

## **PART V**

### **SUPREME COURT OF THE STATE OF NEW YORK**

#### **CIVIL DIVISION**

**SANDY AND PAT LOAM, PLAINTIFFS**

**v.**

**Case No. MT-02**

**THE NATIONAL OVERLAND-YOUNGSTOWN BANK, DEFENDANTS**

#### **STATEMENT OF STIPULATED FACTS\***

Sandy and Pat Loam are in their mid-20's and work for M-Y Landscaping, a company half-owned by one of their fathers, Peter Musgo. Mr. Musgo and his partner, Terry Young, have been in business for over 30 years. In that time they have banked only with the National Overland-Youngstown Bank (N.O.Y.B.), whose slogan is "We make your business, our business (and no one else's)". Musgo and Young have been well-served by N.O.Y.B., receiving numerous commercial loans for expansion, and so they praise the bank, recommending it to employees, relatives, and new neighbors.

Sandy and Pat Loam keep all their accounts at N.O.Y.B.; checking, savings, and one credit card account. The couple are careful with money and have been saving to buy a house. They called N.O.Y.B. on April 17, 2001 to apply for mortgage pre-approval. Their mortgage contact at the bank was Alex Teller, who reported the bank's approval on May 8 by saying to them that "you've got a spotless credit history. I wish all young couples were as easy to approve as you."

Armed with the financing, Sandy and Pat began searching for a suitable four bedroom house with at least one acre of land—enough to put their landscaping expertise to use. Their goal was to find a place by August.

Although they had previously received an occasional pre-approved credit card offer, in June the Loams started to get a flood of targeted offers for various types of life, home, and disability insurance, and home improvement and home furnishing offers. The Loams were at first surprised, then amused by the seeming coincidence of the advertisers' focus on them. But as the stream of offers grew and continued, Pat and

Sandy read a news report, on June 27, about how banks sell their customers' financial information to other companies who then try to sell their own products to those clients. Sandy remarked that "I hope that our 'hometown bank you can trust' hasn't done what I think they've done. Would they have sold our financial history to others, even before we actually have a mortgage through them?" Sandy was particularly concerned because of all of the financial information that they disclosed, including exact income levels and virtually every other piece of their private financial history.

The next day, June 28, 2001 Sandy called and spoke with Alex Teller, their personal mortgage representative at N.O.Y.B., about their concern. Alex explained that there was a new federal law, the Gramm-Leach-Bliley Act (GLB), taking effect which gave bank customers greater rights to restrict the sharing of their nonpublic personal information. Alex assured Sandy that the bank was already in compliance with the law, but explained that it could legally still share information with affiliates or marketing partners. Alex asked what specific offers had come in; Sandy detailed a number of them. Alex said that some were certainly from affiliates or partners of the bank, but that some did seem to be from "unaffiliated third parties." Teller said, "I can inquire about the situation on Monday with Lee Goodenough, who oversees these regulatory matters; I know Lee's out tomorrow."

Sandy thanked Alex, but warned, "we take our financial privacy very seriously. That's why we only bank with you, avoid Internet purchases completely, and never buy over the phone. Our credit is all important to us." Sandy said, "we've always thought of you as true to your advertisements, as local folks who put customers and trust first. That means a lot to us." Alex assured Sandy that the bank valued them as customers and took their concerns seriously.

Sandy also told Alex that earlier in the spring, on May 15, Sandy had called the bank when their credit card bill and bank statement failed to show up in the mail. Sandy called when the expected mail was over a week late. The customer service representative checked, told Sandy that all three items had been mailed on time, and that duplicate copies would be mailed the next day. Sandy said that that was the kind of prompt, efficient service and concern they were used to.

In late August Jan Thompson, the Loams' real estate agent, found the Loams the perfect house, a white colonial on two acres, just 20 minutes from work, and in the well-respected East Bay School District. Sandy signed a contract on August 29, 2001 putting down five percent of the

purchase price, \$7,500, to be held in escrow pending mortgage approval. The sellers, Dr. Chris Dean and spouse, requested in the contract that a closing date be scheduled in September, 2001 as Dr. Dean had retired from the local school in June and they were anxious to move south. As far as the Deans were concerned "time was of the essence" and it was so stated in the contract.

Once the contract was signed Sandy called Alex Teller on August 31, who told Sandy that it would take the bank only a few days to recheck their credit reports and said that as soon as a mortgage commitment was obtained Alex would call Jan Thompson to schedule the closing. Sandy pointed out that in the contract "time was of the essence." Alex assured Sandy that since all the Loams' financial information stayed in-house that barring any unforeseen trouble they should get a verbal commitment in ten days and easily be able to close before the end of the month.

However, on September 7, Teller called and informed the Loams that N.O.Y.B. was unable to commit to the mortgage. Teller said that the credit reports had come back "very unfavorably." Sandy was shocked and started to argue that "there must be some mistake." Teller said that they had pulled all three credit reports and all showed the same problems, which the bank was not allowed to share in any detail. Sandy Loam insisted that, regardless of how the bank now rated their credit, the Loams had maintained their excellent credit practices and that they were going to "get to the bottom of this, no matter how far we have to dig."

The Loams shared the decision with their parents and the real estate agent, who urged them to get free copies of their credit reports from the major credit bureaus. When the first report arrived, much to Sandy's and Pat's shock, it showed a recent rash of large, unpaid credit balances: two credit cards, with balances of \$13,723 and \$17,248; a debit balance at a mail order computer company with \$3,500 on it; three cards at major national retailers, each with several thousand dollars in debits on them; an expensive cell phone plan, unpaid since it was opened in June; and a cash access line with \$10,000 in original debt with interest accruing. The Loams were dumbfounded, but quickly noticed that all of the irresponsible activity had taken place since May. Pat said, "It looks like someone else has been having a lot more fun with our lives than we have, but they've charged it to us!" Sandy replied that "someone has stolen our identity and it happened right after we gave N.O.Y.B. all of our personal financial information. And I bet the bank made money off our information in the process!" They remembered the flood of unsolicited offers and the bank's reassurance that it had complied with the new banking law and realized that their credit history, so carefully and responsibly built, was now in

ruins. At the advice of Jan Thompson, the Loams contacted the State Police, who began an investigation and urged the Loams to contact the State Attorney General's Office for further assistance. The Attorney General's Consumer Frauds Bureau advised the Loams to immediately put a fraud alert warning in their file at the national credit bureaus and to start contacting the individual credit card companies to inform them and cancel those accounts. The AG's office assigned Taylor Tarbell, an experienced investigator of identity theft, to look into the case.

The joint investigatory efforts of the State Police and the Attorney General's Office led to the arrest in late September of two siblings, A.J. and Rusty Gates, on various charges related to the fraudulent theft of Sandy and Pat Loam's financial identity and the subsequent thefts via illegally opened credit accounts. A.J. Gates was an employee of N.O.Y.B.'s affiliated insurance company, Overland-Youngstown Insurance Company (O.Y.I.C.) and worked in the computer processing and marketing unit. According to the charges, Gates provided stolen financial information to a sibling, Rusty, who then applied for the illegal accounts. The bank and insurance company both cooperated with the investigation, which was coordinated through the bank's vice-president in charge of regulatory enforcement and security, Lee Goodenough. The bank and insurance company offered interviews of employees who had access to sensitive financial information and to necessary records, while the police traced post office box ownership and mailing addresses for bills and merchandise purchased with the fraudulent accounts. This led to Rusty Gates, while A.J. Gates separately came under suspicion through the computer record of accounts accessed and records printed out to O.Y.I.C. printers. It was rare that individual records would legitimately need to be printed out in the course of the mass marketing-centered computer work done in the computer processing and marketing unit. Computer records indicated that A.J. Gates had repeatedly printed out individual records, including that of the Loams. Lee Goodenough shared this information with the bank's president, Nicki Biddle, who told Lee to cooperate fully with the authorities.

In a fortunate turn of events, for the Loams, a new part-time employee at M-Y Landscaping, who worked with Pat Loam (the company bookkeeper), was a former 13-month employee at N.O.Y.B. When this employee learned of the Loams' identity theft problem and that N.O.Y.B. was the probable source of the theft, an immediate offer of help was forthcoming. Pat Loam was surprised and asked "How might you help?" Mickey Jackson replied: "I worked on their computers for over a year. I know an awful lot about their practices and the gap between what the bank tells the public and what it really does."

The plaintiffs have brought the instant action against N.O.Y.B. based on two separate causes of action. In the first cause of action the plaintiffs claim that as customers of the bank, the bank owed them a duty to keep their personal financial information secure and that as a result of the bank's negligence, and that of their agents and employees, the plaintiffs' personal financial information was disclosed to unauthorized third parties who ruined plaintiffs' credit, caused them to lose their "dream house" and caused them to sustain damages in the amount of \$250,000. Plaintiffs claim \$250,000 and attorney fees and court costs on their first cause of action. In their second cause of action the plaintiffs claim that the bank breached its statutory obligations under § 349 of the General Business Law and 15 U.S.C. § 6801 et seq., also known as the Gramm-Leach-Bliley Act or GLB, in that they actively engaged in deceptive and unlawful practices in their banking business, both through their ads and personal representations to the plaintiffs. The plaintiffs request an order of specific performance forcing the bank to take corrective measures to correct their credit history, an unspecified amount of damages, attorney fees and court costs on their second cause of action.

As to the first cause of action the defendant contends that at all times they treated the plaintiffs with the utmost care and consideration and maintained the necessary security of the plaintiffs' files. The defense also argues that if the plaintiffs suffered any damages by reason of the disclosure of their personal financial information it was due to the intentional, unforeseeable criminal act of a third party, relieving the defendant of liability. As to the second cause of action the bank contends that it met all of its obligations under both § 349 of the General Business Law and the Gramm-Leach-Bliley Act, advising the plaintiffs of their opt out rights and informing them at all times of how the bank treated their personal financial data. Further, the bank argues that at all times the plaintiffs knew or should have known of the bank's practices with regard to the plaintiffs' personal financial information. The bank demands that the plaintiffs go forth with nothing.

## **WITNESSES**

### **FOR THE PLAINTIFFS**

**SANDY LOAM**  
Plaintiff

**MICKEY JACKSON**  
Former Employee  
N.O.Y.B.

**TAYLOR TARBELL**  
Senior Criminal Investigator  
Attorney General's Office

### **FOR THE DEFENSE**

**NICKI BIDDLE**  
President, N.O.Y.B.

**LEE GOODENOUGH**  
N.O.Y.B. Vice-President  
in Charge of Regulatory  
Compliance and Security

**ALEX TELLER**  
Personal Mortgage  
Representative, N.O.Y.B.

\*This case is hypothetical. Any resemblance between fictitious persons, facts, and circumstances described in this mock trial and real persons, facts, and circumstances is coincidental.

## **STIPULATIONS**

1. No information regarding Mickey Jackson and A.J. Gates, aside from that provided in this packet, may be used in connection with the 2002 case. (Jackson and Gates both appeared as witnesses in the 2000 case.)
2. The social security numbers of the plaintiffs, as found on their Application For Mortgage Pre-Approval, intentionally have 10 digits, not the 9 digits of actual social security numbers. No issue may be made of this at trial.
3. Witness statements are sworn and notarized.
4. All items of evidence are eligible for use at trial, following proper procedure for identification and submission. No other physical evidence, aside from that provided, can be introduced at trial.
5. All witnesses may be portrayed by either sex.
6. All applicable motions have been made and decided, and discovery has been completed. The constitutionality of all statements is not in question. All other evidentiary questions are preserved for the Court. The case is ready for trial before the Civil Division of the Supreme Court of the State of New York, George County, which, for purposes of this mock trial, is a county in New York State.

**AFFIDAVIT OF SANDY LOAM**  
**Witness for the Plaintiff**

My name is Sandy Loam. I'm 27 years old, married to Pat Loam, and live in a rented duplex at 180 Gravel Pit Road, in the town of Underbrook, NY. My spouse and I have brought this lawsuit because of the damage done to our financial and credit history through the deceptive acts and negligence of the National Overland-Youngstown Bank (N.O.Y.B.). N.O.Y.B. portrays itself as a friendly, local bank that puts its customers first. In the past 9 years since I opened a savings and checking account at N.O.Y.B., they have advertised themselves as: "The hometown bank you can trust;" "To build a brighter financial future, trust N.O.Y.B. today;" "Trust N.O.Y.B.: The local bank where customers come first;" and "We make your business our business (and no one else's)." These messages are on the radio, TV, billboards, and in company mailings such as account statements and even on the annual calendar.

Pat and I have been frugal and careful with all of our finances, credit use, and personal financial information. Both separately and as a couple, we have banked only at N.O.Y.B. and it is the source of our only credit card. Although we have received dozens of bank and retail store credit card offers over the years, we constantly refuse them, and have received little directed marketing. We have intentionally used our one credit card for major purchases, but have never run a balance for more than one month at a time. Our only other credit usage has been for the two cars we own, one bought in 1995 with a 5-year loan period, and one in 1997 on a 4-year loan. We have never missed a payment on the cars.

Because we both work at M-Y Landscaping, and Peter and Terry have had such good service from N.O.Y.B., we naturally thought it made good sense to trust them as our bankers, too. The "We make your business our business (and no one else's)" slogan had been proved true for M-Y Landscaping—a number of times when they were negotiating lines of credit to purchase land to open new stores, N.O.Y.B. came through and no information leaked out to competitors. So we were careful with our finances, and our financial information, and we had every reason to believe that N.O.Y.B. would be equally careful with private information. We've seen friends get in trouble and read and seen reports on all kinds of people who either get themselves in a financial mess, or whose private financial information has been stolen. It's one thing if you lose your wallet or if you're a victim of a "skimmer," who secretly slides your credit card through a miniature computer recording device—but buying things over the phone, or not shredding unwanted credit card offers, well, then you're just being foolhardy.

In the late spring we received forms from N.O.Y.B. explaining the new federal law and that we had the right to opt out of having financial information shared. I've got to say, trying to read and understand that stuff just about made our heads swim. We're both college graduates and pretty smart, but that stuff from the bank made us feel stupid. Naturally we did opt out, but we are not certain that we completely understood the complicated language of that form. I didn't think so at the time, but maybe what N.O.Y.B. was hoping for was that the small print and complex language would confuse and intimidate most customers. That, in itself, seems a deceptive practice to me.

Worse, of course, is what happened to our private financial information once we applied for a mortgage at N.O.Y.B. When we filled out the paperwork in May, we were not given an opt out form. The first forms we got came when the bank mailed out the second copy of our statements in mid-May, about the 18th or 19th. We made as much sense of them as we could and sent them back in, having opted out on May 21. After the flood of unsolicited offers for insurance of all types and home-related merchandise—and seeing the unsettling news report on how banks sell your private records to make money—I sought some reassurance by calling Alex Teller on June 28. My conversation with Alex helped me understand that the bank could still use our financial records, and could share them with other "affiliates" like O.Y.I.C. or non-affiliates with whom they had marketing agreements. Alex promised to follow-up, saying "you don't have to worry Sandy. Your records are being carefully protected." That eased my worries.

What came next, when we found the perfect house in August and then had N.O.Y.B. deny us a mortgage in early September because our credit reports "were a disaster," still seems almost surreal. It was N.O.Y.B.'s mishandling of our private information that caused all of our problems and led us into this lawsuit. To think that one of its employees, A.J. Gates, could get his hands on our W-2's and computer records should be proof that our information was not being protected the way it should be. The subsequent ruination of our credit by the Gates twosome—which the bank then used as its reason for denying us credit—is too ironic. So we lose a chance to get a beautiful \$180,000 house for the incredible price of \$150,000 because of our bank's own gross negligence. It's clear to me that the bank did not live up to a reasonable standard of care, much less than to what you have a right to expect from an institution that promotes itself as a bank "you can trust." So because of their policies, and their crooked employee, we lose the perfect house and are left having to clean up the mess they facilitated.



Two weeks ago I got a letter from the IRS demanding the return of \$3,000 they sent in August, based on the filing of an amended return in May. Of course, there is just one little problem—we didn't file an amended return in May. We did get our proper refund of \$1,500 in April; someone else—maybe the Gates, maybe someone to whom they sold our tax returns and W-2 notices, got the larger, illegal, refund. But guess who gets to hire an attorney to try to convince the IRS that Pat and I are the victims of identity theft?

We relied on N.O.Y.B.'s promises of trustworthiness and are in a financial mess as a result. We were trying to build a financial future on a footing as solid as bedrock, but they've thrown us into quicksand. They should have to pay to make us whole again.

Sandy Loam 11/26/01  
Sandy Loam, November 26, 2001

**AFFIDAVIT OF MICKEY JACKSON**  
**Witness for the Plaintiff**

My name is Mickey Jackson; I'm 20 years old, live with my parents, and take courses part-time at a local college specializing in computer-engineering. Since August, 2000 I've worked part-time for M-Y Landscaping, helping them to maintain their computer systems. Prior to that, I worked for 13 months at the National Overland-Youngstown Bank in their management information services department, working on various aspects of their computer and data base systems. I helped install a new system linking the main bank to its four branches and helped write software that was used to ensure accuracy in meeting the clients' opt out decision for the new GLB law.

I was hired by Nicki Biddle, the bank president, as a favor to my parents—they had gone to high school together and remained friends; my dad helped "N.B." get his private pilot's license. I was adrift after my acquittal as a high school senior on charges of having committed computer crimes, charges that cost me my appointment to the U.S. Naval Academy at Annapolis. I still wanted to work on computers, but wasn't ready to jump into a four-year college situation, never having considered going anywhere but the Academy.

I was very appreciative of "N.B.'s" taking a chance on me—it was exactly the kind of thing that only happens in a "small town" setting, and matched what N.O.Y.B.'s own advertising always promised—the values of a "home town bank." "N.B." told me that "I've known you all your life and never believed the charges against you. Now it's your chance to make me look good by doing a great job." I told "N.B.": "I won't let you down."

While my initial duties included installing new work centers and upgrading software, I was soon given the chance to help write some computer code. My boss, Bryan Jennings, said he was very impressed with my speed and accuracy and asked if I thought I was up to writing the code to implement the new opt out provisions of a federal privacy law. Of course, I said "yes." He gave me a quick education on how banks "milk" their customers' account information to rent or sell that data to other commercial firms. I guess I was surprised—maybe stunned—that banks did that at all. He laughed and told me "don't be alarmed. All banks do this all the time." He then proceeded to pull up my parents' own account to show me examples of the kind of valuable information that was sitting in the records. It's a real eye-opener when you look at how money is being spent, through the eyes of a marketer. Your expenditures at restaurants, at book stores, at hotels, what you spend every dollar on, along with your income

level, the status of your car loans—basically everything is of potential value to some business that would love to sell you more of what it already knows you like. But I was shocked that he thought it proper to show me my own parents' records, which they themselves have never shared with me.

Jennings showed me the functions of our existing software that extracted all the nuggets of personal data from all accounts, sorted these into categories, and then sent them off to our affiliates or marketing partners who were interested in specific categories. All of this made money for N.O.Y.B. Jennings explained that the federal law was complicated enough that most customers would not wade through our explanation of the opt out possibility, which in any event only kept us from selling data to complete third parties, with whom we had no joint marketing deals. So my job was to lay out a computer process for inputting the opt outs that were returned, and the code that would then keep those records from being sifted when we were collecting data for third party non-affiliates. We could still "milk" those accounts when the data was going to an affiliate or a marketing partner, however.

All of this was a revelation to me and it was challenging to be given the responsibility of writing code that would make the new system work. Jennings told me that "we want it to restrict only those accounts that are really off-limits—none others. That information is money in the bank for us—and we're the bank!"

I went to work on the project and made good progress. I was given access to the literature the bank was working on that would be sent to customers in the spring, which I found unclear and complex. When I asked the person from the Compliance Office, which had sent me the proposed mailing, why it couldn't be put into more understandable language, I was told it was "not my business" and that it had final approval from Lee Goodenough and Nicki Biddle. Being naturally curious, I looked up the actual GLB law on the Internet, and was surprised to see that it wasn't much more complex than what we were going to mail to thousands of customers. It gave me an uneasy feeling, like I was part of a charade to offer folks "more privacy" but in such a complex package that few could make sense of it.

While I went about my job, to the best of my ability, I became more and more troubled by what I knew we were doing with customers' information. By this point, in the spring of 2001, I was assigned the twice-monthly task of running the programs which sifted customer records for the sellable categories of data, and then electronically transferring the results to the respective affiliates or marketing

partners. In May, I found out that A.J. Gates, my former friend who turned state witness against me, was on the receiving end of the data I was sending to O.Y.I.C. Not surprisingly, I was personally uneasy about dealing with A.J. at all, made doubly so because of my belief that Gates may have tried to frame me for something he himself had done. I was not comfortable in shipping sensitive information to him, given our shared history. One evening in late May I was working and went up to the eighth floor vending machine area to get an I.C.U. cola. Coming back down, I had to take the service elevator because the others were out-of-service. I mistakenly hit "4" instead of "3" and when the door opened I saw A.J. digging in the custodians' big waste bin. He jumped up, startled and holding some papers and said "I'm trying to catch some files I mistakenly threw out." I quickly hit the close button, sarcastically saying "you look in your element." I didn't think about what he was doing at the time, as I was so uneasy about the encounter, but that's how he got his hands on the Loams' W-2 reports. Thankfully I never saw him down on the bank's floors.

Given the new sources of my unease, I decided to talk with Nicki Biddle directly. "N.B." seemed disturbed when I shared my personal sense of hypocrisy as my employer portrayed itself as "the hometown bank you can trust," while intentionally preparing a complex explanation of GLB in the hopes that few customers would actually opt-out, and while I was the person directly sifting personal accounts for sellable data. "N.B." reacted as if I was questioning "N.B.'s" own ethics. Biddle bluntly told me that all banks sift customer records, that it's a significant source of income, and that it was impossible to make the complex GLB law simple enough for everyone to easily understand it. "N.B." softened when it came to my fears about A.J. Gates and assured me that safeguards existed to ensure that no employee misused customer data. "N.B." told me that I could be sure that if A.J. did anything wrong, the bank would make sure that "Gates swings for it."

While initially feeling a bit better about Gates, what I later personally observed in June and July compelled me to resign. I started noticing a pattern of sloppiness with client records which further alarmed me. I often worked late to troubleshoot workstation and main server problems, which took me into various departments. I saw customer records left unsecured overnight; I saw records that should have been shredded, instead in the regular trash when the custodians came through; I realized that the mortgage and loan departments kept the blank forms they used to fax off a request for a credit check in bins near their fax machines. Altogether, I realized that it would be very easy for customer records to be stolen, or an improper credit history request to be made

under the bank's name. The bank's disregard for customer privacy, as evidenced in their sloppy in-house procedures, gave me the creeps.

I spoke with my parents about all these issues and they agreed that my concerns were justified. They also pointed out that, given my one run-in with the law, I should be nowhere near any business that was anything but pristine. It might be all too convenient to point a finger at me, if records were misused.

So on July 24, 2001 I resigned and my parents closed their savings, checking, and credit card accounts at N.O.Y.B. I thought I had put this behind me when I was hired by M-Y Landscaping in early August. Little did I know how prescient my fears of customer data misuses—and A.J. Gates' role—would prove to be. When I learned of the financial pit that Sandy and Pat had been pushed into because of N.O.Y.B. and O.Y.I.C., I had to step forward to help. After all, I probably transferred their data into A.J. Gates' waiting hands.

*Mickey Jackson 11/27/01*  
Mickey Jackson, November 27, 2001

**AFFIDAVIT OF TAYLOR TARBELL**  
**Witness for the Plaintiff**

My name is Taylor Tarbell, and I'm the senior criminal investigator with the Attorney General's Office. I am a retired State Trooper, a graduate of SUNY Albany's Criminal Justice program, where I minored in computer and forensic accounting. I have an interest in white collar crimes and moved to the State Attorney General's Office in 1996, becoming the senior investigator in 2000.

I was assigned to investigate the case involving Sandy and Pat Loam, N.O.Y.B., and O.Y.I.C: the alleged theft of the Loams' identity, and the role of the two affiliated institutions, if any, in that theft. In reviewing the Loams' file, I did not have to dig far to understand why they were convinced that N.O.Y.B. was the source of their problems. Their credit report, dated September 12, 2001 showed a dramatic increase in the number of their credit accounts, and a rapid rise in balances, beginning about the 10th of June. This sort of explosion in credit usage, which continued through the end of August, is often a tell-tale sign of identity theft. What sounds the klaxon in this case was simply the fact that the Loams had actually been so conservative with their finances and use of credit prior to that time. Usually young and middle-aged couples have a plethora of credit accounts, bank accounts opened and closed, and their account numbers have been broadcast hither and yon via the Internet and over the phone. So my job is usually more difficult, in trying to find where their "private" financial records have been stolen. Here, it was very likely that N.O.Y.B. was indeed the source, given the restrictive nature of their past transactions and that the application filed in early May represented the single source of entry into their credit accounts.

I quickly realized that what was fascinating about this case was the potential intersection of the new GLB law with the deceptive practices provisions of § 349. It was clear that the Loams believed they had a right to rely on the truthfulness of N.O.Y.B.'s multi-year advertising campaign that portrayed the bank as trustworthy, customer-centered, and protective of personal financial information. And that strongly suggested that the internal motivations and tactics of N.O.Y.B. personnel in designing their GLB customer opt out program, could also be scrutinized in light of the higher standard that the bank had advertised to the public. I get excited about cutting-edge cases, and I knew I had one.

In a situation like this, where you can trace an I.D. theft to a particular customer's interaction with a single financial institution, many questions of responsibility still remain. There are a wide variety of

channels where personal financial data can leak into criminal hands. A bank might have a bad employee; it might share information with an affiliate or non-affiliate with a bad employee; the entity it shared the data with might share it again, with a company that is itself fraudulent; or the bank's own procedures may be sloppy—failing to shred documents or secure files which are then accessed by someone at a trash hauler or a custodial firm contracted to do work for the bank. So, having a strong indication of the involvement of N.O.Y.B. in itself was only a first step. I had to determine the exact route of the data into criminal hands to know the degree of the bank's responsibility, if any.

Therefore, after interviewing the Loams, I next contacted Lee Goodenough, the VP in Charge of Regulatory Enforcement and Security. On September 25 I informed Lee that we had initiated a formal investigation into the theft of the Loams' financial information and that it appeared initially that N.O.Y.B. was definitely involved. I asked for N.O.Y.B.'s cooperation and said that we needed to proceed discretely, as the source of the theft might be an employee. Goodenough was obviously upset at the possibility, and seemed frazzled or, maybe, caught off guard, asking me several times to repeat myself. Lee finally seemed to fully understand my intent and promised "our full collaboration." We agreed to meet on September 26 at 10:00 a.m.

At that meeting I requested the exact information on when, what, and to whom, data about the Loams had been shared. Goodenough had anticipated my request and provided a printout of the Loams' records and a separate printout of who had received them. The financial data on the Loams included everything important—Social Security numbers, dates of birth, salaries, savings, bank accounts, amount of mortgage pre-approval, status of car loans, basically everything that you would want to know about someone if you were a marketer. This was shared from N.O.Y.B. within Overland-Youngstown Financial Corporation's family of affiliated companies including O.Y.I.C., O.Y.G.R.E. (Overland-Youngstown Greater Real Estate), and its investment arm O.Y.I.S.B.M. (O.Y. Investments: Stocks, Bonds, Mutuals). Also listed were various marketing partners. And a third list was non-affiliated third parties, made up of about a dozen companies, including auto companies and national retail chains.

At first I zeroed in on the latter portion of the list and asked if the Loams had opted out on their GLB forms. Goodenough checked and said that they had, on their checking, savings, and credit card accounts, but had not returned the forms until May 22nd.

At my direction the police were energetically digging into the fraudulent accounts and activities that showed up on the Loams' credit history. Two common trends soon appeared: both the P.O. box and a one-bedroom apartment at 300 Stone Quarry Road were rented to the same individual: R.T. ("Rusty") Gates. Armed with a search warrant, the police raided the apartment on September 27, and discovered few signs of human habitation, but a virtual warehouse of TV's, DVD players, leather jackets, microwave ovens, and other expensive electronics—including two computer systems. Most of the goods were in their original cartons, some opened, others still sealed. Rusty Gates was picked up by the police the next day when he came by the apartment. He refused to talk to the police, claiming only that he had rented the apartment for a former girlfriend who was down on her luck.

I was notified of the arrest and returned to the bank on October 1, at 9 a.m. I wanted Lee Goodenough to check the employee records to see if any "Gates" was on the payroll. When I asked the question, Lee swallowed hard and said,—"I don't have to check, I know that a Gates—A.J.—works for O.Y.I.C." Gates had called in sick that morning, but the police picked A.J. up that afternoon while he was trying to close out a bank account with a \$12,000 balance at the N.O.Y.B. branch in Wheaton.

A.J. Gates claimed that Rusty had forced the illegal acts upon A.J., and agreed to testify against Rusty in return for a reduced sentence. A.J. provided a complete overview of what they had done, and said that O.Y.I.C.'s security procedures "were laughable. Even without access to the computer records, I could collect lots of useful, personal financial data, just by going through the trash or glancing on desks and into files lying open throughout the building. You know, being a computer geek gets you access to almost everywhere!" Gates made clear that with computer access to the marketing data being sent twice a month from N.O.Y.B., identity theft was "like picking ripe grapes—it fell into my hands in bunches." However, A.J. had first run across part of the Loams' records at the top of a large plastic trash utility bin that a custodian had wheeled off the service elevator onto O.Y.I.C.'s floor. A.J. had seen, and took, a copy of the Loams' W-2 forms, which were stapled together. He said it was his first theft, after months of saying no to Rusty. Subsequently he accessed and printed out the Loams' full record from the O.Y.I.C. computer database, in late May. Later he accessed the computer records of a dozen other customers; the latter had been sold by Rusty to several "associates." A police search of A.J. Gates' apartment resulted in the confiscation of certain documents, among which was the W-2 forms of the Loams. I was present at the search.



Overall, in my professional opinion, the Loams' contention that N.O.Y.B. was deceptive and negligent has strong merit. "Deceptive practices" come in many different sizes and shapes. When an institution promotes itself as "trustworthy," as looking out for the well-being of its customers who "come first," and as keeping customer's business affairs "private," there is a certain implied promise of due care in the handling of personal financial data. It's clear that neither N.O.Y.B. nor O.Y.I.C. had adequate security precautions or made any significant effort to truly keep personal financial information data safe from potentially prying eyes. My own tour of the N.O.Y.B. main office showed only 3 shredders, less than one per floor for over 75 employees! And given the fact that the affiliated companies in the O-Y family occupied the other 7 floors of the building—and used the same custodial staff and waste hauler—there was a lot of potential for vital information to be easily stolen. The fact that A.J. accessed a record that only existed in original form at N.O.Y.B.—the W-2 forms—establishes that the Loams were harmed due directly to N.O.Y.B.'s failure to protect their files. N.O.Y.B. may or may not have also been in violation of the Loams' opt out desire under GLB, but it is certain that trusting them to be careful and responsible with financial data was unhealthy for the Loams, and others from whom Gates stole information.

Taylor Tarbell 11/28/01  
Taylor Tarbell, November 28, 2001

**AFFIDAVIT OF NICKI BIDDLE**  
**Witness for the Defense**

My name is Nicki A. Biddle and I'm president of N.O.Y.B. and chair of the Overland-Youngstown family of financial companies. I have been in my present position since 1989 when my father retired and I was appointed in his place. I am the fourth generation of Biddles to be associated with this bank.

This is, personally and professionally, a very difficult situation for me. On the personal level, I have known the principals of M-Y Landscaping since 1975, served as their personal banker for a decade, and lobbied for a number of their loan applications with the loan committee. Indeed I prevailed upon my father to fund M-Y's first major loan in 1975, a recession year, because I believed in the determination and strength of character of Peter Musgo and Terry Young. Likewise, Mickey "Speed" Jackson's parents are two of my oldest friends and I personally vouched for the character of Mickey to justify hiring "Speed." It pains me that Peter, Terry, and the Jacksons now believe we weren't true to our word as an institution.

Let me say that what happened to the Loams is most regrettable and that I am embarrassed, as chair of the board of Overland-Youngstown Financial Corporation, that an O.Y.I.C. employee acted illegally with customer information. Fortunately, we have had no experience of this type in the past—no employee has ever been caught by authorities for misusing customer records.

There appears to be two key elements to the claims made against N.O.Y.B. The first is that we somehow did not live up to our promises to be a "bank you can trust" and to put "customers first." But surveys of our customers taken over the past 15 years indicate very high satisfaction with our trustworthiness. While our customer base has grown by an average of 10% per year since 1992, fewer than 1/2 of 1% have left our bank citing any negative reason for leaving. Overwhelmingly, those who leave cite relocation as their key reason. These results repeated over five years placed us in the top 2% of institutions statewide, resulting in our being named "Small Bank of the Year" by the state banking federation in 2000.

A key portion of the Loams' case against us is, I believe, based on confusion on their part. While all of our consumer advertising focuses on N.O.Y.B. as a small-town bank you can trust, which is customer-friendly, only our commercial ads focus on privacy—"We make your business our

business (and no one else's)." Unfortunately, because the Loams both work at a business which does its banking with N.O.Y.B., they have repeatedly seen those commercial customer-targeted ads. They mistakenly took that promise to commercial customers as a promise to them—consumer-customers, which we never intended. Our own bank records, for payments to advertisers, differentiate between the two target audiences. And please understand—we keep that promise to our commercial customers. We share nothing about their finances with anyone else—not a shred of information that a competitor could use. So, there were no deceptive practices or ads on N.O.Y.B.'s part, only self-induced confusion created by the Loams.

The second source of the Loams' claim is based on assertions by Mickey Jackson and Taylor Tarbell that N.O.Y.B. was sloppy and negligent with customers' records. Understand that Mickey became as jittery as a mouse in a roomful of cats once Mickey knew that A.J. Gates was working for our affiliated insurance company. Personally, after my meeting with Mickey, I was of the opinion that it would only be a matter of weeks before Mickey found a reason to resign. We strongly encourage employees to keep their work areas neat and to put away sensitive files. We do not contract for custodial services, but rather have lifelong employees do the job. That allows us to collect paper refuse which is shredded by a heavy duty state-of-the-art machine located in our basement which serves all of the O-Y affiliates. No intact records leave our facility. We paid \$9,000 this summer for that machine—does that sound like we don't take security seriously?

A third claim, which I really don't think is relevant to this case revolves around the enforcement of the GLB opt out provisions and whether we improperly shipped out the Loams' data to third-party non-affiliates. At most it appears that this may have occurred in May, prior to the Loam's return of the opt out form. But once that form was processed, no Loam's data was mishandled. And given that their data was stolen from our affiliate, O.Y.I.C.—with which we had a perfect right to share the information—the niceties of the third-party sharing appear moot to me. Absolutely no harm was done through that avenue. As far as the supposed complexity of our opt out form, banks had the difficult job of trying to translate a complex law, with specific and detailed provisions, into a quick and easy consumer-directed page or two. Not an easy task, but I think that our form was at least as understandable as anyone else's that I've seen.

As Taylor Tarbell's own affidavit attests, N.O.Y.B. has been completely cooperative in all aspects of this inquiry by authorities.

Tarbell's own claims as to our deceptive or negligent behavior are based on little more than opinion. The fact is that N.O.Y.B. is a very well respected institution, with loyal customers, and excellent employees. I am disappointed with the apparent criminal behavior of A.J. Gates and question the accuracy of the glowing recommendation given by Dr. Chris Dean on Gates' behalf. But O.Y.I.C. had done its homework and had a right to expect good, honest work from someone who came to us with such high praise for his character. The only justice in this matter appears to be the fact that the Deans lost the sale of their house as a direct result of the illegal actions of A.J. Gates, who alone is guilty of stealing the Loams' identity.

Nicki Biddle 11/30/01  
Nicki Biddle, November 30, 2001

**AFFIDAVIT OF LEE GOODENOUGH**  
**Witness for the Defense**

My name is Lee Goodenough, I am 50 years old and live in the Shady Elm projects for disabled veterans in Wheaton, NY.

My curriculum vitae is a simple one. I was honorably discharged from the U.S. Army Special Forces during the Vietnam War when I suffered a severe form of otitis media as the result of an explosion too close to my ear and have been living with chronic tinnitus ever since. After my rehab at home, when the doctors told me I could expect no further hearing improvement, I obtained a job with the Embosser Insurance Company of NA in the compliance department. After 20 years, I retired as chief compliance officer with a full pension to take the position of vice president for compliance and security with N.O.Y.B. In this way I was able to work 30 hours per week, have plenty of time to socialize with my fellow vets, and keep my hands in compliance work. I've been the compliance officer at N.O.Y.B. for the past three years.

I believe Biddle made me the offer after hearing me explain to my daughter, Darlene, who incidentally is engaged to Biddle's son, Eric, how we ran compliance at Embosser. Over there my job encompassed overseeing the day-to-day compliance operations of over 25 businesses, all of whom employed no less than 100 persons. My main responsibility as compliance officer for the insurance company was making sure that "our" insureds obeyed all of the statutes, rules, and regulations mandated by the commissioners of insurance and the individual state departments of insurance. My office was a conglomeration of files, charts with deadlines, calendars, and files of rules and regulations. I learned how to set up a tactical approach to compliance; I took the individual companies and created logos that could be placed on a strategic map. The map, instead of including land masses, rivers, oceans, borders, and general topography, included filing deadlines, personnel management scenarios that would fit into guidelines, liability checkpoints, and other company inspection areas. By cross checking the company's reports with the requirements of the tactical map, a company could move across the board to achieve compliance on a target date. When the target dates were not met, the company was either placed back at its starting point, or placed in a transient position until the objective was achieved. It was my development of this scheme that impressed Biddle and he told me point blank: "Lee, you're good enough for me."

The compliance laws in banking are a bit different than they were in insurance, especially with regard to recently enacted privacy provisions. I

had to become familiar with the GLB Act which was enacted November 12, 1999 but did not require compliance until July 1 of this year. Distilled to its essence, the act recognized that financial institutions share their customers' personal financial information with third parties that are not part of that institution and allowed customers to restrict the use of such information by executing an "opt out" agreement.

This is easy enough for the customer. The customer gets a little form with a tear away portion at the bottom that can be sent back to the bank if the customer wishes to opt out.

From where I sit, however, the burden is much greater. First, the GLB bill only encompasses information that might be disseminated to parties not affiliated with our bank. It does not restrict us from sharing data with our affiliates or partners. Nevertheless, the act places no less than four affirmative obligations on the bank even before a customer chooses to opt out: the notices have to be sent pursuant to certain rules; the customer must be identified and differentiated for the right notices to apply; the definition of personal and non-personal information (NPI) must be included; and the content of the opt out is subject to certain requirements, as is a revised notice. And after all that, the delivery of the notice has to meet statutory requirements. If that were not enough, there are always the exceptions that are also noted in the regulations.

This wealth of information, rules, and regulations must be treated in a manner consistent with bank obligations, and after all, it's the relationship with our customers that is of paramount importance.

Now what happened to the Loams is tricky business. I see it this way. They signed the opt out agreement, sure. But they were not victimized by information that was sent out in violation of that agreement. No, sir! Alex told me that their credit was "small, but important" to them when asking me to check on the status of their opt out request, and if their financial data was sent out improperly to anyone. Naturally, we have to keep records of everything, so I could check on the system and see that their opt out form was received on May 22nd and entered into our compliance system three days later on the 25th. Naturally enough, as their mortgage pre-approval was okayed on the 8th of May, those records were fair game when our computer whizzes ran the mid-month sift of customer files for new information. So even without checking on the specific content of the data we sent to affiliates, partners, and non-affiliated third parties, I was sure that the Loams' information would have been shipped in all three directions. I called Alex Teller to confirm Alex's suspicions and left a message twice to give me a

call on the Loams' situation. I honestly can't recall whether we ever connected on the matter.

When I got the call from Taylor Tarbell in late September about a possible security breach and identity theft stemming from our organization, I sprang into action. I had gathered all the relevant information regarding the Loams, who their financial information had been shared with in May, and what exact information had been shared. I informed President Biddle of the situation and then met with Tarbell on the 26th. Given my long history of compliance and security work, and the substantial number of times I had to deal with regulatory authorities concerned about some aspect of our companies' compliance, I could tell that Tarbell was impressed with my deft fact finding and high level of cooperation. My military and professional career have both taught me that nothing disarms a potential adversary quicker than evidence of full and open cooperation. That was true at our initial meeting and also when I immediately admitted that O.Y.I.C. had an A.J. Gates on its payroll. And between our two meetings I had run a security check on N.O.Y.B. and O.Y.I.C. employees, looking for instances where individual customer records had been printed out by employees unlikely to have good cause to have that data. I found few questionable instances, but A.J. Gates was the name I was going to pass on to Taylor for scrutiny, as A.J. had a suspicious number—about a dozen.

Given our cooperative approach, I was surprised to see that Tarbell chose to believe the characterizations of an admitted thief, Gates, as to the insurance company's security and office procedures. Obviously, those negative remarks are intended to hurt the very people that Gates has already shown his disloyalty to by stealing from our customers and smearing the good name of this organization. In the three years I've been with this company this is the first time we have had an identity theft traced back to the illegal actions of one of our employees. If Gates' version of events was accurate I would expect that we should have had many more problems. Our only mistake in this case was in having an employee at O.Y.I.C. who proved to be a thief.

Lee Goodenough 11/29/01  
Lee Goodenough, November 29, 2001

**AFFIDAVIT OF ALEX TELLER**  
**Witness for the Defense**

My name is Alex Teller and I live at 1832 Clay Road in Underbrook, New York. I have worked at N.O.Y.B. since 1991; three years as a teller and seven in the mortgage department. I am now a "personal mortgage representative" and assist customers with all of their new and second mortgage needs.

I have known the Loams for almost 10 years, first as a teller serving their account needs prior to when they were married. In April 2001 Pat Loam called to inquire about the procedures for seeking a mortgage, and to ask how long it would take to be approved after applying. I agreed to meet with them at their home on the evening of the 20th, but we had to reschedule due to a freak late season snowstorm. I suggested that they could apply on-line, to get the process started, but Sandy was adamant that they would not send sensitive financial information over the Internet. We rescheduled for the evening of Tuesday, May 1 at 8:30 p.m, which gave me time to get back from my kids' elementary school's Law Day program.

We met for about one hour, filled out all the necessary forms, and the Loams turned over copies of records I would need to verify their income, such as their 2000 tax return and W-2 statements. And, of course, they provided their other relevant financial records, all of which happened to be with N.O.Y.B.—savings and checking accounts, a credit card, a car loan, and about \$10,000 in student loans. When they asked "how do we look on paper?," I told them that they had a very good chance of being approved for a loan, in the range of \$100,000-\$120,000.

In truth, if everything checked out, they would have been pre-approved in a heartbeat, as all of their numbers were very good. They were exactly the kind of customer that a bank like N.O.Y.B. loves to fund: homegrown, solid folks who planned to spend their entire lives in the area, and who would always make their payment. I processed their application the next day and heard back the following Tuesday, May 8, from the loan committee that the Loams were approved for \$120,000. I called them with the good news, which I gave to Sandy, saying that a confirmation letter should arrive by the 10th. They had told me that they would be taking their time with the house search, but would definitely try to close a deal by the end of the summer.

I was somewhat surprised when I got a message to call Sandy Loam in late June, as at first I assumed that they must have found a house. Instead, when I called back, Sandy was very agitated about a "tidal wave"



of insurance and house-related offers which they had started getting about the 15th of June. Sandy asked if the bank had sold any of their private financial information to "other companies." Knowing I was in for a hard time, I started going through, step-by-step, what N.O.Y.B. could and probably did share, and with whom. I told Sandy about the new opt out provisions and said that they certainly must have gotten that form with their other account statements in May and with the mortgage confirmation letter. Sandy told me that they had not gotten a form with the mortgage letter, but had eventually gotten one in mid-May with "the second mailing of our bills," which had been returned promptly. Given the timing, I said that it was possible that "your information did leave the bank before we received the opt out form. I'll have to check with our compliance department to be sure." From the list of offers that Sandy had read to me, I actually had no doubt that we had shared and sold their data to affiliates, partners, and unrelated companies. Obviously, the Loams are just the kind of good customers that everyone is interested in trying to sell to. I remember trying to cool Sandy off by pointing out that many of the offers were really for services and goods which they would be needing more of once they found their house, which seemed to have a bit of a calming effect. At no time did I tell Sandy that their personal financial data was "carefully protected" in reference to with whom it was shared. They had read and signed both the mortgage pre-approval form and the opt out agreement and I wasn't about to try to simplify all that complexity with a few soothing words. Indeed, it is often an unpleasant revelation to customers that all banks sell a great deal of data which some customers naively believe to be "private."

It is always difficult when a client calls with news that they've found the perfect house and the subsequent credit recheck uncovers problems. Unfortunately, Sandy Loam was immediately accusatory in September saying the bank had to be responsible for their identity being stolen. Of course, it was not at all clear to me that the credit mess was not of their own making at that point. And when Sandy called me in late June, concerned with the rash of offers in the mail, I had been told of the missing bank statements in May that they had discussed with a customer service representative. I told Sandy at that point to check with the credit agencies to make sure that no one was using information pilfered from the mail. So if their identity had indeed been stolen, that naturally seemed to me to be the first place I might expect to find the problem. And N.O.Y.B. is certainly not responsible for stolen mail.

I do not know the particulars of how the Loams' data were transferred or accessed by criminal elements. But N.O.Y.B. management has well thought-out procedures in place, and high standards for employees, to

limit the improper broadcasting of customer records. We get a regular stream of memos and emails from Lee Goodenough reminding us to clean up and lock up our files. In my experience, most people adhere quite well to those guidelines.

My contact with Mickey Jackson was limited. Mickey replaced my workstation with a laptop PC in February and had to do subsequent updates on my email and Internet configurations so they could be used outside of the building. The final time that I asked for assistance, in early May, I found Mickey looking through some files on my desk when I stopped back in at 7:00 p.m. When I walked in and asked "What are you doing?," Mickey turned red and said that the files were accidentally knocked onto the floor when reaching for the phone, and that Jackson had just picked them up and was "neatening up." I removed the files and did not believe Mickey's story. And one of those files was the mortgage dossier that belonged to the Loams. I didn't think to ask who Jackson was calling but I have subsequently wondered if it might have been A.J. Gates.

  
Alex Teller, November 30, 2001

# **N.O.Y.B.**

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## **NATIONAL OVERLAND-YOUNGSTOWN BANK**

38 Main Street, Youngstown, NY

"As solid as bedrock, as loyal as your best friend:

The Hometown Bank You can Trust"

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From: Nicki Biddle  
To: Taylor Tarbell  
Subject: Inquiry Regarding N.O.Y.B. Advertising Campaigns  
1993-2001

This is the summary I promised you of the various advertising slogans, media utilized, and costs associated with NOYB's consumer and commercial advertising campaigns from 1993 to 2001. The underlined sentences served as our slogan on letterhead and miscellaneous forms for the same time period.

Let me know if there's anything more we can provide. We have nothing to hide and will cooperate in any way necessary.

### **I. Consumer Mass Marketing Campaigns**

#### **1) 1993-1996**

Theme: "Some banks just put *trust* in their names. We demonstrate it everyday, with every customer, and every transaction. **N.O.Y.B.: The Hometown bank you can TRUST.**"

Media used:	Radio:	\$120,000
	TV:	\$230,000
	Newspapers:	\$150,000
	Direct mail:	\$200,000
	Total:	\$700,000

## 2) 1997-1999

Theme: "Some banks are all show, with fancy buildings and glitzy ads. N.O.Y.B. is as glamorous and solid as the bedrock beneath your foundation. To build a brighter financial future, **TRUST N.O.Y.B.** today. We'll help make your dreams come true."

Media used:	Radio:	\$145,000
	TV:	\$275,000
	Newspapers:	\$175,000
	Direct Mail:	\$300,000
	Total:	\$895,000

## 3) 2000-2001

Theme: "Do you ever feel that your bank only wants to see you when times are good? At N.O.Y.B. we understand that you really need a helping hand when working through the hard times. **TRUST N.O.Y.B.:** The local bank whose customers come first."

Media used:	Radio:	\$120,000
	TV:	\$220,000
	Newspapers:	\$140,000
	Direct mail:	\$220,000
	Total:	\$700,000

## II. Commercial (Business) Focused Campaign 1994-2001

Theme: "Whether you're looking to expand, need financing for new technology, or a loan to transition through a downturn, N.O.Y.B. is the bank to call. We make your business our business (and no one else's). We're the "silent" partners you can trust to keep your business private."

Media used:	Radio:	\$350,000
	TV:	\$200,000
	Newspapers:	\$207,000
	Direct mail:	\$450,000
	Total:	\$1,207,000

## **N.O.Y.B.**

### **NATIONAL OVERLAND-YOUNGSTOWN BANK**

38 Main Street, Youngstown, NY

#### **Privacy and Security Policy**

##### **The opportunities you deserve, the privacy you expect: A guide to protecting your privacy**

Safeguarding the privacy of customer information is a complex and dynamic process. The purpose of this section is to explain how NOYB protects and uses your personal information when and after you utilize our services. We want you to know that information given to us is safe, secure and used in a responsible manner.

To offer you the greatest advantages as a NOYB customer, we find that sharing limited amounts of your personal information within our NOYB family of companies and with well-respected, carefully selected business partners enables us to offer you personalized products and services at lower costs and/or much greater convenience than otherwise would be possible.

From time to time we may revise and redisclose this policy. Throughout this policy, "we," "us" and "our" refer to NOYB. "You" refers to you.

##### **Your protection is our priority**

We have implemented extensive administrative, technical and physical safeguards and quality controls. These include:

- Setting policies and procedures for carefully handling your information
- Limiting physical access to facilities containing your information through the use of guard personnel and state-of-the-art security systems
- Maintaining a database across the NOYB family of companies to honor our customers' privacy preferences
- Requiring third-party business partners to agree contractually to comply with privacy laws to do business with NOYB
- Auditing company security practices

Clearly stated policies in our employee handbook, background checks on all employees and thorough on-the-job training in confidentiality and customer privacy ensure that our employees are committed to keeping your personal information safe and secure.

##### **Key reasons to feel secure at NOYB**

- Technology leader using sophisticated, industry-leading data-encryption software
- Physical safeguards and quality controls help ensure the security and confidentiality of our customers' personal financial information
- Responsible information-sharing within the NOYB family of companies allows us to save you time and offer valuable financial products and services
- Choice and control over information use
- A database to honor our customers' privacy preferences across the NOYB family of companies

##### **Our pledge**

We will not reveal specific information about customer accounts or other personally identifiable data to unaffiliated third parties for their independent use with the following exceptions: 1) the information is provided to help complete a customer initiated transaction; 2) the customer requests it; 3) the disclosure is required by/or allowed by law (e.g., subpoena, investigation of fraudulent activity, etc.); 4) the customer has been informed about the possibility of disclosure for marketing or similar purposes through a prior communication and has not exercised the right to opt out; 5) the information is exchanged with reputable information reporting agencies to maximize the accuracy and security of such information; or 6) in the performance of bona fide corporate due diligence for merger or asset sales.

##### **Benefits to sharing within the NOYB family**

In order to continue offering and recommending valuable financial products and services, we may share customer and former customer information within our NOYB family of companies. In order to serve you better, many specialized banking services are performed by one affiliate on behalf of another. In particular, wire services, international transactions and corporate services may be conducted by one affiliate for the customer of others.

In situations where an affiliate of the company plans to share non-experience credit information with another affiliate, NOYB will honor your request not to share this information. It is important to remember that a FCRA request to not share applies to certain information about your applications with us, such as your account number, and information about your credit report or similar information obtained from credit bureaus and other sources outside NOYB.

##### **Benefits to sharing outside the NOYB family**

To make products and services available, often at substantial savings to you, we may prudently share some customer and former customer non-public personal information with business partners under an agreement requiring that the information be kept confidential and used only for those offers. Our business partners may have privacy policies which vary from those set forth herein.

### Information we gather and communicate

In order to provide you with the financial services you may need, comply with government regulations, improve our products and services and better understand your financial needs, we collect and maintain a range of customer and former customer data including non-public personal information:

- From applications, supporting documents and other forms (such as your phone, Social Security and account numbers, assets, income and employment history)
- About your transactions with us, our affiliates and our business partners (such as your loan balance, payment history and other account information)
- From a credit reporting agency (such as your credit worthiness and credit history)
- From business partners, vendors and service companies (such as a property appraisal, purchase contract or membership number)

We are periodically required to disclose some of this data to third parties, such as credit reporting agencies, federal and state regulators and loan investors, in order to do business with you. We may also share all of this information with companies that perform services on our behalf. These business partners contractually agree to keep the information confidential and not use it for any other purpose. Additionally, in order to provide you with valuable product and service offers, we share limited amounts of this non-public personal information (such as a list of customers in a certain income range) within our NOYB family of companies and with well-respected business partners who are contractually obligated to maintain the confidentiality of your information.

Please note that we do not have any control over the disclosure or use of public personal information, such as information that may be included in your mortgage when it is recorded, or information that may be included in your automobile title records. You should be aware that other third parties might use that information to contact you.

### You have choices

Because we respect your right to privacy, we give you the choice of how your personal information may be shared. You may choose to

- Allow NOYB to share limited amounts of your personal information within and outside the NOYB family of companies, or
- Limit information sharing outside the NOYB family of companies.

The process of limiting our ability to share your information is called "opting out."

We therefore provide you two options to consider, and have a strong commitment to honor your request. They are to:

- Continue receiving valuable and convenient product and service offers. No action is required if you want to enjoy the benefits of valuable product and service offers by allowing NOYB to share limited amounts of your personal information within and outside the NOYB family of companies
- Opt out of information sharing outside the NOYB family of companies. Making this decision will prevent us from sharing non-public, personal information with carefully screened non affiliated third parties. This choice may limit our ability to inform you of valuable and convenient products and services from these companies.

Please be aware that even if you decide to opt out, NOYB will continue to share non-public personal information with companies that perform services on our behalf and with third parties as otherwise required or permitted by law, as well as share transactions and experience within the NOYB family of companies.

During the loan application process, you'll be provided with a privacy notice that includes a toll-free phone number to call if you decide to exercise the opt out choice.

In today's ever-changing, competitive market, opting out may mean missing timely information about money-saving products and services that help you accomplish your homeownership or other financial goals. It's something to think about carefully. We don't want you to miss out on any opportunities.

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### INFORMATION SHARING NOTIFICATION & CONSENT

Please complete, detach and mail to:  
National Overland-Youngstown Bank, 38 Main St., Youngstown, NY

I (we) direct you to **not** share non-public personal information about me/us with/among non-affiliates of the National Overland-Youngstown Bank. I understand that NOYB may share my/our information with its affiliates and marketing partners.

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Name (Customer 2)

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature (Customer 2)

\_\_\_\_\_  
Social Security Number

\_\_\_\_\_  
Social Security Number (Customer 2)

# N.O.Y.B.

## Application for Mortgage Pre-Approval

The application is intended to be completed by the "Borrower" and "Co-Borrower". Please fill out all applicable areas; please seek assistance of mortgage representative if unsure of how to proceed on any item.

Mortgage for:      VA      ☒ Conventional      other      Applied for:      ☒ FHA      FmHA

### Type of Mortgage and Terms of Loan

Amount	Interest rate	No. of Months	Amortization type: Fixed	GPM	ARM
\$120,000	7.25	360	X		

### Borrower Information

Borrower's name

Co-Borrower's name

Sandy Loam

Pat Loam

☒ Married

☐ Unmarried

☒ Married

☐ Unmarried

☐ Separated

☐ Separated

Social Security Number Home Phone Number Age Yrs. School Social Security Number Home Phone Number Age Yrs. School

123-456-7890

876-5432

27

17

098-765-4321

same

27

17

Present address (street, city, state, ZIP) own X rent

Present address (street, city, state, ZIP) own X rent

180 Gravel Pit Road, Underbrook, NY

Same

### Employment Information

Name and Address of Employer

Yrs. On Job

Name and Address of Employer

Yrs. On Job

M-Y Landscaping

6

same

6

2860 Harrison Road

Position

Position

Overland, NY

Landscape architect

Accountant

Monthly Income

Monthly Income

\$4,200

\$3,800

### Asset/Debt Information

Please list, in descending order of value, any real property or investments held:

1. Mutual Large Cap Fund \$13,000 stock

3.

N/A

2. Mass Marketing Corp \$3,000 stock

4.

N/A

Please List all bank accounts, account numbers, credit cards, numbers, and loans of any kind, whether through an institution or personal:

1. NOYB Checking: 067234 A16: \$3,500

6.

N

2. NOYB Savings: 014378621: \$23,786

7.

O

3. NOYB Credit card: 1686231789: no balance

8.

N

4. NOYB car loan: 68009748: 4 months @ \$350/

9.

E

5. NOYB Student Loans: 93182213: \$8,600

10.

I

### Acknowledgement of Mortgage Loan Applicant

I/we attest that the information provided herein is accurate to the best of our knowledge. I/we understand that NOYB, its agents, and contractors may and will verify the accuracy of the above data, using information about our private financial history and accounts and seeking one or more credit reports from reputable credit bureaus. I/we understand that NOYB will not share, pending pre-approval approval by NOYB and acceptance by me/us, our personal financial data except with bank staff authorized to assist in the analysis of our application status, including the loan committee, with final authority resting with the Bank President; except that NOYB has the full right to share information as necessary to verify our above statements.

Borrower Sandy Loam

Co-Borrower Pat Loam

Date: 5/2/01

# N.O.Y.B.

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## NATIONAL OVERLAND-YOUNGSTOWN BANK

38 MAIN STREET, YOUNGSTOWN, NY

"WE MAKE YOUR BUSINESS OUR BUSINESS (AND NO ONE ELSE'S)"

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**TO:** Nicki Biddle **DATE:** April 17, 2001

**FROM:** Lee Goodenough

**SUBJECT:** Proposed Security Upgrades for FY 01-02 (7/1/01-6/30/02)

Many thanks for providing permission for me and A.J. Gates to attend the National Conference of Bank Security Officers—it was a very rewarding, even an eye-opening experience for both of us. It was helpful having A.J. on hand for the technical seminars on computer security. Based on our previous discussions, augmented by the new information I just received, I am proposing the following upgrades to our ongoing efforts:

1. Expand the number of our shredding machines so that each office has at least one high capacity machine. This would entail the purchase of at least 10 additional machines at a cost of \$5,500. Alternately we would purchase a "major shredder" for installation in the basement, and use by our custodial staff. This would cost about \$9,000. Although the initial cost is higher, the shredding is done faster, and by lower paid employees, than having multiple small machines being used by higher paid staff throughout the complex. The latter is more cost effective and is my recommendation.

Approved NB (initial) Disapprove\_\_\_\_\_ (initial)

2. Upgrade our computer firewall protection: a major problem facing many banks remains the security of internal customer records in this age of Internet banking. The advances are constant and significant. Given the seminars I attended, I think it would be judicious to bring in a consulting firm to review our current set-up, make recommendations, and install the latest, best system. The last time we did this was 18 months ago. Costs: Probably at least \$25,000, perhaps as much as \$40,000.

Approved NB (initial) Disapprove\_\_\_\_\_ (initial)



Nicki Biddle  
April 17, 2001  
Page 2

3. Hire one additional staff member, a specialist in computer security, to assist with the above upgrade, keep us up-to-date, and implement a regular screening and review of our own employees' access to and use of customer information. The new recommended review period should be between 1-3 months, per each employee. As you know, I now do spot checks about every six months, concentrating on employees who do not have a regular need to see individual customer records. Given my part-time status, I cannot increase the frequency of those reviews without additional help.

Costs: Probably \$80-90,000, with benefits, for a young, but cutting edge, computer expert.

Approved \_\_\_\_\_ (initial)

Disapprove NR (initial)



## **PART VI**

### **Pertinent Law and Information**

#### **NEGLIGENCE:**

In order to meet the requirements for negligence in a civil suit, Plaintiffs must show or prove that the four elements of negligence were met by the Defendants. The four elements are:

- 1) the existence of a duty or obligation on the part of the defendant as to the plaintiff;**
- 2) a breach of that duty—which is either an act or the failure to act—that a reasonable person would or should have done in that circumstance;**
- 3) causation, that the defendant’s negligence was the proximate cause of the injury;**
- 4) an injury to the plaintiff as a result of the breach of duty.**

#### **Commentary:**

Negligence is lack of ordinary care. It is a failure to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent person would not have done under the same circumstances, or on the other hand, from failing to do an act which a reasonably prudent person would have done under the same circumstances. Ordinary care means that caution, attention or skill a reasonable person would use under similar circumstances.

Negligence requires both a foreseeable danger of injury to another and conduct unreasonable in proportion to the danger. A person is not responsible for the consequences of his conduct unless the risk of injury was reasonably foreseeable. The exact occurrence or precise injury need not have been foreseeable; but injury as a result of negligent conduct must have been not merely possible but probable.

If a reasonably prudent person could not foresee any injury as a result of his conduct, or if his conduct was reasonable in the light of what he could foresee, there is no negligence. Conversely, there is negligence if a reasonably prudent person could foresee injury as a result of his conduct, and his conduct was unreasonable in the light of what he could foresee.

In order for the plaintiff to be awarded damages, the plaintiff must prove that the injuries and damages sustained were proximately caused by the defendant’s negligence. That is, the threshold question for proximate cause determinations is whether the negligence alleged in fact caused the claimed injuries.

Further, in the area of negligence there are voluminous treatises explaining the meaning of "concurrent" and "intervening" causes that may contribute to the plaintiff's damages.

When there are two or more concurrent proximate causes a fact finder is often charged with determining whose negligence was the substantial factor in causing the injury.

Whenever the plaintiff's contact with a third person (directly or indirectly) was so extraordinary and unforeseeable as to relieve the defendant of responsibility it is called an intervening or superseding cause. Such intervening act must be the independent, intentional act of another and one that does not naturally flow from the original, wrongful act and which could not reasonably have been foreseen.

Some illustrative examples:

- 1) Surreptitious theft of chemicals: Theft of chemicals from a supervised classroom held a superseding force absolving the school from liability for student's injury;
- 2) Tenant assaulted and robbed by intruders: Landlord who had notice of other crimes and failed to repair door locks, may be liable;
- 3) Library patron stabbed by a derelict who had previously assaulted others: Library which took no precautions held responsible;
- 4) Failure to erect protective barrier around outside of deli could not serve as basis for imposing liability for patron's injuries when struck by car inside of deli; and
- 5) Where State failed to replace burned out bulb in a traffic light, it was reasonably foreseeable that accident would occur at the intersection. Acts of the drivers of the cars not necessarily a superseding cause.

**Please note:** Prior to 1975, New York applied a rule of "contributory negligence" in tort cases. Under this rule, if a plaintiff was *at all* responsible for his injuries, then the plaintiff could recover nothing from the defendant. Under the Comparative Negligence Rule of CPLR Article 14-A, enacted in 1975, a plaintiff can still recover even if plaintiff did contribute to the injuries, but the award is reduced by whatever percentage the fact finder determines to be the fault of the plaintiff. This is called comparative negligence.

## **NEW YORK STATE GENERAL BUSINESS LAW SECTION 349: DECEPTIVE ACTS AND PRACTICES**

### **STATUTE**

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(h) ... (A)ny person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

Note: This section of the General Business Law does not contain any definitions, but has been discussed and interpreted in the following caselaw.

### **CASELAW ON SECTION 349**

Gaidon, et. al v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999):

For a plaintiff's claim to satisfy the requirements of Section 349, the deceptive act or practice complained of must be "consumer oriented" and have a "broad impact" on consumers at large. In addition, a plaintiff must allege that the defendant has engaged in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof. A "deceptive act or practice" is a representation or omission "likely to mislead a reasonable consumer acting reasonably under the circumstances." The court distinguished a claim under Section 349 from a traditional common-law fraud claim, which is more serious ("just short of criminal conduct") and which generally requires evidence of intentional, false representations and other connotations of "scienter" such as willfulness, knowledge, design and bad faith.

Oswego Laborer's Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20 (1995) held that Section 349 does not require repetition or a pattern of deceptive behavior, and thus plaintiff need not show that defendant committed complained-of acts repeatedly -- either against the same plaintiff or against other consumers -- but instead must show that such acts or practices have broader impact on consumers at large. It is also not necessary, the court held, for a plaintiff bringing a claim under Section 349 to establish defendant's intent to defraud or mislead; however, proof of "scienter" permits the court to treble the damages up to \$1,000. Finally, the court held that while Section 349 does not require proof of "justifiable reliance" on the act or practice complained of, a plaintiff seeking compensatory damages must show that the defendant engaged in a material deceptive act or practice that caused actual, although not necessarily pecuniary harm.

Marcus v. Jewish National Fund, Inc., 158 A.D.2d 101 (1st Dept. 1990): Advertisements, brochures, and other solicitations distributed by a charitable organization are not exempt from compliance with strictures against false advertising and other deceptive practices as provided in Section 349.

Lefkowitz v. Colorado State Christian College, 76 Misc. 2d 50 (1973): The test of false advertising under Section 349 is the "capacity to deceive," and no specific injuries need to be established.

Vallery v. Bermuda Star Line, Inc., 141 Misc. 2d 395 (1988): The test as to whether a representation is deceptive or misleading is measured not against the standard of the reasonable person, but against the public, including unwary and unthinking consumers who buy on impulse motivated by appearances and general impressions as affected by advertising and sales representations.

Mennen Co. v. Gillette Co., 565 F. Supp 648 (U.S. District Ct., SDNY, 1983): The capacity to deceive under the parallel federal statute is not tested by reference to an average consumer, but rather must be construed to protect the vast multitude, which includes those who are ignorant, unthinking, and credulous.

Andre v. Pace University, 161 Misc. 2d 613 (1994): There is no requirement under Section 349 that plaintiffs prove that defendant's practices or acts were intentional, fraudulent or even reckless. Nor does the statute require that plaintiffs prove that they relied on defendant's misrepresentations and deceptive practices.

### **THE GRAMM-LEACH-BLILEY ACT (15 U.S.C. Sec. 6801 et. seq.)**

This act (the "GLB Act") contains provisions establishing the privacy of certain consumer financial information (described in the Act as "nonpublic personal information") and restricting financial institutions, including banks, from disclosing such information to "nonaffiliated third parties" (defined as entities which are "not an affiliate of, or related by common ownership or affiliated by corporate control with the financial institution). Notably, the act does not restrict disclosure to affiliated institutions and other institutions with which financial institutions have written joint marketing agreements.

Financial institutions are required by the Act to provide notices to their customers about their information-collection and information-sharing practices. These notices are required to be "reasonably understandable," which is defined as meaning that they contain "clear and concise sentences, plain language, and active voice." Consumers must be given an opportunity to "opt out" if they do not want their information shared with nonaffiliated third parties. If a consumer opts out, the financial institution must honor the opt-out direction "as soon as is reasonably practicable."

Financial institutions were required by the GLB Act to be in full compliance by July 1, 2001.

NOTE: Assume for purposes of this mock trial problem that the information disclosed was nonpublic personal information.