

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

<p>JOSEFINA VALLE and WILFREDO VALLE,  individually and on behalf of all others similarly  situated,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>POPULAR COMMUNITY BANK  f/k/a BANCO POPULAR NORTH AMERICA  a/k/a BANCO POPULAR NORTH AMERICA,</p> <p style="text-align: right;">Defendant.</p>	<p>Index No. 653936/2012</p> <p>Hon. O. Peter Sherwood, J.S.C.</p> <p><b>Motion Seq. 012 and 013</b></p> <p><b>[PROPOSED] FINAL APPROVAL  ORDER AND FINAL JUDGMENT</b></p>
--	--

WHEREAS, Plaintiffs and Settlement Class Representatives<sup>1</sup> Josefina Valle and Wilfredo Valle (“Plaintiffs”), individually and on behalf of the Settlement Class, and Defendant Popular Bank f/k/a and a/k/a Popular Community Bank and Banco Popular North America (“Popular” or “Defendant”) entered into a Settlement Agreement and Release (“Settlement Agreement”), which this Court preliminary approved on March 23, 2018. *See* Order Granting Preliminary Approval to Proposed Class Action Settlement Agreement and Preliminary Certification of Settlement Class (“Preliminary Approval Order”) (NYSCEF Doc. No. 438) (*id.*, ¶ 2). The Court also provisionally certified the Settlement Class for settlement purposes only (*id.*, ¶¶ 3-4); approved the Notice Program, including the form, substance, and distribution plan of the Notices (*id.*, ¶ 7); approved the claims process (*id.*, ¶ 8); and scheduled the Fairness Hearing to take place on August 6, 2018 (*id.*, ¶ 5).

WHEREAS, pursuant to the Settlement Agreement and subject to the terms and conditions therein, including Court approval, Popular agreed to provide Settlement Consideration, including the

---

<sup>1</sup> Capitalized terms are defined in the Settlement Agreement.

following, in exchange for the agreement of Plaintiffs and the Proposed Settlement Class to fully, finally, and forever resolve, discharge, and release their claims: (i) a total payment of up to \$5.2 million to the Settlement Class for verified claims submitted by Settlement Class members (Settlement Agreement, ¶ 57.a.); (ii) a total payment of up to \$10,000 (up to \$5,000 each) in incentive awards to the Settlement Class Representatives (*id.*, ¶ 57.b.); (iii) payment to the Settlement Administrator of Settlement Notice and Claim Administration costs of up to \$250,000 (*id.*, ¶ 57.c.); and (iv) payment of up to \$1,950,000 to Settlement Class Counsel for their attorneys' fees and costs incurred in this bringing and litigating this action (*id.*, ¶ 57.d.).

WHEREAS, this matter came before the Court on: (i) Plaintiffs' Motion for Final Approval of Proposed Class Action Settlement ("Final Approval Motion"), including the supporting memoranda of law and accompanying Affirmations of Joseph P. Guglielmo and Eric Schachter and related exhibits, seeking final approval of the proposed Settlement, certification of the Settlement Class for settlement purposes only, and the entry of final judgment (Mot. Seq. 012); and (ii) Plaintiffs' and Settlement Class Counsel's Motion for Attorneys' Fees and Reimbursement of Costs (Mot. Seq. 013) ("Motion for Attorneys' Fees and Costs"), including the supporting memoranda of law and accompanying Affirmations of Joseph S. Tusa and Daryl F. Scott, seeking payment of attorneys' fees and expenses to Settlement Class Counsel and the Incentive Award to the Settlement Class Representatives.

WHEREAS, on August 6, 2018, the Court held a Fairness Hearing about which all Settlement Class Members were given notice. Pursuant to CPLR §§ 904, 907, 908, and 909 and New York General Business Law ("GBL") § 349(h), the Court considered: (i) the fairness, reasonableness, and adequacy of the proposed Settlement Agreement, including the Releases contained therein; (ii) the reasonableness and sufficiency of the Notice given to the Settlement Class, including conformity with due process; (iii) whether the Claims Process comported with the Court's Preliminary Approval

Order; (iv) the fairness and reasonableness of amount of Settlement Class Counsel Attorneys' Fees and Costs requested; and (v) the fairness and reasonableness of Plaintiff Incentive Awards to the Settlement Class Representatives – and, based on those considerations, determined whether to grant final certification of the Settlement Class, final approval of the Notice Program and claims process, and final approval of the Settlement.

WHEREAS, having duly considered the Settlement Agreement and Exhibits annexed thereto, the Parties' submissions in support of the Final Approval Motion and Motion for Attorneys' Fees and Costs, submissions by Settlement Class Members in accordance with the Preliminary Approval Order, the record and all prior proceedings had in this action, for good cause shown, IT IS HEREBY ORDERED AND ADJUDGED as follows:

## **I. DEFINED TERMS**

1. This Final Approval Order and Final Judgment incorporates by reference the definitions in the Settlement Agreement and all capitalized terms used, but not defined herein, shall have the same meanings as in the Settlement Agreement.

## **II. JURISDICTION AND VENUE**

1. The Court retains sole and exclusive jurisdiction to consider all further matters arising out of or connected with the Settlement.

2. Venue is proper in this Court and in New York County.

3. This Court is an appropriate forum for litigating Plaintiffs' and the Settlement Class's claims for a number of reasons: (i) Popular maintains several branches and offices in the state of New York and County of New York; (ii) Plaintiffs and the Settlement Class assert that the subject claims arise under or otherwise implicate New York state law; and (iii) Plaintiffs and the Settlement Class are current or former Popular account holders who maintained their accounts in New York.

*See Pino Alto Partners*, 21 misc. 3d 1114(A), 2008 WL 4603469, \*7-8 (“As to the fourth factor under

CPLR § 902, the desirability of this forum is manifest given the residence of the likely class members and the Commercial Division’s familiarity with contract issues and complex litigation.”).

### **III. FINAL APPROVAL OF THE SETTLEMENT**

4. The Court finally approves the Settlement, together with all exhibits thereto, as fair, reasonable and adequate. The Court finds that the Settlement was reached in the absence of collusion, is the product of informed, good faith, arms’ length negotiations between the Parties and their capable and experienced counsel. The Court approves the Settlement and orders the Parties to perform their obligations pursuant to the Settlement Agreement and to achieve the Effective Date.

5. This Court hereby dismisses this Action with prejudice and without costs (except as otherwise provided in the Settlement Agreement and this Final Approval Order and Final Judgment), except that this Court shall retain jurisdiction to the extent necessary to enforce the Settlement.

6. The Court approves the Releases contained in Section XIV of the Settlement Agreement, which shall take effective upon the Effective Date.

### **IV. SETTLEMENT CLASS CERTIFICATION**

7. The Court finds that, for the sole purposes of the Settlement, the requirements for certification of a Settlement Class pursuant to CPLR §§ 901 and 902 are satisfied. Specifically, for the purposes of this Settlement only, the Court finds that: (i) the Settlement Class is sufficiently numerous; (ii) common questions of fact and law predominate over individual questions; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the Class; (iv) the representative parties will fairly and adequately protect the interests of the class; (v) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

8. The Court finally certifies the following Settlement Class:

All persons who, during the Class Period: (1) maintained one or more Accounts in New York at Popular, (2) incurred at least one Overdraft Fee in such Account(s), (3)

in connection with an ATM withdrawal or Point-of-Sale (“POS”) Debit Card transaction, (4) as a result of one or more of the following alleged practices by Popular: (i) reordering of ATM and/or POS Debit Card transactions from highest-to-lowest dollar amounts, (ii) providing inaccurate balance information in response to an ATM balance inquiry, ATM withdrawal or other ATM transaction, and/or (iii) not providing a “real time” warning that an attempted ATM or POS transaction, if honored by Popular, would overdraw the Account (collectively, “Disputed Practices”). Excluded from the Settlement Class are the following: (i) the Court, immediate family members of the Court, and employees of the Court; and (ii) directors, officers, and employees of Popular, Popular’s parent entity(ies), any Popular subsidiary, or any other entity(ies) in which Popular has a controlling interest.

9. The Court finally certifies Plaintiffs Josefina Valle and Wilfredo Valle as the Settlement Class Representatives for the certified Settlement Class.

10. The Court finally certifies Tusa P.C. and Scott+Scott Attorneys at Law LLP as Settlement Class Counsel for the certified Settlement Class.

11. The Court finds that the Settlement Class Representatives and Settlement Class Counsel fairly and adequately represented the interests of the Settlement Class at all times in connection with this Action and the Settlement.

## **V. SETTLEMENT NOTICE TO CLASS**

12. This Court finds that the Notice Program and the Notice provided to Settlement Class members: fully satisfied the requirements of constitutional due process, the CPLR §§ 904 and 908, and any other applicable laws; constituted the best notice practicable under the circumstances; and constituted due and sufficient notice to all persons entitled thereto. Settlement Class Counsel and/or the Settlement Administrator has filed with the Court proof that the Court-approved Notices were provided to Settlement Class Members in compliance with the procedures set forth in the Agreement and the Preliminary Approval Order.

## **VI. RELEASES AND INJUNCTIONS**

13. It is hereby ordered that, upon the Effective Date, Plaintiffs shall be deemed to have provided the Releases contained in Paragraph 111 and 113 of the Settlement and Plaintiffs and all Settlement Class Members, except those who have timely and properly opted out of the Settlement (identified by name in the Appendix to this Final Order and Judgment), shall be deemed to have provided the Releases contained in Paragraph 112 and 113 of the Settlement. The Parties are to bear their own costs, except as otherwise provided in the Settlement.

14. Plaintiffs and all Settlement Class Members are permanently enjoined from instituting any action seeking to prosecute any Released Claims against any of the Released Persons to the fullest extent provided in Section XIV of the Settlement Agreement.

15. The Releases shall not preclude any action to enforce the terms of the Settlement Agreement and are not intended to include the release of any rights or duties of the Parties arising out of the Settlement Agreement.

16. Without affecting the finality of this Final Approval Order and Judgment in any way, this Court retains continuing jurisdiction of all matters relating to the modification, interpretation, administration, implementation, effectuation, and enforcement of the Settlement. Settlement Class Counsel are to continue in their role to oversee all aspects of the Settlement. Upon notice to Settlement Class Counsel, Popular may seek from this Court such further orders or process as may be necessary to prevent or forestall the assertion of any of the Released Claims in any forum, or as may be necessary to protect and effectuate the Settlement and this Final Approval Order.

17. If the Effective Date does not occur or if this Final Approval Order and Judgment is not finally upheld on appeal, all orders, judgments, stipulations, and Releases relating to this Settlement shall be null and void. Nothing in any order or judgment relating to this Settlement (including, without limitation, the Preliminary Approval Order and this Final Approval Order and Judgment) shall be used in any way by any Party to argue for or against class certification or for or

against any issue of liability or damage.

18. Judgment shall be, and hereby is, entered dismissing this Action in its entirety with prejudice, except as provided herein or in the Settlement Agreement. The Court finds that there is no just reason for delay and expressly directs immediate entry by the Clerk of the Court of judgment as set forth herein pursuant to CPLR § 5016.

**VII. ATTORNEYS' FEES AND INCENTIVE AWARD**

19. Payment to Class Counsel in the amount of \$1,950,000 for attorneys' fees, costs, and expenses incurred in litigating this Action is hereby approved as reasonable compensation for Settlement Class Counsel's work, which has resulted in a substantial benefit to the Settlement Class and created a Settlement benefit that will be provided to the Settlement Class Members in accordance with the terms of the Settlement Agreement, which award of attorneys' fees and costs shall be paid directly by Popular to Settlement Class Counsel as provided in the Settlement Agreement. No other attorneys' fees, costs, or expenses shall be paid by Popular.

20. An incentive and service award payment in the total amount of \$10,000 (\$5,000 each) for the Named Plaintiffs, Josefina Valle and Wilfredo Valle, in settlement of their claims and in recognition of their services as Class Representatives, is approved as fair and reasonable. Plaintiffs shall not be entitled to any other incentive or service award payment under the Settlement Agreement, but the incentive award shall not bar or otherwise prevent Plaintiffs from submitting a potentially Qualified Claim relating to overdraft fees incurred by them during the Class Period.

Dated: New York, New York

\_\_\_\_\_, 2018

SO ORDERED: \_\_\_\_\_  
Hon. O. Peter Sherwood, J.S.C.

cc: All Counsel of Record

## **APPENDIX**

### **SETTLEMENT CLASS MEMBERS WHO HAVE REQUESTED EXCLUSION:**

1. Filipa Disla
2. Anthony Celentano