

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

CHRIS LASHAMBAE, individually and on behalf
of all others similarly situated,

Plaintiff,

- against -

CAPITAL ONE BANK, N.A.,

Defendant.

Case No. 1:17-cv-06406-FB-VMS

PRELIMINARY APPROVAL ORDER

WHEREAS, Plaintiff in the above-captioned class action (“Action”) has applied for an order, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, preliminarily approving the Settlement Agreement and Release entered into between Plaintiff Chris Lashambae, individually and on behalf of the proposed Class, and Defendant Capital One, N.A, (“Capital One”) dated March 15, 2019 (the “Agreement,” “Settlement Agreement,” or “Settlement”), and this Court having reviewed the Settlement Agreement as submitted to the Court with the Amended Motion for Preliminary Approval of Class Action Settlement, having held oral argument, and having required the parties to amend the Settlement Agreement and Notice of Settlement, which they have done and submitted with the Amended Motion for Preliminary Approval of Class Action Settlement at ECF No. [49].

WHEREAS, this Preliminary Approval Order incorporates the Settlement Agreement, and its exhibits, and the terms used herein shall have the meaning and/or definitions given to them in the Settlement Agreement, as submitted to the Court with the Amended Motion for Preliminary Approval of Class Action Settlement.

NOW, THEREFORE, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, upon the agreement of the Parties, and after consideration of the Agreement and its exhibits,

IT IS HEREBY ORDERED as follows:

1. The Court finds that the Settlement Agreement proposed by the Parties as amended by the Court is fair, reasonable, and adequate and likely to be approved at a final approval hearing such that giving notice is justified. The representations, agreements, terms, and conditions of the Settlement, as embodied in the Settlement Agreement as amended by the Court and the exhibits attached thereto, are preliminarily approved pending a final hearing on the Settlement as provide herein. The Settlement meets the considerations set forth in the amended Federal Rule 23(e) as well as City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

2. The Settlement Agreement as amended by the Court appears to have been the product of arm's length negotiation between the Parties and appears to have been made in good faith.

3. The Court finds it will likely certify at the final approval stage a Settlement Class, for purposes of the Settlement only, consisting of:

all present and former Capital One consumer checking account holders in the United States and its territories who were not opted in to Capital One's Debit Card Overdraft Service for ATM and everyday debit card transactions, and who were charged overdraft fees, between May 1, 2013 and the date of preliminary approval of the Settlement, on a Lyft transaction that was coded as recurring.

The Court finds that this Settlement Class meets the relevant requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) in that: (a) the number of Settlement Class members is so numerous that joinder is impracticable; (b) there are questions of law and fact common to the Settlement Class members; (c) the claims of the Class Representative are typical of the claims of the Settlement Class members; (d) the Class Representative is an adequate representative for the Settlement Class, and has retained experienced counsel to represent them; (e) the questions of

law and fact common to the Settlement Class members predominate over any questions affecting any individual Settlement Class Member; and (f) a class action is superior to the other available methods for the fair and efficient adjudication of the controversy. The Court therefore preliminarily certifies the proposed Settlement Class.

4. For purposes of the Settlement only, the Court finds and determines that it will likely find at the final approval stage, pursuant to Rule 23(a)(1) of the Federal Rules of Civil Procedure, that Plaintiff Chris Lashambae will fairly and adequately represent the interests of the Settlement Class in enforcing their rights in the Action, and therefore appoints him as the Class Representative.

5. For purposes of the Settlement only and pursuant to Rule 23(a)(1) of the Federal Rules of Civil Procedure, the Court appoints as Class Counsel the law firms of Tycko & Zavareei, LLP; Kopelowitz Ostrow P.A.; and Reese LLP to act on behalf of the Settlement Class and the Class Representative with respect to the Settlement.

6. Epiq Class Action & Claim Solutions, Inc. is appointed as Settlement Administrator to administer the notice procedures. The Settlement Administrator shall abide by the terms and conditions of the Settlement Agreement that pertain to the Settlement Administrator.

7. Pursuant to the recently amended Fed. R. Civ. P. 23(e), the terms of the Settlement Agreement (and the Settlement provided for therein), as amended by the Court, are preliminarily approved and likely to be approved at the Final Approval Hearing because:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;

- (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

8. Having reviewed the proposed forms of the revised Class Notice submitted by the Parties as Exhibits 3 and 4 to the Amended Motion for Preliminary Approval of Class Action Settlement, the Court approves, as to form and content, such Class Notice as amended by the Court and posted on the docket herewith for the purpose of notifying the Settlement Class as to the proposed Settlement, the Final Approval Hearing, and the rights of the members of the Settlement Class. The Class Notice as amended and posted herewith contains all of the essential elements necessary to satisfy the requirements of federal law, including the Federal Rules of Civil Procedure and federal and state due process provisions, including the class definition, the identities of the Parties and their counsel, a summary of the terms of the proposed settlement, information regarding the manner in which objections may be submitted, information regarding opt-out procedures and deadlines, and the date and location of the Final Approval Hearing.

9. The Court directs the Settlement Administrator to cause a copy of the email or postcard notice, as set forth in Exhibit 4 to the Amended Motion for Preliminary Approval of Class Action Settlement as amended by the Court and posted herewith, to be sent to all persons identified in the Class Member List, which Capital One shall provide to the Settlement Administrator no later than thirty (30) calendar days after the date of the entry of this Preliminary Approval Order. The email shall be made no later than sixty (60) calendar days after the date of the entry of this Preliminary Approval Order. The mailing of the postcard notice is to be made by first class United States mail, postage prepaid, within seventy-five (75) calendar days after

entry of this Preliminary Approval Order, and, if any postcard notice is returned as undeliverable, the re-mailing of any postcard notice is to be made no later than one hundred and five (105) days after entry of this Preliminary Approval Order. The Notice Plan shall be completed within one hundred and five (105) days of entry of this Preliminary Approval Order. The Court has extended these dates from those proposed in light of the March 13, 2020, declaration of National Emergency.

10. The revised Class Notice, as set forth in Exhibits 3 and 4 to the Amended Motion for Preliminary Approval of Class Action Settlement as amended by the Court and filed herewith, shall be updated by Plaintiff and/or the Settlement Administrator to include any changes to the date and time of the Final Approval Hearing between the date of the preliminary approval of the Settlement and the date of emailing, mailing or re-mailing the Class Notice. The Court finds and determines that emailing and mailing of the Class Notice as amended by the Court and posted herewith pursuant to this Order constitutes the best notice practicable under the circumstances, constitutes due and sufficient notice of the matters set forth in the notices to all persons entitled to receive such notices, and fully satisfies the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and all other applicable law and rules.

11. Capital One shall deposit the Settlement Amount into the Escrow Account within twenty-five (25) days from the date of the entry of this Order.

12. Any person falling within the definition of the Settlement Class may, upon request, be excluded or “opt out” from the Settlement Class. In the event a Settlement Class Member wishes to be excluded from the Settlement and not to be bound by this Agreement, that person must, prior to the Opt-Out and Objection Deadline, sign and mail a notice of intention to opt-out of the Settlement to the Settlement Administrator. The notice must be postmarked on or

before the Opt-Out and Objection Deadline and must include the name of this Action, the account holder's name, address, and telephone number, the last four digits of the account number of the Capital One Account, a clear request that the individual would like to "opt-out," be "excluded," by use of those or other words clearly indicating a desire to no longer participate in the Settlement, and personal signature. Any member of the Settlement Class who timely and properly requests exclusion in compliance with these requirements will thereafter be excluded from the Settlement Class, not become a Settlement Class Member, will not have any rights under the Settlement, will not be entitled to receive a settlement payment, and will not be bound by the Settlement Agreement or the Final Approval Order. Any members of the Settlement Class who fail to submit a valid and timely opt-out request shall be bound by all terms of the Settlement Agreement and the Final Approval Order, regardless of whether they have requested to be opted-out from the Settlement. If an Account has more than one account holder, and if one account holder excludes himself or herself from the Settlement Class, then all account holders on that account shall be deemed to have opted-out of the Settlement with respect to that account and no account holder shall be entitled to a payment under the Settlement.

13. A Final Approval Hearing will be held by this Court in the Courtroom of the Honorable Vera M. Scanlon, United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Courtroom 13A South, New York, NY 11201 at **11:00 AM on October 1, 2020**, to determine: (a) whether the Settlement should be approved as fair, reasonable, and adequate to the Settlement Class; (b) whether the Final Approval Order should be entered in substance materially the same as Exhibit D to the Agreement; (c) whether to approve any Fee Application and/or Service Award Application; and (d) any other matters that may properly be brought before the Court in connection with the Settlement. The Final Approval Hearing is

subject to continuation or adjournment by the Court without further notice to the Settlement Class. The Court may approve the Settlement with such modifications as the Parties may agree to, if appropriate, without further notice to the Settlement Class. The Parties must file all moving papers and briefs in support of the entry of the Final Approval Order on or before one hundred and forty-five (145) days after the date of entry of this Order (“Final Approval Motion Deadline”).

14. Any Settlement Class Member may enter an appearance in the Action, at their own expense, individually or through counsel of their own choice. If a Settlement Class Member does not enter an appearance, he or she will be represented by Settlement Class Counsel.

15. Any Settlement Class Member who wishes to object to the Settlement, to the Fee Application, or the Service Award Application, or to appear at the Final Approval Hearing and show cause, if any, why the Settlement should not be approved as fair, reasonable, and adequate to the Settlement Class, or why a final judgment should not be entered thereon, may do so, but must proceed as set forth in this paragraph, in Question 15 of the Class Notice, and in Paragraph 69 of the Settlement Agreement as amended by the Court and posted herewith. Only a Settlement Class Member may file an objection. No Settlement Class Member or other person will be heard on such matters unless they have filed a written objection (together with any briefs, papers, statements, or other materials that the Settlement Class Member or other person wishes the Court to consider) with the Clerk of the Court on or before the Opt-Out and Objection Deadline, and mailed (via U.S. Mail) all such documents and materials to Class Counsel and Capital One Counsel on or before the Opt-Out and Objection Deadline, as set forth in the Class Notice. Any objection must set forth: (i) the name of the Action, Lashambae v. Capital One Bank, N.A., No. 1:17-cv-06406 (E.D.N.Y.); (ii) the objector’s full name, address, and telephone

number; (iii) the last four digits of their account number; (iv) the reason(s) the objector claims to be a Settlement Class Member; (v) all grounds for the objection, accompanied by any legal support for the objection known to the objector or his or her counsel; (vi) the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or fee application; (vii) the identity of all counsel representing the objector who will appear at the Final Approval Hearing; (viii) a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; (ix) a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing; and, (x) the objector's signature (an attorney's signature is not sufficient). The Parties must file any briefs in response to any objection on or before fifteen (15) days prior to the date of the Final Approval Hearing **(September 16, 2020)**.

16. Any Settlement Class Member who does not make his or her objections in the manner set forth by paragraph 15, above, by the Objection Deadline **(August 7, 2020)**, shall be deemed to have waived any objections, and shall be forever barred from raising such objections in this or any other action or proceeding, absent further order of the Court.

17. Prior to the Final Approval Hearing, (i) Class Counsel shall file with the Court and serve on all Parties a declaration certifying that the Class Notice has been provided, (ii) Capital One shall file with the Court and serve on all Parties a declaration certifying that notice was provided to the appropriate government entities in accordance with CAFA; and (iii) the Settlement Administrator shall file a declaration setting forth the identities of all opt-outs.

18. All Settlement Class Members shall be entitled to share in the Settlement Amount consistent with the distribution plan outlined in the Settlement Agreement.

19. All pretrial proceedings in this action are stayed and suspended until further order of this Court, except such actions as may be necessary to implement the Settlement Agreement and this Preliminary Approval Order.

20. Upon the entry of this Order, the Class Representative and all members of the Settlement Class shall be provisionally enjoined and barred from asserting any claims against Capital One and the Released Parties arising out of, relating to, or in connection with the Released Claims prior to the Court's decision as to whether to grant Final Approval of the Settlement.

21. This Settlement, and any and all negotiations, statements, documents, and/or proceedings in connection with the Settlement, shall not be construed or deemed to be evidence of an admission or concession by Capital One of any liability or wrongdoing by Capital One or any of its affiliates, agents, representatives, vendors, or any other person or entity acting on its behalf with respect to the assessment of overdraft fees or that the case was properly brought as a class action, and shall not be construed or deemed to be evidence of an admission or concession that any person suffered compensable harm or is entitled to any relief with respect to Capital One's assessment of overdraft fees. Capital One may file the Settlement Agreement as amended by the Court and posted herewith in any action or proceeding that may be brought against it in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

22. In the event that (a) this Court does not finally approve the Settlement as provided in the Settlement Agreement; (b) this Court does not enter the Final Approval Order as provided in all material respects and substantial form set forth in the Settlement Agreement; or (c) the

Settlement does not become final for any other reason, the Settlement Agreement shall be null and void and any order or judgment entered by this Court in furtherance of the Settlement shall be vacated *nunc pro tunc*. In such a case, the Parties shall proceed in all respects as if the Settlement Agreement had not been executed and the Parties shall in no way be prejudiced in proceeding with or defending this litigation, the provisional class certification effected herein will be null and void, and Capital One shall have the right to object to certification of the Settlement Class or any other class at any future time.

23. For the benefit of the Settlement Class and to protect this Court's jurisdiction, this Court retains continuing jurisdiction over the Settlement proceedings to ensure the effectuation thereof in accordance with the Settlement preliminarily approved herein and the related orders of this Court.

24. Class Counsel and Capital One Counsel are hereby authorized to use all reasonable procedures in connection with approval and administration of the Settlement that are not materially inconsistent with this Order or the Settlement Agreement, including making, without further approval of the Court, minor changes to the form or content of the Class Notice, and other exhibits that they jointly agree are reasonable or necessary.

25. The Court hereby sets the following schedule of events:

Event	Days From Preliminary Approval Order	Date
Class Member List provided to Settlement Administrator	30 Days	April 29, 2020
Email Notice Complete	60 Days	May 29, 2020
Mailed Notice Complete	75 Days	June 13, 2020
Re-Mail Notice Complete and Completion of Notice Plan	105 Days	July 13, 2020
Opt-Out and Objection Deadline	130 Days	August 7, 2020
Motion for Final Approval, Fee Application and Service Award Application	145 Days	August 22, 2020
Response to Objections	170 Days	September 16, 2020
Final Approval Hearing	185 Days	October 1, 2020 @ 11:00 AM

IT IS SO ORDERED.

DATED: March 30, 2020

 /s/
 HONORABLE VERA M. SCANLON
 US MAGISTRATE JUDGE