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

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JOSEFINA VALLE and WILFREDO VALLE, Individually and on behalf of all others similarly situated,	:	
Plaintiffs,	:	Index No. 653936/2012
– against –	:	(Singh, J.)
POPULAR COMMUNITY BANK f/k/a BANCO POPULAR NORTH AMERICA a/k/a BANCO POPULAR NORTH AMERICA,	:	
Defendants.	:	

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DEFENDANT BANCO POPULAR NORTH AMERICA'S ANSWER AND AFFIRMATIVE DEFENSES TO <u>PLAINTIFFS' SECOND AMENDED CLASS ACTION COMPLAINT</u>

Defendant Banco Popular North America d/b/a Popular Community Bank ("BPNA"), by its attorneys, states as follows for its Answer and Affirmative Defenses to the Second Amended Class Action Complaint ("SAC"):

I. INTRODUCTION

1. Defendant Popular [1] 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.

ANSWER: BPNA admits that (i) it is a New York-chartered banking corporation that engages in the business of consumer and commercial banking in the State of New York and (ii) its headquarters and principal place of business is in New York, New York. BPNA does not know what is meant by "directing its North American operations," and therefore lacks sufficient information to admit or deny that allegation. Except as expressly admitted, BPNA denies the allegations of Paragraph 1.

[1] The SAC misidentifies BPNA as "Popular Community Bank f/k/a Banco Popular North America a/k/a Banco Popular North America" ('Popular' or 'Defendant'). In each of its Answers to the allegations of the SAC, BPNA assumes that the terms "Popular" or "Defendant" refer to BPNA and answers accordingly.

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.

ANSWER: BPNA admits that (i) for a period of time ending no later than August 1, 2013 (when it amended its item processing policy), BPNA processed certain categories of consumer debits in highest-to-lowest dollar amount order at the close of each banking day,[2] and (ii) BPNA has used the terms "Overdraft Withdrawal," "Overdraft Fee" and "Continuous Overdraft Fee" in customer account statements to denote charges relating to overdrafts. Except as expressly admitted, BPNA denies the allegations of Paragraph 2.

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.

ANSWER: BPNA states that Plaintiffs have voluntarily withdrawn Count II of the SAC, which was their purported claim for breach of the implied contractual duty of good faith and fair dealing ("implied duty claim"). To the extent the allegations of Paragraph 3 relate to Plaintiffs' withdrawn implied duty claim, no answer is required. To the extent an answer is required, BPNA admits that (i) it changed its item processing policy no later than August 2013 and (ii) it now processes debits in chronological order or low-to-high dollar amount order within certain categories

[2] As set forth in the Court's February 18, 2016 Memorandum Decision and Order, any GBL § 349 claim based on the purported provision of false balance information (which is necessarily Plaintiffs' entire GBL § 349 claim) (i) is barred by the 3-year statute of limitations for any overdraft fees incurred before September 10, 2011 and (ii) fails to state a claim with respect to any fees incurred before December 31, 2010, the earliest date on which Plaintiffs claim that BPNA began providing false balance information to its customers.

of consumer debits. BPNA denies that its conduct was deceptive or otherwise unlawful. Except as expressly admitted, BPNA denies the allegations of Paragraph 3.

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.

ANSWER: BPNA admits that Plaintiffs make the allegations set forth in Paragraph 4. BNPA denies that it engaged in any deceptive or otherwise unlawful conduct. Except as expressly admitted, BPNA denies the allegations of Paragraph 4.

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.

ANSWER: BPNA admits that it does not affirmatively warn its customers, absent a balance inquiry, that an attempted ATM withdrawal, if completed, would result in an overdraft, but denies that it has any obligation to do so; and BPNA admits that a declined ATM transaction would not result in an overdraft or non-sufficient funds ("NSF") charge to the customer's account. Except as expressly admitted, BPNA denies the allegations of Paragraph 5.

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.

ANSWER: BPNA states that, to the extent the allegations of Paragraph 6 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required.

BPNA also states that the allegations of Paragraph 6 state a legal conclusion to which no answer is required. To the extent an answer is required, BPNA denies the allegations of Paragraph 6.

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 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.

ANSWER: BPNA admits that Plaintiffs purport to bring this action on behalf of themselves and the putative "GBL § 349 Class" purportedly defined in Paragraph 7. BPNA denies that the putative class is properly defined, denies that the putative class is ascertainable, and denies that class certification is otherwise appropriate. Except as expressly admitted, BPNA denies the allegations of Paragraph 7.

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.

ANSWER: BPNA states that the allegations of Paragraph 8 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, so no answer is required. To the extent an answer is required, BPNA denies that Plaintiffs are asserting an implied duty claim and, on that basis, deny all of the allegations of Paragraph 8.

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."

ANSWER: BPNA states that, to the extent the allegations of Paragraph 9 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, BPNA admits that Plaintiffs purport to assign the definitions to the terms set forth in Paragraph 9. Except as expressly admitted, BPNA denies the allegations of Paragraph 9.

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.

ANSWER: BPNA admits that for New York savings account customers, which included Plaintiffs, BPNA imposes an overdraft fee of $10.00 per transaction when the customer completes a transaction that results in an overdraft of the customer's savings account, as well as an additional $5.00 fee for each day after the fifth business day that the customer's savings account remains overdrawn (subject to a $75 cap on the aggregate $5 daily fees effective August 1, 2013). BPNA admits that for New York checking account customers, which never included Plaintiffs, BPNA imposes an overdraft fee of $30.00 per transaction when the customer completes a transaction that results in an overdraft of the customer's checking account, as well as an additional $5.00 fee for each day after the fifth business day that the customer's checking account remains overdrawn (subject to a $75 cap on the aggregate $5 daily fees effective August 1, 2013). BPNA admits that Plaintiff

Josefina Valle incurred one $10.00 overdraft fee and 16 additional $5 daily fees in July 2012 because she overdrew her savings account and failed to deposit funds to cover the overdraft. Except as expressly admitted, BPNA denies the allegations of Paragraph 10.

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.

ANSWER: BPNA admits that when a customer attempts a transaction that, if approved, could result in an overdraft, BPNA may properly (a) decline the transaction for insufficient funds or (b) allow the transaction and charge an overdraft fee in accordance with the terms of the governing account agreement and applicable state and federal law. Except as expressly admitted, BPNA denies the allegations of Paragraph 11.

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."

ANSWER: BPNA admits that (i) overdraft and NSF fees are a revenue source for BPNA and (ii) the 2011 Annual Report for BPNA's parent company identified reduced overdraft charges as one reason for lower bank revenues. BPNA denies any quotation or characterization of the referenced, but unattached, New York State Banking Department staff report that is inconsistent with the text of the report, and BPNA respectfully refers the court to the report for its true, correct, and complete terms. BPNA lacks information sufficient to form a belief regarding (i) the extent to which overdraft and NSF fees are a "substantial" source of revenue for other financial institutions and (ii) the unidentified research and consulting firm's conclusions about unidentified banks' profit margins from NSF fees or the percentage of unidentified banks' incomes derived from consumer check fees. Except as expressly admitted, BPNA denies the allegations of Paragraph 12.

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.

ANSWER: BPNA states that, to the extent the allegations of Paragraph 13 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, BPNA admits that it charged overdraft fees to Plaintiff Josefina Valle during the purported GBL § 349 Class Period[3] as a result of Plaintiff Valle overdrawing her savings account. Except as expressly admitted, BPNA denies the allegations of Paragraph 13.

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.

ANSWER: To the extent the allegations of Paragraph 14 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, BPNA admits that Plaintiffs seek relief for purported violations of GBL § 349. Except as expressly admitted, BPNA denies the allegations of Paragraph 14.

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.

ANSWER: BPNA lacks information sufficient to form a belief regarding Plaintiff Josefina Valle's current residence, noting, *inter alia*, that she is no longer a customer of the bank.

[3] As noted above, the GBL§ 349 Class Period is overbroad to the extent it purports to seek recovery for overdraft fees incurred before December 31, 2010 (the earliest date by which Plaintiffs allege that BPNA began providing false account balance information and thereby making it difficult for them to track their balances and avoid overdraft charges) or before September 11, 2011 (the start of the 3-year statute of limitations period).

BPNA admits that Plaintiff Josefina Valle and her late husband opened a passbook savings account at a New York branch of Banco Popular de Puerto Rico in 1994. Except as expressly admitted, BPNA denies the allegations of Paragraph 15.

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.

ANSWER: BPNA admits that (i) the passbook savings account that Plaintiff Josefina Valle opened with her husband in 1994 (account ending 5118) was closed in September 1999; and (ii) at the same time in September 1999, Plaintiff Josefina Valle opened a new passbook savings account (a Totten trust account ending 0490) naming her son, Plaintiff Wilfredo Valle, as the beneficiary. BPNA lacks information sufficient to form a belief regarding when Plaintiff Josefina Valle's husband passed away. Except as expressly admitted, BPNA denies the allegations of Paragraph 16.

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.

ANSWER: BPNA admits that (i) the savings account established by Plaintiff Josefina Valle in September 1999 (account ending 0490) was converted into a Relationship Savings Account (also a Totten trust account naming Plaintiff Wilfredo Valle as the beneficiary) in October 1999 (account ending 5630). BPNA admits that Plaintiff Josefina Valle incurred overdraft charges during the putative GBL § 349 Class Period as a result of making ATM withdrawals that overdrew her account. Except as expressly admitted, BPNA denies the allegations of Paragraph 17.

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, polices, and practices complained of by Plaintiffs occurred in New York.

ANSWER: BPNA admits that (i) Plaintiff Josefina Valle had a Relationship Savings Account at BPNA from October 1999 until she closed the account in June 2014; (ii) Plaintiffs could access that Relationship Savings Account by various means, including a BPNA-issued ATM card; (iii) during the time that Plaintiffs' Relationship Savings Account was open, Plaintiffs utilized BPNA's consumer banking services in New York, including at BPNA branches and at proprietary and non-proprietary ATMs; and (iv) BPNA conducts its New York banking operations in the State of New York. Except as expressly admitted, BPNA denies the allegations of Paragraph 18.

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, polices, and practices complained of by Plaintiffs occurred in New York.

ANSWER: BPNA admits that (i) Plaintiff Wilfredo Valle was the beneficiary of the Relationship Savings Account (a Totten trust account) opened by Plaintiff Josefina Valle in October 1999 and closed by Plaintiff Josefina Valle in June 2014; (ii) Plaintiffs could access that Relationship Savings Account by various means, including a BPNA-issued ATM card; (iii) during the time that Plaintiffs' Relationship Savings Account was open, Plaintiffs utilized BPNA's consumer banking services in New York, including at BPNA branches and at proprietary and non-proprietary ATMs; and (iv) BPNA conducts its New York banking operations in the State of New York. BPNA lacks information sufficient to form a belief regarding Plaintiff Wilfredo Valle's relationship to Plaintiff Josefina Valle or regarding Plaintiff Wilfredo Valle's current residence, noting, *inter alia*, that the Relationship Savings Account for which he was the named beneficiary was closed by Plaintiff Josefina Valle in June 2014. Except as expressly admitted, BPNA denies the allegations of Paragraph 19.

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, 2102, 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.

ANSWER: BPNA admits that it charged the overdraft fees identified in Paragraph 20 when, on or about the referenced dates, Plaintiffs overdrew the subject Relationship Savings Account and subsequently failed to deposit funds to cover the overdrafts. Except as expressly admitted, BPNA denies the allegations of Paragraph 20.

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.

ANSWER: BPNA denies the allegations of Paragraph 21.

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.

ANSWER: BPNA admits that (i) Plaintiffs used a BPNA-issued ATM card (not a debit card) to make the withdrawals that resulted in the imposition of the overdraft charges identified in Paragraph 20 and (ii) the ATM(s) used by Plaintiffs to make those withdrawals were part of an ATM network in which BPNA participated (although they were not BPNA proprietary ATMs). Except as expressly admitted, BPNA denies the allegations of Paragraph 22.

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."

ANSWER: BPNA admits that (i) it is a New York-charted banking corporation organized under the laws of the State of New York; (ii) it maintains offices at 11 West 51st Street, New York, New York 10019 and 120 Broadway, 16th Floor, New York, New York 10271; (iii) it engages in consumer and commercial banking in the State of New York; (iv) it operates approximately 50 branches and provides ATM services in the following states: New York, New

Jersey and Florida; (v) when this action began in November 2012, BPNA had approximately 30 branches in New York, approximately 90 branches in the United States (exclusive of Puerto Rico), and approximately 35,000 ATMs that BPNA customers could access without incurring BPNA-imposed ATM usage fees; (vi) BPNA is a subsidiary of Popular, Inc., a bank holding company; and (vii) in June 2012, BPNA's d/b/a was changed from Banco Popular to Popular Community Bank. BPNA lacks information sufficient to form a belief regarding the allegations about the unspecified and unattached FDIC reports referenced in Paragraph 23. BPNA respectfully refers the court to its May 31, 2012 press release for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 23.

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.

ANSWER: BPNA admits that (i) it is a New York-chartered banking corporation, (ii) its headquarters and principal place of business are in the State of New York, (iii) it conducts banking operations in the State of New York, and (iv) this Court has subject matter jurisdiction over this action. Except as expressly admitted, BPNA denies the allegations of Paragraph 24.

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.

ANSWER: BPNA admits that (i) BPNA's headquarters and principal place of business are in New York County, (ii) it conducts banking operations in the State of New York, and (iii) venue is proper in New York County for this action. Except as expressly admitted, BPNA denies the allegations of Paragraph 25.

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.

ANSWER: BPNA admits that Plaintiffs seek individual and class relief for purported violations of GBL § 349 and that venue is proper in the Commercial Part of this Court for this action. BPNA denies that class certification is appropriate. To the extent that the allegations of Paragraph 26 relate to Plaintiffs' implied duty claim, which has been voluntarily withdrawn with prejudice, no answer is required. Except as expressly admitted, BPNA denies the allegations of Paragraph 26.

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 15th 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."

ANSWER: BPNA lacks information sufficient to form a belief regarding the truth of the allegations that banks charged $37.1 billion in overdraft and NSF fees to their customers in 2009 and that banks charged over $35 billion in overdraft and NSF fees to their customers in 2010. BPNA also lacks information sufficient to form a belief regarding the truth of the quoted language from the *USA Today* article referenced in Paragraph 27. BPNA respectfully refers the court to the referenced *USA Today* article for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 27.

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).

ANSWER: BPNA lacks information sufficient to form a belief regarding the truth of (i) the allegation that "nearly all of the overdraft fees imposed by deposit institutions are profit for them" or (ii) the allegations that an unidentified banking consultant stated in a February 2005 report that the profit margin for overdraft fees at some unspecified bank or banks is 90%. BPNA denies any characterization by Plaintiffs of the referenced NYBD report that is inconsistent with its text. BPNA respectfully refers the court to the referenced NYBD report for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 28.

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.

ANSWER: BPNA admits that the block-quoted text in Paragraph 29 appears in the referenced July 9, 2009 *USA Today* article. BPNA lacks information sufficient to form a belief regarding the truth of the article as it pertains to other banks or financial institutions. BPNA denies any allegation or implication that its overdraft protection program provides "loans" to consumers. BPNA respectfully refers the court to the July 9, 2009 *USA Today* article for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 29.

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.

ANSWER: BPNA admits that, from time to time, it has increased the amount of the overdraft fee that it charges consumers when they overdraw their accounts. BPNA denies that the total amount of overdraft fees that it has collected has always increased over time, including during the purported GBL § 349 Class Period. BPNA lacks information sufficient to form a belief regarding the truth of the characterization of the referenced 2008 GAO report or the truth of the referenced content of that report; but, in any event, the report pre-dates the purported GBL § 349 Class Period. BPNA respectfully refers the court to the April 8, 2009 *Forbes* article and the 2008 GAO report for their true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 30.

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."

ANSWER: BPNA admits that (i) banking overdraft practices are the subject of governmental regulation, including Amended Regulation E; (ii) customers who overdraw their accounts can incur overdraft fees, which can increase if the customer fails to deposit funds to cover the overdraft; and (iii) overdraft fees are a source of revenue for at least some banks, including BPNA. BPNA lacks information sufficient to form a belief regarding the statement attributed in Paragraph 31 to unidentified "Fed officials." BPNA respectfully refers the court to the November 13, 2009 *Wall Street Journal* article for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 31.

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."

ANSWER: BPNA admits that the referenced article includes the quoted text. BPNA lacks information sufficient to form a belief regarding the truth of the referenced content of the article. BPNA respectfully refers the court to the September 29, 2009 *Wall Street Journal* article for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 32.

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."

ANSWER: BPNA admits that the referenced article includes the quoted text. BPNA lacks information sufficient to form a belief regarding the truth of the referenced content of the article. BPNA respectfully refers the court to the September 23, 2009 *Wall Street Journal* article for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 33.

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."

ANSWER: BPNA admits that (i) Amended Regulation E, which includes certain provisions relating to banking overdraft practices, became effective in July 2010; and (ii) on April 20, 2012, *Bloomberg* posted an article titled "Nine U.S. Banks Said to Be Examined on Overdraft Fees" (BPNA was not identified as one of those banks), which included the quoted text in Paragraph 34.

BPNA lacks information sufficient to form a belief regarding the truth of the referenced content of the *Bloomberg* article regarding the overdraft practices of other banks or what any customers understood or understand about the benefits and/or drawbacks of overdraft protection. BPNA respectfully refers the court to the April 20, 2012 *Bloomberg* article for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 34.

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."

ANSWER: BPNA admits that the February 22, 2012 CFPB press release includes the quoted text, which is attributed to Mr. Cordray. BPNA lacks information sufficient to form a belief regarding the truth of Mr. Cordray's quoted statements generally, but denies that BPNA's overdraft practices caused any financial or economic harm, let alone serious harm, to Plaintiffs or any of its customers. BPNA respectfully refers the court to the CFPB press release and *FDIC Guidance* for their true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 35.

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).

ANSWER: BPNA lacks information sufficient to form a belief regarding the truth of the allegations of Paragraph 36 regarding (i) the fact of the supposed testimony, (ii) the circumstances of the supposed testimony, (iii) the truth of the supposed testimony with respect to any other bank or financial institution, or (iv) the personal experience of the supposed declarant, an attorney with the Empire Justice Center, a non-profit law firm focusing on poverty law issues. Except as expressly admitted, BPNA denies the allegations of Paragraph 36.

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.

ANSWER: BPNA admits that (i) Plaintiff Josefina Valle is a senior citizen and (ii) Social Security payments were direct-deposited into her Relationship Savings Account. BPNA lacks information sufficient to form a belief regarding the allegations that Social Security payments are Plaintiff Josefina Valle's primary source of income. Except as expressly admitted, BPNA denies the allegations of Paragraph 37.

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.

ANSWER: BPNA admits that (i) Amended Regulation E, 12 C.F.R. § 205.17, went into effect July 1, 2010 for new deposit account customers and on August 15, 2010 for existing deposit account customers; (ii) Amended Regulation E set forth various requirements for bank-provided overdraft services. BPNA states that the remaining allegations of Paragraph 38 state a legal conclusion to which no answer is required. To the extent an answer is required, BPNA denies that the allegations of Paragraph 38 accurately set forth the requirements of Amended Regulation E, which appear in their entirety at 12 C.F.R. § 205.17. Except as expressly admitted, BPNA denies the allegations of Paragraph 38.

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).

ANSWER: BPNA admits (i) that it is subject to Amended Regulation E; (ii) the existence of the November 24, 2010 FDIC Overdraft Payment Supervisory Guidance ("*FDIC Guidance*") referenced in Paragraph 39; and (iii) the existence of the February 24, 2005 Joint Guidance on Overdraft Protection Programs referenced in Paragraph 39 ("*Joint Guidance*"). BPNA denies Plaintiff's characterization of the *FDIC Guidance* and the *Joint Guidance*, including any allegation or implication that either guidance imposed any legal obligations on BPNA. BPNA respectfully refers the court to the *FDIC Guidance* and the *Joint Guidance* for their true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 39.

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

ANSWER: BPNA states that the allegations of Paragraph 40 state a legal conclusion to which no answer is required. To the extent an answer is required, BPNA admits that (i) it is a financial institution subject to Amended Regulation E and (ii) its deposits are insured by the FDIC. Except as expressly admitted, BPNA denies the allegations of Paragraph 40.

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.

ANSWER: BPNA admits that the *FDIC Guidance* included the block-quoted text in Paragraph 41. BPNA respectfully refers the court to the *FDIC Guidance* for its true, correct, and complete terms. BPNA states that the remaining allegations of Paragraph 41 state a legal conclusion to which no answer is required. To the extent an answer is required, BPNA denies that the block-quoted text accurately reflects the legal requirements imposed by Amended Regulation E. Except as expressly admitted, BPNA denies the allegations of Paragraph 41.

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.

ANSWER: BPNA respectfully refers the court to the *FDIC Guidance* for its true, correct, and complete terms. BPNA states that the allegations of Paragraph 41 state a legal conclusion to which no answer is required. To the extent an answer is required, BPNA denies that the *FDIC Guidance* "required" or otherwise imposed any legal obligation on BPNA to take the action alleged in Paragraph 42. Except as expressly admitted, BPNA denies the allegations of Paragraph 42.

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."

ANSWER: BPNA admits (i) the existence of the Federal Reserve document referenced in Paragraph 43 and (ii) that the document states that Amended Regulation E will "limit the costs of overdraft services by providing consumers a choice regarding their institution's payment of overdrafts for ATM [transactions]." BPNA respectfully refers the court to the Federal Reserve document for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 43.

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.

ANSWER: BPNA admits that (i) it is subject to Amended Regulation E and (ii) the January 2004 NYBD Industry Letter referenced in Paragraph 44 includes the block-quoted text. BPNA respectfully refers the court to the January 2004 NYBD Industry Letter for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 44.

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.

ANSWER: BPNA admits that the *Joint Guidance* includes the quoted text. BPNA respectfully refers the court to the *Joint Guidance* for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 45.

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.

ANSWER: BPNA admits that (i) it is a New York-chartered banking corporation, (ii) it is subject to Amended Regulation E, and (iii) it is subject to 3 NYCRR §6.8(d) and (e). BPNA states that the remaining allegations of Paragraph 46 state a legal conclusion to which no answer is required. Except as expressly admitted, BPNA denies the allegations of Paragraph 46.

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[4]

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.

ANSWER: BPNA admits that that (i) from at least November 16, 2006 (the earliest overdraft charge identified in Paragraph 20 of the SAC) until no later than August 1, 2013 (when it amended its item processing policy), BPNA processed certain categories of consumer debits in order from highest-to-lowest dollar amount at the close of each banking day; and (ii) BPNA admits that it does not process transactions on non-banking days (that is, weekends or bank holidays). BPNA states that the allegations of Paragraph 47 characterizing BPNA's item processing practice from November 16, 2006 until no later than August 1, 2013 as "deceptive and unlawful" and stating that it constitutes "consumer oriented conduct" state legal conclusions to which no answer is required. To the extent an answer is required, BPNA denies those allegations. Except as expressly admitted, BPNA denies the allegations of Paragraph 47.

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

[4] As noted above, Plaintiffs have withdrawn their implied duty claim with prejudice. Accordingly, any allegations relating to that withdrawn claim do not require an answer.

> 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.

ANSWER: BPNA admits (i) the existence of the document entitled *FDIC Overdraft Payment Program Supervisory Guidance Frequently Asked Questions* and (ii) that the document includes the block-quoted text. BPNA respectfully refers the court to the document for its true, correct, and complete terms. BPNA states that the remaining allegations of Paragraph 48 state a legal conclusion to which no answer is required. To the extent an answer is required, BPNA denies those allegations. Except as expressly admitted, BPNA denies the allegations of Paragraph 48.

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."

ANSWER: BPNA admits (i) the existence of the February 22, 2011 CFPB press release, (ii) that the release includes the quoted text, and (iii) that the CFPB, at least at the time of the press release, likely had the concern expressed in the press release. BPNA respectfully refers the court to the February 22, 2011 CFPB press release for its true, correct, and complete terms. BPNA denies that it engaged in the type of item processing involving the "commingling of all checks, bill payments, debit card transactions, and ATM withdrawals each day" described in the press release and, therefore, also objects to Plaintiffs' attempt to use the term "High-to-Low Reordering" to conflate item processing practices that are not substantially similar. Except as expressly admitted, BPNA denies the allegations of Paragraph 49.

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.

ANSWER: To the extent the allegations of Paragraph 50 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, for the reasons stated in its answer to Paragraph 49, BPNA objects to Plaintiffs' attempt to use the term "High-to-Low Reordering" to conflate item processing practices that are not substantially similar, and BPNA denies the allegations of Paragraph 50.

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.

ANSWER: To the extent the allegations of Paragraph 50 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, for the reasons stated in its answer to Paragraph 49, BPNA objects to Plaintiffs' attempt to use the term "High-to-Low Reordering" to conflate item processing practices that are not substantially similar, and BPNA denies the allegations of Paragraph 51.

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.

ANSWER: BPNA admits that Plaintiff Josefina Valle opened a Popular Savings Account in September 1999. BPNA denies Plaintiffs' "information and belief" allegations that the deposit agreement in effect in September 1999 was silent regarding item processing order. BPNA states that the allegation that BPNA had discretion over item processing states a legal conclusion to which no answer is required. BPNA also states the allegations of Paragraph 52 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, so no answer is required. Except as expressly admitted, BPNA denies the allegations of Paragraph 52.

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.

ANSWER: BPNA states that the allegations of Paragraph 53 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, so no answer is required. To the extent an answer is required, BPNA admits that the December 1995 version of its "Personal and Business Banking Services" agreement does not expressly address the order in which BPNA would process debit and withdrawal activity in the subject account. Except as expressly admitted, BPNA denies the allegations of Paragraph 53.

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.

ANSWER: BPNA states the allegations of Paragraph 54 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, so no answer is required. To the extent an answer is required, BPNA admits that the February 2000 version of BPNA's "Checking Account Contract" (Plaintiffs never had a BPNA checking account) does not expressly address the order in which BPNA would process debit and withdrawal activity in the subject checking account. Except as expressly admitted, BPNA denies the allegations of Paragraph 54.

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.

ANSWER: BPNA states the allegations of Paragraph 55 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, so no answer is required. To the extent an answer is required, BPNA admits that Plaintiff Josefina Valle opened a Popular Savings Account in September 1999. BPNA denies Plaintiffs' "information and belief" allegations regarding the item processing terms of that agreement. Except as expressly admitted, BPNA denies the allegations of Paragraph 55.

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).

ANSWER: BPNA states the allegations of Paragraph 56 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, so no answer is required. To the extent an answer is required, BPNA admits that the account agreements referenced in Paragraph 56 include terms relating to item processing. BPNA denies any characterization that is inconsistent with the terms of those agreements. Except as expressly admitted, BPNA denies the allegations of Paragraph 56.

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.

ANSWER: BPNA states that to the extent the allegations of Paragraph 57 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, BPNA admits that, for a period of time ending no later than August 1, 2013 (when it amended its item processing policy), BPNA processed certain categories of consumer debits in order from highest-to-lowest dollar amount at the close of each banking day. BPNA states that the allegations of Paragraph 57 that BPNA's subject item processing practice constituted bad faith or was deceptive and misleading in violation of GBL § 349 state legal conclusions to which no answer is required. Except as expressly admitted, BPNA denies the allegations of Paragraph 57.

<u>Plaintiffs Were Injured by Popular's Reordering Policies</u>

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.

ANSWER: BPNA admits that, on April 18, 2012, when Plaintiff made three successive ATM withdrawals, application of BPNA's then-current item processing policy resulted in three overdraft charges instead of the two overdraft charges that would have resulted if the withdrawals had been processed in chronological order. BPNA denies that Plaintiffs incurred any overdraft charges in connection with any account activity on January 1-3, 2011. BPNA further states that because this Court has already determined that any GBL claim based on any such fees incurred before September 10, 2011 would be time-barred, no answer is required to the allegations relating to the supposed September 2-5, 2007 and January 1-3, 2011 transactions. BPNA denies that Plaintiffs were "victims" of BPNA's item processing policy or practices; and BPNA denies that anyone other than Plaintiffs themselves caused Plaintiffs to overdraw their accounts and thereby incur overdraft charges. Except as expressly admitted, BPNA denies the allegations of Paragraph 58.

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.

ANSWER: BPNA states that the allegations of Paragraph 59 relate solely to overdraft charges allegedly incurred by Plaintiffs on or about September 2-5, 2007. Because this Court has already determined that any such claim is time-barred, no answer is required. To the extent any response is required, BPNA admits (i) the allegations of Paragraph 59 regarding the amount and sequence of the ATM withdrawals they completed on September 2, 2007 (a Sunday – a non-banking day) and September 4, 2007 (the first banking day after the Labor Day holiday), (ii) BPNA processed

Plaintiffs' September 2 and September 4 transactions in accordance with its then-current item processing policy at the close of the first banking day (September 4); and (iii) BPNA's then-current item processing policy resulted in two overdraft charges instead of the one overdraft charge that would have resulted if the withdrawals had been processed in chronological order. BPNA denies any allegation or implication that anyone other than Plaintiffs themselves caused Plaintiffs to overdraw their accounts and thereby incur overdraft charges. Except as expressly admitted, BPNA denies the allegations of Paragraph 59.

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.

ANSWER: BPNA states that the allegations of Paragraph 60 relate to transactions that allegedly occurred from January 1-4, 2011. The Court has already determined that any GBL § 349 claim (Plaintiffs' only remaining claim) for overdraft fees incurred before September 10, 2011 is time-barred, so to no answer is required. Except as expressly admitted, BPNA denies the allegations of Paragraph 60.

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 reordering 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.

ANSWER: BPNA admits (i) the amount and sequence of the withdrawals and balance inquiry alleged in the first three sentences of Paragraph 61 and (ii) that BPNA's item processing policy in effect during April 2012 resulted in three overdraft charges instead of the two overdraft charges that would have resulted if the withdrawals had been processed in chronological order. Except as expressly admitted, BPNA denies the allegations of Paragraph 61.

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.

ANSWER: BPNA admits that (i) effective August 1, 2013, it changed its item processing order policy such that it no longer processes any categories of transactions in order from highest-to-lowest dollar amount; (ii) instead, BPNA processes transactions chronologically or, if the date cannot be determined, in order from lowest-to-highest dollar amount; (iii) the change was reflected in its July 31, 2013 *Branch Administration Special Marketing Bulletin* (BPNA 759); and (iv) August 1, 2013 is after November 14, 2012, the date on which this action was originally filed. Except as expressly admitted, BPNA denies the allegations of Paragraph 62.

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.

ANSWER: BPNA admits that it promotes the convenience of its ATM cards and debit cards. BPNA denies that it fails to provide its deposit account customers with accurate balance information, and further denies that its customers generally do not have access to accurate balance information. Except as expressly admitted, BPNA denies the allegations of Paragraph 63.

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.

ANSWER: BPNA denies the allegations of Paragraph 64.

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.

ANSWER: BPNA admits that (i) Plaintiff Josefina Valle (or some other person(s) authorized by her to access her account) used her BPNA-issued ATM card to make an ATM balance inquiry at least 83 times between January 2007 and August 2012 and (ii) BPNA provided balance information in response to each balance inquiry. Except as expressly admitted, BPNA denies the allegations of Paragraph 65.

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.

ANSWER: BPNA admits that Plaintiff Josefina Valle (or some other person(s) authorized by her to access her account) used her BPNA-issued ATM card to make the balance inquiries referenced in Paragraph 66 at an ATM that was part of a network in which BPNA was participating. Except as expressly admitted, BPNA denies the allegations of Paragraph 66.

67. In response to balance inquires 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 overdraft their deposit account, causing injury and out-of-pocket loss to Plaintiffs.

ANSWER: BPNA denies the allegations of Paragraph 67.

Plaintiffs Were Injured by Popular Providing False and Inaccurate Account Balances

68. For multiple balance inquires 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.

ANSWER: BPNA denies the allegations of Paragraph 68.

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.

ANSWER: BPNA admits that (i) at 10:37 a.m. on June 2, 2012 (a Saturday and non-banking day), Plaintiff Josefina Valle or her authorized representative made an ATM withdrawal; (ii) at 10:38 a.m. on June 2, 2012, Plaintiff Josefina Valle or her authorized representative made a balance inquiry at the same ATM; and (iii) at 10:41 a.m. on June 2, 2012, Plaintiff Josefina Valle or her authorized representative made an ATM withdrawal of $82.00, which resulted in an overdraft to her account. BPNA denies that its account statements reflect the *available* balance information that would have been provided to Plaintiff in response to the balance inquiry at 10:38 a.m. on June 2, 2012. Except as expressly admitted, BPNA denies the allegations of Paragraph 69.

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.

ANSWER: BPNA admits that (i) on January 1, 2012 (New Year's Day – a holiday and non-banking day), the opening balance in Plaintiffs' account was $541.69; (ii) on that same day, Plaintiffs made three ATM cash withdrawals in the amounts of $201.75, $201.75, and $101.75

(totaling $505.25) from a non-BPNA ATM; (iii) because Plaintiff made the withdrawals from a non-BPNA ATM, each withdrawal resulted in an additional $2.00 non-BPNA ATM fee ($6.00 in additional fees); (iv) because January 1, 2012 was a holiday, BPNA did not process any of the January 1 withdrawals until the close of the next banking day, Monday, January 3, 2012; (v) on January 3, 2012, Plaintiffs made an ATM withdrawal of $302.00 (plus an additional $2.00 non-BPNA ATM fee) and an ATM withdrawal of $42.00 (plus an additional $2.00 non-BPNA ATM fee); (vi) between the two withdrawals on January 3, 2012, Plaintiffs made an ATM balance inquiry; (vii) on January 3, 2012, a preauthorized credit of $266.00 was posted to the account; (viii) the credits and debits to the account on January 1-3, 2012 were processed at the close of the banking day on January 3, 2012; and (ix) following item processing, Plaintiffs incurred two overdraft charges. BPNA denies that Plaintiffs incurred more overdraft charges as a result of its item processing policy in effect in January 2012 than Plaintiffs would have incurred if the withdrawals had been processed in chronological order; BPNA denies that it provided false balance information to Plaintiffs; and BPNA denies that Plaintiffs' monthly account statement concerning the period covering January 1-3, 2012 reflects the *available* balance information that would have been provided to Plaintiffs in response to the ATM balance inquiry on January 3, 2012. Except as expressly admitted, BPNA denies the allegations of Paragraph 70.

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 an 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.

ANSWER: BPNA states that to the extent the allegations of Paragraph 71 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, BPNA denies the allegations of Paragraph 71.

72. Popular [*sic*] 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.

ANSWER: BPNA denies the allegations of Paragraph 72.

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).

ANSWER: BPNA states that, to the extent the allegations of Paragraph 73 relate to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, BPNA states that it lacks information sufficient to form a belief regarding the truth of the allegations of Paragraph 73 with respect to other financial institutions. BPNA respectfully refers the court to the referenced judicial decisions for their true, correct, and complete terms. Further answering, BPNA states that whether a specific withdrawal or debit "will" result in an overdraft often cannot be determined in real time; whether an overdraw "will" result from a particular transaction will depend on other activity in the account (including both debits and credits) during that same item processing period. Except as expressly admitted, BPNA denies the allegations of Paragraph 73.

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. During the Class Periods, 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.

ANSWER: BPNA admits that (i) the *Joint Guidance* purports to set forth best practices for the banking industry concerning the disclosure and imposition of NSF and overdraft fees and (ii) on October 3, 2011, the NYBD became a part of the NYDFS. BPNA respectfully refers the court to the *Joint Guidance* for its true, correct, and complete terms. BPNA states that the allegation of Paragraph 74 regarding whether BPNA's have "complied" with the *Joint Guidance* presupposes a legal obligation that does not exist, and therefore denies that allegation. BPNA lacks information sufficient to know what Plaintiffs mean by "other guidance from New York and federal banking regulators." Except as expressly admitted, BPNA denies the allegations of Paragraph 74.

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.

ANSWER: BPNA admits that the *Joint Guidance* includes the quoted language, but denies that the *Joint Guidance* purported to describe any policy or practice of BPNA. BPNA respectfully refers the court to the *Joint Guidance* for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 75.

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.

ANSWER: BPNA admits that the OTS issued the *OTS Guidance* referenced in Paragraph 76. BPNA denies any characterization of the *OTS Guidance* that is inconsistent with its terms. BPNA respectfully refers the court to the *OTS Guidance* for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 76.

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."

ANSWER: BPNA admits that the *OTS Guidance* contains the text quoted in Paragraph 77. BPNA denies any characterization of the *OTS Guidance* that is inconsistent with its terms. BPNA respectfully refers the court to the *OTS Guidance* for its true, correct, and complete terms. Except as expressly admitted, BPNA denies the allegations of Paragraph 77.

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.

ANSWER: BPNA admits that (i) the FDIC issued the *FDIC Overdraft Study* referenced in Paragraph 78 and (ii) the referenced *FDIC Overdraft Study* contains the block-quoted text in Paragraph 78. BPNA lacks information sufficient to form a belief as to the truth of the content of the block-quoted text. BPNA respectfully refers the court to the *FDIC Overdraft Study* for its true, correct, and complete terms. BPNA admits that, absent a balance inquiry from a customer, it did not warn its customers that an attempted ATM or POS transaction would, if completed, result in an overdraft. BPNA denies any allegation or implication that it had either the legal obligation or technical ability to provide such notice. Except as expressly admitted, BPNA denies the allegations of Paragraph 78.

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.

ANSWER: BPNA admits the allegations of Paragraph 79, viz., that the *FDIC Overdraft Study* contains the block-quoted text and that the *OTS Guidance* contains similar text. BPNA respectfully refers the court to the *FDIC Overdraft Study* and the *OTS Guidance* for their true, correct, and complete terms.

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.

ANSWER: BPNA admits that (i) the *FDIC Overdraft Study* includes the quoted text and (ii) BPNA used a third-party vendor and/or third-party software to for item processing and, where appropriate, imposition of overdraft charges. BPNA respectfully refers the court to the *FDIC Overdraft Study* for its true, correct, and complete terms. BPNA lacks information sufficient to form a belief regarding the extent to which other banks rely on third-party vendors and/or third-party software for such purposes. Except as expressly admitted, BPNA denies the allegations of Paragraph 80.

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.

ANSWER: BPNA admits that, absent a balance inquiry from a customer, it did not warn its customers that an attempted ATM or POS transaction would, if completed, result in an overdraft. BPNA denies any allegation or implication that it had either the legal obligation or technical ability to provide such notice. Except as expressly admitted, BPNA denies the allegations of Paragraph 81.

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.

ANSWER: BPNA admits that (i) Plaintiffs made ATM balance inquiries on the dates referenced in Paragraph 82 and (ii) those inquiries were made either before or after Plaintiffs made an ATM withdrawal that ultimately resulted in an overdraft charge. Except as expressly admitted, BPNA denies the allegations of Paragraph 82.

83. Defendant's responses to Plaintiffs' balance inquires [*sic*] 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 nonproprietary ATMs would overdraw their accounts.

ANSWER: BPNA denies the allegations of Paragraph 83.

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."

ANSWER: BPNA admits that it stated in one of its August 12, 2014 Answers to Plaintiffs' Interrogatories that "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." BPNA denies the allegations of Paragraph 83 to the extent that the word "yet" refers back, in whole or in part, to the allegations of preceding Paragraph 83. Except as expressly admitted, BPNA denies the allegations of Paragraph 84.

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.

ANSWER: BPNA admits that (i) Plaintiff Josefina Valle advised BPNA on July 25, 2012 that she wished to opt out of BPNA's overdraft protection program; (ii) BPNA honored Plaintiff's request, removing her from the program and providing her with a new ATM card that would not allow her to overdraw her account; and (iii) BPNA did not refund any of the overdraft fees that Plaintiff had incurred as a result of overdrawing her account. BPNA denies that Plaintiff(s) requested a refund of any of the overdraft fees charged to the account. Except as expressly admitted, BPNA denies the allegations of Paragraph 85.

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.

ANSWER: BPNA denies the allegations of Paragraph 86.

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.

ANSWER: BPNA admits that Plaintiffs purport to bring this lawsuit as a putative class action pursuant to Article 9 of the New York Civil Practice Law and Rules ("CPLR"). BPNA denies, however, that class treatment is appropriate.

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

ANSWER: BPNA states that the allegations of Paragraph 88 state legal conclusions to which no answer is required. To the extent an answer is required, PBNA denies the allegations of Paragraph 88.

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.

ANSWER: BPNA admits that Popular, Inc.'s 2011 Annual Report indicated that, at the time of the report, BPNA had approximately 395,000 customers. BPNA states that the remaining allegations of Paragraph 89 state legal conclusions to which no answer is required. Except as expressly admitted, BPNA denies the allegations of Paragraph 89.

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.

ANSWER: BPNA denies the allegations of Paragraph 90.

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.

ANSWER: BPNA lacks information sufficient to form a belief regarding the truth of the allegations that Plaintiffs' counsel are "experienced in complex and consumer class action litigation." Except as expressly admitted, BPNA denies the allegations of Paragraph 91.

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.

ANSWER: BPNA denies the allegations of Paragraph 92.

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.

ANSWER: BPNA denies the allegations of Paragraph 93.

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.

ANSWER: BPNA states that the allegations of Paragraph 94(a) relate to Plaintiffs' implied duty claim, which was withdrawn with prejudice, so no answer is required. BPNA states that the allegations of Paragraph 94 state legal conclusions to which no answer is required. To the extent an answer is required, BPNA denies that it has engaged in any conduct in violation of GBL § 349 and denies that it has otherwise engaged in any conduct that would entitle Plaintiffs to any of the relief sought. Except as expressly admitted, BPNA denies the allegations of Paragraph 94.

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

ANSWER: BPNA states that, to the extent the allegations of Paragraph 95 relates to Plaintiffs' implied duty claim, which has been withdrawn with prejudice, no answer is required. To the extent an answer is required, BPNA denies the allegations made in Paragraph 95.

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.

ANSWER: BPNA lacks knowledge or information sufficient to form a belief as to the truth of the allegations made in Paragraph 96 regarding the state of mind of Plaintiffs or their counsel. BPNA denies, however, that no difficulty will be encountered in the management of this litigation that should preclude its maintenance as a class action. Except as expressly admitted, BPNA denies the allegations of Paragraph 96.

COUNT I

BREACH OF IMPLIED CONTRACTUAL DUTIES OF GOOD FAITH AND FAIR DEALING

(By Plaintiffs and All Implied Covenants Class Members)

BPNA states that Count I (Plaintiffs' implied duty claim) has been withdrawn with prejudice. As such, Count I and its underlying allegations (Paragraphs 97-102) are a legal nullity to which no response is required.

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.

ANSWER: BPNA incorporates by reference each of its answers to Paragraphs 1-96 as if fully set forth herein.

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

ANSWER: BPNA states that the allegation of Paragraph 104 states a legal conclusion to which no answer to required. To the extent an answer is required, BPNA admits the allegation of Paragraph 104.

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."

ANSWER: BPNA admits the allegation of Paragraph 105.

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.

ANSWER: BPNA denies the allegations of Paragraph 106.

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.

ANSWER: BPNA denies the allegations of Paragraph 107.

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.

ANSWER: BPNA denies the allegations of Paragraph 108.

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.

ANSWER: BPNA denies the allegations of Paragraph 109.

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.

ANSWER: BPNA denies the allegations of Paragraph 110.

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.

ANSWER: BPNA denies the allegations of Paragraph 111.

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).

ANSWER: BPNA denies the allegations of Paragraph 112.

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.

ANSWER: BPNA denies the allegations of Paragraph 113.

WHEREFORE, Defendant Banco Popular North America d/b/a Popular Community Bank prays that the Court enter judgment in its favor and against Plaintiffs, that it be awarded its taxable costs, and that the Court grant it such other and further relief as the Court deems just and proper.

AFFIRMATIVE DEFENSES

For its Affirmative Defenses to the Second Amended Complaint ("SAC"), BPNA states as follows:

AFFIRMATIVE DEFENSE NO. 1:

BPNA is entitled to judgment on Count II (the sole remaining Count of the SAC) for any fee allegedly imposed by BPNA before September 11, 2011 based on GBL § 349's three-year statute of limitations.

AFFIRMATIVE DEFENSE NO. 2:

BPNA is entitled to judgment on Count II (the sole remaining Count of the SAC) for any fee allegedly imposed by BPNA before December 10, 2010, the date that Plaintiffs allege that BPNA began providing purportedly false balance information to its customers.

<u>AFFIRMATIVE DEFENSE NO. 3</u>:

BPNA is entitled to judgment on Count II (the sole remaining Count of the SAC) pursuant to GBL § 349(d) because BPNA's item processing, balance disclosures, and related overdraft practices complied with applicable federal regulations.

<u>AFFIRMATIVE DEFENSE NO. 4</u>:

BPNA is entitled to judgment on Count II (the sole remaining Count of the SAC) because any claim based on item processing order is preempted by 3 NYCRR 6.8, which provides that, "notwithstanding any other provision of law or regulation," New York-chartered banks may impose overdraft fees "to the same extent" as national banks; and, as previously adjudicated in *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 725 (9th Cir. 2012), the federal preemption doctrine bars any state law claims against national banks based on their item processing practices, including processing certain categories of consumer debits in highest-to-lowest dollar amount order.

<u>AFFIRMATIVE DEFENSE NO. 5</u>:

BPNA is entitled to judgment on Plaintiffs' prayer for statutory or punitive damages in Count Two (the sole remaining Count of the SAC) because, under CPLR 902(b), such damages are not recoverable in a class action.

<u>AFFIRMATIVE DEFENSE NO. 6</u>:

BPNA is entitled to judgment on Count Two (the sole remaining Count of the SAC) under the voluntary payment doctrine because Plaintiffs made or permitted the underlying payments with full knowledge of the relevant facts in the absence of fraud.

<u>AFFIRMATIVE DEFENSE NO. 7</u>:

BPNA is entitled to judgment on Count Two (the sole remaining Count of the SAC) under the doctrine of laches, waiver, and equitable estoppel because, despite having allegedly incurred overdraft fees dating back to at least 2006, Plaintiffs unreasonably delayed at least 6 years in asserting any claims challenging BPNA's challenged overdraft policies and practices, all while continuing to accept the benefits of overdraft protection, including immediate access to cash despite not having sufficient funds on deposit. Plaintiffs' unreasonable delay has been prejudicial to BPNA in that, among other things, (i) BPNA was unreasonably denied the opportunity to address Plaintiffs' concerns at an earlier date when Plaintiffs' *claimed* damages, along with those of the putative class, would have been smaller; and (ii) witnesses and evidence that may have been beneficial to BPNA's defense of this action are no longer available, have been lost, or have otherwise been compromised as a result of the passage of time.

RESERVATION OF RIGHTS

BPNA respectfully reserves the right to supplement or amend its Affirmative Defenses in accordance with the New York Civil Practice Law and Rules, any Standing Order of the Court, or any scheduling order entered by the Court.

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