

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK  
COMMERCIAL DIVISION**

<p>JOSEFINA VALLE and WILFREDO VALLE, individually and on behalf of all others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>POPULAR COMMUNITY BANK f/k/a BANCO POPULAR NORTH AMERICA a/k/a BANCO POPULAR NORTH AMERICA,</p> <p style="text-align: center;">Defendant.</p>	<p>Index No. 653936/2012</p> <p>Hon. Anil C. Singh. J.S.C.</p> <p><b>Jury Trial Demanded</b></p> <p>Plaintiffs hereby designate New York County as the place of trial.</p>
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**SECOND AMENDED CLASS ACTION COMPLAINT<sup>1</sup>**

Plaintiffs Josefina Valle and Wilfredo Valle (“Plaintiffs”), individually and on behalf of all others similarly situated, for their complaint against Popular Community Bank f/k/a Banco Popular North America a/k/a Banco Popular North America (“Popular” or “Defendant”) allege based upon personal knowledge as to Plaintiffs and Plaintiffs’ own acts, and upon information and belief as to all other matters based upon the investigations conducted by and through Plaintiffs’ attorneys, as follows:

**I. INTRODUCTION**

1. Defendant Popular is a New York-chartered trust company or banking corporation that engages in the business of consumer and commercial banking in the State of New York, directing its North American operations from its headquarters and principal place of business located in New York, New York.

<sup>1</sup> Plaintiffs preserve for appeal and do not waive the claims alleged in their First Amended Class Action Complaint that were dismissed in the Court’s August 4, 2014 Decision and Order.

2. This action challenges the policies and practices of Popular concerning its re-ordering of customer debits from highest-to-lowest amounts to maximize the number of Overdraft Fees it charged to customer deposit accounts. As set forth below, the practices complained of were not isolated incidents, but, were part of a broader policy impacting consumers in New York and constitute consumer oriented conduct. Popular uses the terms “Overdraft Withdrawal,” “Overdraft Fee,” “Continuous” Overdraft Fee or “NSF/Unavailable Fee” in customer account statements (collectively, “Overdraft Charges”), to describe its imposition of Overdraft Charges. As reflected in Defendant’s *Schedule of Fees*, and demonstrated by Plaintiffs’ experiences, the amount of Overdraft Fees and Continuous Overdraft Fees charged by Popular for any single overdraft are often substantially greater than the one-time NSF Fee.

3. As set forth below, on at least three occasions, Popular re-ordered and cleared Plaintiffs’ ATM debits from highest-to-lowest amounts, causing them to incur more overdrafts and Overdraft Charges than they would have been charged had Defendant cleared Plaintiffs’ debits chronologically or from lowest-to-highest. Defendant’s practice of re-ordering of Plaintiffs’ debits from highest-to-lowest amounts constitutes deceptive conduct that also breaches the implied covenant of good faith and fair dealing. Indeed, after the filing of this lawsuit, Popular changed its re-ordering policy in 2013, clearing debits chronologically or from lowest-to-highest amounts.

4. Additionally, Popular engaged in deceptive acts and practices by routinely providing false and inaccurate account balances to Plaintiffs and the Classes in response to ATM balance inquires. Specifically, as discussed below, in response to balance inquiries, Plaintiffs were provided false and inaccurate account balances. These false account balances inflated the

amount that Plaintiffs appeared to have in their account and caused Plaintiffs and the Classes to incur additional Overdraft Charges. Plaintiffs allege that Popular's practice of providing inaccurate balances, while representing in account agreements that it would provide accurate account balances in response to ATM balance inquires, is deceptive and was not an isolated practice, but, was part of a broader policy at Popular to maximize the number of and amount of Overdraft Charges it received from consumers.

5. Popular also fails to notify customers of overdrafts or advise customers of their right to opt-out or decline transactions that would result in an overdraft before the completion of an ATM or Point-of-Sale (POS) transaction. As set forth below, despite the fact that Popular is able to determine, almost instantaneously, whether there are sufficient funds in a customer's account, Popular has the ability to decline transactions or notify customers that a particular transaction, if completed, will result in an overdraft. Despite this fact, Popular fails to notify customers and provide them the option to decline ATM and POS transactions that would result in an overdraft and incur Overdraft Charges. This practice allows Popular to maximize the number of and amount of Overdraft Charges it imposes on consumers, including Plaintiffs and the Classes. A declined ATM or POS transaction would not result in any fees for an overdraft or non-sufficient funds.

6. Plaintiffs allege that each challenged method, act, policy, and practice by Popular constitutes a breach of the implied duties of good faith and fair dealing by Popular and/or a violation of New York General Business Law ("GBL") §349.

7. Plaintiffs bring this action on behalf of themselves individually and on behalf of the following "GBL§349 Class:"

All deposit account customers of Popular, whose account(s) is or was located in New York, on whom Popular imposed or collected one or more Overdraft Charges from from November 14, 2009 to the present (the “GBL §349 Class Period”).

Excluded from the Overdraft Fee Class is Popular, its parent, subsidiaries, officers, directors, employees, partners and co-venturers. Also excluded are any federal, state, or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

8. Plaintiffs further bring this action on behalf of themselves individually and on behalf of the following “Implied Covenants Class:”

All deposit account customers of Popular, whose account(s) is or was located in New York, whose deposit agreement with Popular was silent or reserved Popular discretion to determine the clearing order of debits and withdrawals, on whom Popular imposed or collected one or more Overdraft Charges from November 14, 2006 to the present (the “Implied Covenants Class Period”).

Excluded from the Implied Covenants Class is Popular, its parent, subsidiaries, officers, directors, employees, partners and co-venturers. Also excluded are any federal, state, or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action. Further excluded from the Implied Covenants Class is any class member who opened their deposit account from May 1, 2000 through the next revision to Defendant’s deposit agreement that did not explicitly disclose Defendant’s policy to clear withdrawals from highest-to-lowest amounts, or December 31, 2001, whichever end date is earlier.

9. The Implied Covenants Class and GBL §349 Class are collectively referred to herein as the “Classes” and the Implied Covenants Class Period and GBL §349 Class Period are collectively termed the “Class Periods.”

10. Popular presently imposes Overdraft Charges of \$10.00 or \$30.00 for each courtesy overdraft loan made where Popular determines a deposit customer account has “non-sufficient funds” (or “NSF”) to cover a withdrawal or debit card transaction from the account. Popular imposes an additional “Continuous” Overdraft Charge of \$5.00 per day for each day after the fifth business day an account remains overdrawn. As a result, the amount of Overdraft Charges imposed by Popular for any single courtesy overdraft loan is unlimited and could result in Overdraft Charges far exceeding \$10.00 or \$30.00. By example, for just one ATM withdrawal in July 2012, Popular imposed \$90.00 in Overdraft Charges on Plaintiffs. Had Defendant instead imposed a one-time NSF Fee, that fee would have totaled \$10.00.

11. Popular may take one of two actions when there are insufficient funds in a customer’s account to cover a withdrawal or debit card transaction and when the customer does not have a formalized overdraft loan agreement with Defendant: (a) decline the transaction and notify the customer of the insufficiency of funds; or (b) permit the transaction and provide a “courtesy overdraft” loan without any prior customer authorization. Popular rarely follows the first course of action. Rather, it has adopted an automatic, charge-based overdraft loan policy, whereby Popular permits the withdrawal or debit card transaction, makes a “courtesy” overdraft without prior customer approval, without disclosure of a secret credit line internally at Popular termed the “Debit Pad,” and imposes and collects Overdraft Charges.

12. Overdraft and NSF fees are a substantial source of revenues for financial institutions, including Popular. Popular’s parent company confirmed that reality in its 2011 Annual Report, attributing reduced Overdraft Charges as a reason for lower revenues. Indeed, as discussed more fully below, a New York State Banking Department (“NYBD”) staff report entitled “NSF and Overdraft Charges in New York State: The Impact of Bank Characteristics

and Changes in Retail Payments” noted that “a research and consulting firm focused on information technology in financial services, said that the NSF fee has a profit margin in the 90% range and accounts for almost two-thirds of banks’ income from consumer check fees.”

13. During the Class Periods, Plaintiffs were charged Overdraft Charges imposed by Popular, and were injured thereby in the same or sufficiently similar manner to the other members of the Classes.

14. Plaintiffs and the Classes seek damages, statutory and exemplary damages, as well as equitable relief to remedy Popular’s breaches of the implied duties of good faith and fair dealing and/or violations of the New York General Business Law §349.

## **II. PARTIES**

### **A. *Plaintiffs***

15. Plaintiff Josefina Valle is a resident of the Bronx, New York. Plaintiff Josefina Valle and her late-husband opened a passbook savings account with a New York branch of Banco Popular de Puerto Rico in 1994.

16. In September 1999, upon the passing of Plaintiff Josefina Valle’s husband, her joint passbook saving account with her husband ending 5118 was closed and a new passbook savings account was opened by her in trust for her son Plaintiff Wilfredo Valle. That passbook savings account was assigned account number ending 0490.

17. In or about October 1999, Plaintiffs passbook savings account ended 0490 was converted to a Popular statement savings account. Plaintiffs’ converted Popular statement savings was assigned account number ending 5630. The Overdraft Charges imposed by Defendant during the Class Periods were unilaterally deducted from Plaintiffs’ deposit account ending 5630.

18. Plaintiffs maintained a deposit account with Popular in New York until June 2014, including a Popular Relationship Savings account, which was accessible using a Popular-issued ATM or debit card. During the Class Periods, Plaintiffs transacted business with Popular in New York. Plaintiff Josefina Valle made or approved deposits and/or withdrawals at Popular branches and ATMs located in New York during the Class Periods, and Popular's methods, acts, policies, and practices complained of by Plaintiffs occurred in New York.

19. Plaintiff Wilfredo Valle is a resident of the Bronx, New York, and the son of Plaintiff Josefina Valle. Plaintiff Wilfredo Valle had been a Popular deposit customer during the Class Periods until June 2014. During this time, he has maintained a deposit account with Popular in New York, including a Popular Relationship Savings account, as a result of being a named account holder on the Popular saving account with Plaintiff Josefina Valle. During the Class Periods, Plaintiffs transacted business with Popular in New York. Popular's methods, acts, policies, and practices complained of by Plaintiffs occurred in New York.

20. On the following dates during the Class Periods, Popular imposed Overdraft Charges on Plaintiffs by deducting such charges automatically from Plaintiffs' Popular savings account: November 16, 2006 (two \$10 Overdraft Charges), December 7, 2006 (two \$10 Overdraft Charges), January 2, 2007, January 3, 2007 (two \$10 Overdraft Charges), January 5, 2007, January 10, 2007, February 26, 2007, April 18, 2007, May 10, 2007, June 8, 2007, July 10, 2007 (two \$10 Overdraft Charges), August 10, 2007, September 5, 2007 (two \$10 Overdraft Charges), October 2, 2007 (two \$10 Overdraft Charges), October 11, 2007 (two \$10 Overdraft Charges), November 2, 2007, November 9, 2007, November 15, 2007, December 3, 2007, December 11, 2007, January 23, 2008, February 8, 2008, February 13, 2008, March 11, 2008, April 8, 2008, April 14, 2008, May 2, 2008, May 9, 2008 (two \$10 Overdraft Charges), June 10,

2008 (two \$10 Overdraft Charges), July 2, 2008, July 11, 2008 (two \$10 Overdraft Charges), August 6, 2008, September 3, 2008, September 10, 2008, September 16, 2008, October 2, 2008, October 8, 2008, November 7, 2008, December 2, 2008, December 5, 2008 (two \$10 Overdraft Charges), January 9, 2009, February 9, 2009 (two \$10 Overdraft Charges), March 3, 2009, March 10, 2009, April 2, 2009, April 9, 2009, May 11, 2009, May 19, 2009, May 22, 2009, June 2, 2009, June 9, 2009, July 2, 2009, July 7, 2009, August 13, 2009, September 2, 2009, September 9, 2009, October 2, 2009, October 12, 2009, November 2, 2009, November 9, 2009, December 2, 2009, December 8, 2009, January 12, 2010 (two \$10 Overdraft Charges), February 2, 2010, February 9, 2010 (two \$10 Overdraft Charges), March 2, 2010, March 9, 2010, April 2, 2010, April 27, 2010 (two \$10 Overdraft Charges), May 6, 2010, June 2, 2010, June 8, 2010 (two \$10 Overdraft Charges), January 11, 2011, January 19, 2011 (two \$10 Overdraft Charges), February 2, 2011, January 4, 2012 (two \$10 Overdraft Charges), January 25, 2012, January 26, 2012, January 27, 2012, January 30, 2012, February 1, 2012, February 2, 2012 (one \$10 Overdraft Charge, one \$5 Overdraft Charge), February 14, 2012, February 21, 2012, February 22, 2012, February 23, 2012, February 24, 2012, February 27, 2012, February 28, 2012, February 29, 2012, March 6, 2012 (three \$10 Overdraft Charges), March 12, 2012, March 13, 2012, March 14, 2012, March 15, 2012, March 16, 2012, March 19, 2012, March 20, 2012, March 21, 2012, March 22, 2012, March 23, 2012, March 26, 2012, March 27, 2012, March 28, 2012, March 29, 2012, April 19, 2012 (three \$10 Overdraft Charges), April 25, 2012, April 26, 2012, April 27, 2012, April 30, 2012, May 4, 2012, May 10, 2012, May 11, 2012, May 14, 2012, May 15, 2012, May 16, 2012, May 17, 2012, May 18, 2012, May 21, 2012, May 22, 2012, May 23, 2012, May 24, 2012, May 25, 2012, May 29, 2012, May 30, 2012, May 31, 2012, June 5, 2012 (two \$10 Overdraft Charges), June 11, 2012, June 12, 2012, June 13, 2012, June 14, 2012, June 15, 2012, June 18,



2012, June 19, 2012, June 20, 2012, June 21, 2012, June 22, 2012, June 25, 2012, June 26, 2012, June 27, 2012, June 28, 2012, July 5, 2012, July 10, 2012, July 11, 2012, July 12, 2012, July 13, 2012, July 16, 2012, July 17, 2012, July 18, 2012, July 19, 2012, July 20, 2012, July 23, 2012, July 24, 2012, July 25, 2012, July 26, 2012, July 27, 2012, July 30, 2012 and July 31, 2012. During the Class Periods, Defendant imposed Overdraft Charges on Plaintiffs totaling approximately or exactly \$1,445.00, causing them actual and compensatory injury and damages.

21. At least three of the listed Overdraft Charges were caused by Defendant's high-to-low Reordering Policy. At least two of the listed Overdraft Charges were caused by Popular having provided inaccurate account balances to Plaintiffs or their authorized users in response to ATM balance inquires. All the listed Overdraft Charges would have been avoided had Defendant notified Plaintiffs prior to the completion of their ATM transactions that the withdrawals would overdraw their account.

22. Plaintiffs' ATM cash withdrawals resulting in an Overdraft Charge was completed using a Popular-issued ATM or debit card at an ATM that participated in a network joined by Defendant, including NYCE, CIRRUS, Allpoint, Plus, Pulse, MasterCard, Visa, Discover, American Express and ATH.

**B. *Defendant***

23. Popular is a New York-chartered trust company or banking corporation organized under and existing by virtue of the laws of the State of New York that maintains its principal offices at 11 West 51st Street, New York, NY 10019 and 120 Broadway, 16th Floor, New York, NY 10271. Popular engages in the business of consumer and commercial banking within New York, with additional branch and ATM operations in California, Florida, Illinois, and New Jersey. When this action was commenced, it operated 32 branches within New York, and approximately

90 total branches in the continental United States, along with providing access to approximately 35,000 “free” ATMs. As of June 30, 2012, according to reports available from the Federal Deposit Insurance Corporation (“FDIC”), Popular reported total assets of \$8,669,514,000. That same report lists \$6,174,122,000 in customer deposits. Popular is a division or subsidiary of Popular, Inc., a bank holding company. Concerning its name change from Banco Popular North America to Popular Community Bank, a May 31, 2012 Popular press release stated: “After 51 years in New York, Banco Popular, a division of Popular, Inc. (NASDAQ:BPOP), becomes Popular Community Bank on June 4 with signage and related rebranding changes at 32 branches in New York City and seven in New Jersey.”

### **III. JURISDICTION AND VENUE**

24. The New York courts and this Court have jurisdiction pursuant to CPLR §§ 301 and/or 302. Jurisdiction is proper because Popular maintains its banking charter in the State of New York, Popular maintains its principal place of business and headquarters in the State of New York, Popular transacts business within New York, and committed acts inside the State of New York or outside the State of New York causing injury within the State of New York.

25. Venue is proper in New York County pursuant to CPLR §503 because Popular maintains its principal place of business and headquarters in New York County and many of the acts and omissions giving rise to Plaintiffs’ and the Classes’ claims occurred in New York County.

26. Venue is proper in the Commercial Part of this Court pursuant to 22 NYCRR §202.70 insofar as this lawsuit is a class action, Plaintiffs and the Classes seek equitable relief and the damages sought for the Classes, exclusive of punitive damages, interests, costs, disbursements, and counsel fees claimed, exceed \$150,000.00.

#### **IV. FACTUAL BACKGROUND**

##### **A. OVERDRAFT CHARGES GENERATE MASSIVE PROFITS FOR BANKS AND DEPOSITORY INSTITUTIONS:**

27. In 2009, deposit institutions charged \$37.1 billion in overdraft and NSF fees to their deposit clients. Even after new regulations went into effect in 2010, banks charged estimated overdraft and NSF fees in 2010 exceeding \$35 billion. A September 30, 2013 article appearing in *USA Today*, entitled *Bank Fees Rise for 15<sup>th</sup> Straight Year*, reports that, “Bank fees rose for the 15th straight year, with fees for overdrafts and out-of-network ATM usage hitting record highs, according to Bankrate.com.”

28. Nearly all of the overdraft fees imposed by deposit institutions are profit for them. One report prepared by NYBD regulators in February 2005 cited a banking consultant as placing the overdraft fee profit margin at 90%. That same report concluded that: “[B]ank revenues from service charges on deposit accounts – including NSF fees -- have increased over the last few years, both nationwide and at banks with branches in New York State.” That study was published in a report entitled *NSF and Overdraft Fees in New York State: The Impact of Bank Characteristics and Changes in Retail Payments*. <http://www.banking.state.ny.us/rp0502.pdf> (last accessed November 13, 2012).

29. According to a July 9, 2009 article appearing in *USA Today* entitled *Banks’ “Courtesy” Loans at Soaring Rates Irk Consumers*:

Even as regulators crack down on abusive mortgage and credit card practices, another type of lending threatens to mire consumers in a credit trap. It’s called “courtesy overdraft” and has long been used by banks to automatically pay transactions that account holders don’t have the money to cover — and then charge them a steep fee. For years, banks have made it easier for customers to overdraw their checking accounts, aided by a cottage industry of consultants who make big money by helping to wring fees out of consumers, a USA TODAY analysis finds. But what began as a customer service has often become an

important revenue driver for banks at the expense of the most vulnerable consumers, according to bank memos reviewed by USA TODAY and interviews with industry insiders.

30. Overdraft fees have increased over time. An April 8, 2009 *Forbes* article entitled *Don't Get Fleeced by Overdraft Fees* discussed a report by the United States Government Accounting Office ("GAO"):

The 2008 GAO report found that the average overdraft fee has risen by about 11% (after inflation adjustments) from 2000 to 2007. ... The report speculates a few reasons for a rise; an increase in electronic banking makes it easier to charge overdraft fees. Also more banks automatically enroll you in overdraft protection programs.

31. The overdraft practices of the banks subjected them to strict government scrutiny and new regulations in 2009. However, unlawful and deceptive practices persist. A November 13, 2009 article in *The Wall Street Journal* entitled *Fed Curtails Banks Scope to Charge for Overdrafts* stated: "Overdraft fees can be sizable and add up. Sometimes customers who overdraw their accounts by just a few dollars are hit with \$30 fees for each additional transaction. Banks bring in from \$25 billion and \$38 billion a year when customers overdraw their accounts, Fed officials said."

32. According to a September 24, 2009 article in *The Wall Street Journal* entitled *As Banks Retreat, Lawmakers Press Attack* confirmed: "Rolling back fees poses a high-stakes dilemma for banks. Last year, the industry earned \$39.5 billion from service charges on deposits, according to the Federal Deposit Insurance Corp. Fees for everything from automated-teller-machine use to balance transfers accounted for about 25% of the industry's total revenue -- and a much-needed cushion as banks wrestle with losses." That article continued: "Some banks maximize penalties by processing the largest purchase a customer makes first, draining accounts faster and creating the potential for multiple fees on smaller purchases. J.P. Morgan said it is

ending this practice for most transactions. Later this fall, TD Bank, a unit of Toronto-Dominion Bank, also said it will stop the practice, posting most account transactions chronologically instead.”

33. A September 23, 2009 article in *The Wall Street Journal* entitled *Two Banks to Lessen Overdraft Penalties* stated: “A recent study by the Federal Deposit Insurance Corp. found that consumers are getting hit with fees ranging from \$10 to \$38 per item in these automatic overdraft programs. Requiring customers to opt into these programs could put a big dent in banks’ revenue. The FDIC’s study found the surveyed banks earned an estimated \$1.97 billion in nonsufficient-fund fees, which includes overdrafts and bounced checks, in 2006.”

34. Even after new regulations targeting state and federal banks became effective in July 2010 to protect consumers against deceptive courtesy overdraft loan policies and programs, abuses persist. Discussing an ongoing investigation by the Consumer Financial Protection Bureau (“CFPB”) into some of those abuses, *Bloomberg* reported on April 20, 2012, “Consumer activists and lawmakers have long criticized overdraft protection as a system designed to build profits rather than protect customers. They say the penalties are too high, that some banks manipulate the timing of transactions to maximize fees and that customers were being automatically enrolled without understanding the potential drawbacks.”

35. Discussing its investigation, CFPB Director Richard Cordray was quoted in a February 22, 2012 CFPB press release expressing the Bureau's concern that, "overdraft practices have the capacity to inflict serious economic harm on the people who can least afford it." The *FDIC Guidance* (defined in Paragraph 39, *infra*) similarly warns that, "Serious financial harm can result for consumers with a low or fixed income."

36. As an attorney with the Empire Justice Center testified during the New York Banking Department Overdraft Protection Hearing, held on October 17, 2005,

Rather, today, Bounce Protection Plans are unabashedly instituted by banks as yet another profit-making mechanism. According to a report issued by the Consumer Federation of America and National Consumer Law Center, it costs a bank approximately 50 cents to \$1.50 to process a bounce check. Yet, one nationally-chartered bank in Albany told me last week that they charge \$33 for each bounced check and another \$33 every four days until the account is brought current, regardless of the overdraft amount. It is estimated that banks generate more than \$5.6 billion in annual revenue and \$5.2 billion in annual profits from bounced check fees. These fees far outweigh any risk assumed by the banks and are devastating to families. *They disproportionately affect lower-income individuals and it is my experience that banks are completely unforgiving, regardless of circumstances.* (Emphasis added).

37. The concerns expressed by the CFPB, FDIC and Empire Justice Center impact Plaintiff Josefina Valle, a senior citizen who depends on Social Security payments deposited into her Popular savings account as her primary source of income.

**B. BANKING REGULATORS REVISE FEDERAL RESERVE REGULATION E IN 2010 IN ACCORD WITH NEW YORK BANKING DISCLOSURE REQUIREMENTS AND REGULATIONS:**

38. Effective July 1, 2010 for new deposit customers, and August 15, 2010 for existing deposit customers, Regulation E, 12 C.F.R. §205.17, directed that regulated deposit institutions (including Popular) could not impose Overdraft Charges for ATM withdrawals or

debit card purchases unless notice and consumer consent were obtained that conforms to Regulation E.

39. A November 24, 2010 regulator guidance styled, *FDIC Overdraft Payment Supervisory Guidance* (the “*FDIC Guidance*”) made clear that all regulated institutions, including Popular, were required to comply with the overdraft regulations in revised Regulation E. The *FDIC Guidance* reiterated that regulated institutions were expected to have complied and implemented a 2005 guidance issued by federal banking regulators Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation (“*FDIC*”) and National Credit Union Administration, styled the *Joint Guidance on Overdraft Protection Programs* (the “*Joint Guidance*”), 70 Fed. Reg. 9127, 9129 (Feb. 24, 2005).

40. Popular is subject to Regulation E, for among other reasons, its deposits are insured by the FDIC.

41. The *FDIC Guidance* summarized the revised Regulation E requirements:

#### **Regulation E Requirements**

Under new Regulation E requirements that took effect on July 1, 2010, institutions must provide notice and a reasonable opportunity for customers to opt-in to the payment of ATM and POS overdrafts for a fee. In complying with these requirements, institutions should not attempt to steer frequent users of fee-based overdraft products to opt-in to these programs while obscuring the availability of alternatives. Targeting customers who may be least able to afford such products such as through aggressive advertising or other promotional activities can raise safety and soundness concerns about potentially unsustainable consumer debt. Any steering activity with respect to credit products raises potential legal issues, including fair lending, and concerns about unfair or deceptive acts or practices (UDAPs), among others, and will be closely scrutinized.

42. The *FDIC Guidance* further requires Popular to contact any deposit customer charged more than six Overdraft Charges in a rolling twelve-month period to discuss in person or by telephone less-costly alternatives to the Overdraft Charges imposed by Popular.

43. Discussing revised Regulation E in a document entitled *Highlights of Final Rules Regarding Overdraft Service*, the Federal Reserve made clear that the revisions were intended to protect consumers and “limit the costs of overdraft services.”

44. The notice and disclosure rules contained in revised Regulation E have long been the rule for New York-chartered banks and trust companies. The New York policy requiring affirmative consumer consent prior to the imposition of Overdraft Charges for debit card transactions was reiterated in a January 2004 NYBD Industry Letter, entitled *Best Practices for Issues of Debit Cards – Reissue*:

If an account is overdrawn, it is not reasonable for a bank to honor the debit card transaction while at the same time assessing a fee for the “overdraft”, without prior notice of the fee to the consumer. Whether or not the customer has an overdraft feature on the underlying checking account, any “overdraft” feature on the debit card should be optional, and the terms thereof should be clearly and conspicuously spelled out in the customer agreement. At the time a deposit account is opened, or by a subsequent mailing offering this feature, customers should be given a clear choice whether to either accept or decline this overdraft feature. Finally, for those accepting an “overdraft” feature, fees should be reasonable.

The NYBD’s notice, disclosure and consent requirements were contained in New York banking regulations, codified at 3 NYCRR §§6.8(e), 13.4(l) and 32.4.

45. It was also the position of the NYBD for New York-charted banks and trust companies, stated in comment to the *Joint Guidance*, that: “The overdraft protection service should not be offered for non-check transactions[,]” except at proprietary ATM machines where state usury laws will apply.



46. To the extent not required for New York-chartered banks prior to the effective date of revised Regulation E, New York banking regulations, including 3 NYCRR §6.8(d) and (e), made the revised Regulation E notice and affirmative consent rules applicable to New York-charted banks like Defendant.

**C. RE-ORDERING WITHDRAWALS AND DEBIT CARD TRANSACTIONS TO CLEAR HIGH-TO-LOW IS A BREACH OF THE IMPLIED DUTIES OF GOOD FAITH AND FAIR DEALING, AND IS DECEPTIVE AND MISLEADING**

47. An unlawful and deceptive practice utilized by Popular to create or maximize the number of Overdraft Charges imposed on its deposit customers involves the re-ordering and clearing of withdrawals or debits made during a single day or over multiple days from those in the highest amounts to those in the lowest amounts (“High-to-Low Reordering”). Defendant’s policy of re-ordering of customer debits from highest to lowest does nothing for consumers other than maximize the number of overdraft fees charged to their customer deposit accounts. Popular did not engage in re-ordering in an isolated practice directed at Plaintiffs, but, rather Popular engaged in re-ordering as part of a broader policy directed at all consumers to maximize the number of and amount of Overdraft Charges it received from deposit customers, including Plaintiffs and the Classes. Moreover, as reflected in the statements by banking regulators, the FDIC, the CFPB and the NYBD, such conduct is not a private dispute between Popular and Plaintiffs but rather affects consumers throughout New York and constitutes consumer oriented conduct.

48. The *FDIC Guidance* demonstrates the consumer oriented conduct and confirms multiple times that consumer harm results from High-to-Low Reordering. A document entitled *FDIC Overdraft Payment Program Supervisory Guidance Frequently Asked Questions*, expounds on the *FDIC Guidance* position and the manner in which Popular should have cleared withdrawals and debits during the Class Periods:

Transactions should be processed in a neutral order that avoids manipulating or structuring processing order to maximize customer overdraft and related fees. Examples of a neutral order include order received, check number, serial number sequence, or other approaches when necessary based on sound business justification.

Re-ordering transactions to clear the highest item first is not considered neutral because this approach will tend to increase the number of overdraft fees. By contrast, processing batches of transactions in a random order or order received is a neutral approach; however, institutions should not arrange the order of types of transactions (*i.e.*, batches) cleared in order to increase the number of overdrafts and maximize fees.

49. The CFPB also confirmed the consumer harm caused by High-to-Low Reordering in its February 22, 2011 press release: “The CFPB is concerned that overdraft practices employed by some financial institutions increase consumer costs. One such practice is commingling of all checks, bill payments, debit card transactions, and ATM withdrawals each day and processing the largest transactions first. This maximizes the number of transactions that will trigger an overdraft fee.”

50. High-to-Low Reordering was employed by Popular during the Class Periods to create Overdraft Charges or maximize the number of Overdraft Charges imposed on Popular’s deposit customers, including Plaintiffs. It is a deceptive and misleading practice and a breach of Popular’s implied duties of good faith and fair dealing owed to Plaintiffs and Class members, which has caused them injury.

51. A related deceptive and misleading practice and abuse of discretion is present where a depository institution prioritizes certain types of withdrawals and debit card transactions to clear before others prior to High-to-Low Reordering.

***Bad Faith Statements and Omissions in Defendant's Deposit Agreements***

52. Plaintiffs opened their Popular Savings Account in September 1999. Upon information and belief, Defendant's deposit agreement in effect at that time was silent as the order in which Defendant would clear customer debits and withdrawals within a single day, or over multiple days, thereby providing Defendant with discretion over the clearing order over customer debits and withdrawals.

53. For example, supporting Plaintiffs' information and belief, Defendant's form deposit agreement titled "Personal and Business Banking Services" agreement, revised in December 1995, is silent as to the order in which Defendant will clear debits and withdrawals.

54. As a further example, supporting Plaintiffs' information and belief, Defendant's form "Checking Account Contract," as of February 2000, is silent as to the order in which Defendant will clear debits and withdrawals.

55. Alternatively, upon information and belief, the Popular deposit agreement in effect in September 1999 provided Defendant with express discretion over the clearing order over customer debits and withdrawals.

56. Beginning in its customer deposit agreement revised in January 2002, and consistently thereafter, Popular reserved for itself express discretion over the clearing order of customer debits and withdrawals in customer deposit agreements revised in 2002, 2004, 2007, 2008 and 2010 as to Popular's policy concerning "Check Processing Order." *See* BPNA 3149 (revised January 2002), BPNA 3186 (revised March 2002), BPNA 244 (revised October 2004),

BPNA 299 (revised January 2007), BPNA 360 (revised April 2008), BPNA 404 – 405 (revised July 2010).

57. Popular applied the discretion it reserved itself in its deposit agreement with Plaintiffs in bad faith, in violation of its implied duties of good faith and fair dealing by reason of its policy to always or nearly always re-order debits and withdrawals, including but not limited to ATM debits and cash withdrawals from highest-to-lowest amounts to maximize and manufacture the number and amount of Overdraft Charges it imposed on Plaintiffs and other Class members. Apart from its bad faith statements and omissions in its deposit agreements, Defendant's High-to-Low Reordering policy is deceptive and misleading to consumers in violation of GBL §349.

***Plaintiffs Were Injured by Popular's Reordering Policies***

58. Plaintiffs were victims of Defendant's re-ordering policy on at least three occasions: September 2-5, 2007, January 1-3, 2011 and April 18, 2012. On each occasion, Plaintiffs were charged more Overdraft Charges by Popular than it would have charged had it cleared Plaintiffs' ATM cash withdrawals chronologically or from lowest-to-highest amounts.

59. On September 2, 2007 (a Sunday), Plaintiffs began the day with a positive account balance of \$247.28. Plaintiffs' account statement shows two ATM withdrawals on September 2, 2012 for \$162.00, at 2:05 p.m. and \$42.00, at 2:06 p.m. Plaintiffs' account statement shows another ATM withdrawal on September 4, 2007 for \$141.50, at 12:28 p.m., respectively. According to Plaintiffs' account statement, Popular re-ordered these withdrawals – across multiple days – and cleared them all on September 4, 2007, from highest to lowest. That practice resulted in two Overdraft Charges imposed on Plaintiffs' account on September 5, 2007. Popular manipulated, increased and manufactured the number of Overdraft Charges imposed on September 5, 2007 by reason of its re-ordering policies. By re-ordering Plaintiffs' withdrawals

from highest-to-lowest amounts, Popular created at least one Overdraft Charge that would not have existed had it cleared the debits chronologically or from lowest-to-highest amounts.

60. On January 1, 2011 (a Saturday), Plaintiffs began the day with a positive account balance of \$807.69. Plaintiffs' account shows three ATM withdrawals on January 1, 2011 for \$201.75, at 8:23 a.m., for \$201.75, at 8:25 a.m., and \$101.75, at 8:27 a.m. Plaintiffs' account statement shows two ATM withdrawal on January 3, 2011 for \$302.00, at 10:46 a.m., and \$42.00, at 10:52 a.m. According to Plaintiffs' account statement, Popular re-ordered these withdrawals – across multiple days – and cleared them all on January 3, 2011, from highest-to – lowest amounts. That practice resulted in two Overdraft Charges imposed on Plaintiffs' account on January 4, 2011. Popular manipulated, increased and manufactured the number of Overdraft Charges imposed on January 4, 2011 by reason of its re-ordering policies. By re-ordering Plaintiffs' withdrawals from highest-to-lowest amounts, Popular created at least one Overdraft Charge that would not have existed had it cleared the debits chronologically or from lowest-to-highest amounts.

61. On April 18, 2012, Plaintiffs began the day with a positive account balance of \$16.69. Plaintiffs made three ATM withdrawals and one balance inquiry on that day. The three withdrawals were for 1) \$11.75, at 1:43 p.m.; 2) \$11.75, at 1:44 p.m.; and 3) \$61.75, at 1:45 p.m. According to Plaintiffs' account statement, Popular re-ordered and cleared these withdrawals on April 18, 2012 from highest-to-lowest amounts. That practice resulted in three Overdraft Charges imposed on Plaintiffs' account on April 19, 2013. Popular manipulated, increased, and manufactured the number of Overdraft Charges imposed on April 19, 2013 by reason of its re-ordering policies. By re-ordering Plaintiffs' withdrawals from highest to lowest amounts, Popular created at least one Overdraft Charge that would not have existed had it cleared the

debits chronologically or from lowest-to-highest amounts. By re-ordering Plaintiffs' withdrawals from highest-to-lowest amounts, Popular created at least one Overdraft Charge that would not have existed had it cleared the debits chronologically or from lowest-to-highest amounts.

62. On August 1, 2013, after this lawsuit was filed, Defendant changed its re-ordering policy to abandon its High-to-Low Reordering policy that re-ordered debits and withdrawals from highest-to-lowest dollar amounts. The policy change was reflected in a July 31, 2013 *Branch Administration Special Marketing Bulletin* (BPNA 759). As a result, after August 1, 2013, Popular changed its policy to thereafter clear customer debits and withdrawals chronologically by date and time. If the date and time for a series of transactions could not be determined, the transactions would be cleared from the lowest-to-highest dollar amount.

**D. POPULAR'S INACCURATE BALANCE INFORMATION IS DECEPTIVE AND MISLEADING:**

63. Popular actively promotes the convenience of its ATM and debit cards, but fails to provide deposit account customers with accurate balance information. When customers execute transactions, they generally do not have access to accurate balance information.

64. Popular provides inaccurate balance information to its customers through its electronic networks. In certain cases, Defendant informs its customers that they have a positive balance when, in reality, they have a negative balance, despite Defendant's actual knowledge of outstanding debits and transactions, including electronic ATM and POS debits.

65. Plaintiffs or authorized users of their Popular ATM or debit card frequently checked their balances before or immediately after ATM transactions, at least eighty-four (84) times between January 2007 and August 2012. Popular provided information in response to each ATM balance inquiry by Plaintiffs or their authorized users.

66. Plaintiffs or their authorized users performed these ATM balance inquiries using a Popular-issued ATM or debit card at an ATM that participated in a network joined by Defendant, including NYCE, CIRRUS, Allpoint, Plus, Pulse, MasterCard, Visa, Discover, American Express and/or ATH.

67. In response to balance inquiries made by Plaintiffs or their authorized ATM or debit card users at participating ATMs and ATM networks, the account balance supplied and listed on their account statements was often false and inaccurate. As a result, and as a result of Defendant's re-ordering policy, it was difficult or impossible for Plaintiffs and Class members to accurately track their account balances. On multiple occasions, the false account balances supplied by Defendant caused Plaintiffs or their authorized users to overdraw their deposit account, causing injury and out-of-pocket loss to Plaintiffs.

***Plaintiffs Were Injured by Popular Providing False and Inaccurate Account Balances***

68. For multiple balance inquiries performed by Plaintiffs or their authorized users on or after December 31, 2010, Defendant misstated Plaintiffs' correct account balance, misrepresenting a balance that ***overstated*** Plaintiffs' correct account balance.

69. For example, on June 2, 2012, Plaintiffs or their authorized representative made an ATM withdrawal at 10:37 a.m. Immediately thereafter at 10:38 a.m., Plaintiffs or their authorized representative completed a "balance inquiry" at the same ATM. As reflected in Plaintiffs' account statement, the account balance provided in response to that inquiry misrepresented Plaintiffs' balance as ***positive*** \$273.19. As a result of that false account balance, Plaintiffs or their authorized user made another ATM cash withdrawal for \$82.00 on June 2, 2012 at 10:41 a.m. that overdrew their account resulting in a \$10.00 Overdraft Charge. These facts are evident from Plaintiffs' account statement (BPNA 165) prepared by Defendant.

70. A further example caused Plaintiffs to incur at least one additional Overdraft Charge. On January 1, 2012, Plaintiffs started with an account balance of \$541.69. Later that same day, Plaintiffs made three ATM cash withdrawals of \$201.75, \$201.75 and \$101.75, each resulting in an additional \$2.00 Non-Popular ATM Fee,” none of which were cleared or posted on January 1, 2012. After a “Preauthorized Credit” to Plaintiffs’ account on January 3, 2012, their account balance was represented on Plaintiffs’ statement as \$807.69. On January 3, 2012, Plaintiffs or their authorized user made an ATM cash withdrawal of \$302.00 at 10:46 a.m., again incurring a \$2.00 “Non-Popular ATM Fee.” At 10:49 a.m. on January 3, 2012, Plaintiffs or an authorized user performed a “balance inquiry”. As reflected in Plaintiffs’ account statement, the account balance provided in response to that inquiry misrepresented Plaintiffs’ balance as \$807.69. As a result of that false account balance, Plaintiffs or their authorized user made another ATM cash withdrawal for \$42.00 on January 3, 2012 at 10:52 a.m. that overdrew their account. These facts are evident from Plaintiffs’ account statement (BPNA 146 - 147) prepared by Defendant.

71. The overdraft charges imposed by Popular on January 4, 2011 were further deceptive and imposed in breach of its duties of good faith and fair dealing because Popular had provided Plaintiffs with a false account balance in response to his ATM balance inquiry on January 3, 2011 at 10:49 a.m. As reflected on Plaintiffs’ monthly statement (BPNA 146-147), Defendant responded to that ATM balance inquiry by misrepresenting to Plaintiffs that their account balance was positive \$807.69. That account balance was false, as reflected by the ATM cash withdrawals on January 1, 2011 and January 3, 2011 processed and posted to Plaintiffs’ account statement prior to 10:49 a.m. on January 3, 2011. The false account balance provided by Defendant to Plaintiffs caused at least one of the Overdraft Charges imposed on January 4, 2011.



72. Popular representations to Plaintiffs or their authorized ATM or debit card users as to the account balance of their Popular deposit account were false and deceptive as Popular routinely failed to provide Plaintiffs with accurate balance information, overstating the amount in Plaintiffs' account, causing them to incur Overdraft Charges. Although Popular has actual knowledge of outstanding debits and transactions, it informed Plaintiffs that they had a positive balance when, in reality, they have a negative balance. Thus, although Popular has actual knowledge of outstanding transactions and debits that have already created a negative balance in a customer's account, it encourages customers like Plaintiffs and the Classes to incur more overdraft charges by approving, rather than declining subsequent debit card transactions.

**E. FAILURE TO DISCLOSE OVERDRAFT CHARGES BEFORE COMPLETION OF A WITHDRAWAL OR ELECTRONIC DEBIT IS A BREACH OF THE IMPLIED DUTIES OF GOOD FAITH AND FAIR DEALING, DECEPTIVE AND MISLEADING:**

73. Financial institutions like Defendant are "instantaneously notified" of ATM or point-of-sale (POS) transactions that will overdraw a customer's account and cause an overdraft fee. *In re HSBC Bank, USA, N.A.*, 1 F. Supp. 3d 34, 39-40 (E.D.N.Y. 2014). Banks further possess the "technological capability to decline debit card transactions (which they do if a pending transaction would exceed a pre-determined, overdraft tolerance limit for an account), or to notify customers that the particular transaction will result in an overdraft." *In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1308-09 (S.D. Fla. 2010)

74. Since February 2005, the *Joint Guidance* set forth the best practices for the banking industry concerning the disclosure and assessment of NSF and overdraft fees. Those best practices were expressly endorsed and adopted by the NYBD.<sup>2</sup> During the Class Periods,

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<sup>2</sup> Effective October 3, 2011, the NYBD became part of the New York Department of Financial Services (the "NYDFS").

Popular's overdraft policies have not complied with the best practices established in the *Joint Guidance* and other guidance from New York and federal banking regulators.

75. The *Joint Guidance* further describes another deceptive Popular policy and practice: "Where the institution knows that the transaction will trigger an overdraft fee, such as at a proprietary ATM, institutions also may not alert the consumer prior to the completion of the transaction to allow the consumer to cancel the transaction before the fee is triggered." To avoid that deceptive practice, the *Joint Guidance* advised depository institutions to provide notice and disclosure *prior to* the completion of an ATM withdrawal that would trigger an Overdraft Charge.

76. Contemporaneous with the *Joint Guidance*, the Office of Thrift Supervision ("OTS") issued its own guidance. See *Guidance on Overdraft Protection Programs*, 70 Fed. Reg. 8428-01 (Feb. 18, 2005) (the "*OTS Guidance*"). The *OTS Guidance* provided that consumers should be provided notice and an opportunity to cancel any transaction that would result in a "courtesy" overdraft loan and fee. *Id.* at 8431.

77. Like the *FDIC Guidance* and *Joint Guidance*, the *OTS Guidance* reiterates that savings institutions should, "not allow[] consumers to access overdraft amounts unless the consumer is informed that the transaction will trigger an overdraft fee and is given an opportunity to cancel the transaction."

78. According to a November 2008 FDIC survey and report concerning bank overdraft programs and fees entitled *FDIC Study of Bank Overdraft Programs* (the "FDIC Overdraft Study"):

The majority (81.0 percent) of banks operating automated programs allowed overdrafts to take place at automated teller machines (ATMs) and point-of-sale (POS)/debit transactions. However, most banks whose automated overdraft

programs covered ATM and POS/debit transactions informed customers of an NSF only after the transaction had been completed (88.8 percent of banks for POS/debit transactions and 70.7 percent of banks for ATM transactions). A minority of banks (7.9 percent for POS/debit and 23.5 percent for ATMs) did inform consumers that funds were insufficient before transactions were completed at these locations, offering the customers an opportunity to cancel the NSF transaction and avoid a fee.

These majority practices described in the FDIC Overdraft Study were employed by Popular among its standard overdraft policies, and caused harm and injury to Plaintiffs and the Classes.

79. The FDIC Overdraft Study further stated: “Automated overdraft programs are usually a computerized program by which the bank honors a customer’s overdraft obligations using standardized procedures or a matrix to determine whether the NSF [not sufficient funds] occurrence qualifies for the overdraft coverage.” The *OTS Guidance* also contains those findings.

80. The FTC Overdraft Study also found that more than half of banks employed third-party vendors to implement or manage their overdraft programs. In addition, “[m]ost banks using vendors to manage their automated overdraft programs (70.6 percent) also reported that they paid third-party vendors a percentage of the fees generated by the program, typically 10 to 20 percent of additional fees generated.” Upon information and belief, Popular utilized a third-party vendor, or third-party vendor software, to process withdrawals and debits from customer accounts and impose Overdraft Charges.

81. Even after issuance of the guidance and advisories from the New York and federal banking regulators during the Class Periods, Popular continued imposing Overdraft Charges without providing its customers with notice and the opportunity to cancel or amend the ATM withdrawal or debit card transaction that would cause a customer’s account to become overdrawn.

82. On the following dates, Plaintiffs or their authorized ATM or debit card users successfully performed ATM “balance inquires” before or after making an ATM cash withdrawals that resulted in one or more Overdraft Charges imposed by Defendant: January 2, 2007, February 23, 2007, August 9, 2007, June 9, 2008, May 18, 2009, March 7, 2010, April 24, 2010, May 5, 2010, June 1, 2010, January 1, 2012, January 3, 2012 March 3, 2012, May 3, 2012, June 2, 2012 and July 3, 2012. Had Plaintiffs been provided accurate balance information in response to balance inquires made before ATM withdrawals, they would have been able to determine whether to continue the transaction, and accept an Overdraft Charge, or decline the transaction, incurring no Overdraft Charges.

83. Defendant’s responses to Plaintiffs’ balance inquires at non-proprietary Popular ATMs, and Defendant’s imposition of fees on Plaintiffs’ deposit account for providing those balances (albeit inaccurately), further demonstrates that Defendant knew in real-time that ATM or debt card withdrawals by Plaintiffs and Class members at Popular proprietary and non-proprietary ATMs would overdraw their accounts.

84. Yet, as admitted by Defendant in its August 12, 2014 Interrogatory Responses in this action, “Absent a balance inquiry request, it has not, however, been BPNA’s policy or practice to otherwise provide contemporaneous notice to a customer attempting to make a withdrawal at an ATM that the requested transaction, if accepted by BPNA, would overdraw the account.”

**F. PLAINTIFFS COMPLAINED TO DEFENDANT AND SOUGHT REFUNDS**

85. In July 2012, Plaintiffs complained to Popular concerning the imposition of Overdraft Charges. Popular did not refund any Overdraft Charges to Plaintiffs as a result of that in-person complaint. Popular’s only response to Plaintiffs’ complaint was to replace Plaintiff

Josefina Valle's ATM card with a different ATM card that a Popular employee stated would not permit overdraft withdrawals during ATM withdrawals.

86. Every Overdraft Charge imposed on Plaintiffs' deposit account during the Class Periods was a violation of the implied contractual duties of good faith and fair dealing and violated of GBL §349. But for those violations, Plaintiffs would not have been charged any Overdraft Fees, Continuous Overdraft Fees or NSF for ATM cash withdrawals.

#### **V. CLASS ACTION ALLEGATIONS**

87. Plaintiffs bring this action as a class action pursuant to Article 9 of the New York Civil Practice Law and Rules.

88. The Classes each satisfy the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements.

89. The members of the Classes are so numerous that joinder of all Class members is impracticable. According to the 2011 Annual Report of Popular, Inc., Popular had approximately 395,000 clients, including New York deposit account holders subjected to the unlawful conduct alleged in this Second Amended Class Action Complaint.

90. Plaintiffs' claims are typical of the claims of the members of the Classes. Plaintiffs have no interests that are adverse or antagonistic to those of the Classes. Plaintiffs' interests are to obtain relief for themselves and the Classes for the harm arising out of the common methods, acts, practices, and conduct pled herein.

91. Plaintiffs will fairly and adequately protect the interests of the members of the Classes and have retained counsel competent and experienced in complex and consumer class action litigation.

92. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Since the damages suffered by each member of the Classes are relatively small, the expense and burden of individual litigation make it virtually impossible for Plaintiffs and members of the Classes to individually seek redress for the wrongful conduct alleged.

93. In addition, Popular has acted and/or refused to act on grounds generally applicable to the Classes, thereby making appropriate final injunctive relief appropriate to enjoin and cease Popular's unlawful practices.

94. Common questions of law and fact exist as to all members of the Classes that predominate over any questions affecting solely individual members of the Classes. Among the questions of law and fact common to the Classes are:

- (a) whether Popular breached implied contractual duties of good faith and/or fair dealing owed to Plaintiffs and/or the Implied Covenants Class;
- (b) whether Popular violated New York General Business Law §349 as to Plaintiffs and/or the GBL §349 Class;
- (c) whether Popular's methods, acts, practices, and conduct were misleading and/or deceptive;
- (d) the proper measure of damages to be paid to Plaintiffs and/or the Classes; and
- (e) whether Plaintiffs and/or the Classes are entitled to injunctive relief to remedy Popular's past and continuing violations of laws alleged herein.

95. The Classes are readily definable and prosecution of this action as a class action will reduce the possibility of repetitious litigation.

96. Plaintiffs and their counsel know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

## COUNT I

### **BREACH OF IMPLIED CONTRACTUAL DUTIES OF GOOD FAITH AND FAIR DEALING**

**(By Plaintiffs and All Implied Covenants Class Members)**

97. Plaintiffs repeat and reallege paragraphs 1 through 96 as though set forth herein.

98. Plaintiffs and members of the Implied Covenants Class had agreements with Popular concerning their deposit accounts held by Popular, which agreement were silent as the order in which Defendant would clear customer debits and withdrawals within a single day, or over multiple days, or provided Defendant with discretion over the clearing order over customer debits and withdrawals.

99. Plaintiffs' individual claim for breach of the implied contractual duties of good faith and fair dealing derive from their deposit agreement with Defendant in existence as of September 1999, when their deposit account at issue in this action was opened. Upon information and belief, Defendant's deposit agreement in effect in September 1999 was silent as the order in which Defendant would clear customer debits and withdrawals within a single day, or over multiple days, thereby providing Defendant with discretion over the clearing order over customer debits and withdrawals. Alternatively, upon information and belief, the Popular deposit agreement in effect in September 1999 provided Defendant with express discretion over the clearing order over customer debits and withdrawals.

100. Popular owed Plaintiffs and Class members implied duties of good faith and fair dealing to not deprive them of the benefits of the agreements, and not to apply Popular's discretion over the agreements arbitrarily, irrationally, in bad faith, or in a manner that benefitted Popular and harmed Plaintiffs and Class members. Popular breached these implied duties of good faith and fair



dealing by acting with bad faith and applying its discretion in a manner designed to harm Plaintiffs and the Class and to financially benefit Popular.

101. Popular breached its implied duties of good faith and fair dealing to Plaintiffs and the Class by re-ordering of customer debits and withdrawals or types of withdrawals to create or maximize the Overdraft Charge(s) imposed by Popular.

102. For each breach of the implied duties of good faith and fair dealing, Popular imposed and collected Overdraft Charges, thereby causing actual and financial injury and damage to Plaintiffs and all Implied Covenants Class members.

## COUNT II

### **VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW §349**

#### **(By Plaintiffs and All GBL §349 Class Members)**

103. Plaintiffs repeat and reallege paragraphs 1 through 96 as though set forth herein.

104. Plaintiffs and the Class members are “persons” within the meaning of GBL §349(h).

105. GBL §349(a) states: “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.”

106. Defendant’s misleading and deceptive acts, policies, and practices adversely impacted Plaintiffs and other New York consumer deposit account holders, and therefore constitute consumer-oriented conduct under GBL §349 that resulted in actual and direct harm to Plaintiffs and Class members.

107. Defendant engaged in misleading acts, policies, and practices defined and prohibited by GBL §349. By engaging in the conduct alleged in this Complaint, Defendant engaged in misleading acts and practices in that its conduct had a tendency and likelihood to, and did in fact, deceive Plaintiffs and the Class among the persons to whom such conduct was and is targeted.

108. Popular engaged in deceptive acts, policies, and practices in the form of misrepresentations and/or material omissions during the conduct of business in and from New York in violation of GBL §349(a) by engaging in the methods, acts, practices, and conduct described in this Complaint, including the following:

- (a) Providing false account balances in response to deposit account customer’s ATM balance inquires;

(b) Failing to disclose prior to the completion of the transaction that ATM withdrawals and electronic debit card transactions would cause the customer's account to become overdrawn and subject to Popular's Overdraft Charges and loans; and

(c) Re-ordering of customer debits and withdrawals or types of withdrawals to create or maximize the Overdraft Charge(s) imposed by Popular.

109. As a direct and proximate result of Popular's violations GBL §349(a), Plaintiffs and the Class suffered actual losses, damages, and injuries, including financial losses, damages, and injuries comprising all unreimbursed Overdraft Charges. Plaintiffs and the Class suffered additional financial losses, damages, and injuries resulting from Popular's imposition and collection of Maintenance Fees that should not have been imposed or collected but for its wrongful imposition and collection of Overdraft Charges on Plaintiffs and Class members.

110. In addition to pecuniary losses, Plaintiffs and the Class suffered actual harm as a result of Popular's violations GBL §349(a), including but not limited to the annoyance, harassment, time, frustration, anger, and anxiety incurred by Plaintiffs and the Class due to Popular's violations of GBL §349.

111. Popular's violations of GBL §349(a) have directly, foreseeably, and proximately caused damages and injury to Plaintiffs and the Class. Popular's violations of GBL §349 caused Plaintiffs' and the GBL §349 Class members' injuries because absent its violations Plaintiffs and Class members would have been charged any Overdraft Charges or NSF Fees, or because the combination of Popular Overdraft Fee and "Continuous" Overdraft Fees was greater in amount than a one-time NSF Fee for any declined debit or withdrawal.

112. Plaintiffs and the GBL §349 Class are entitled to pursue claims against Popular during the GBL §349 Class Period for damages, statutory damages, treble damages, exemplary damages, injunctive relief, costs and attorney's fees pursuant to GBL §349(h) to redress Popular's violations of GBL §349(a).

113. Plaintiff Josefina Valle and GBL §349 Class members who were sixty-five years of age or older at the time of Popular's violations of GBL §349 are entitled to pursue additional claims against Popular during the GBL §349 Class Period pursuant to GBL §349-c to redress Popular's violations of GBL §349(a) perpetrated against one or more elderly persons.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs and the Classes pray for judgment against Popular as follows:

- (1) Certifying the Classes pursuant to Article 9 of the Civil Practice Law and Rules, certifying Plaintiffs as representatives of the Classes, and designating their counsel as counsel for the Classes;
- (2) Awarding Plaintiffs and the Classes compensatory damages;
- (3) Awarding Plaintiffs and the Classes statutory and exemplary damages where permitted;
- (4) Permanently enjoining Popular from continuing to engage in the unlawful and inequitable conduct alleged herein;
- (5) Granting Plaintiffs and the Classes the costs and expenses of prosecuting this action, together with interest and reasonable attorneys' fees; and
- (6) Granting such other relief as this Court may deem just and proper under the circumstances.

**JURY DEMAND**

Plaintiffs and the Classes demand a trial by jury on all issues so triable.

Dated: New York, New York  
August 12, 2015

**SCOTT+SCOTT,  
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