federal savings and loan association and was therefore regulated by the Office of Thrift Supervision ("OTS"), not the Office of the Comptroller of the Currency ("OCC"). There is no dispute that despite Congress's passage of the Dodd-Frank Act, which *inter alia*, transferred oversight responsibility for federal savings banks from the OTS to the OCC and prospectively replacing the field preemption of regulation of federal savings banks with conflict preemption the field preemption of the OTS regulations continues to plaintiff since her agreements with defendant predated the Dodd-Frank Act's enactment.

The Court is aware that OTS regulations provide that state law claims based on contracts and commercial law are *not* preempted, as long as they do not significantly impair federally-authorized deposit-related activities. 12 C.F.R. § 557.13. However, Plaintiff's causes of action seek to impose substantive requirements on Astoria's federally-regulated policies and procedures regarding the imposition of overdraft fees for debit card transactions and these involve precisely the fields of "Checking accounts," "Disclosure requirements," and "Service charges and fees" that the OTS regulations explicitly state are completely preempted. 12 C.F.R. § 557.12. (b), ©, (f). The OTS regulations make explicit that there is to be no further analysis if a state law purports to regulate such areas: Furthermore, plaintiff seeks injunctions against Astoria's alleged practices and this shows that plaintiff's causes of action seek to impose requirements on Astoria's practices as relate to deposit activities, rather than merely seeking redress of a private wrong, which would not be covered by OTS regulations. Consequently, the Court finds that the OTS occupied the entire field of "the deposit and lending-related practices of federal savings banks. As such,

plaintiff's causes of action are preempted and the Complaint must be dismissed in its entirety since all of the causes of action stem from claims regarding the overdraft fee policy, and plaintiff can only seek redress for the alleged wrongs by use of the Federal Law. Accordingly, the branch of the motion seeking to dismiss the complaint because the causes of action are preempted by federal law is granted.

The branch of the motion seeking to dismiss based upon the causes of action being disproven by documentary evidence, pursuant to CPLR 3211 (a), serves as another basis to dismiss the complaint. CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . . " In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

Here, defendant has submitted plaintiff's Account Agreements that she signed prior to opening her accounts at Astoria. These show that, prior to opening any of the Checking Accounts, plaintiff agreed that Astoria could "pay electronic debit transactions from the highest to lowest dollar amount", and that Plaintiff could opt-out of the overdraft protection program if she so chose. This disclosure clearly informed Plaintiff that, as a rule, she should expect that Astoria would pay her electronic debits "in the order of highest to lowest amounts" – which is precisely what Plaintiff alleges Astoria "always" did. Contrary to plaintiff's claim this disclosure is unambiguous and simply stated in a clear concise manner and cannot be deemed "deceptive". Defendant's evidence also shows that plaintiff was able to find out the amount of funds she had available for withdrawal or transfer at all times since the current and available balances in plaintiff's accounts were accessible to her online, at an ATM machine, or by calling Astoria. The evidence also shows that contrary to plaintiff's claim, her consent to the overdraft service was obtained when she opened her first checking account. The opt-in by telephone or e-mail in August of 2010, policy was the result of a change in Astoria's policy after plaintiff opened her accounts. Finally, the evidence shows that the overdraft notices sent to plaintiff by Astoria do not indicate the existence of any disputed fact and plaintiff cannot allege that she was prevented from obtaining information as to her incurrence of an overdraft fee since her account balances were available at all times online, at an ATM, or by calling Astoria. Plaintiff has not submitted any evidence to refute defendant's evidence and consequently, the branch of the motion seeking dismissal pursuant to CPLR 3211 (a)(1) is granted.

Based on the above, the motion is granted based on federal preemption grounds and pursuant to CPLR 3211 (a)(1). As such this Court need not address defendant's other grounds for dismissal of the complaint.

Dated: July 19, 2012

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ORIN R. KITZES, J.S.C.