

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT )  
OVERDRAFT LITIGATION )  
 )  
MDL No. 2036 )  
Fourth Tranche )  
\_\_\_\_\_)  
 )  
THIS DOCUMENT RELATES TO: )  
 )  
*Shane Swift v. BancorpSouth, Inc.*,<sup>1</sup> )  
S.D. Fla. Case No. 1:10-cv-23872-JLK )  
\_\_\_\_\_)

DEFENDANT BANCORPSOUTH BANK'S REPLY IN SUPPORT OF ITS  
MOTION FOR SUMMARY JUDGMENT

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<sup>1</sup> BancorpSouth, Inc. is not a proper defendant in this matter. Counsel for Swift and BancorpSouth Bank discussed the proper BancorpSouth entity to name in this matter in 2010, and Swift properly identified the defendant herein as BancorpSouth Bank in his Second Amended Complaint (Doc. 994).

BancorpSouth Bank respectfully submits this reply in support of its Motion for Summary Judgment (DE #2999) (the "Motion") and response to Plaintiff's Opposition to the same (DE #3043) (the "Response").<sup>2</sup> The simple issue presented by BancorpSouth's Motion is whether Swift can recover overdraft fees from BancorpSouth by challenging BancorpSouth's policy of posting debit transactions within each banking day from highest to lowest dollar value, when for the entire Class Period BancorpSouth's posting policy and its potential effects were disclosed in plain language to account holders in the governing account documents.<sup>3</sup> Swift has wholly failed to carry his burden to identify record evidence that supports each element of his claims. Moreover, Swift's Response is a collection of contentions unsupported by record citations, which are insufficient to create a genuine issue of material fact. The undisputed evidence is that BancorpSouth disclosed at all relevant times that it could post debit transactions in any order of its choosing, and more importantly, that the order it chose could result in more overdraft fees. Swift testified unequivocally that he understood these disclosures upon reading them. Nevertheless, Swift now challenges the precise outcome that BancorpSouth warned him about. The Court should grant BancorpSouth's summary judgment on all of Swift's claims.<sup>4</sup>

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<sup>2</sup> BancorpSouth incorporates its Motion and all exhibits thereto, (DE #2999), continues using the defined terms therein, and also incorporates its Response to Plaintiffs' Statement of Material Facts To Be Tried ("Response to Stmt. of Facts") (attached hereto as Exhibit 1).

<sup>3</sup> Despite Swift's counsel's arguments and assertions in the Response regarding BancorpSouth's Overdraft Payment Service, it is undisputed that BancorpSouth's practice at issue in this lawsuit is its posting order. Swift unequivocally testified that this case is about BancorpSouth's high-to-low posting order, stating that "there shouldn't be a resequencing of highest to lowest." (Response to Stmt. of Facts at ¶ 104.) Indeed, Swift made clear that he views BancorpSouth's Overdraft Payment Service as beneficial. (DE #2999-3 at ¶ 52.)

<sup>4</sup> In his Response, Swift confirmed that he is no longer pursuing a conversion claim and does not oppose summary judgment on that claim. (DE #3043 at 1.) The Court should therefore enter summary judgment on Swift's conversion claim, even if it denies all other relief requested in BancorpSouth's Motion. As Swift's conversion claim was his only tort claim, the Court also should enter summary judgment on Swift's request for punitive damages because he has no claims that allow for the imposition of punitive damages. *See L.L. Cole & Son, Inc. v. Hickman*, 282 Ark. 6, 10 (Ark. 1984) ("[P]laintiff must specifically plead and prove his cause of action in tort in order to be awarded punitive damages. Otherwise, the presumption will be that the action is in contract where punitive damages are not recoverable"; *see also Curtis v. Partain*, 272 Ark. 400, 403 (Ark. 1981) ("Generally punitive damages are not recoverable in actions for breach of contract.") (overruled on other grounds); Ark. Code. Ann § 4-88-113 (allowing for actual damages and attorneys' fees for ADTPA claims, but not providing for an award of punitive

## I. SUMMARY JUDGMENT STANDARD

The party moving for summary judgment is entitled to judgment as a matter of law if the nonmoving party fails to show any element of the case for which he has the burden of proof. *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). The nonmoving party may not rest upon the mere allegations or denials in its complaint. Instead, the “nonmovant then has the burden of showing that summary judgment is not appropriate by setting forth ‘specific facts showing that there is a genuine issue for trial’ . . . Mere conclusory allegations and assertions are insufficient to create a disputed issue of material fact.” *Wise v. Hartford Life and Accident Ins. Co.*, 360 F.Supp.2d 1310, 1316-17 (N.D. Ga. 2005) (*quoting* Fed. R. Civ. P. 56(e)). If the party's response consists of nothing more than a repetition of its conclusory allegations, the district court must enter summary judgment in the moving party's favor. *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981); Fed. R. Civ. P. 56(e); *Wise, supra* (“non-moving party... must file a response which includes other evidence showing that there is a genuine issue for trial.”)<sup>5</sup>

## II. ARGUMENT AND CITATION OF AUTHORITY

BancorpSouth demonstrated in its Motion that each of Swift's claims fails for lack of evidence, shifting the burden to Swift to identify record evidence that satisfies each element of his claims. Swift's Response fails at every turn to identify such evidence. Because Swift has not satisfied his burden, summary judgment is appropriate.

It is undisputed that since at least 2003 BancorpSouth disclosed not only its discretion to post debit transactions in any order of its choosing, but also, critically, that the high-to-low posting order could cause Swift to incur more overdraft fees on his BancorpSouth account. In his Response, Swift does not cite any evidence disputing that BancorpSouth made these dispositive

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damages). Swift's remaining claims are: breach of contract, unconscionability, unjust enrichment, and violation of the Arkansas Deceptive Trade Practices Act ("ADTPA").

<sup>5</sup> A summary judgment order in a certified and properly noticed class action binds the class as a whole. *See Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012). Swift, as representative of a certified class, will bind all members of the certified class **once it is properly noticed**. Plaintiff does not dispute that, if his claims fail, so will all of the claims for the remaining class members. *Antenor v. D&S Farms*, 39 F. Supp. 2d 1372, 1377 (S.D. Fla. 1999); (DE #2999-1 at 2-3; DE #3043 at 2-3, 22.) At this time BancorpSouth is still unable to identify the members of the certified *Swift* class as adopted by the Court in its Order on Class Certification, (DE #2673), and notice has not been sent to the certified class. This Court's rulings are not binding on the absent class members unless and until they receive adequate notice. *Juris*, 685 F.3d at 1294.

disclosures. Paying more overdraft fees than he might have paid under another posting order, however, is precisely the "harm" of which Swift now complains. Further, although Swift's counsel urges this Court to ignore Swift's own sworn testimony, the undisputed record evidence is that Swift understood BancorpSouth's disclosures regarding posting order and the corresponding effects on account holders upon reading them. Finally, Swift has not identified any evidence demonstrating bad faith by BancorpSouth – a necessary element of each of Swift's theories. The fact that one of the reasons BancorpSouth posted debits high-to-low was to increase non-interest revenue is not evidence of bad faith, as a matter of law. Swift's lack of evidence is fatal to his claims; BancorpSouth is therefore entitled to summary judgment on each remaining claim.

**A. Swift Cannot Prove A Breach of Contract Without Evidence of Breach or Bad Faith.**

Swift argues that BancorpSouth is not entitled to summary judgment on his breach of contract claim because BancorpSouth acted in bad faith. He fails, however, to point to any provision of the Deposit Agreement that BancorpSouth has breached. In fact, Swift admits in his Response that the Deposit Agreement gave BancorpSouth discretion to post debit transactions in high-to-low order throughout the Class Period -- implicitly admitting that BancorpSouth has not breached any provision of that agreement. (DE #3043 at 4, 7.) Swift tries to save his breach of contract claim by asserting a breach of the implied covenant of good faith and fair dealing, arguing that evidence of bad faith, alone, is enough to state a breach of contract claim. This gambit inevitably fails because: (1) a violation of the duty of good faith and fair dealing is not an independent cause of action under Arkansas law (which Swift admits); (2) Swift has not cited a single piece of evidence demonstrating that BancorpSouth violated any provision of the Deposit Agreement; and (3) Swift has not identified any evidence of BancorpSouth's alleged bad faith. Accordingly, the Court should dismiss Swift's contract claim.

*1. Swift Has Not Identified Any Breach of the Deposit Agreement.*

Although he concedes in his Response that his claim must be premised on breach of "an express contractual provision," Swift never identifies a single provision of any contract that BancorpSouth has breached, much less provides evidence of any such breach. (DE #3043 at 7.) Indeed, Swift testified that the Deposit Agreement expressly authorizes BancorpSouth to post debits in any order, including high-to-low. (DE #2999-3 at ¶¶ 17, 21, 29.) Swift cites both the

Deposit Agreement and the Account Information Statement in his Response and admits that these documents give BancorpSouth discretion to post in high-to-low order. (DE #3043 at 5.) Swift further does not identify any other provision of the Deposit Agreement that BancorpSouth breached, or point to any evidence that any specific provision was breached.

Because breach is an essential element of a breach of contract claim, and Swift has not identified a single contractual provision BancorpSouth breached, Swift's contract claim fails as a matter of law. *See, e.g., Burger King Corp. v. Weaver, M-W-M, Inc.*, 169 F.3d 1310, 1318 (11th Cir. 1999) (claim for breach of the implied covenant failed as a matter of law because plaintiff cited no contract provision that was breached); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1429 (11th Cir. 1990) (same); *cf. Keys Jeep Eagle v. Chrysler Corp.*, 897 F. Supp. 1437, 1443 (S.D. Fla. 1995) (granting summary judgment on contract claims where "Plaintiffs do not identify a single contract term or provision that [defendant] allegedly breached"). BancorpSouth should be granted summary judgment on Swift's breach of contract claim.

2. *Swift Concedes that Good Faith and Fair Dealing is Not an Independent Claim.*

There is no dispute: Arkansas law does not recognize an independent claim for breach of the implied covenant of good faith and fair dealing absent a breach of the underlying contract. *Arkansas Research Med. Testing, LLC v. Osborne*, 2011 Ark. 158 (2011); *see also Preston v. Stoops*, 373 Ark. 591, 285 S.W.3d 606 (Ark. 2008); *W. Memphis Adolescent Residential, LLC v. Compton*, 2010 Ark. App. 450, 374 S.W.3d 933 (Ark. App. 2010) (holding that Arkansas law does not recognize a separate cause of action for breach of contractual duties of good faith and fair dealing); *Country Corner Food & Drug, Inc. v. First State Bank*, 332 Ark. 645, 966 S.W.2d 894 (Ark. 1998) ("[t]he fact that every contract imposes an obligation to act in good faith does not create a cause of action for a violation of that obligation, and this court has never recognized a cause of action for failure to act in good faith.") Arkansas courts treat a breach of the implied covenant as "nothing more than **evidence of a possible breach** of the contract between the parties." *Arkansas Research*, 2011 Ark. at \*6 (emphasis added).

Plaintiff improperly stretches the language of *Arkansas Research* to suggest that BancorpSouth's alleged breach of good faith and fair dealing independently proves a breach of contract claim. This suggestion ignores the central holding of *Arkansas Research*: a plaintiff must demonstrate that the defendant took actions inconsistent with a specific contractual

provision. Evidence of a breach of the covenant of good faith and fair dealing cannot, on its own, state a claim for breach of contract where no provision has been shown to have been breached. *Arkansas Research, supra* at \*6. Indeed, Swift acknowledges the limitations on his good faith and fair dealing theory when he states that Arkansas law provides a "claim for breach of the implied duty of good faith and fair dealing **premised on an express contractual provision.**" (DE #3043 at 7 (emphasis added).) As such, even if Swift could demonstrate bad faith, such evidence is not sufficient to state a breach of contract claim.

3. *Swift Has Not Presented Any Evidence That BancorpSouth Acted in Bad Faith.*

Although still unclear, Swift appears to contend that he can get around his failure to show a breach of contract because BancorpSouth did not "discharge its discretionary contractual rights in good faith." (DE #3043 at 4.) Swift's entire breach of contract claim therefore hinges on his unsupported argument that BancorpSouth's alleged bad faith amounts to a breach of contract. (*Id.* at 5.) As explained above, Swift's theory does not hold up because he cannot prove, as he must, that BancorpSouth breached the Deposit Agreement. Even if Swift's proposed end-run around the elements of a contract claim were permissible, however, he also has failed to show bad faith.

In order to show bad faith, Plaintiff must present evidence that BancorpSouth's conduct was "dishonest, malicious or oppressive." *Williams v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2573196, \*3 (E.D. Ark. June 22, 2010) (quoting *Unum Life Ins. Co. of Am. v. Edwards*, 362 Ark. 624, 628, 2010 S.W.3d 84, 87 (2005)). Plaintiff has not presented any such evidence, and cannot. The record contains no evidence that BancorpSouth objectively or subjectively acted in bad faith by posting debit transactions in high to low order.

Swift's purported evidence of bad faith is that BancorpSouth adopted high-to-low posting for debit transactions purely for financial gain. (DE #3043 at 6-7.) This contention is false. The undisputed record evidence is that increasing non-interest revenue was **one of several** reasons BancorpSouth adopted high-to-low posting. BancorpSouth representatives testified that it also adopted this posting order based on the Bank's understanding that its customers prefer that larger debits be paid first, because high-to-low posting is easier for customers to understand than the Bank's previous approach, and because posting high-to-low is efficient internally. (DE #2999-3 at ¶ 4); (Response to Stmt. of Facts at ¶ 100).

Furthermore, seeking to increase revenue is neither bad faith nor unconscionable. *See, e.g., Bennett v. Behring Corp.*, 466 F. Supp. 689, 699 (S.D. Fla. 1979) (“A contract, fair when entered into, does not thereafter become unconscionable simply because a great many other persons enter into identical contracts with defendant thereby increasing defendants’ profits”); *California Grocers Assn. v. Bank of America*, 22 Cal. App. 4<sup>th</sup> 205, 216 (Cal. App. 1 Dist. 2012) (citing *Bennett v. Behring*) (“The huge volume of [deposit item returned check fees] and [ ] consequent cumulative profit to Bank of America – is inconsequential.”) Indeed, Swift’s own expert testified that there is nothing wrong with a bank seeking to increase revenue through overdraft fees. (Response to Stmt. of Facts at ¶ 101).

Swift also appears to contend that BancorpSouth violated the covenant of good faith and fair dealing because “the consequences of BancorpSouth's exercise of discretion were not foreseeable.” (DE #3043 at 7.)<sup>6</sup> Swift has not presented any evidence regarding whether his alleged injury was foreseeable, or that BancorpSouth concealed the potential harm of which he now complains. The “consequences” Swift contends were not foreseeable were the increased overdraft fees he incurred on his BancorpSouth account. Yet this precise consequence was specifically disclosed to him in the controlling account documents. (DE #2999-3 at ¶¶ 11, 17, 19.) BancorpSouth plainly disclosed its discretionary high-to-low posting policy during the entire class period. (*Id.* at ¶ 11). For example, the 2003 Account Information Statement states:

When multiple debit transactions are presented for payment from your account on a given banking day, your account may be debited in various categories of transactions in a descending order by the greatest dollar amount debit transaction to the least dollar amount debit transaction. This may result in more items being returned and/or paid into overdraft, thus causing you to incur fees for each such item.

(Ex. 13 to Plaintiff’s Motion for Class Certification; DE #2274-13.)<sup>7</sup> Swift received these account documents, agreed to be bound by them, and understood their terms once he read them. (DE

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<sup>6</sup> Plaintiff improperly applies the concept of foreseeability in this context: the cases he cites for this proposition pertain to the requirement of foreseeability in negligence cases. *Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (Ark. 1983) (employment agency's negligence led to an abduction and rape); *Stacks v. Ark. Power & Light Co.*, 299 Ark. 136, 771 S.W.2d 754 (Ark. 1989) (power company's negligence led to injuries from sagging overhead power line).

<sup>7</sup> Similarly, the 2007 Deposit Account Terms and Conditions Agreement states: “If more than one item or order is presented for payment against this account on the same day and the available balance of this account is insufficient to pay them all, we may pay any of them in any

#2999-3 at ¶¶ 13, 23, 25, 29, 33.) Swift cannot now claim that additional overdraft fees were not foreseeable.

**B. Swift's Unconscionability Claim Fails As A Matter of Law.**

Swift's unconscionability claim fails because Arkansas law does not recognize such a claim and because Swift cannot point to any evidence that BancorpSouth's posting policies were unconscionable.<sup>8</sup> Moreover, in his Response, Plaintiff improperly requests relief not included in his Second Amended Complaint. For these reasons, the Court should award summary judgment on the unconscionability claim.

1) *Unconscionability is Not an Affirmative Cause of Action Under Arkansas Law.*

Unconscionability is not an affirmative right of recovery or private right of action under Arkansas law. *See Hughes v. Wet Seal Retail, Inc.*, 2010 U.S. Dist. LEXIS 121710, \*5 (W.D. Ark. Nov. 16, 2010) (interpreting Arkansas law) (recognizing that unconscionability is a state law contract defense). Because Arkansas courts do not recognize unconscionability as anything other than a defense to a contract claim, BancorpSouth is entitled to summary judgment on Plaintiff's unconscionability count. *Id.* Swift has never pointed to a single Arkansas court that has allowed an unconscionability claim to proceed.<sup>9</sup>

2) *Plaintiff Improperly Requests "Supplemental" Relief Not Originally Included in his Complaint.*

In his Response, Plaintiff requests, for the first time, damages as "supplemental relief" arising out of his unconscionability claim. (DE #3043 at 9.) Plaintiff's Second Amended

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order we choose, even if the order we choose results in greater insufficient funds fees than if we had chosen to pay them in some other order." (DE #3043-16).

<sup>8</sup> Contrary to Plaintiff's assertion, BancorpSouth has not ignored the Court's motion to dismiss ruling which allowed Swift to proceed with his unconscionability claim. (DE #305 at 26-27). BancorpSouth acknowledges the Court's earlier order, but respectfully notes that neither the Court's Order Denying Defendants' Motions to Dismiss (DE #1305) nor its Order Ruling on Omnibus Motion to Dismiss (DE #305) specifically addressed Arkansas law. The Court has not yet analyzed whether Arkansas case law recognizes unconscionability as an affirmative cause of action.

<sup>9</sup> Swift's case law on this point is not from Arkansas, and is not persuasive. (DE #3043 at 9-10.) *See, e.g., Williams v. First Government Mortg. and Investors Corp.*, 225 F.3d 738 (D.C. Cir. 2000) (appellate court remanded common law unconscionability claim for clarification); *Premier Digital Access, Inc. v. Central Telephone Co.*, 360 F.Supp.2d 1161 (D. Nev. 2005) (granting defendant's motion for summary judgment on unconscionability claim).

Complaint contains no such request. (DE #994.) In requesting this "supplemental" relief for the first time and citing Ark. Code. Ann. § 16-111-103(a) and 28 U.S.C. §§ 2201-2202 for the first time, Swift seeks at this late date to tack a request for damages onto his unconscionability claim. Swift essentially seeks to amend his complaint via his response brief and without leave. This request is improper under the Federal Rules of Civil Procedure and should be denied. *See, e.g., Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 325 F.3d 1274 (11th Cir. 2003) (claim not pled in second amended complaint could not be raised at summary judgment stage); *Palmer v. Alberston's, LLC*, 2010 WL 785652 (N.D. Fla. March 3, 2010) (holding that Plaintiff cannot introduce a claim for the first time in his response to defendant's motion for summary judgment); *Burger King Corp. v. Hinton, Inc.*, 203 F.Supp.2d 1357, 1367 (S.D. Fla. 2002) ("[t]he Court cannot award damages on claims outside of the pleadings").

3) *Swift Has Cited No Evidence Demonstrating That the Challenged Practices Are Unconscionable.*

As BancorpSouth discussed at length in its Motion, the undisputed facts are insufficient to demonstrate unconscionability. Swift has failed to satisfy his evidentiary burden to show that BancorpSouth's posting practices are procedurally or substantively unconscionable.

Procedural unconscionability focuses on the manner in which the contract was entered. *Gobeyn v. Travelers Indemnity Co.*, 2009 U.S. Dist. LEXIS 88824 (E.D. Ark. Sept. 24, 2009). Swift had full access to information on his account through multiple channels, and does not allege that he was misled in opening his account. (DE #2999-3 at ¶¶ 20, 31.) As described above, the undisputed facts show that BancorpSouth's challenged practices were fully disclosed to Plaintiff and expressly authorized in the Deposit Agreement. (*Id.* at ¶¶ 11, 13, 14, 17-19.) Plaintiff could have discovered at any time that he could incur additional overdraft fees as a result of the high-to-low posting order, as this precise consequence was specifically disclosed to him in the controlling account documents. (DE #2999-3 at ¶ 11, 17, 19.) Swift received these account documents and understood their terms once he read them. (DE #2999-3 at ¶¶ 13, 23, 25, 29, 33.)<sup>10</sup> Because both BancorpSouth's discretion to post in any order it chose and the potential

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<sup>10</sup> In arguing that BancorpSouth's practices are procedurally unconscionable, Swift's counsel takes the remarkable step of disregarding their own client's sworn testimony. (DE #3043 at 11.) Swift's undisputed testimony is that the Deposit Agreement was clear and understandable.

for such order to result in more overdraft fees were explicitly disclosed in the governing account documents, Plaintiff cannot demonstrate procedural unconscionability.

In order to show substantive unconscionability, Swift must present evidence that the terms of the contract are "harsh, one-sided, or oppressive." *See Gobeyn*, 2009 U.S. Dist. LEXIS 88824 at \*9. "[S]ubstantive unconscionability concerns the terms of the agreement and whether those terms are so one-sided as to shock the conscience." *Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008 U.S. Dist. LEXIS 27668, \*38 (E.D. Ark. March 25, 2008). Indeed, just because a contract may be more costly for one party in the long run than he expected does not mean its terms are unconscionable. *See, e.g., Orr v. Black & Furci, P.A.*, 876 F.Supp. 1270 (M.D. Fla. 1995) (reasonableness of contract evaluated at the time the contract is entered into); *Bennett v. Behring Corp.*, *supra* at 699.

Simply put, proving substantive unconscionability is a high bar, and Swift has not met this standard. Swift claims that BancorpSouth's high-to-low posting order harmed him by causing additional overdraft fees. As stated, this precise risk was explicitly disclosed in the governing account documents, and therefore cannot form the basis of an unconscionability claim. Further, a high-to-low posting order is neither shocking nor exceptional, and is routinely used throughout the banking industry. (Compl. ¶¶2-4); (Response to Stmt. of Facts at ¶ 102); (DE #3035-2 at 3.) Plaintiff's own expert testified that failing to post in chronological order does not violate any banking rules or regulations. (Response to Stmt. of Facts at ¶ 102.) Indeed, BancorpSouth's high-to-low posting order is consistent with federal banking regulations and provisions of the UCC and Arkansas law. (DE #2999-1 at 10-11.)<sup>11</sup>

Similarly, the fact that BancorpSouth was motivated in part to increase revenue has no bearing on Plaintiff's unconscionability argument. As stated above, seeking to increase revenue is not evidence of bad faith or unconscionability. *See, e.g., Bennett, supra* at 699; *California Grocers Assn., supra* at 216. "In fact, Parties to business transactions are required to act justly and honestly, but they are not required to act unselfishly or altruistically." *Whitley v. Irwin*, 465 S.W.2d 906, 910-11 (Ark. 1971) (citations omitted). To that end, Swift's own expert testified

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<sup>11</sup> Plaintiff is correct that these provisions apply to paper checks. However, it would be inconsistent and illogical to deem high-to-low posting of debit card transactions unconscionable when state and federal law both specifically approve the same order for check transactions.

that there is nothing wrong with a bank seeking to increase revenue through overdraft fees. (Fried Dep. at 59:2-12.)

**C. Swift Has No Evidence Supporting His Unjust Enrichment Claim.**

Plaintiff fails to cite a single piece of evidence in support of his unjust enrichment claim; therefore, he cannot meet his evidentiary burden and defeat summary judgment. Plaintiff's entire argument regarding unjust enrichment in the Response is that he can bring his unjust enrichment claim as an alternative to his contract-based claims. BancorpSouth does not dispute this point, and agrees that Arkansas law permits alternative pleading. (DE #3043 at 16.)<sup>12</sup> This pleading concept does not change that fact that Swift has presented no evidence supporting any element of an unjust enrichment claim under Arkansas law.

In order to prove an unjust enrichment claim under Arkansas law, a plaintiff must demonstrate that the defendant received something of value, which he or she is not entitled to, and which he or she must restore. *El Paso Production Co. v. Blanchard*, 269 S.W.3d 362, 372 (Ark. 2007) (“To find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore. There must also be some operative act, intent, or situation to make the enrichment unjust and compensable.”); *see also Kistler v. Stoddard*, 688 S.W.2d 746, 747 (Ark. App. 1985) (“The doctrine of unjust enrichment is an equitable one, providing that one party should not be allowed to benefit at the expense of another because of an innocent mistake or unintentional error”). Swift has failed to identify evidence of any of these elements. In the absence of any supporting evidence, Swift's unjust enrichment claim must be dismissed.

**D. Swift's ADTPA Claim Likewise Fails For Lack of Evidence.**

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<sup>12</sup> Swift could only prevail on **either** a breach of contract claim **or** an unjust enrichment claim – **not** both. Arkansas law does not recognize an unjust enrichment cause of action by parties to a written contract. *Adkinson v. Kilgore*, 970 S.W.2d 327 (Ark. Ct. App. 1998). It is undisputed that a written contract exists between Swift and BancorpSouth; therefore, Swift's unjust enrichment claim fails unless the contract is declared unconscionable and void. Because Swift's unjust enrichment claim is wholly dependent on his allegations of unconscionability, the failure of his unconscionability claim (outlined herein) necessarily leads to the dismissal of Swift's unjust enrichment claim. Even if the Deposit Agreement were declared unconscionable, Swift could proceed with only an unjust enrichment claim -- his breach of contract claim would fail as a matter of law in the absence of a written contract.

BancorpSouth is entitled to summary judgment on Plaintiff's ADTPA claim because BancorpSouth acted within the ADTPA's safe harbor provision. In addition, summary judgment on the ADTPA claim is warranted because Plaintiff has not presented any record evidence proving the required elements of unconscionability or deception to satisfy his ADTPA claim.

1) *BancorpSouth's Practices Are Not Prohibited by the ADTPA*

Swift's ADTPA claim fails because the challenged policies are not the type of conduct prohibited by the ADTPA. *See Baptist Health v. Murphy*, 226 S.W.3d 800, 811 (Ark. Sup. Ct. 2006). Swift argues that BancorpSouth somehow engaged in "deceptive acts" by allegedly failing to disclose its posting practice to customers. As with all of his claims, Swift has not pointed to record evidence to support this contention.<sup>13</sup> The undisputed facts clearly show that BancorpSouth's challenged practices were fully disclosed to Swift and expressly authorized in the Deposit Agreement. (DE #2999-3 at ¶¶ 11, 13, 14, 17-19.) Swift explicitly agreed to the Deposit Agreement. (*Id.* at ¶ 29.) Most significantly Swift testified that he understood the disclosures as soon as he read them. (DE #2999-3 at ¶ 25.) Because the high-to-low posting order and its potential effects were fully disclosed in the Deposit Agreement, this practice was not deceptive or unconscionable as a matter of law.<sup>14</sup>

2) *BancorpSouth's Conduct Falls Within the Safe Harbor Provision of the ADTPA.*

Plaintiff does not challenge the fact that BancorpSouth's posting order is permitted by Article 4 of Arkansas' UCC.<sup>15</sup> (DE #3043 at 17-18.) All that is required by the ADTPA's safe harbor provision is that the practice be permitted under the laws of Arkansas or the United States. *See Ark. Code Ann. § 4-88-101(1) and (3)*. The safe harbor analysis should stop there.

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<sup>13</sup> Swift's Response states that in 2003 "BancorpSouth made the conscious decision not to disclose the change in posting order and maintained that policy throughout the class period," but does not cite to the record for this assertion. (DE #3043 at 19.) This is typical of Swift's Response; similar unattributed statements of "facts" appear frequently in the Response.

<sup>14</sup> In this section, too, Swift's counsel attempts to dismiss Swift's sworn testimony while failing to cite any other record evidence. (DE # 3043 at 20.) Again, Swift testified that he understood BancorpSouth's posting order upon reading the Deposit Agreement. (DE #2999-3 at ¶ 25.)

<sup>15</sup> Article 4 of the Arkansas UCC provides that "items may be accepted, paid, certified or charged to the indicated account of [the bank's] customer in any order" suiting the bank. UCC § 4-303(b); Ark. Code Ann. § 4-4-3.

Nonetheless, Plaintiff maintains that because both the cited Arkansas UCC provision and the OCC Opinion specifically approving high-to-low posting apply only to paper check posting, they do not support posting other transactions in high to low order. *OCC Posting Opinion*, 2002 WL 32639293 at \*3; (DE # 3043 at 17.) As stated in connection with Plaintiff's unconscionability claim, it would be illogical to deem high-to-low posting of debit card transactions unconscionable when state and federal law both **specifically approve** the same order for check transactions. BancorpSouth adopted a single posting order for all debit transactions, and chose an order that had been approved by state and federal authorities. To now deem this order unconscionable violates the spirit of the ADTPA safe harbor. Further, although the OCC Opinion is not binding, it is certainly persuasive and provides guidance to non-national banks. Indeed, one of BancorpSouth's Rule 30(b)(6) witnesses testified that the Bank considered state and federal guidelines in determining BancorpSouth's overdraft policies and overdraft fee amount. (Response to Stmt. of Facts at ¶ 103.) Swift has not cited any authority for the proposition that the ADTPA's safe harbor provision should be interpreted as narrowly as he argues.<sup>16</sup>

**E. Record Evidence Supports BancorpSouth's Ratification and Waiver Defenses.**

The undisputed facts are that Swift voluntarily initiated all transactions which caused his account to be overdrawn. (DE # 3035 at 4; DE #2999-3 at ¶¶ 35, 48-49, 50.) Swift knowingly continued to overdraw his account and incur overdraft fees after he received multiple notices of overdraft fees and disclosures regarding BancorpSouth's overdraft policies. (DE #2999-3 at ¶¶ 40, 48-49.) Further, Swift could have, with minimal inquiry, learned of BancorpSouth's posting

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<sup>16</sup> The safe harbor provides that the ADTPA does not apply to practices that are "**permitted** under laws administered by . . . any regulatory body or officer acting under statutory authority of this state or the United States." Ark. Code Ann. § 4-88-101(3) (emphasis added). This language implies a permissive standard, rather than if stated more restrictively, e.g. practices that are "specifically authorized" by a federal or state statute. *See, e.g., DePriest v. AstraZeneca Pharmaceuticals, L.P.*, 351 S.W.3d 168, 2009 Ark. 547 (Ark. 2009) (upholding trial court's ruling that ADTPA's safe harbor provision applied where challenged promotional and advertising activity was supported by FDA-approved labeling); *Cytyc Corp. v. Neuromed. Sys., Inc.*, 12 F.Supp. 2d 296, 301 (S.D.N.Y. 1998) (advertising statements that "comport substantively" with FDA-approved labeling "are neither false nor misleading" as a matter of law).

order policy far earlier than he did, simply by reading his account documents. (DE #2999-3 at ¶¶ 21, 25-27, 29-30, 32.)<sup>17</sup> Plaintiff testified he would have known and understood BancorpSouth's posting order as far back as 2006 if he had just read the disclosures BancorpSouth sent him. (*Id.* at ¶¶ 13, 26, 36.) Despite these facts, Plaintiff never contacted the bank or complained about these practices. (DE #2999-3 at ¶¶ 37-38). These undisputed facts prove ratification and waiver and entitle BancorpSouth to summary judgment on this basis alone.<sup>18</sup>

### III. CONCLUSION

The issue presented in this case is whether Swift can recover overdraft fees from BancorpSouth by challenging BancorpSouth's policy of posting debit transactions within each banking day from highest to lowest dollar value, despite the fact that BancorpSouth disclosed throughout the Class Period that its posting policy could lead to more overdraft fees than might occur under some other posting order. Swift has failed wholly to carry his burden to point to record evidence that supports the elements of his claims. The undisputed evidence is that BancorpSouth disclosed at all relevant times that it could post debit transactions in any order of its choosing, that the order it chose could result in more overdraft fees, and that Swift testified unequivocally that he understood these disclosures upon reading them. Under this state of facts, Swift cannot prove the elements of his contract, quasi-contract, or ADPTA claims. Because it is undisputed that BancorpSouth complied with the Deposit Agreement and fully disclosed the very outcome that Swift is now complaining about, BancorpSouth is entitled to summary judgment on all of Swift's remaining claims.

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<sup>17</sup> The knowledge element of the waiver defense is based on what Swift knew or should have known about BancorpSouth's high-to-low posting order. *United Forest Products Co. v. Baxter*, 452 F.2d 11 (8th Cir. 1971) (knowledge requirement for waiver may be actual or constructive); *In Re NWFEX, Inc.*, 267 B.R. 118 (Bankr. W.D. Ark. June 22, 2001) (actual or constructive knowledge is an element of waiver).

<sup>18</sup> BancorpSouth incorporates herein as if fully set forth both its summary judgment motion and its arguments and facts cited in support of its response to Plaintiff's summary judgment motion regarding these defenses. (DE #3035.)

Respectfully submitted this 10th day of December, 2012.

**PARKER, HUDSON, RAINER & DOBBS LLP**

/s/ Eric Jon Taylor

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record entitled to receive service.

This 10th day of December 2012.

/s/ Eric Jon Taylor  
Eric Jon Taylor

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT )  
OVERDRAFT LITIGATION )

MDL No. 2036 )  
Fourth Tranche )

THIS DOCUMENT RELATES TO: )

*Shane Swift v. BancorpSouth, Inc.*,<sup>1</sup> )  
S.D. Fla. Case No. 1:10-cv-23872-JLK )

BANCORPSOUTH'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL  
FACTS TO BE TRIED

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<sup>1</sup> BancorpSouth, Inc. is not a proper defendant in this matter. Counsel for Swift and BancorpSouth Bank discussed the proper BancorpSouth entity to name in this matter in 2010, and Swift properly identified the defendant herein as BancorpSouth Bank in his Second Amended Complaint (Doc. 994).

Pursuant to Local Rule 56.1(a), Defendant BancorpSouth Bank ("BancorpSouth") responds and objects to Plaintiff Shane Swift's Statement of Facts to Be Tried and Response to BancorpSouth Bank's Statement of Material Facts (DE #3043-1) ("Plaintiff's Statement of Facts").

### **General Objections**

BancorpSouth states the following general objections to Swift's numbered Response to BancorpSouth's Statement of Material Facts (Paragraphs 1 through 67 of DE #3043-1) and Swift's numbered Statement of Material Facts to be Tried (Paragraphs 68 through 99 of DE #3043-1). BancorpSouth does not respond individually to the numbered paragraphs of Swift's Response to BancorpSouth's Statement of Material Facts: all of BancorpSouth's statements are confirmed by the evidence relied on and cited in support of each statement, and BancorpSouth incorporates all of the testimony and documents previously cited herein.

BancorpSouth objects to all of the numerous statements by Swift that are not supported by citations to record evidence. Local Rule 56.1(a)(2) provides that a statement of material facts must "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." Because these "facts" are not supported by a citation to the record or otherwise do not comply with LR 56.1(a)(2), the Court should not consider them.

BancorpSouth objects to Swift's multiple responses which state that "Plaintiffs dispute that the cited testimony supports the statement," or similar language. (*See, e.g.*, Responses 4, 21-22, 25-27, 29, 32-33, 36-40, 43, 49, 52-53, 63.) These Responses by Swift are argument and/or legal conclusions, and therefore inappropriate in a statement of facts and should not be considered by the Court. *Segal v. Rickey's Restaurant and Lounge, Inc.*, 2012 WL 2393769, \*8 (S.D. Fla. June 25, 2012) ("Defendant improperly made legal argument in its statement of facts. Therefore, the Court will only consider legal arguments raised in the [summary judgment] memorandum."); *U.S. v. All Funds in the Account of Property Futures, Inc.*, 820 F.Supp.2d 1305 (S.D. Fla. 2011) (refusing to consider legal conclusions in statement of undisputed facts in its ruling on summary judgment). Additionally, these Responses often do not cite any record evidence in support of Swift's contentions. The record evidence cited by BancorpSouth fully supports each of the Statements to which these Responses refer, and BancorpSouth relies on the evidence cited.

Similarly, BancorpSouth objects to Swift's Responses and Statements which misstate the

record or misleadingly describe the evidence cited.

BancorpSouth hereby incorporates each of these general responses and objections into its specific responses and objections set out below whether or not BancorpSouth refers to such general objection in its response to a specific Statement. Nothing contained herein is an admission of the relevance or admissibility of any Statement or Response submitted by Plaintiff.

**BancorpSouth's Response to Plaintiff's Statement of Material Facts to be Tried**

BancorpSouth responds to the numbered Statements as follows:

**Response to Statement No. 68:** BancorpSouth disputes this Statement. BancorpSouth does not "manipulate" its customers' debit transactions. BancorpSouth receives debit transactions at different times through the day in no particular order. After all transactions are captured and the entire system is balanced, BancorpSouth sorts the transactions in a predetermined sequence and posts transactions to accounts. BancorpSouth must impose some rules and an order for posting transactions in order to process these transactions. (DE #3035 at 4.) In 2003 BancorpSouth adopted a posting order that posts all credits, then posts debit transactions in order of highest dollar amount to lowest dollar amount. (DE #2999-3 at ¶¶ 4-5). BancorpSouth adopted this posting order to, among other reasons, increase non-interest revenue, post first the transactions BancorpSouth believes its customers consider more important, streamline the posting process, and make the posting order easier for customers to understand. (DE #2999-3 at ¶ 4.)

**Response to Statement No. 69:** BancorpSouth admits that in 2002 it retained EPG to consult on various areas of revenue enhancement. BancorpSouth admits that it adopted some of EPG's recommendations concerning posting order starting in 2003. However, BancorpSouth did not adopt all of EPG's recommendations. (BancorpSouth Bank's Responses to Plaintiff's First Set of Interrogatories, attached hereto as Exhibit 1, at 11-12; Transcript of Deposition of Jeff Jagers taken on August 15, 2012 ("Jagers Dep.")<sup>2</sup> at 88:15-89:20). BancorpSouth also states that NSF fees are not at issue in this case, therefore any increase in NSF fee revenue is irrelevant. (Swift's Second Amended Complaint, DE # 994 at 1). BancorpSouth denies that maximizing the number of overdraft fees was the "fundamental reason" for adoption of the high-to-low posting order. (DE # 2999-3 at ¶ 4; Transcript of Deposition of Paul Carrubba taken on October 9, 2012

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<sup>2</sup> A copy of the relevant portions of the Jagers Dep. is attached hereto as Exhibit 2.

("Carrubba Dep.")<sup>3</sup> at 17-2-18:2.)

**Response to Statement No. 70:** This Statement is not relevant to any element of any of Swift's remaining claims. BancorpSouth further disputes this statement. BancorpSouth denies that this Overdraft Payment Service was "secret;" BancorpSouth fully disclosed that it could pay items into overdraft and charge a corresponding overdraft fee. (DE #2999-3 at ¶¶ 15-18.) Since 2003, BancorpSouth has provided account holders an overdraft payment service with a varying overdraft limit. Under this service, BancorpSouth provides an amount over and above the customer's available balance for which BancorpSouth will authorize payment of debit transactions. (*Id.* at ¶6.) At all times since BancorpSouth started its Overdraft Payment Service, a BancorpSouth customer has had the option to remove the Overdraft Payment Service from his account on request. (*Id.* at ¶ 10).

**Response to Statement No. 71:** BancorpSouth objects to the first sentence of this Statement because it is not supported by a citation to evidence as required by L.R. 56.1(a)(2); the Court therefore should not consider it. BancorpSouth further objects to the first sentence of this Statement because it states legal conclusion and legal argument which must be disregarded. In response to the second sentence of this Statement, BancorpSouth refers to its Response to Statement No. 70.

**Response to Statement No. 72:** BancorpSouth states that each referenced document speaks for itself, and states that this Statement is not relevant to any element of any of Swift's remaining claims.

**Response to Statement No. 73:** BancorpSouth states that the referenced testimony speaks for itself, and states that it is not relevant to any element of any of Swift's remaining claims. BancorpSouth refers also to its Response to Statement No. 69.

**Response to Statement No. 74:** BancorpSouth states that the referenced document speaks for itself, and states that the Statement is not relevant to any element of any of Swift's remaining claims.

**Response to Statement No. 75:** BancorpSouth states that the referenced document speaks for itself, and states that the Statement is not relevant to any element of any of Swift's remaining claims.

**Response to Statement No. 76:** BancorpSouth disputes this Statement. In response

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<sup>3</sup> A copy of the relevant portions of the Carrubba Dep. is attached hereto as Exhibit 3.

to the first sentence of this Statement, BancorpSouth refers to its Response to Statement No. 70. By way of further response, BancorpSouth agrees that the amount of an individual customer's overdraft limit at any given time (which was subject to change every month) was not disclosed, but notes that such statement is not relevant to any element of any of Swift's remaining claims: Plaintiff testified that this case is about BancorpSouth's high-to-low posting order. (Transcript of deposition of Shane Swift taken on January 18, 2012 ("Swift Dep.") at 28:5-29:16.)<sup>4</sup> BancorpSouth further states that its Overdraft Payment Service provided a beneficial service to its customers. (DE #2999-3 at ¶¶ 52-54.)<sup>5</sup>

**Response to Statement No. 77:** BancorpSouth states that each referenced document speaks for itself.

**Response to Statement No. 78:** BancorpSouth states that the referenced document and testimony speaks for itself. BancorpSouth also objects to this Statement to the extent it contains improper legal argument and legal conclusions, and should therefore be disregarded. By way of further response, BancorpSouth disputes the second sentence of this Statement. BancorpSouth plainly disclosed its discretionary high-to-low posting policy before 2008. For example, the 2003 Account Information Statement states:

When multiple debit transactions are presented for payment from your account on a given banking day, your account may be debited in various categories of transactions in a descending order by the greatest dollar amount debit transaction to the least dollar amount debit transaction. This may result in more items being returned and/or paid into overdraft, thus causing you to incur fees for each such item.

(Ex. 13 to Plaintiff's Motion for Class Certification at 1 (DE #2274-13).)

**Response to Statement No. 79:** BancorpSouth states that each referenced document speaks for itself. BancorpSouth further states that this Statement is not relevant to any element of any of Swift's remaining claims. BancorpSouth further states that it fully and regularly disclosed its discretionary posting order policy at all times during the class period. (DE #2999-3 at ¶ 11.)

**Response to Statement No. 80:** BancorpSouth objects to this Statement because it

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<sup>4</sup> A copy of the relevant portions of the Swift Dep. is attached hereto as Exhibit 4.

<sup>5</sup> In response to Swift's footnotes 1 and 2 in connection with Statement 76, BancorpSouth states that these footnotes contain improper legal argument and legal conclusions, and should therefore be disregarded. Further, to the extent that these footnotes contain statements not supported by any citation to record evidence, the Court should not consider them.

states a legal conclusion, and should therefore be disregarded.

**Response to Statement No. 81:** In response to this Statement, BancorpSouth objects to the use of the term "such items" as vague and ambiguous. BancorpSouth further states that it adopted a high-to-low posting order in 2003 for debit transactions, (DE #2999-3 at ¶ 4), and refers to its Response to Statement No. 68. BancorpSouth fully disclosed this discretionary posting policy through the entire class period. (*Id.* at ¶ 11.)

**Response to Statement No. 82:** BancorpSouth objects to this Statement because it states legal conclusions and legal argument, and should therefore be disregarded. Also, the referenced document speaks for itself.

**Response to Statement No. 83:** BancorpSouth objects to the first sentence of this Statement because it is not supported by a citation to evidence as required by L.R. 56.1(a)(2). BancorpSouth further states that the referenced document speaks for itself. Additionally, BancorpSouth objects to Swift's statement "for the first time provided," because it is unclear which part of the quoted language purportedly appeared "for the first time."<sup>6</sup>

**Response to Statement No. 84:** BancorpSouth objects to the first sentence of this Statement because it states a legal conclusion, and should therefore be disregarded. BancorpSouth further states that each referenced document speaks for itself.

**Response to Statement No. 85:** BancorpSouth objects to the first two sentences of this Statement because they are not supported by a citation to evidence as required by L.R. 56.1(a)(2). BancorpSouth further states that each referenced document speaks for itself, states that this Statement is not relevant to any element of any of Swift's remaining claims, and objects to legal conclusion and legal argument which should be disregarded.

**Response to Statement No. 86:** BancorpSouth disputes this Statement. Swift testified he could see the high-to-low posting order from reading his own account statements. (DE #2999-3 at ¶¶ 21, 26, 30, 32.) BancorpSouth also objects to the use of the phrase "practice of re-sequencing": the evidence is that BancorpSouth must impose some order on transactions in order to post them, not that transactions exist in a particular order in their natural state and that BancorpSouth changes that pre-existing order. BancorpSouth also refers to its Response to

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<sup>6</sup> In response to Swift's footnote 3 in connection with Statement 83, BancorpSouth states that this footnote contains improper legal argument and legal conclusions, and should therefore be disregarded. Further, because this footnote is not supported by any citation to record evidence, the Court should not consider it.

Statement No. 68.

**Response to Statement No. 87:** BancorpSouth states that each document referenced as well as the testimony referenced speaks for itself. BancorpSouth objects to the remainder of this Statement to the extent that it states a legal conclusion, and should therefore be disregarded.

**Response to Statement No. 88:** BancorpSouth states that each document referenced as well as the testimony referenced speaks for itself. BancorpSouth further states that this Statement is not relevant to any element of any of Swift's remaining claims.

**Response to Statement No. 89:** BancorpSouth disputes this Statement. When asked about the referenced document, BancorpSouth's Gordon Lewis testified that he was not dissatisfied with the bank's ethics or treatment of customers. (Transcript of deposition of Gordon Lewis taken on May 11, 2012 ("Lewis Dep.")<sup>7</sup> at 42:8-17.) Mr. Lewis also testified that he did not recall writing this e-mail. (*Id.* at 46:13-17.) Mr. Lewis testified that he does not question BancorpSouth's high-to-low posting order because it is industry practice and "gives the customer the advantage of paying their more significant items first." (*Id.* at 46:18-47:2.) BancorpSouth further states that the document referenced speaks for itself, and states that this Statement is not relevant to any element of any of Swift's remaining claims.

**Response to Statement No. 90:** BancorpSouth disputes this Statement. BancorpSouth's Jeff Jagers testified that BancorpSouth kept records of formal customer complaints, but that records were not necessarily kept if a customer complained via a call to BancorpSouth's call center. (Transcript of Deposition of Jeff Jagers taken on October 12, 2011 ("2011 Jagers Dep.")<sup>8</sup> at 199:18-24.) BancorpSouth further states that the testimony referenced speaks for itself, and that this statement is not relevant to any element of any of Swift's remaining claims.

**Response to Statement No. 91:** BancorpSouth objects to this Statement to the extent that it states a legal conclusion, and should therefore be disregarded. BancorpSouth further states that the document referenced speaks for itself.

**Response to Statement No. 92:** BancorpSouth states that each document referenced speaks for itself. BancorpSouth further objects to this Statement because it is not supported by citation to evidence as required by L.R. 56.1(a)(2), and the Court therefore cannot consider it:

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<sup>7</sup> A copy of the relevant portions of the Lewis Dep. is attached hereto as Exhibit 5.

<sup>8</sup> A copy of the relevant portions of the 2011 Jagers Dep. is attached hereto as Exhibit 6.

Swift's Exhibit No. 27 is not an exhibit to any deposition in this case or otherwise properly put in the record before this Court. BancorpSouth further objects to this statement to the extent that it states a legal conclusion, and should therefore be disregarded.

**Response to Statement No. 93:** BancorpSouth disputes this Statement. The testimony cited contains no support for Swift's statement that "bank officers, executives and employees routinely misunderstood the Bank's posting order." In fact, the cited testimony states that the operations, call center, and debit card divisions of BancorpSouth know, for example, that there is a delay in time between the swiping of a debit card at a merchant and when that transaction is settled, because they deal with those transactions on a daily basis. (Transcript of Deposition of Derek Caswell taken on August 17, 2012 ("Caswell Dep.")<sup>9</sup> at 139-141). Mr. Caswell also testified that he cannot know what BancorpSouth employees may or may not understand about the posting process. (*Id.* at 141:4-7; 158:25-159:25). Significantly, Mr. Caswell testified that while a BancorpSouth employee might not understand all the operational aspects of BancorpSouth's posting process, "they would have the same information and be able to determine the same balance information and how that information comes across as the customer," and it is up to the customer to track his or her transactions and balance his or her account. (*Id.* at 143:12-25). Because this Statement is not supported by a citation to the record as required by L.R. 56.1(a)(2), the Court therefore should not consider it. BancorpSouth further objects to this Statement because it states a legal conclusion, and therefore should be disregarded.

**Response to Statement No. 94:** BancorpSouth disputes this Statement. The testimony cited does not say what Swift claims it says. BancorpSouth incorporates and refers to the facts cited in Response to Statement No. 93. Additionally, the testimony cited by Swift states that customers had access to the same account information as BancorpSouth employees through online banking, the call center and later, mobile banking. (Caswell Dep. at 168:1-8). Mr. Caswell testified that it is "up to the customer to know what your transactions are and to balance it out," and did not testify that that any alleged internal confusion at BancorpSouth caused misleading information to be given to customers. (*Id.* at 168:9-14; *see also* citations in support of Response to Statement No. 93). Because this Statement is not supported by a citation to the record as required by L.R. 56.1(a)(2), the Court therefore should not consider it. BancorpSouth further

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<sup>9</sup> A copy of the relevant portions of the Caswell Dep. is attached hereto as Exhibit 7.

objects to this Statement because it states a legal conclusion, and therefore should be disregarded.

**Response to Statement No. 95:** BancorpSouth states that each document referenced as well as the testimony referenced speaks for itself. BancorpSouth further states that Swift and his wife both testified that they understood, when they read the relevant disclosures from BancorpSouth, that BancorpSouth reserved the right to post debits in any order and that the posting order chosen could lead to more overdraft fees, and that they would have understood the same earlier if they had read the disclosures earlier. (DE #2999-3 at¶¶ 25, 26.) By way of further response, BancorpSouth objects to the following portion of Statement No. 95 -- ". . . and that he incurred overdraft fees as a result of BancorpSouth's practice" -- because it states a legal conclusion which should be disregarded.

**Response to Statement No. 96:** BancorpSouth states that the testimony referenced speaks for itself. BancorpSouth further states that the Statement is not relevant to any element of any of Swift's remaining claims. BancorpSouth also states that the Deposit Agreement expressly authorizes BancorpSouth to impose and deduct charges, including overdraft fees, directly from Plaintiff's account as they accrue. (DE #2999-3 at¶ 15.)

**Response to Statement No. 97:** BancorpSouth states that the testimony referenced speaks for itself. BancorpSouth further states that this Statement is not relevant to any element of any of Swift's remaining claims.

**Response to Statement No. 98:** BancorpSouth states that the testimony referenced speaks for itself. BancorpSouth further states that this Statement is not relevant to any element of any of Swift's remaining claims.

**Response to Statement No. 99:** BancorpSouth disputes this Statement. Mr. Carrubba testified that U.C.C. Section 4-303 "does not prohibit a bank from selecting any sequence it wants to post any transaction." (DE #3043-32.) The testimony referenced further speaks for itself.

**BancorpSouth's Statement of Additional Material Facts**

100. BancorpSouth adopted a high-to-low posting order for multiple reasons, including the Bank's understanding that customers prefer to have their larger transactions be paid first, because high-to-low posting is easier for customers to understand than the Bank's previous approach, because high-to-low posting is more efficient, and because it would increase non-

interest revenue. (Carrubba Dep. at 17:2-18:2; DE #2999-3 at ¶ 4).

101. A bank's goal of increasing revenue through overdraft fees does not violate any state or federal law. (Transcript of deposition of Steven Fried taken on October 11, 2012 ("Fried Dep.")<sup>10</sup> at 59:2-12.)

102. A high-to-low posting order of debit transactions is routinely used throughout the banking industry and does not violate any banking rules or regulations. (Carrubba Dep. at 51:11-52:6); Fried Dep. at 111:5-112:5.)

103. BancorpSouth considered state and federal guidelines in determining its overdraft policies and overdraft fee amount. (Transcript of deposition of Michael Lindsey taken on May 10, 2012 ("Lindsey Dep.")<sup>11</sup> at 190:17-18.)

104. Plaintiff testified that this case is about BancorpSouth's high-to-low posting order. (Swift Dep. at 28:5-29:16.)

Respectfully submitted this 10th day of December, 2012.

**PARKER, HUDSON, RAINER & DOBBS LLP**

*/s/ Eric Jon Taylor*

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<sup>10</sup> A copy of the relevant portions of the Fried Dep. is attached hereto as Exhibit 8.

<sup>11</sup> A copy of the relevant portions of the Lindsey Dep. is attached hereto as Exhibit 9.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record entitled to receive service.

This 10th day of December 2012.

/s/ Eric Jon Taylor  
Eric Jon Taylor

# **Exhibit 1**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT )  
OVERDRAFT LITIGATION )

MDL No. 2036 )  
*Fourth Tranche* )

THIS DOCUMENT RELATES TO: )  
*Shane Swift v. BancorpSouth, Inc.,* )  
S.D. Fla. Case No. 1:10-cv-23872-JLK )

**DEFENDANT BANCORPSOUTH BANK'S RESPONSES TO PLAINTIFF'S  
FIRST SET OF INTERROGATORIES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, defendant BancorpSouth Bank ("BancorpSouth")<sup>1</sup> hereby submits its answers and objections to Plaintiff's First Set of Interrogatories ("Interrogatories").

**GENERAL ANSWERS AND OBJECTIONS**

BancorpSouth hereby incorporates each of these general answers and objections into its specific answers and objections to each of Plaintiff's Interrogatories, whether or not BancorpSouth

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<sup>1</sup> In the definitions section of his interrogatories, Plaintiff defines "You" to refer to, "the above-named Defendant." The only defendant named in the interrogatories, however, is "BancorpSouth, Inc.," which is listed in the case style at the top of Plaintiff's Interrogatories. BancorpSouth, Inc., is not a proper defendant in this matter. Counsel for Plaintiff and Defendant discussed the proper BancorpSouth entity to name in this matter in 2010, and Plaintiff properly identified the defendant herein as BancorpSouth Bank in his Second Amended Complaint (DE # 994). BancorpSouth Bank, as the only defendant in this matter, is the entity responding to Plaintiff's interrogatories, and BancorpSouth Bank interprets any references to "Defendant" in Plaintiff's interrogatories to refer to BancorpSouth Bank.

refers to such general answers or objection in its specific answer to a specific Interrogatory.

1. BancorpSouth objects to the Interrogatories to the extent that they purport to seek information protected from disclosure by the attorney-client privilege, the work product doctrine, the joint defense or common interest privilege, or any other privilege, immunity, or exemption from disclosure.

2. BancorpSouth objects to the Interrogatories to the extent they call for the disclosure of information prohibited or otherwise protected from disclosure by any laws or regulations of any State or the United States.

3. BancorpSouth objects to the Interrogatories to the extent that they seek information outside of BancorpSouth's possession, custody, or control, and/or information that is also within Plaintiff's possession, custody or control. Nevertheless, as described in BancorpSouth's Responses to Plaintiff's First Request For Production, BancorpSouth will produce Swift's monthly statements and other documents related to Swift's BancorpSouth account that BancorpSouth regularly distributes to Plaintiff, to the extent that BancorpSouth has such documents within its possession, custody, or control.

4. BancorpSouth objects to the Interrogatories to the extent that they purport to impose upon BancorpSouth any duty or obligation that is in excess of those obligations that are imposed by the Federal Rules of Civil Procedure, the Local Rules, the Court's orders, or any other applicable law or rule. In particular, BancorpSouth objects to the Interrogatories to the extent that they purport to call for information neither relevant to the claims or defenses of the parties nor reasonably calculated to lead to the discovery of admissible evidence, and/or purport to impose a duty on BancorpSouth beyond undertaking a reasonably diligent search for requested information.

5. BancorpSouth objects to the timeframe of the Interrogatories as set forth in paragraph nine

(9) of the Interrogatories on the grounds that it is overly broad, unduly burdensome, and seeks information that is neither relevant to the claims or defenses in this action nor reasonably calculated to lead to the discovery of admissible evidence. BancorpSouth further objects to the timeframe of the Interrogatories to the extent that the timeframe includes claims or damages that are barred by statutes of limitations, statutes of repose, or laches. The longest limitations period applicable to Plaintiff Swift's claims in his lawsuit is the five-year limitations period on his contract and ADTPA claims under Arkansas law. Plaintiff filed his original complaint in this matter on May 18, 2010. Therefore, any claims seeking compensation for overdraft fees assessed before May 18, 2005 are time-barred. Thus, for purposes of these answers, unless otherwise stated, BancorpSouth shall respond only for the period of January, 2005, to present (i.e., the date of these Interrogatories) in response to any requests regarding transactions which Plaintiff contends triggered compensable overdraft fees.

This limitation on BancorpSouth's responses shall not apply to responses related to information concerning the decisions regarding the order for posting electronic debit card transactions or other policies which were in effect during the alleged class period related to the posting of electronic debit card transactions. For responses related to policies or procedures related to posting order or paying debit card transactions into overdraft, or the decisions to adopt such policies, BancorpSouth shall produce documents only for the period of January, 2002 until the present (i.e., the date of these Interrogatories). The basis for this limitation is that BancorpSouth first adopted a policy of posting all transactions from highest dollar amount to lowest dollar amount in 2003, as first applied its "overdraft payment service" (as described in BancorpSouth's Responses to Plaintiff's First Set of Interrogatories) to debit card transactions in 2003.

6. BancorpSouth objects to the definition of " 'you,' 'your' and/or 'defendant' " to the extent it

purports to encompass "any affiliated entities" of BancorpSouth. BancorpSouth responds with respect to the entity named as defendant herein, BancorpSouth Bank.

7. BancorpSouth objects to the Interrogatories' definition of the term "Complaint" to the extent it purports to define that term to include any complaint pending in MDL 2036 other than the operative complaint *Swift v. BancorpSouth, Inc.*, S.D. Fla. Case No. 1:10-cv-23872-JLK.

8. BancorpSouth objects to the Interrogatories' definition of the term "Deposit Agreement" on the grounds that its reference to "all related documents which incorporate the Deposit Agreement" is vague and ambiguous. For purposes of these answers, BancorpSouth interprets the term "Deposit Agreement" to mean the "Deposit Account Terms and Conditions" attached as Exhibit A to Plaintiff's Second Amended Complaint and the "Account Information Statement" attached as part of Exhibit B to Plaintiff's Second Amended Complaint, and any earlier versions of these documents that applied to Swift's BancorpSouth account.

9. BancorpSouth objects to the Interrogatories' definition of the term "Item" on the grounds that its reference to "any debit or transaction processed through an account" is vague and ambiguous. BancorpSouth defines the term "Transaction" in the Account Information Statement. When BancorpSouth uses the term "Transaction" in these answers, BancorpSouth interprets and uses the term as it is defined in the Account Information Statement.

10. BancorpSouth objects to the Interrogatories' definition of the term "Account" to the extent that it purports to include accounts that cannot be accessed by an electronic debit card and/or on which overdraft fees cannot be incurred.

11. BancorpSouth further objects to the definition of the term "Account" on the grounds that the phrase "your institution" is vague and ambiguous. BancorpSouth responds with respect to the entity named as a defendant herein, BancorpSouth Bank.

12. BancorpSouth further objects to use of the phrase "other members of the proposed Class(es)" in the definition of the term "Account" on the grounds that no motion to certify any proposed class has been filed, that no Class has been or properly can be certified, and that members of the proposed Class(es) cannot readily be ascertained.

13. BancorpSouth objects to the Interrogatories' definition of the term "authorized" on the grounds that it is vague and ambiguous, and to the extent that it relies on the definition of "item" in the interrogatories (*see* objection number 9, above). With respect to use of the term "authorized" in connection with items initiated by use of an electronic debit card, BancorpSouth objects to any definition different from the process of authorization as specified by the rules and regulations of Visa, MasterCard, and similar networks with respect to debit cards accepted on their networks. For purposes of these answers, BancorpSouth will interpret the term "authorized" in this manner.

14. BancorpSouth objects to the Interrogatories' definition of the term "received" on the grounds that it is vague and ambiguous, and it is based on the definition of the term "authorized" (*see* objections number 13, above). BancorpSouth further objects to the definition of the term "received" to the extent that it depends on the formulation of "the date and time ... a dollar amount for the item is made available to you" because that formulation is vague and ambiguous. BancorpSouth further objects to the definition because it is inconsistent with banking practice and the operation of electronic debit card networks, and improperly conflates authorization of an electronic debit card transaction with receipt of an electronic debit card debit item for settlement of a definitive dollar amount.

15. BancorpSouth objects to the Interrogatories' definition of "overdraft fees" which includes a reference to the undefined phrase "sustained overdraft fees." BancorpSouth further objects to this definition because it does not make any distinction between charges assessed but not paid and

charges assessed and paid. For purposes of these Responses, BancorpSouth interprets the term "overdraft fees" to mean only overdraft fees incurred on consumer deposit accounts, which charges are both assessed and paid.

16. BancorpSouth objects to the Interrogatories to the extent they call for information related to any individual other than Swift, the only Plaintiff specifically named in the operative case *Shane Swift v. BancorpSouth, Inc.*, S.D. Fla. Case No. 1:10-cv-23872-JLK. BancorpSouth also objects to the definition of "Plaintiffs' account" to refer to "any bank account opened and maintained at your institution by any of the named Plaintiffs" to the extent it seeks to reach any account information related to any customer other than Swift.

17. Certain of the information sought in these Interrogatories can only be obtained and produced, as a practical matter by searching electronically stored information ("ESI") in the possession, custody, or control of BancorpSouth. A manual search for and production of such information would be unduly burdensome and oppressive, and requiring BancorpSouth manually to search for and produce the information sought in these Interrogatories would exceed the scope of its obligations under the Federal Rules of Civil Procedure. BancorpSouth is prepared to meet and confer with Plaintiff to discuss and agree upon appropriate protocols for searching and production of ESI, as specifically contemplated and required under the Federal Rules of Civil Procedure. BancorpSouth anticipates that the agreed-upon protocols will include, at a minimum, identification of custodians whose electronic records will be searched and agreed upon search terms that are reasonably designed to obtain ESI that is relevant to the parties' claims and defenses in this action. BancorpSouth provides its written responses to these Interrogatories with the understanding that it may need to supplement its responses to these Interrogatories after ESI protocols are agreed upon and the information is obtained from the ESI within BancorpSouth.

18. BancorpSouth has answered certain Interrogatories pursuant to Rule 33(d) of the Federal Rules of Civil Procedure, referring Plaintiff to documents that BancorpSouth will produce that contain information responsive to one or more of the Interrogatories. BancorpSouth states that certain of these documents may only be obtained through the ESI protocol described above, in paragraph 17 of these General Responses and Objections.

19. Certain information called for in these Interrogatories is confidential and proprietary. BancorpSouth will produce such information only pursuant to an appropriate protective order entered by the Court. BancorpSouth is prepared to meet and confer with Plaintiff to discuss and agree upon an appropriate protective order. Further, to the extent any Interrogatory seeks customer-identifying information related to customers other than the named Plaintiff, or other customer confidential information that BancorpSouth is under an obligation to keep confidential, BancorpSouth will not produce that information.

20. BancorpSouth is continuing to compile information and documents responsive to the non-objectionable portion of the Interrogatories. All objections and answers are based on information presently known to BancorpSouth after reasonable inquiry performed to date. BancorpSouth's objections and answers as set forth herein are made without prejudice to BancorpSouth's right to assert additional or supplemental objections or responses. Accordingly, BancorpSouth reserves the right to supplement these answers and objections, and will do so as responsive, non-privileged information is located and compiled, pursuant to Fed. R. Civ. P. 26.

21. BancorpSouth objects to the general instruction in paragraph number five (5) of the Interrogatories which refers to documents that are "generated ... after the date of your answers" to the extent it is intended to reach documents that are prepared in anticipation of litigation in accordance with Fed. R. Civ. P. 26(b)(3).

22. BancorpSouth objects to the general instruction in paragraph number six (6) of the Interrogatories as there has been no agreement as to the production or format of a privilege log. Subject to this objection, with regard to the identification and protection of privileged documents and information, BancorpSouth will comply with the Fed. R. Civ. P. 26(b)(5).

23. BancorpSouth has made reasonable efforts to answer the Interrogatories, subject to its general and specific objections, as BancorpSouth understands and interprets each Interrogatory. If Plaintiff subsequently asserts any interpretation of any Interrogatory that differs from BancorpSouth's interpretation of the Interrogatory, BancorpSouth reserves the right to supplement and amend its objections and answers.

24. Nothing contained herein is an admission of the relevance or admissibility of any answer.

25. BancorpSouth is prepared to meet and confer with Plaintiff in an effort to resolve any questions or concerns regarding its general and specific objections.

#### **RESPONSES TO FIRST SET OF INTERROGATORIES**

**INTERROGATORY NO. 1:** Identify all persons who have knowledge of the facts or circumstances regarding the subject matter of this lawsuit and, for each such person, describe the facts known to that person and identify all documents relating to those facts. Such persons should include but not be limited to all persons who have knowledge of facts you will use in opposing a motion for class certification; who have knowledge of the policies, practices and procedures you employed regarding the manner or sequence in which your customers' transactions are posted to their accounts; and who were employed and/or retained by you in connection with the development, operation, revision and/or maintenance of software used to determine overdrafts and overdraft fees.

**ANSWER TO INTERROGATORY NO. 1:** BancorpSouth objects to Interrogatory No. 1 on the grounds that it is premature, overly broad, and unduly burdensome. As phrased, Interrogatory No. 1, particularly the request for disclosure of all persons "who have knowledge of the policies, practices and procedures you employed regarding the manner or sequence in which your customers' transactions are posted to their accounts," would require disclosure of every current or former

BancorpSouth employee (since 2003) in Bank operations or at a BancorpSouth branch. BancorpSouth further objects to Interrogatory No. 1 on the grounds that it is vague and ambiguous, especially as it relates to the undefined terms and phrases "subject matter of this lawsuit" and "employed regarding the manner or sequence in which your customers' transactions are posted to their accounts." Subject to its general and specific objections, and using its best efforts to comprehend Plaintiff's vague terms, BancorpSouth states that the following individuals have substantial knowledge of facts or circumstances relevant to BancorpSouth's policies and procedures related to the assessment, collection, and refunding of overdraft fees: Michael Lindsey and Jeff Jagers. Subject to and without waiving the foregoing general and specific objections, BancorpSouth states that it continues to investigate in good faith the subjects identified in this Interrogatory.

**INTERROGATORY NO. 2: Identify each overdraft fee you assessed against an account held by each Plaintiff named in the Complaint(s) and, for each such fee, identify each item that was the basis for the overdraft fee and state all facts that show the basis on which the account was deemed to have been subject to an overdraft fee.**

**ANSWER TO INTERROGATORY NO. 2:** BancorpSouth objects to Interrogatory No. 2 on the grounds that it is vague and ambiguous, especially as it relates to the undefined terms and phrases "basis for the overdraft fee" and "basis on which the account was deemed to have been subject to an overdraft fee." BancorpSouth also objects to the use of the term "assessed" with regard to overdraft fees, because Plaintiff does not clarify whether this Interrogatory requests information regarding fees triggered by a transaction, fees actually charged, or fees collected, and does not clarify whether fees that were later refunded should be included. Subject to and without waiving the foregoing general and specific objections, BancorpSouth refers Plaintiff to reasonably available documents that it agrees to produce, pursuant to Fed. R. Civ. P. 33(d), related to Swift's accounts with BancorpSouth, which reflect reasonably available information concerning the transactional history of such accounts, for the time period of January, 2005, through the date of the

Interrogatories. *See also* BancorpSouth's Responses to RFP Nos. 7 and 8. BancorpSouth generally states that, with regard to debit card transactions before the effective date of Reg E in 2010, it charged an overdraft fee against a customer's account when a customer authorized a transaction that his account did not have sufficient funds to cover, as determined when the debit card transaction posted to the account. BancorpSouth also states that, even if a BancorpSouth customer authorizes a transaction at a time when, to the best BancorpSouth can determine, insufficient funds are in the account to cover the transaction, the transaction may not cause an overdraft (and an attendant overdraft fee) if the customer makes a deposit that posts the same banking day and which would cover the debit card transaction, because BancorpSouth posts all deposits for a given banking day before posting any debits. BancorpSouth further agrees to produce, pursuant to Fed. R. Civ. P. 33(d), responsive, reasonably available, and non-privileged documents further detailing this information, and to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

**INTERROGATORY NO. 3:** For each item identified in response to Interrogatory No. 2 as the basis for an overdraft fee, state: (a) the date and time you authorized the item; (b) the date and time you received the item; and (c) the date and time the item was debited from the account.

**ANSWER TO INTERROGATORY NO. 3:** BancorpSouth objects to this Interrogatory on the grounds that it is vague and ambiguous including the phrase "the basis for an overdraft fee." Subject to and without waiving the foregoing general and specific objections, BancorpSouth refers Plaintiff to reasonably available documents or ESI that it agrees to produce related to Swift's accounts with BancorpSouth (subject to agreed-upon appropriate protocols for searching and production of ESI, as discussed in General Objection No. 17 herein), which reflect reasonably available information concerning the transactional history of such accounts, for the time period of

January, 2005, through the date of the Interrogatories. *See also* BancorpSouth's Response to RFP No.

7. BancorpSouth further agrees to meet and confer with Plaintiff concerning whether a further narrative response is required after review of such documents.

**INTERROGATORY NO. 4:** For the period 1998 to the present, describe with particularity all policies, practices and procedures you used to determine the sequence in which items are posted to customers' accounts, including the dates any policies, practices or procedures were changed and the reason for such changes, and identify all persons with knowledge of the creation, implementation, modification, of such policies, practices and procedures.

**ANSWER TO INTERROGATORY NO. 4:** BancorpSouth objects to the timeframe of Interrogatory No. 4 on the grounds that it is overly broad, unduly burdensome, and requests information that is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence. BancorpSouth further objects to Interrogatory No. 4 because it seeks information which falls outside of the applicable statutes of limitations. Subject to and without waiving the foregoing objections, BancorpSouth refers Plaintiff to reasonably available documents that it agrees to produce, subject to the entry of an appropriate protective order, concerning the posting of electronic debit card transactions to customer accounts. *See also* BancorpSouth's Responses to RFP Nos. 9-11, 13, 22, 24, 38-41, 49-51, 53-54. BancorpSouth further states that, beginning in 2003, it posted the debits on checking accounts for a given day from highest dollar amount to lowest dollar amount. No debits for a given day are posted, however, until after all deposits for that day are posted to the customer's account. Prior to 2003, BancorpSouth's posted transactions in an order dictated by the type of transaction, and to post high-to-low within each type of transaction if there was more than one transaction of a particular type. Earnings Performance Group ("EPG") and other consulting firms approached BancorpSouth in the early 2000s offering consulting services that they represented would increase BancorpSouth's revenue. BancorpSouth engaged EPG in 2002. EPG proposed numerous policies for increasing bank profitability, including

adopting a high-to-low posting order for debits. BancorpSouth did not adopt all of EPG's recommendations, but BancorpSouth did adopt a high-to-low posting order. BancorpSouth adopted the high-to-low posting order for debits to, among other reasons, increase non-interest revenue and streamline the posting process by eliminating the distinctions between types of transactions.

**INTERROGATORY NO. 5: Describe with particularity how the policies, practices and procedures identified in Interrogatory No. 4 varied or vary from state to state, if at all.**

**ANSWER TO INTERROGATORY NO. 5:** BancorpSouth incorporates by reference its objections to Interrogatory No. 4. Subject to and without waiving the foregoing general and specific objections, BancorpSouth refers Plaintiff to reasonably available documents that it agrees to produce, subject to the entry of an appropriate protective order, concerning the order of posting of electronic debit card transactions to customer accounts. *See also* BancorpSouth's Responses to RFP Nos. 9-11, 13, 22, 24, 38-41, 49-51, 53-54. BancorpSouth further states that practices described in BancorpSouth's response to Interrogatory 4 do not vary from state to state. BancorpSouth further states that when it acquired a bank that used a different posting order, the acquired bank's posting order was used for its account holders until the acquired bank and its account holders could be converted to BancorpSouth's systems. For the time period relevant to this lawsuit, BancorpSouth states that it acquired American State Bank in 2005. Between November 30, 2005 and April 21, 2006, the account posting order for former account holders at American State Bank differed from the posting order on preexisting BancorpSouth accounts.

**INTERROGATORY NO. 6: If the policies, practices and procedures regarding overdraft fees you have followed during the 180 days immediately preceding the date on which you answer these interrogatories are materially different than the policies, practices and procedures relating to overdraft fees you followed from 1998 to present, describe in detail all ways in which your current policies, practices and procedures differ, explain when, how and why they changed, and identify all documents that describe, refer or relate to the differences or changes.**

**ANSWER TO INTERROGATORY NO. 6:** BancorpSouth objects to Interrogatory No. 6

on the ground that it potentially reaches BancorpSouth's policies, practices, and procedures for setting the amount of an individual overdraft fee, and the Interrogatory is, therefore, overly broad, unduly burdensome, and seeks information that is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence. BancorpSouth also objects to the vague term "policies and procedures regarding overdraft fees." BancorpSouth further objects to the timeframe of this Interrogatory in that the request for information dating to 1998 is overly broad, unduly burdensome, and seeks information that is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence, and because it falls outside of applicable statutes of limitations. Subject to and without waiving the foregoing general and specific objections, BancorpSouth states that in anticipation of the effective date of "Reg E," and in order to comply with Reg E, BancorpSouth changed its policies in 2010 with regard to enrollment of customers in its overdraft payments service (as described in response to Interrogatory No. 12 herein). BancorpSouth now requires all customers to affirmatively opt in to the overdraft payment service in connection with transactions governed by Reg E. For more information regarding BancorpSouth's overdraft payment service, see response to Interrogatory No. 12 herein. BancorpSouth further agrees to produce, pursuant to Fed. R. Civ. P. 33(d), responsive, reasonably available, and non-privileged documents further detailing this information, and to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

**INTERROGATORY NO. 7: Describe with particularity all actions you have taken to inform your customers of your policies, practices and procedures of posting items in the order of highest to lowest dollar amount, including when, how and by whom each such action was taken.**

**ANSWER TO INTERROGATORY NO. 7:** BancorpSouth objects to Interrogatory No. 7 on the grounds that it is overly broad, unduly burdensome, and to the extent that it purports to

require BancorpSouth to identify each and every separate document, oral conversation, communication, or other responsive item concerning the posting of certain items to customer accounts in highest to lowest order. Subject to and without waiving the foregoing general and specific objections, BancorpSouth refers Plaintiffs to reasonably available documents that it agrees to produce, subject to the entry of an appropriate protective order, concerning information provided to customers concerning the posting of debit card transactions in order of highest to lowest dollar amount, for the time period of 2003 through the date of these Interrogatories. *See also* BancorpSouth's Response to RFP Nos. 1-6, 11, 17, 26, 48 and 55.

BancorpSouth further states that it has fully and regularly disclosed its policy of posting debit card transactions in order of highest to lowest dollar amount since it began following this policy in 2003. These disclosures were made, among other methods of disclosing BancorpSouth's posting policies, in the Deposit Account Terms and Conditions and Account Information Statements, revised from time to time, which have governed BancorpSouth accounts during all periods since 2003. BancorpSouth also refers Plaintiff to the Deposit Account Terms and Conditions, attached as Exhibit A to Swift's Second Amended Complaint, which states, in part:

ORDER OF PAYMENT - Unless otherwise provided in the Account Information Statement (see OTHER TERMS section below), if more than one item or order is presented for payment against the account on the same day and the available balance of the account is insufficient to pay them all, we may pay any of them in any order we choose, even if the order we choose results in greater insufficient funds fees than if we had chosen to pay them in some other order. Our payment of any item or order in overdraft does not create any obligation for us to pay any other item or order in overdraft in the future, and you agree that no course of dealing regarding the payment of items or orders in overdraft will be created between us . . .

and refers Plaintiff to the Account Information Statement, attached as Exhibit B to Swift's Second Amended Complaint. BancorpSouth further agrees to produce, pursuant to Fed. R. Civ. P. 33(d), responsive, reasonably available, and non-privileged documents further detailing this information,

and to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

**INTERROGATORY NO. 8:** State the manner in which you have defined or otherwise described the term "overdraft" to your customers.

**ANSWER TO INTERROGATORY NO. 8:** Subject to and without waiving the foregoing general objections, BancorpSouth refers Plaintiff to reasonably available documents that it agrees to produce, pursuant to Fed. R. Civ. P. 33(d) and subject to the entry of an appropriate protective order, concerning the actions it has taken to inform customers of BancorpSouth's policies, practices and procedures regarding the posting of electronic debit card transactions, for the time period of 2003 through the date of the Interrogatories, including exemplars of its Deposit Account Terms and Conditions and Account Information. *See also* BancorpSouth's Responses to RFP Nos. 1-6, 11, 17, 26 and 55. BancorpSouth further agrees to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

In addition, BancorpSouth refers Plaintiff to the Deposit Account Terms and Conditions attached as Exhibit A to Swift's Second Amended Complaint, which states, among other things, as follows:

LIABILITY: ... Each of you also agrees to be jointly and severally (solitarily) liable for any account deficit resulting from charges or overdrafts, whether caused by you or another authorized to withdraw from the account, and the costs we incur to collect the deficit including our reasonable attorneys.

\* \* \*

ORDER OF PAYMENT - Unless otherwise provided in the Account Information Statement (*see* OTHER TERMS section below), if more than one item or order is presented for payment against the account on the same day and the available balance of the account is insufficient to pay them all, we may pay any of them in any order

we choose, even if the order we choose results in greater insufficient funds fees than if we had chosen to pay them in some other order. Our payment of any item or order in overdraft does not create any obligation for us to pay any other item or order in overdraft in the future, and you agree that no course of dealing regarding the payment of items or orders in overdraft will be created between us.

BancorpSouth also refers Plaintiff to the "About Overdrafts" section of the Account Information Statement, attached as Exhibit B to Swift's Second Amended Complaint, which states in part:

An "overdraft" occurs any time a check, ACH, ATM, debit card, bank fee (including overdraft-related fee) or any other transaction (collectively, a "Transaction") is presented for payment against an account and the available balance of the account is insufficient to pay the Transaction. When an overdraft occurs, we may, at our discretion, refuse the Transaction, or alternatively, we may choose to pay the Transaction, in which case a negative account balance will result.

**INTERROGATORY NO. 9: Describe with particularity each step, including each form of communication, involved in an electronic debit transaction, beginning with the initiation of the transaction, continuing through your receipt of notice of the dollar amount of the transaction and authorization of the transaction, and ending with your posting of the transaction to the customer's account and your assessment of overdraft fee, if any, based on the transaction.**

**ANSWER TO INTERROGATORY NO. 9:** BancorpSouth objects to Interrogatory No. 9 on the grounds that it is vague and ambiguous, especially as to its use of the undefined terms and phrases "electronic debit transaction," "initiation," "receipt," and "notice." BancorpSouth further objects on the grounds that this Interrogatory is overly broad and unduly burdensome (e.g., the steps entailed may differ depending on the type of transaction), and to the extent that it calls for information that is not within the knowledge, custody, or control of BancorpSouth. BancorpSouth further objects on the ground that Interrogatory No. 9 is inaccurate to the extent it states that BancorpSouth is presented with information reflecting the final amount of a transaction prior to or at the time of initiation or authorization of the transaction.

Subject to and without waiving the foregoing general and specific objections, BancorpSouth

refers Plaintiff to reasonably available documents that it agrees to produce, pursuant to Fed. R. Civ. P. 33(d) and subject to the entry of an appropriate protective order, concerning the steps involved in posting of transactions to customer accounts, for the period of 2003 through the date of the Interrogatories. BancorpSouth also refers Plaintiff to the Omnibus Motion to Dismiss and/or for Judgment on the Pleadings and Incorporated Memorandum of Law [DE # 217] at 8-12 (discussing the authorization and settlement process for electronic debit card transactions), and to BancorpSouth's Motion to Dismiss Plaintiff's Second Amended Complaint [DE# 1068] in this matter. *See also* BancorpSouth's Responses to RFPs 34-36, 41, 69-70. BancorpSouth further states as follows:

BancorpSouth's processing of debit card transaction (whether a "PIN" or a "signature" transaction) begins when BancorpSouth's systems receive an inquiry from a credit card processor. For a signature transaction, the transaction is routed to BancorpSouth via a third-party card processing vendor ("FDR"). The FDR system determines whether the transaction is or is not authorized. Authorization is based on whether the requested transaction exceeds the total of what the FDR system calculates the customer's account balance to be. FDR initiates a balance inquiry to BancorpSouth's Stratus system, and subtracts any signature transactions authorized from up to three prior days that have not "settled." If the requested transaction exceeds the total of the account balance (as calculated by FDR), the transaction will not be authorized. A signature transaction does not post to a customer's account, and does not reduce the customer's balance, until the merchant clears the transaction, which can be several days later. A signature transaction posts to the customer's account only after that the merchant clears the transaction. Signature transactions post at the end of the day when all other transactions for that day post, in order from highest dollar amount to lowest dollar amount. The posting of the transaction occurs on BancorpSouth's account demand deposit

account system ("DDA" or "mainframe"). If the transaction at issue causes the customer's account to be overdrawn or causes an overdrawn account to be further overdrawn, an overdraft fee will be assessed against the customer's account. The overdraft fee will be charged against the customer's account on the day following the transaction that triggered the fee.

For debit card "PIN" transactions, the process is similar, but not identical. PIN transactions are authorized or denied by BancorpSouth's "Stratus" system. Authorization is based on whether the requested transaction exceeds the total of what the Stratus system calculates the customer's account balance to be. The Stratus system will include the overdraft limit for that customer if the customer is enrolled in the overdraft payment service. The Stratus system's balance information is regularly updated by communication with BancorpSouth's DDA system. If the requested transaction exceeds the total of the account balance (as calculated by Stratus) the transaction will not be authorized. A PIN transaction posts to the customer's account, on the DDA, at the end of the day when all other transactions for that day post, in order from highest dollar amount to lowest dollar amount. If the transaction at issue causes the customer's account to be overdrawn or causes an overdrawn account to be further overdrawn, an overdraft fee will be assessed against the customer's account. The overdraft fee will be charged against the customer's account on the day following the transaction that triggered the fee.

BancorpSouth further agrees to produce, pursuant to Fed. R. Civ. P. 33(d), responsive, reasonably available, and non-privileged documents further detailing this information, and to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

**INTERROGATORY NO. 10: For each step in the process described in your answer to Interrogatory No. 9, identify each computer system or database used to transmit and/or store information and for each such database or system, identify its task and function and describe in detail where and how you retain the information associated with each step and the process**

by which such records or information can be accessed:

**ANSWER TO INTERROGATORY NO. 10:** In Response to Interrogatory No. 10, BancorpSouth incorporates by reference its specific objections to Interrogatory No. 9. BancorpSouth further objects to Interrogatory No. 10 on the grounds that it is overly broad, unduly burdensome, and seeks information that is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, BancorpSouth refers Plaintiff to reasonably available documents that it agrees to produce, pursuant to Fed. R. Civ. P. 33(d) and subject to the entry of an appropriate protective order, concerning computer systems and databases concerning electronic debit card transactions, for the time period of 2003 through the date of the Interrogatories. *See also* BancorpSouth's Responses to RFP Nos. 32-33, 41 and 69-70. BancorpSouth further states that this Interrogatory overlaps with Interrogatory No. 9 to a substantial extent; therefore, BancorpSouth refers Plaintiff to the portions of BancorpSouth's response to Interrogatory No. 9 that are responsive to this Interrogatory.

BancorpSouth further agrees to produce, pursuant to Fed. R. Civ. P. 33(d), responsive, reasonably available, and non-privileged documents further detailing this information, and to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

**INTERROGATORY NO. 11:** On an annual basis for each year since 2002 and for each State in which you maintain customer accounts, state (a) the aggregate total dollar amount of overdraft fees based on debit card and/or ATM transactions you assessed against your customers' accounts; (b) the aggregate total dollar amount of overdraft fees based on debit card and/or ATM transactions assessed against customers accounts that you have forgiven, waived, reversed or otherwise not collected; and (c) the number of your customers' accounts that have been assessed more than one overdraft fee based on debit card and/or ATM transactions on a single day.

**ANSWER TO INTERROGATORY NO. 11:** BancorpSouth objects to Interrogatory No.

11 on the grounds that it is overly broad, unduly burdensome, seeks information that is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence, and falls outside of applicable statutes of limitations. BancorpSouth also objects to the use of the vague and undefined phrase "overdraft fees based on debit card and/or ATM transactions." Subject to and without waiving the foregoing general and specific objections, BancorpSouth refers Plaintiff to reasonably available documents and/or data that it agrees to produce, pursuant to Fed. R. Civ. P. 33(d) and subject to the entry of an appropriate protective order, concerning the aggregate amounts and number of customer accounts requested, for the time period of 2003 through the date of the Interrogatories. *See also* BancorpSouth's Responses to RFP Nos. 27 and 28. BancorpSouth further agrees to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

**INTERROGATORY NO. 12: Describe in detail how you determine whether to authorize a debit transaction made on a customer's account. In the event an automated algorithm is used, describe in detail each factor considered by the algorithm and the weight ascribed to each such factor.**

**ANSWER TO INTERROGATORY NO. 12:** BancorpSouth objects to Interrogatory No. 12 on the grounds that it is vague and ambiguous, especially as it relates to the phrase "authorize a debit transaction made on a customer's account." BancorpSouth further objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing general and specific objections, BancorpSouth refers Plaintiff to reasonably available documents that it agrees to produce, subject to the entry of an appropriate protective order, concerning the method by which BancorpSouth determines whether or

not to authorize an electronic debit card transaction, for the time period of 2003 through the date of the Interrogatories. *See also* BancorpSouth's Response to RFP Nos. 34-36. BancorpSouth further states that, since 2003, BancorpSouth has provided an "overdraft payment service" with a varying overdraft limit. A customer can both have an overdraft protection product (such as a linked savings account, credit card, or line of credit to cover transactions that would overdraw the customer's checking account) and be enrolled in the overdraft payment service. Under the overdraft payment service, BancorpSouth provides an amount over and above the customer's available balance for which BancorpSouth will authorize payment of debit card transactions initiated by the customer. Under the overdraft payment service, each enrolled account holder has an overdraft limit. The bank may also, at its discretion, pay an item into overdraft above the overdraft limit. The amount of the overdraft limit may vary for each customer, and may vary for an individual customer, from statement period to statement period. The amount of the overdraft limit is affected by such factors as the length of time the customer's account has been open, the average balance in the account over the previous 90 days, and the number of times the customer has overdrawn his account in the previous 12 months. For an account enrolled in the overdraft payment service, whether a particular debit card transaction is authorized or not is determined by comparing the amount of the requested debit card transaction with the amount in the customer's account (as best BancorpSouth can determine in light of the uncertainties of what other transactions will be requested or will arrive before all of the transactions post at the end of the banking day) plus the amount of the customer's currently effective overdraft limit for the account. If the apparently available balance plus the overdraft limit exceeds the amount of the requested debit card transaction, the debit card transaction will be authorized; if the amount of the requested debit card transaction exceeds the apparently available balance plus the overdraft limit, the transaction will not be authorized.

Since its inception, the existence of the overdraft payment service has been disclosed to customers in BancorpSouth's Account Information Statement, among other methods of disclosure. At all times, a BancorpSouth customer has had the option to remove the overdraft payment service from his account on request. Although the default rule from 2003 until the effective date of Reg E in 2010 was for an account holder to be enrolled in the overdraft payment service unless he opted out, BancorpSouth changed its policies in 2010 to comply with Reg E. BancorpSouth now requires all customers to affirmatively opt in to the overdraft payment service for debit card and ATM card transactions in order to use the service for those transactions.

BancorpSouth further agrees to produce, pursuant to Fed. R. Civ. P. 33(d), responsive, reasonably available, and non-privileged documents further detailing this information, and to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

**INTERROGATORY NO. 13: Describe in detail the manner in which your Hogan or RDS (or equivalent) system operates with regard to the processing of items.**

**ANSWER TO INTERROGATORY NO. 13:** BancorpSouth objects to Interrogatory No. 13 on the grounds that it is vague and ambiguous, especially as it relates to the undefined terms "equivalent" and "processing." BancorpSouth also objects to the use of the undefined and vague term "Hogan or RDS (or equivalent) system." Subject to and without waiving the foregoing general and specific objections, BancorpSouth refers Plaintiff to reasonably available documents that it agrees to produce, pursuant to Fed. R. Civ. P. 33(d) and subject to the entry of an appropriate protective order, concerning the system(s) it employs, for the time period of 2003 through the date of the Interrogatories. *See also* BancorpSouth's Responses to RFP Nos. 41, 69 and 70. BancorpSouth further states that this Interrogatory overlaps with Interrogatory No. 9 to a substantial extent; therefore, BancorpSouth refers Plaintiff to the portions of BancorpSouth's

response to Interrogatory No. 9 that are responsive to this Interrogatory.

BancorpSouth further agrees to produce, pursuant to Fed. R. Civ. P. 33(d), responsive, reasonably available, and non-privileged documents further detailing this information, and to meet and confer with Plaintiff after Plaintiff reviews such documents regarding whether a further narrative response is required and/or whether deposition testimony is appropriate on these topics.

**INTERROGATORY NO. 14: Identify all third parties, other than legal counsel or federal agencies, who have provided any documents, advice, assistance, proposals, reports, studies or services of any kind to you in connection with your policies, practices and procedures relating to the determination or assessment of overdraft fees, or the revenue projected to be derived from such fees.**

**ANSWER TO INTERROGATORY NO. 14:** BancorpSouth objects to Interrogatory No. 14 on the grounds that it is overly broad, unduly burdensome and seeks information that is not relevant to any claim or defense in this action and/or not reasonably calculated to lead to the discovery of admissible evidence. BancorpSouth further objects to Interrogatory No. 14 because it potentially reaches BancorpSouth's policies, practices, and procedures for, among other things, setting the amount of an overdraft fee. Subject to and without waiving the foregoing general and specific objections, BancorpSouth agrees to conduct a reasonable inquiry and identify the requested third parties.

\*\*\*\*\*

Respectfully submitted this 27th day of June, 2011.

**PARKER, HUDSON, RAINER & DOBBS LLP**



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Eric Jon Taylor  
Georgia Bar No. 699966  
William J. Holley, II  
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*Counsel for Defendant BancorpSouth Bank*

VERIFICATION

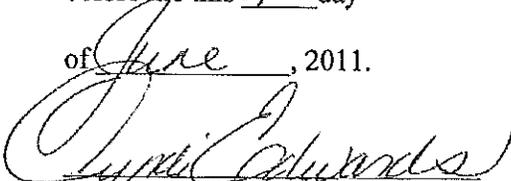
I, Jeff Jaggers, being duly sworn, depose and say that I am Senior Vice President for BancorpSouth Bank ("BancorpSouth"). I have reviewed the foregoing Defendant BancorpSouth's Responses to Plaintiff's First Set of Interrogatories, which I understand have been compiled from a number of sources within BancorpSouth with the assistance of BancorpSouth's counsel. To the best of my knowledge, information, and belief, the factual information contained in Defendant BancorpSouth's Objections and Responses to Plaintiff's First Set of Interrogatories is true and accurate.

This 27th day of June, 2011.

  
Name: Jeff Jaggers

Position: Senior Vice President

Sworn to and subscribed  
before me this 27 day  
of June, 2011.

  
Notary Public

My Commission Expires:



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANT BANCORPSOUTH BANK'S RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed as follows:

Robert C. Gilbert, Esq.  
Alters Law Firm, P.A.  
4141 N.E. 2<sup>nd</sup> Avenue, Suite 201  
Miami, Florida 33137

Jeffrey M. Ostrow, Esq.  
Jonathan Streisfeld, Esq.  
Kopelowitz Ostrow Ferguson Weiselberg Keechl  
200 S.W. First Avenue, 12<sup>th</sup> Floor  
Fort Lauderdale, Florida 33301

Darren T. Kaplan, Esq.  
Chitwood Harley Harnes, LLP  
2300 Promenade II  
1230 Peachtree Street, NE  
Atlanta, Georgia 30309

This 27<sup>th</sup> day of June, 2011.

  
Eric Jon Taylor

# **Exhibit 2**

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CASE NO. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT )  
OVERDRAFT LITIGATION )

MDL No. 2036 )

THIS DOCUMENT RELATES TO: )

Swift vs. BancorpSouth, Inc. )  
N.D. FL Case No. 1:10-cv-00090-SPM )  
S.D. FL Case No. 1:10-cv-23872-JLK )

THE DEPOSITION OF

JEFF JAGGERS

Taken on Behalf of the Plaintiffs

August 15, 2012

12:38 P.M. - 4:08 P.M.

Edward F. Kidd, RPR, LCR #501

My License Expires: 6/30/14

82	<p>1 that we, that we at some point collected as</p> <p>2 revenue and then had to chargeoff. And so on</p> <p>3 a quarterly basis, we take a sampling of</p> <p>4 customer's accounts and we would have</p> <p>5 reviewed the charged off accounts and</p> <p>6 identified what percentage on those sampling</p> <p>7 made up fees and what percentage made up the</p> <p>8 outstanding balances, and that's the formula</p> <p>9 we use for that quarter on a monthly basis to</p> <p>10 account for the loss and the proper</p> <p>11 accounting, under the proper accounting</p> <p>12 rules.</p> <p>13 Q. And I assume that fees that are</p> <p>14 charged off are not then allocated to a</p> <p>15 reserve account, right, that's just a</p> <p>16 reduction in income?</p> <p>17 A. Fees that are charged off, once that</p> <p>18 monthly calculation, that general ledger</p> <p>19 account represents a reduction in income.</p> <p>20 Q. Okay. But not the outstanding</p> <p>21 balance of the transaction because you have a</p> <p>22 reserve set up for that; right?</p> <p>23 A. The calculation should account for</p> <p>24 those balances and those -- the value of</p> <p>25 those -- that portion of the chargeoff will</p>	84	<p>1 me know when you've had a moment to look at</p> <p>2 it and are ready to talk about it.</p> <p>3 A. Okay.</p> <p>4 Q. Who is Mary Ann Briggs?</p> <p>5 A. Mary Ann Briggs was employed, was an</p> <p>6 employee of BancorpSouth.</p> <p>7 Q. Do you know what department she</p> <p>8 worked in?</p> <p>9 A. She worked for Lee McAllister and she</p> <p>10 worked in what we call branch coordination.</p> <p>11 Q. Down at the bottom of the chain,</p> <p>12 first page, there is an email from Cathy</p> <p>13 Talbot to Mary Ann Briggs. Who is Cathy</p> <p>14 Talbot?</p> <p>15 A. Cathy Talbot is an employee of</p> <p>16 BancorpSouth.</p> <p>17 Q. Is she still employed with</p> <p>18 BancorpSouth?</p> <p>19 A. Yes.</p> <p>20 Q. In what department was Cathy Talbot</p> <p>21 working in October of 2003 at BancorpSouth?</p> <p>22 A. She would have been in the audit</p> <p>23 department, audit slash security department.</p> <p>24 Q. Okay. And Cathy Talbot writes you</p> <p>25 may want to check on it for clarification to</p>
83	<p>1 be applied to our reserves.</p> <p>2 Q. To your reserves. Okay. And that's</p> <p>3 not the only thing you have reserves for;</p> <p>4 right?</p> <p>5 A. That's right.</p> <p>6 Q. You have reserve for bad checks and</p> <p>7 all kind of other things that you pay on that</p> <p>8 you don't ultimately have recourse for;</p> <p>9 right?</p> <p>10 A. Right, our reserve account is for</p> <p>11 multiple purposes.</p> <p>12 Q. So you don't have multiple reserve</p> <p>13 accounts?</p> <p>14 A. No.</p> <p>15 Q. Okay. Thank you. 53.</p> <p>16 (Discussion off the record.)</p> <p>17 (Thereupon, Exhibit 53 was</p> <p>18 marked for identification purposes only.)</p> <p>19 BY MR. KAPLAN:</p> <p>20 Q. Looking at the document that has been</p> <p>21 marked as 53 for identification, it begins</p> <p>22 with an email at the top of the chain from</p> <p>23 Lee McAllister dated October 14th, 2003, to</p> <p>24 one Mary Ann Briggs and CCing Jeff Jagers,</p> <p>25 and the subject is re: posting priority. Let</p>	85	<p>1 the branches. I was told high to low, no T/C</p> <p>2 priority. Do you know what she is</p> <p>3 abbreviating with her T/C priority?</p> <p>4 A. Tran code.</p> <p>5 Q. That would be the transaction code?</p> <p>6 A. Right.</p> <p>7 Q. She writes in quotes, makes it easier</p> <p>8 to explain to customers why one item paid and</p> <p>9 another did not, close quote. She goes on to</p> <p>10 put in parentheses, of course, it also helps</p> <p>11 fees. Do you have an understanding as to</p> <p>12 what Ms. Talbot is referring to in this email</p> <p>13 when she writes of course it also helps fees?</p> <p>14 MR. TAYLOR: Object to the form.</p> <p>15 BY MR. KAPLAN:</p> <p>16 Q. If you understand?</p> <p>17 A. Yes. As we discussed earlier, we</p> <p>18 engaged EPG to assist us with revenue</p> <p>19 enhancement. One of their recommendations</p> <p>20 was to simplify our posting order and one of</p> <p>21 the benefits of that was to increase our fee</p> <p>22 revenue.</p> <p>23 Q. Okay. And she writes I had talked to</p> <p>24 Janice Phillips. For clarification, who is</p> <p>25 Janice Phillips?</p>

86	<p>1 A. She is now Janice Bowen, and she's an 2 employee of BancorpSouth. 3 Q. The following page she writes Michael 4 Lindsey mentioned it in a meeting, let me 5 know if I'm wrong. 6 She wasn't wrong, was she? 7 A. Reading through the email, Cathy 8 and -- you know, there are a number of people 9 on this string. 10 Q. Uh-huh? 11 A. I believe what -- what Cathy was 12 referring to was the posting order. 13 Q. Uh-huh? 14 A. Being moved to high to low. 15 Q. And of course that also helps fees? 16 A. Yes, uh-huh. 17 Q. All right. Okay. You want to take a 18 break? 19 A. All right. 20 Q. I'm done with this exhibit. 21 (Recess taken.) 22 BY MR. KAPLAN: 23 Q. 54. 24 (Thereupon, Exhibit 54 was 25 marked for identification purposes only.)</p>	88	<p>1 privilege noninterest income opportunity? 2 A. EPG had a, I don't know if they 3 considered it intellectual property, had a 4 recommendation that they call powerpay. And 5 that they made the banks and they made -- 6 they made that presentation to BancorpSouth. 7 Q. And you ran the numbers and it 8 indicated that the opportunity that powerpay 9 overdraft privilege represented for 10 BancorpSouth was nine to 10 million a year? 11 A. No, EPG. 12 Q. EPG ran the numbers? 13 A. EPG provided what their estimate 14 would be. 15 Q. What was powerpay overdraft, what was 16 that program? 17 A. We didn't do it. So I don't recall 18 all the features and functions of that 19 program. We did not engage them and did 20 not -- 21 Q. Fair enough. The next sentence you 22 write, after several phone calls this 23 afternoon the following banks are disclosing 24 an overdraft limit to the customer. And then 25 there is a list of banks. AmSouth,</p>
87	<p>1 BY MR. KAPLAN: 2 Q. Showing you a document marked as 54 3 for identification, it is an email from you 4 dated March 17, 2004, to Larry Bateman and 5 Clyde Hubbard, the subject which is 6 noninterest income. Let me know when you're 7 ready to talk about this. 8 A. Sure, go ahead. 9 Q. Who is Larry Bateman? 10 A. Larry Bateman is Clyde Hubbard's 11 boss. 12 Q. What is his formal title? 13 A. Vice chairman, BancorpSouth. 14 Q. Okay. Is Larry Bateman still at 15 BancorpSouth? 16 A. Yes. 17 Q. Okay. You write Larry and Clyde, I 18 started researching the, quote, 19 "powerpay/overdraft privilege" noninterest 20 income opportunity. The preliminary numbers 21 from last year indicated the opportunity was 22 at least nine to 10 million a year. Did I 23 read that correctly? 24 A. Yes. 25 Q. Okay. What is the powerpay/overdraft</p>	89	<p>1 Trustmark, People's Bank and Trust, Bank of 2 Oklahoma, International Bank of Commerce. 3 Was one of the features of EPG's powerpay 4 overdraft privilege that these banks were 5 disclosing an overdraft limit to the 6 customer? 7 A. I believe one of the features was 8 that they were marketing to their -- to 9 customers, marketing the customers use -- 10 they used the term overdraft privilege. 11 Q. Uh-huh? 12 A. That you were marketing overdraft 13 usage to the customer, and as part of that 14 marketing of the overdraft usage to the 15 customer, you disclosed to them what their 16 overdraft limit is. 17 Q. Okay. And the banks -- BancorpSouth 18 didn't do that? 19 A. We did not market overdraft usage to 20 our customers. 21 Q. And, in fact, you never -- well? 22 A. We did not do powerpay. 23 Q. Okay. Let me go back and perhaps I 24 should rephrase the question. 25 BancorpSouth in March of 2004 was not</p>

# **Exhibit 3**

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE SOUTHERN DISTRICT OF FLORIDA  
3 MIAMI DIVISION

4 CASE NO. 1:09-MD-02036-JLK

5 IN RE: CHECKING ACCOUNT OVERDRAFT )  
6 LITIGATION )

7 MDL No. 2036 )

8 THIS DOCUMENT RELATES TO: )  
9 FOURTH TRANCHE ACTIONS )

10 Swift v. BancorpSouth, Inc. )  
11 N.D. FL, C.A. No. 1:10-00090-SPM-AK )  
12 S.D. Fla. Case No. 1:10-cv-23872-JLK )

13 ---

14 DEPOSITION OF

15 PAUL A. CARRUBBA

16 October 9, 2012

17 2:10 p.m.

18 1500 Marquis II Tower  
19 285 Peachtree Center Avenue, NE  
20 Atlanta, Georgia

21 Pamela L. Porter, RPR, CCR-B-2160

22 ---

14	16
<p>1 other financial institutions that are presenting                  2 checks that are drawn on BancorpSouth to them. Checks                  3 can be presented to BancorpSouth from the Federal                  4 Reserve.                  5 And I'm using the term checks, but it's                  6 really images of checks today. There are very few                  7 paper checks that are actually presented for payment.                  8 The bank receives debit card transactions.                  9 That's kind of the scope of transactions that are                  10 received.                  11 And in a batch posting process, those                  12 transactions throughout the -- that are received                  13 throughout the day are pulled together, and then the                  14 transactions are put into a sequence, a predetermined                  15 sequence, for posting the transactions.                  16 And based on my review of the material,                  17 based on my interviews with the bank, the priorities                  18 of posting transactions are that the bank post first                  19 deposits. Credits post first followed by a tier or                  20 bucket of debits that include bank-generated                  21 transactions, bank fees, wire transfers, what's                  22 referred to as forced-pay items, and deposited                  23 returned items posted next. Then those transactions                  24 are followed by all other transactions.                  25 Q. All other debits?</p>	<p>1 think that following the credits, that there were bank                  2 transactions, internal bank transactions, followed by                  3 a bucket that contained electronic banking                  4 transactions, then followed by a bucket that contained                  5 checks.                  6 I think those were -- I remember there                  7 were four different buckets, but it was something like                  8 that. And then, again, within those buckets,                  9 transactions were posted high to low.                  10 Q. Would a debit card transaction fall within                  11 the bucket that you described as electronic debit                  12 transactions?                  13 A. Yes, it would.                  14 Q. Do you have an understanding of why                  15 BancorpSouth switched from the pre-2002/2003 order                  16 that had four buckets for debit transactions to the                  17 subsequent order that for all intents and purposes                  18 collapsed the debit transactions all into one bucket?                  19 MR. GAYNOR: Object to the form. Bobby,                  20 we're starting to get far afield from his report                  21 here, anything he says he was asked to opine on.                  22 MR. GILBERT: I think it goes right to it.                  23 But if you think I'm going beyond it at some                  24 point, stop me. I don't think I am, but --                  25 THE WITNESS: And I'm sorry. I lost the</p>
15	17
<p>1 A. All other debits. Thank you. All other                  2 debits in the sequence of highest amount to lowest                  3 amount.                  4 Q. From your work in this case, have you come                  5 to learn when BancorpSouth adopted the order, if you                  6 will, that you just described?                  7 A. Yes. My understanding that it was in --                  8 it was either 2002 or 2003. I'm not exactly sure of                  9 the date.                  10 Q. And do you have an understanding of what                  11 the difference was, regardless of whether it was some                  12 date in 2002 or 2003, what the difference -- what the                  13 change was between what existed immediately before the                  14 change and the process you just described?                  15 MR. GAYNOR: Object to the form.                  16 THE WITNESS: Yes. Based on my review of                  17 the materials and the depositions, the bank                  18 posted transactions from debit transactions high                  19 to low. The bank had in their first category of                  20 sequence of posting credits followed by buckets                  21 of transactions.                  22 Q. (By Mr. Gilbert) Buckets of debit                  23 transactions?                  24 A. Buckets of debit transactions. I do not                  25 remember the exact sequence of those buckets, but I</p>	<p>1 question.                  2 Q. (By Mr. Gilbert) Do you have an                  3 understanding of why BancorpSouth switched from the                  4 multiple buckets for debit transactions to what                  5 essentially was a single bucket for debit                  6 transactions?                  7 A. Well, again, they didn't switch to just a                  8 single bucket because there were two different buckets                  9 of transactions. And -- as I previously described,                  10 but based on my reading of the testimony and the                  11 documentation that I have reviewed, the bank came to                  12 the conclusion that it was more efficient for the bank                  13 to post transactions all in one sequence.                  14 It was less confusing for the customer to                  15 post those transactions all in one sequence as opposed                  16 to having various buckets.                  17 And having been involved in the banking                  18 business for as long as I have and having seen various                  19 methods of posting transactions, I can personally                  20 state that it is very difficult to describe the                  21 sequence of posting with numerous buckets of                  22 transactions.                  23 So it simplified for BancorpSouth, in                  24 their mind, how to explain how these transactions                  25 posted to the account. And then one other rationale</p>

18	<p>1 was based on revenue, that it did increase revenue to</p> <p>2 the bank in the form of overdraft fees.</p> <p>3 Q. Let me digress a little bit.</p> <p>4 Mr. Carrubba, you devote -- would it be fair to say</p> <p>5 that you devote a significant portion of your</p> <p>6 professional time to serving as an expert witness or</p> <p>7 in a litigation support capacity?</p> <p>8 A. No, that's not true.</p> <p>9 Q. What percentage of your -- I don't know</p> <p>10 how you measure it, maybe by billable time. What</p> <p>11 percentage of your billable time in a given year over</p> <p>12 the past couple of years would you say is devoted to</p> <p>13 expert witness and/or litigation support versus legal</p> <p>14 work?</p> <p>15 A. I would say historically it's been</p> <p>16 somewhere in the 15 percent, maybe 20 percent,</p> <p>17 somewhere in that range, 15 to 20 percent of my time</p> <p>18 Q. I'm sorry. I didn't mean to cut you off.</p> <p>19 A. Yeah, historically that's been over the</p> <p>20 past few years.</p> <p>21 Q. And would you tend to believe that that's</p> <p>22 what it is now as well?</p> <p>23 A. Are you talking about now as of -- what</p> <p>24 time frame?</p> <p>25 Q. Now as of October 2012 as well.</p>	20
19	<p>1 MR. GAYNOR: Talking about today? This</p> <p>2 month? This year?</p> <p>3 Q. (By Mr. Gilbert) Oh, I'm sorry. This</p> <p>4 year as well.</p> <p>5 A. Yeah, this year it has been. Up until</p> <p>6 recently I've had several matters that have kept me</p> <p>7 quite busy. But for the full year, I'm thinking it's</p> <p>8 probably still going to be in that 15 to 20 percent</p> <p>9 range.</p> <p>10 Q. Do you -- forgive the term. If it sounds</p> <p>11 inappropriate, I don't mean it to be insulting, but do</p> <p>12 you market your services as an expert witness and</p> <p>13 litigation support provider?</p> <p>14 A. No, I do not. I have no marketing at all.</p> <p>15 I do know that I am listed -- and I cannot remember</p> <p>16 the name of that company. I have no relationship with</p> <p>17 them.</p> <p>18 Q. Without --</p> <p>19 A. Santa Fe Group, the Santa Fe Group has a</p> <p>20 listing of experts, and I am listed as an expert, but</p> <p>21 I have done nothing for the Santa Fe Group.</p> <p>22 Q. Do you regularly speak and make</p> <p>23 presentations on the topics relating to banking</p> <p>24 litigation and banking law to different groups?</p> <p>25 A. I do speak frequently on banking-related</p>	21
18	<p>1 issues, yes.</p> <p>2 Q. And do some of those presentations also</p> <p>3 include issues pertaining to the subject matter of</p> <p>4 this litigation, overdraft fees, posting order, debit</p> <p>5 card transactions, and the like?</p> <p>6 A. I have, and I don't now how many, I'm</p> <p>7 going to say two or three maybe, had presentations on</p> <p>8 matters similar to this, yes.</p> <p>9 Q. What type of groups do you generally make</p> <p>10 those speeches or presentations to?</p> <p>11 A. Generally, I am making presentations to</p> <p>12 regional automated clearinghouse associations and</p> <p>13 their members. I've made presentations via the</p> <p>14 webinar, through webinar presentations for Bankers</p> <p>15 Online, another group called Banker Stuff. I've made</p> <p>16 some other presentations for other organizations.</p> <p>17 EPCOR was one I did recently.</p> <p>18 Q. What is it called?</p> <p>19 A. EPCOR, E-P-C-O-R, they are a regional</p> <p>20 automated clearinghouse association. And I've done</p> <p>21 some other webinars for regional associations.</p> <p>22 Q. Would it be accurate to say that all or</p> <p>23 substantially all of the presentations that you make</p> <p>24 on banking-related issues are to folks in the banking</p> <p>25 industry?</p>	20
19	<p>1 A. For the most part, that is correct.</p> <p>2 Although, I can't vouch for the attendees that are</p> <p>3 there. I know in some of the automated clearinghouse</p> <p>4 presentations they actually have corporate treasurer</p> <p>5 managers who are outside of banking who attend those</p> <p>6 meetings.</p> <p>7 Q. In the course of performing your expert</p> <p>8 witness and litigation support services over the past</p> <p>9 five years, have you ever participated in a matter</p> <p>10 where you're adverse to a bank?</p> <p>11 A. Yes.</p> <p>12 Q. How many times? If it's a number -- I</p> <p>13 mean, a large number, feel free to just say it's more</p> <p>14 than I can count on two hands.</p> <p>15 A. No, it's not a very large number, but I</p> <p>16 have been an expert witness against a financial</p> <p>17 institution. I have been employed as an expert</p> <p>18 witness. I have testified in a case.</p> <p>19 Q. Is that one of the cases that you've</p> <p>20 testified in in the last five years?</p> <p>21 A. Yes.</p> <p>22 Q. Which one is that? If it's easier for me</p> <p>23 to go to the list --</p> <p>24 A. Can I see the list?</p> <p>25 Q. Of course you may. This is just a copy of</p>	21

50	<p>1 I'm going to mark your report as Exhibit 2.                  2 (Plaintiff's Exhibit 2 was marked for                  3 identification.)                  4 Q. (By Mr. Gilbert) At this point in time,                  5 do you have any additional opinions that you expect to                  6 express in this case that are not contained within                  7 your report?                  8 A. At this point in time, no, but subject to                  9 any new information that I'm provided.                  10 Q. But as we sit here today, no others?                  11 A. No others.                  12 Q. Good. On page three of your report under                  13 your Assignment section, take a moment just to read                  14 that first sentence to yourself.                  15 A. Okay.                  16 Q. I just have a question. It may be that                  17 I'm misreading this. But in the fourth line it says                  18 it includes "and information." Do you see where it                  19 has that?                  20 A. Right.                  21 Q. What are you referring to by "and                  22 information"?                  23 A. Information that I obtained through                  24 reviewing documents other than the ones that I                  25 specifically mention there, the depositions and the</p>	52	<p>1 that out to other financial institutions. I guess                  2 it's similar to a survey, although I have not done an                  3 official survey that I could produce to you. Just                  4 based on my 40 years of experience in this industry                  5 and having talked to literally hundreds of banks, that                  6 is what I mean by most banks.                  7 Q. How many banks would you estimate that                  8 number to be based on your experience?                  9 MR. GAYNOR: Object to the form.                  10 THE WITNESS: I'm sorry. What number are                  11 you referring to?                  12 Q. (By Mr. Gilbert) You said that, your                  13 phrase, most banks, is based on your personal                  14 experience dealing with banks over 40 years.                  15 A. Right.                  16 Q. So are we talking about 50 banks, a                  17 hundred banks, 200? I'm asking you because I have no                  18 way of knowing.                  19 A. I see what you're saying. It will be                  20 purely an estimate.                  21 Q. What would that estimate be?                  22 A. Probably 500 banks.                  23 Q. You understand, I presume, that                  24 BancorpSouth today as we sit here is still posting                  25 debits in high-to-low order?</p>
51	<p>1 interviews.                  2 Q. Page four, Section IV A, the first                  3 sentence where you describe what a checking account                  4 is.                  5 A. Yes.                  6 Q. Would you agree with me that a checking                  7 account is a demand deposit account subject to                  8 withdrawal of funds by check and other items as well,                  9 including debit card transactions?                  10 A. That would be correct.                  11 Q. Page five towards the bottom of Section B,                  12 actually the bottom of page five where the sentence --                  13 the new paragraph, "It is my experience that most                  14 banks sort and post transactions in the following                  15 order," what do you mean by most banks? The top 100                  16 banks? The top 500 banks?                  17 A. It really goes across the board in my                  18 opinion. It's most banks that I'm familiar with. And                  19 it could be large banks, regional banks, or even                  20 smaller financial institutions.                  21 Q. Are you counting, when you say most banks,                  22 are you counting the number of banks, or are you                  23 counting maybe based on the amount of total deposits?                  24 A. Again, based on my experience with the                  25 banks that I have worked with, and I am projecting</p>	53	<p>1 A. I have not looked at the current method                  2 that they're using to post transactions.                  3 Q. So you have no knowledge about what the                  4 current method is?                  5 A. Today? No, I do not. Let me -- it was                  6 not anything that I was giving an opinion on. There                  7 may have been some mention of how they're posting                  8 transactions as of the time the depositions were                  9 taken, but I do not specifically remember the sequence                  10 of posting because it was outside the scope of what I                  11 was looking at.                  12 Q. Based on your experience dealing with many                  13 banks within the industry, have you seen a trend in                  14 the industry over the past two to three years, both                  15 before and since the adoption of Reg E, in terms of                  16 changes in posting order?                  17 A. I don't know that I would call it a trend,                  18 but there have been a number of financial institutions                  19 that I specifically have knowledge of that have made                  20 some changes in their posting and other areas related                  21 to Regulation E or the changes that came about as a                  22 result of Regulation E.                  23 Q. Have a number of the banks that you've                  24 worked with or are familiar with gone from high-to-low                  25 posting to either some form of chronological posting</p>

# **Exhibit 4**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

Case No. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION

MDL No. 2036  
Fourth Tranche

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THIS DOCUMENT RELATES TO:

Shane Swift v. BancorpSouth, Inc.,  
S.D. Fla. Case No. 1:10-cv23872-JLK

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DEPOSITION OF SHANE SWIFT

WEDNESDAY, JANUARY 18, 2012  
200 SOUTHWEST FIRST AVENUE  
FORT LAUDERDALE, FLORIDA 33301  
10:00 a.m. - 2:00 p.m.

APPEARANCES:

On behalf of BancorpSouth:  
Eric Jon Taylor, Esquire  
and Darren E. Gaynor, Esquire  
Parker, Hudson, Rainer & Dobbs, LLP  
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Atlanta, Georgia 30303  
(404) 523-5000  
etaylor@phrd.com

On behalf of Shane Swift:  
Jeffrey M. Ostrow, Esquire  
and Jason H. Alperstein, Esquire  
Kopelowitz, Ostrow, Ferguson, Weiselberg  
200 Southwest First Avenue, Suite 1200  
Fort Lauderdale, Florida 33301  
(954) 525-4100  
alperstein@kolawyers.com

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**Shane Swift v. BancorpSouth, Inc.**  
**Shane Swift on 01/18/2012**

Page 26

1 Q. To prepare for the deposition.  
 2 A. No.  
 3 Q. Did you talk to anyone other than your  
 4 lawyers yesterday to prepare for the deposition?  
 5 A. No, I did not.  
 6 Q. Did you talk to your wife about the  
 7 deposition?  
 8 A. Yes.  
 9 Q. When did you talk to your wife about  
 10 the deposition?  
 11 A. Yesterday and this morning.  
 12 Q. Did she do anything to help you prepare  
 13 for the deposition?  
 14 A. Told me I looked good.  
 15 Q. Was that yesterday or today?  
 16 A. That was this morning.  
 17 Q. Is she here in Fort Lauderdale?  
 18 A. Yes.  
 19 Q. Okay. Otherwise, you were by video  
 20 phone. That's why I asked. I'm not saying you don't  
 21 look good. I'm just saying if she knew you looked  
 22 good, she would have had to be here. That's all I  
 23 meant. So your wife came with you for the deposition,  
 24 right?  
 25 A. Yes, she came with me.

Page 27

1 Q. Did she stay back at the hotel?  
 2 A. Yes.  
 3 Q. I should have said this earlier. If at  
 4 any time, you want to take a break, just let me know.  
 5 We'll take breaks.  
 6 The only exception to that rule is if  
 7 there's a question pending; that is, if I ask you a  
 8 question, please answer it before we take a break.  
 9 A. Okay.  
 10 Q. I should have said that earlier. Mr.  
 11 Swift, is it fair to say your wife handles the  
 12 finances for you in the family?  
 13 A. That would be fair to say.  
 14 Q. Now, you came over for the deposition  
 15 today from Pocahontas, right?  
 16 A. I came for the deposition yesterday.  
 17 Q. You left yesterday for the deposition  
 18 today, but you came from Pocahontas, in other words?  
 19 A. Yes.  
 20 Q. Is Pocahontas where you do your  
 21 banking?  
 22 A. Yes.  
 23 Q. Do you know how many BancorpSouth  
 24 branches there are in Pocahontas?  
 25 A. Yes.

Page 28

1 Q. How many?  
 2 A. One, I believe.  
 3 Q. I apologize. I didn't --  
 4 A. One. I'm sorry.  
 5 Q. In your own words, tell me what this  
 6 lawsuit is about.  
 7 A. This lawsuit is about unfair  
 8 resequencing of A.T.M. and debit card transactions.  
 9 Q. What do you think is unfair about  
 10 resequencing of A.T.M. and debit card transactions?  
 11 A. It's a manipulation of the customer or  
 12 the consumer by a financial institution who has  
 13 professionals working for them as opposed to, you  
 14 know, the ordinary working man. Anything else?  
 15 Q. Oh, I wasn't sure you were done. It's  
 16 also kind of hard to see your face. You're kind of in  
 17 the shadows.  
 18 A. Oh, I'm sorry.  
 19 Q. No, it's not -- it's just I wasn't sure  
 20 you were done. If I'm staring at you, it's because  
 21 I'm not sure you're done.  
 22 A. Okay.  
 23 Q. You're using the word, unfair, and I'm  
 24 trying to get at what is unfair in your mind about  
 25 resequencing of A.T.M. and debit transactions?

Page 29

1 MR. OSTROW: Form.  
 2 A. Excuse me?  
 3 BY MR. TAYLOR:  
 4 Q. We should have gone over that, also.  
 5 A. It is -- it's a program manipulation of  
 6 transactions that take place by somebody or two people  
 7 using their debit cards on a daily basis where nothing  
 8 is immediately done at that time, you know.  
 9 I believe that if somebody makes a  
 10 transaction that -- you know, in chronological order  
 11 on a certain day with the dated receipt through a  
 12 weekend that if that happens on the next business day  
 13 that there shouldn't be a resequencing of highest to  
 14 lowest, let's say, a half dozen transactions done that  
 15 weekend from lowest to highest, let's say, in  
 16 chronological order over the weekend.  
 17 Q. Done?  
 18 A. I'm done.  
 19 Q. Okay.  
 20 A. You wanted an example, right?  
 21 Q. Well, I want to know what --  
 22 A. What I believe, yes. Well, that's an  
 23 example of what I believe.  
 24 Q. I want to make sure I'm understanding  
 25 you.

# **Exhibit 5**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CASE NO. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION  
MDL No. 2036

THIS DOCUMENT RELATES TO:

Swift v. BancorpSouth, Inc.  
N.D. FL Case No. 1:10-cv-00090-SPM  
S.D. FL Case No. 1:10-cv-23872-JLK

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DEPOSITION OF GORDON LEWIS

\*\*\*\*\*

TAKEN AT THE INSTANCE OF THE PLAINTIFF  
IN THE BANCORPSOUTH CONFERENCE CENTER  
387 WEST MAIN STREET, TUPELO, MISSISSIPPI  
ON MAY 11, 2012, BEGINNING AT 10:45 A.M.

(APPEARANCES NOTED HEREIN)  
Reported by: LUANNE FUNDERBURK, CSR 1046

---

ADVANCED COURT REPORTING  
P.O. BOX 761  
TUPELO, MS 38802-0761  
(662) 690-1500

1 A. I do.

2 Q. Was that an issue that you recall raising  
3 as a concern of yours during the time that you were a  
4 bank president for BancorpSouth?

5 A. It is a question that I could have raised  
6 at points in time during my tenure as a regional  
7 president.

8 Q. Was there a particular dissatisfaction on  
9 your part at any point in time about the corporate  
10 department's ethics when you were a bank president?

11 A. About their ethics?

12 Q. Yes.

13 A. No, sir.

14 Q. How about the conduct and the way that the  
15 corporate departments were treating the customers on  
16 any particular topics?

17 A. No.

18 Q. How about the way that the corporate  
19 department was treating employees of the bank?

20 A. I can't tie anything to this -- that  
21 question.

22 Q. Because the beginning part of this  
23 paragraph is talking about the importance of customer  
24 service that you referred to earlier in your  
25 deposition today, right?

1 Q. Go ahead. Read it. Please, read it.

2 A. Okay. I'm just waiting for the green  
3 light, okay? "Please, explain the rationale behind  
4 our policy of posting largest items first. What can  
5 be done to protect our bank from loss and our tellers  
6 from criticism in situations where transit items come  
7 through and paid ahead of items we handled properly  
8 during operating hours."

9 Q. You don't recall writing this language into  
10 an e-mail and sending it to Larry Bateman at any  
11 point in time, correct?

12 A. I do not.

13 Q. Do you recall at any point in time  
14 questioning the rationale behind BancorpSouth's  
15 policy of posting largest items first?

16 A. I do not recall it, but this e-mail  
17 indicates that I did.

18 Q. Okay. Do you still question the policy as  
19 to whether posting largest items first is a good  
20 policy to apply to consumer accounts?

21 MR. TAYLOR: Object to the form.

22 A. No.

23 Q. Why not?

24 A. I suppose it's industry practice. It gives  
25 the customer the advantage of paying their more

1 significant items first. And in the overall payment  
2 of items, it's one of the options that's available.

3 Q. It was industry practice in 2005, as well,  
4 correct?

5 A. I don't know.

6 Q. Why do you know it now but you don't know  
7 whether it was in 2005?

8 A. I don't -- there are a lot of things that I  
9 don't know about 2005, I suppose.

10 Q. Now, when this e-mail was written and sent  
11 in September of 2005 and this paragraph that I had  
12 you read into the record, there's a discussion of  
13 protecting the bank from loss and the tellers from  
14 criticism in situations where transit items come  
15 through and pay ahead of items we handled properly  
16 during operating hours. So, there's an expression of  
17 concern in this e-mail about dealing with the bank's  
18 customers, correct?

19 MR. TAYLOR: Object to the form.

20 A. The point of concern would be the tellers'  
21 interaction with the customers.

22 Q. Relating to the policy of posting largest  
23 items first, correct?

24 MR. TAYLOR: Object to the form.

25 A. Well, the criticism, and again, I do not

# **Exhibit 6**

**In Re: Checking Account Overdraft Litigation  
Jeff Jagers**

**1:09-MD-02036-JLK  
October 12, 2011**

**Page 1**

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

---

IN RE: CHECKING ACCOUNT )  
OVERDRAFT LITIGATION )  
 )  
 ) NO. 1:09-MD-02036-JLK  
 )  
 )

---

DEPOSITION  
OF  
JEFF JAGGERS  
OCTOBER 12, 2011

**In Re: Checking Account Overdraft Litigation  
Jeff Jagers**

**1:09-MD-02036-JLK  
October 12, 2011**

**Page 199**

1 bring it current without being assessed a fee,  
2 and then after that, the fee kicks in?

3 A. Yes. There's a one-time fee. After  
4 ten days, if your account reaches the ten day --  
5 ten days overdrawn -- ten consecutive days  
6 overdrawn, there will be a one-time fee.

7 Q. How much is it?

8 A. \$25, and changed October 1st to \$35.

9 Q. Charge them 40. What about -- is there  
10 a minimum threshold that you need to be negative  
11 before an OD fee will kick in, or is it one  
12 penny?

13 A. There is no threshold.

14 Q. Has the bank received customer  
15 complaints regarding high to low posting from  
16 the time period of '06 through Reg E?

17 A. Yes, I would say yes. Yes.

18 Q. Is there a record kept when somebody  
19 complains?

20 A. If it is a formal complaint, there is a  
21 record kept. But if it's a call center, you  
22 know, inquiry, you know, hey, you know, you  
23 charged me three fees yesterday. I don't like  
24 that. No, there's not a record kept.

25 Q. Where is the call center?

# **Exhibit 7**

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CASE NO. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT )  
OVERDRAFT LITIGATION )  
 )  
MDL No. 2036 )  
 )  
 )  
THIS DOCUMENT RELATES TO: )  
 )  
Swift vs. BancorpSouth, Inc. )  
N.D. FL Case No. 1:10-cv-00090-SPM )  
S.D. FL Case No. 1:10-cv-23872-JLK )  
 )  
\_\_\_\_\_ )

THE DEPOSITION OF  
DEREK CASWELL  
Taken on Behalf of the Plaintiffs  
August 17, 2012  
A.M. - 1:00 P.M.

\_\_\_\_\_  
Meschelle Manley Deen, LCR #610  
My license expires: 6/30/14

9:00

138	<p>1 Q. Any possibility that Mr. Beacom                  2 didn't understand how some merchants settle                  3 transactions after the swipe of a debit card?                  4 A. Definitely. In terms of not                  5 understanding?                  6 Q. Yes. I'm sorry. "Definitely" what?                  7 That he wouldn't know that?                  8 A. That he wouldn't fully understand was                  9 your question?                  10 Q. Yes.                  11 A. Definitely, he would not fully                  12 understand.                  13 Q. He would not fully understand that?                  14 A. That's not his job.                  15 Q. His job is to run the regional banks?                  16 A. Exactly.                  17 Q. Okay. So how high up do you have to                  18 get in BancorpSouth to know about the                  19 problems of merchants settling debit card                  20 transactions at some time after the swipe?                  21 MR. TAYLOR: Object to the                  22 form.                  23 THE WITNESS: Yeah. That's not                  24 a good question.                  25 ///</p>	140	<p>1 Q. Sure.                  2 A. Right.                  3 Q. People that actually work in the                  4 debit card area?                  5 A. Right. Yeah.                  6 Q. And that's in processing --                  7 A. It's part of operations, is what I                  8 was getting at.                  9 Q. But apart from those three discrete                  10 areas, it's your view that the knowledge that                  11 there is a delay when some merchants swipe a                  12 debit card to the time when the transaction                  13 settles -- is that knowledge not widely known                  14 throughout the employees of BancorpSouth?                  15 MR. TAYLOR: Object to the                  16 form.                  17 THE WITNESS: What is your                  18 specific question again on that one?                  19 BY MR. KAPLAN:                  20 Q. Well, that is my specific question.                  21 You told me three subdepartments of                  22 BancorpSouth where employees have, you think,                  23 an understanding that when some merchants                  24 swipe a card, there is a delay before the                  25 transaction is settled, right?</p>
139	<p>1 BY MR. KAPLAN:                  2 Q. Well, I'm sorry. Let me rephrase it,                  3 then.                  4 What department at BancorpSouth do                  5 you have to work in to know that there is a                  6 delay from a merchant swiping a debit card to                  7 the transaction being settled?                  8 MR. TAYLOR: Object to the                  9 form.                  10 THE WITNESS: You're going to                  11 have to be more specific.                  12 BY MR. KAPLAN:                  13 Q. Well, you know that there is a delay                  14 between the time that some merchants swipe a                  15 card and the time the transaction is settled?                  16 A. Now you're being more -- now you're                  17 saying "some merchants." Before you said                  18 "merchants," so it was all encompassing.                  19 Q. Right.                  20 A. So some merchants. Operations -- the                  21 call center -- I would say primarily.                  22 Q. And that's pretty much it, right?                  23 A. For the most [verbatim], but I deal                  24 with it day to day. Oh, our debit card                  25 area. Sorry.</p>	141	<p>1 A. Those are the ones that deal with it                  2 day to day, right.                  3 Q. Right.                  4 A. They are the ones that would have a                  5 better understanding of that. I can't say                  6 what people know and what they don't know                  7 throughout the bank.                  8 Q. Right.                  9 A. I'm not them. But are other people                  10 aware that when they go to a restaurant that                  11 it takes longer in the bank? Yes.                  12 Q. But you're sure that William Beacom                  13 doesn't know that?                  14 MR. TAYLOR: Object to the                  15 form.                  16 THE WITNESS: No. What I said                  17 was that Bill doesn't know the operational                  18 aspects of that.                  19 BY MR. KAPLAN:                  20 Q. Okay.                  21 A. And I don't know exactly, you know,                  22 the circumstance, on top of that.                  23 Q. Well, judging by this email that was                  24 forwarded to you and that you subsequently                  25 forwarded, do you think that William Beacom</p>

142	<p>1 has an accurate understanding as to how  2 transactions in the debit card department are  3 updated on on-line banking?  4 A. I can't speak for him, but I know  5 that he doesn't deal with it day to day, so I  6 would say the operational piece of it and  7 exactly how debit card transactions post, all  8 of them, that's not his responsibility.  9 Q. So you wouldn't expect him to know  10 that level of knowledge about debit cards?  11 A. I would expect him to know general  12 [verbatim], such as it takes longer at a  13 restaurant, but, you know, what filed as this  14 and what does that and the operational  15 aspects, no.  16 Q. And you certainly wouldn't expect the  17 customers of BancorpSouth to have that  18 knowledge, right?  19 MR. TAYLOR: Object to the  20 form.  21 THE WITNESS: (Witness does not  22 respond.)  23 BY MR. KAPLAN:  24 Q. I mean, you know, if a regional  25 banking president doesn't have it, you</p>	144	<p>1 technology, which is back office -- okay? --  2 and you're talking, two, just general  3 information.  4 BY MR. KAPLAN:  5 Q. Well, is Mr. Beacom talking about  6 back-office technology in this email?  7 MR. TAYLOR: Object to the  8 form.  9 THE WITNESS: It's him -- him  10 writing the email.  11 BY MR. KAPLAN:  12 Q. Yeah. Well, correct me if I'm wrong,  13 but I asked you is there any way that William  14 Beacom, as a regional banking president,  15 would not have an understanding as to how  16 debit card transactions post on the on-line  17 banking system, and you said that it's  18 definitely likely that he doesn't know,  19 right?  20 MR. TAYLOR: Object to the  21 form.  22 BY MR. KAPLAN:  23 Q. Am I mischaracterizing your  24 testimony?  25 A. Somewhat. I mean, what I said was</p>
143	<p>1 wouldn't expect a customer of BancorpSouth to  2 have that knowledge, would you?  3 MR. TAYLOR: Same objection.  4 THE WITNESS: (Witness does not  5 respond.)  6 BY MR. KAPLAN:  7 Q. Would you?  8 A. I guess -- can you ask that a little  9 bit differently?  10 Q. You don't understand the question?  11 A. No.  12 Q. If a regional banking president of  13 BancorpSouth isn't able to understand all of  14 the operations of debit card transaction  15 settlements, how would you expect a  16 BancorpSouth customer to understand that?  17 MR. TAYLOR: Object to the  18 form.  19 THE WITNESS: I mean, I did say  20 that an employee of BancorpSouth wouldn't  21 understand the operational aspects of that,  22 but they would have the same information and  23 be able to determine the same balance  24 information and how that information comes  25 across as the customer. You're talking, one,</p>	145	<p>1 that that is not his -- the operation piece.  2 Q. Uh-huh.  3 A. Do you understand there's -- my mind  4 is thinking the back office part.  5 Q. I do.  6 A. That's not his area.  7 Q. But do you have to understand the  8 back-office part to understand how debit card  9 transactions post on on-line banking with  10 BancorpSouth?  11 A. No.  12 Q. So given that, is there some reason  13 to believe that William Beacom is confused  14 when he's talking about debit card and  15 on-line banking [verbatim]?  16 A. I mean, I don't know what to think.  17 That's his email and that's his language.  18 Q. It is his email. It's an email that  19 you got, and you didn't stop and ask  20 Mr. Beacom what he meant by this email, did  21 you? You forwarded it.  22 A. Right. It's just a straight forward.  23 Q. And Mr. Beacom wrote: "We continue  24 to hear these complaints from our customers,  25 especially about our on-line banking system."</p>

158	<p>1 forwarded this complaint?                  2 MR. TAYLOR: Object to the                  3 form.                  4 THE WITNESS: I can't speak on                  5 behalf of Kathryn Dekker.                  6 BY MR. KAPLAN:                  7 Q. Well, what did you think was                  8 incorrect in Ms. Dekker's email?                  9 MR. TAYLOR: Object to the                  10 form.                  11 THE WITNESS: In terms of                  12 specifically what the -- the merchant issue                  13 she's talking about?                  14 BY MR. KAPLAN:                  15 Q. Yes.                  16 A. She's talking about -- well, again, I                  17 can't speak on behalf of Kathryn --                  18 Q. Sure.                  19 A. -- but restaurants can settle                  20 differently than big-box businesses like a                  21 Wal-Mart, and there can be a delay in those                  22 coming in.                  23 Q. And you know that?                  24 A. Yeah.                  25 Q. But Kathryn Dekker doesn't apparently</p>	160	<p>1 BY MR. KAPLAN:                  2 Q. Right. She could be talking about                  3 that?                  4 A. Uh-huh.                  5 MR. KAPLAN: Do you want to                  6 take a break?                  7 MR. TAYLOR: You can finish --                  8 THE WITNESS: Yeah. Let's just                  9 finish this one.                  10 BY MR. KAPLAN:                  11 Q. When she writes, "Historically, we                  12 have told the customer that the reason that                  13 they don't show on the account right away" --                  14 and I assume she's talking about -- you and I                  15 both assume she's talking about debit card                  16 transactions, right?                  17 A. Uh-huh.                  18 Q. -- "is because the merchant hasn't                  19 batched, which is incorrect," is she wrong so                  20 far -- in what she's saying, so far as you                  21 can tell?                  22 MR. TAYLOR: I'll object to the                  23 form. I'm confused where the double                  24 negatives are in that question.                  25 MR. KAPLAN: It's the actual --</p>
159	<p>1 know that?                  2 A. Well, I don't know what she knows or                  3 she doesn't know, and I also don't know if                  4 she's specifically referencing that or some                  5 other instance or anything else. There is                  6 nothing that shows my specific communication                  7 with Kathryn that says, "Hey, Kathryn.                  8 What's up?"                  9 Q. But you were able to come to an                  10 understanding -- that was your take on her                  11 email, right? It was that it was the product                  12 of her not understanding?                  13 A. It could be a -- let's see. (Witness                  14 reviewing document.)                  15 Q. There's a question pending. If you                  16 want, I can have it read back.                  17 A. Yeah. Just go ahead again.                  18 (Court reporter read back the                  19 requested question.)                  20 THE WITNESS: You know, I can't                  21 say what she understands and what she doesn't                  22 understand. All I can say is that in terms                  23 of this statement right here, what she could                  24 be talking about is the delay of the merchant                  25 processing -- settling the payment.</p>	161	<p>1 the text itself isn't --                  2 MR. TAYLOR: I understand. I                  3 got lost.                  4 THE WITNESS: (Witness does not                  5 respond.)                  6 BY MR. KAPLAN:                  7 Q. If you don't understand the question,                  8 I can rephrase.                  9 A. Yeah. Go ahead.                  10 Q. So let's look at the first sentence                  11 of this paragraph: "Historically, we have                  12 told the customer that the reason that they                  13 don't show on the account" -- and we have                  14 agreed that that's debit transactions --                  15 "right away is because the merchant hasn't                  16 batched, which is incorrect."                  17 So in that particular sentence, is                  18 there anything that Kathryn is saying that,                  19 in your view, is not correct?                  20 A. I don't know what "we" is, first of                  21 all. I don't know the definition of "we." I                  22 know it's not -- I mean, from my                  23 understanding, I don't know on whose behalf                  24 she's speaking, on the part of. That could                  25 be her branch. I don't have -- I have never</p>

166	<p>1 like a Wal-Mart that's -- it just depends on                  2 the type of merchant, again.                  3 Q. It does. And my question to you is,                  4 in looking at this email, is it at least                  5 apparent to you, Derek Caswell, that Kathryn                  6 Dekker doesn't understand how the debit                  7 transactions post?                  8 A. You know, I can't really speak on her                  9 behalf. I do see flaws in her response --                  10 Q. Yeah.                  11 A. -- but I don't know what her full                  12 understanding is overall, and, again, I don't                  13 know what this is in relation to.                  14 Q. Fair enough.                  15 A. What specific issue, like, with the                  16 customer.                  17 Q. Right. So if Kathryn Dekker, a                  18 customer service representative of                  19 BancorpSouth, is sending an email which                  20 contains flaws in her description of how                  21 debit card transactions post, how is a                  22 customer of BancorpSouth to understand how                  23 debit card transactions post?                  24 MR. TAYLOR: Object to the                  25 form.</p>	168	<p>1 On a debit card, you know you have                  2 that money; you have authorized that you have                  3 that money; you have authorized the                  4 transaction. And the information, in terms                  5 of your balance, is available on Internet                  6 banking, it's available through the call                  7 center, and now mobile banking to see where                  8 you are at that point in time.                  9 It's up to the customer to know what                  10 your transactions are and to balance it out.                  11 And it's, you know, fairly easy. We have                  12 many customers that don't have an issue with                  13 that, and, you know -- and that's, you know,                  14 how it is.                  15 Q. It sounds simple, doesn't it?                  16 A. Yeah.                  17 Q. Does Kathryn Dekker understand that                  18 it's that simple?                  19 MR. TAYLOR: Object to the                  20 form.                  21 THE WITNESS: I can't speak on                  22 behalf of Kathryn.                  23 BY MR. KAPLAN:                  24 Q. How about Alana Corey, CSR --                  25 MR. TAYLOR: Same objection.</p>
167	<p>1 THE WITNESS: You're going to                  2 have to ask a specific question.                  3 BY MR. KAPLAN:                  4 Q. That is my specific question.                  5 MR. TAYLOR: I object to the                  6 form.                  7 THE WITNESS: (Witness does not                  8 respond.)                  9 BY MR. KAPLAN:                  10 Q. You can't answer the question?                  11 MR. TAYLOR: If I object, that                  12 doesn't mean you don't answer. That's                  13 just -- it's a place order [verbatim].                  14 THE WITNESS: Okay. You said                  15 how are customers supposed to --                  16 BY MR. KAPLAN:                  17 Q. -- understand how debit transactions                  18 post?                  19 A. Well, just like when you write a                  20 check, you have your check ledger, and that                  21 check doesn't go in right away. It goes                  22 through the process. You know that you have                  23 spent that money; you have authorized that                  24 you have spent that money, and it's going to                  25 go through.</p>	169	<p>1 BY MR. KAPLAN:                  2 Q. -- she doesn't seem to understand it                  3 either, does she?                  4 A. I can't speak on their behalf. And                  5 these are all, again, forwarded emails.                  6 Q. Well, Alana Corey writes: "It has                  7 been the cause of customers' accounts closing                  8 and the cause of several upset customers.                  9 They know it is our updating and not the                  10 merchants, because they use the same                  11 merchants with different banks and it updates                  12 instantly."                  13 Did I read that correctly?                  14 A. Which page?                  15 Q. It's page 2, of 76.                  16 A. That's what it says, yeah.                  17 Q. Okay. And you and I talked about                  18 that before, and you said it sounded to you                  19 as if Alana Corey didn't understand how debit                  20 card transactions posted for some merchants,                  21 right?                  22 A. That could be a possibility.                  23 Q. Okay. And so Alana Corey, a CSR -- a                  24 customer service representative of                  25 BancorpSouth -- if she doesn't understand how</p>

# **Exhibit 8**

**SHANE SWIFT V BANCORPSOUTH**  
**Steven Fried on 10/11/2012**

**1:09-MD-02036-JLK**  
**Page 1**

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF FLORIDA  
3 MIAMI DIVISION  
4 Case No. 1:09-MD-02036-JLK

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6  
7 IN RE: CHECKING ACCOUNT  
8 OVERDRAFT LITIGATION,  
9 MDL NO. 2036  
10 Fourth Tranche.

11 \_\_\_\_\_  
12 THIS DOCUMENT RELATES TO:  
13 SHANE SWIFT V BANCORPSOUTH,  
14 INC., S.D. FLA CASE NO.  
15 1:10-CV-23872-JLK

16 \_\_\_\_\_  
17  
18 DEPOSITION OF STEVEN FRIED  
19 Thursday, October 11, 2012  
20  
21  
22  
23

24 Reported By:  
25 KATHLEEN WILKINS, CSR #10068, RPR, CRR, CCRR, CLR

**SHANE SWIFT V BANCORPSOUTH**  
**Steven Fried on 10/11/2012**

<p style="text-align: right;"><b>Page 58</b></p> <p>1 let them know that there was an authorization.                  2 And then if the -- if for some reason the                  3 transaction got cancelled or didn't go through,                  4 they would have a certain period of time to remove                  5 that memo posting. If the transaction did go                  6 through, then it would get thrown into this bucket                  7 and processed with the other transactions for the                  8 exact amount of the transaction.                  9 Q. Do you express any opinion in your                  10 report that BancorpSouth was not commercially                  11 reasonable in the way it used memo posting on                  12 debit card transactions?                  13 A. I don't believe that that was an opinion                  14 I expressed.                  15 Q. Did any of the banks you worked for                  16 engage EPG?                  17 A. No.                  18 Q. You know who EPG is?                  19 A. I do.                  20 Q. How about Karaker?                  21 A. No.                  22 Q. Any other consultants, when you were at                  23 the bank that you described, to address revenue                  24 enhancement?                  25 A. No. We did it the old-fashioned way.</p>	<p style="text-align: right;"><b>Page 60</b></p> <p>1 At the banks that you've listed, that                  2 would lead to an overdraft fee, right?                  3 A. Not necessarily.                  4 Q. Because there were subjective decisions                  5 made about whether it would be applied, right?                  6 A. Correct.                  7 Q. So let's assume the subjective decision                  8 was made to apply an overdraft fee, and let's say                  9 it stayed in overdraft for five, ten days.                  10 Was there any additional fee charged for                  11 that account?                  12 A. No.                  13 Q. Okay. What is -- talking about DDAs                  14 now, was that ledger balance on a DDA?                  15 A. It's the balance that the customer sees                  16 which is simply the total of all the deposits and                  17 minus the total of all the debits to the account.                  18 It's not necessarily a collected balance.                  19 Q. When you say the customer sees, what do                  20 you mean by that?                  21 A. If you pick up a checking account                  22 statement, you made a deposit for \$10,000 the day                  23 before and you pick up your statement today, it's                  24 going to show a \$10,000 deposit. That's the                  25 ledger balance.</p>
<p style="text-align: right;"><b>Page 59</b></p> <p>1 Q. Tell me what you mean by that.                  2 A. We did it by bringing in new customers.                  3 Q. Your banks charged overdraft fees,                  4 right?                  5 A. Yes.                  6 Q. And that added to revenues, right?                  7 A. Yes.                  8 Q. And there's nothing, per se, wrong about                  9 a bank making revenue, right?                  10 A. No.                  11 Q. And there's nothing, per se, wrong about                  12 overdraft fees, right?                  13 A. No.                  14 Q. Tell me if -- your banks that you                  15 listed, when you worked there, did they use                  16 continuous overdraft fees?                  17 A. They did not.                  18 Q. Did they have any other name for a                  19 transaction that went into overdraft and stayed in                  20 overdraft for a period of time?                  21 A. You mean without alteration as far as                  22 the dollar amount? In other words, you overdraw                  23 by \$1,000 and it just sat there for six months?                  24 Q. Let's take that hypothetical, that you                  25 have a transaction that overdraws by \$1,000.</p>	<p style="text-align: right;"><b>Page 61</b></p> <p>1 But that money hasn't been collected by                  2 the bank yet. So technically, that 10,000 is                  3 uncollected funds, but it's still going to show up                  4 on the checking account statement.                  5 So I guess maybe the short answer is                  6 what you see on your checking account, that's the                  7 ledger balance.                  8 Q. Was that cash balance on a DDA?                  9 A. I don't -- you're going to have to                  10 define for me what you mean by "cash balance." If                  11 what you're referring to is the average collect --                  12 daily or average collected balance and some banks                  13 will call that cash available, I've never seen it                  14 called cash balance.                  15 Q. So you're not familiar with the phrase                  16 "cash balance"?                  17 A. No. I mean, I've seen cash available,                  18 available to withdraw. I've seen collected                  19 balance, okay.                  20 Q. Okay. Are you familiar with the phrase                  21 "memo balance"?                  22 A. No.                  23 Q. Are you familiar with the phrase                  24 "available balance"?                  25 A. Yes.</p>

**SHANE SWIFT V BANCORPSOUTH**  
**Steven Fried on 10/11/2012**

**1:09-MD-02036-JLK**  
**Pages 110..113**

<p style="text-align: right;"><b>Page 110</b></p> <p>1 Q. Is it your opinion that BancorpSouth  2 does not utilize that information?  3 MR. SOBOL: Objection. Vague.  4 Incomplete.  5 THE WITNESS: What information are you  6 referring to?  7 BY MR. TAYLOR:  8 Q. All the information you just described.  9 MR. SOBOL: Objection. Vague.  10 THE WITNESS: It's my understanding that  11 for certain categories of transactions, they do  12 not utilize the information they have available to  13 them.  14 BY MR. TAYLOR:  15 Q. How does your opinion on utilizing this  16 date and time information interact with the  17 function of batch posting?  18 MR. SOBOL: Objection. Vague.  19 Ambiguous.  20 THE WITNESS: I'm not even sure I  21 understand that question.  22 BY MR. TAYLOR:  23 Q. Is it because you're unfamiliar with  24 batch posting and how that works?  25 MR. SOBOL: Objection. Vague.</p>	<p style="text-align: right;"><b>Page 112</b></p> <p>1 chronologically a violation of any banking  2 regulation or rule?  3 MR. SOBOL: Objection to the extent it  4 calls for a legal conclusion.  5 THE WITNESS: Not to my knowledge.  6 BY MR. TAYLOR:  7 Q. Do you know, based on the documents  8 you've read, what the average balance for a  9 BancorpSouth DDA customer is?  10 A. My recollection is it was like \$383.  11 Q. Have you ever worked for a bank that had  12 a similar average DDA number?  13 A. Probably not.  14 Q. Not even close, right?  15 A. Well, I mean, I don't remember what the  16 numbers were, for example, when I worked for Union  17 Bank. I don't remember what the numbers were when  18 I worked for Bankers Trust Company. Subsequent to  19 that, I would guess it's probably not even close.  20 Q. Okay. Looking at page 6 of your report,  21 I'm down -- the third full paragraph, you say  22 that, "Examples of customers using a debit card to  23 purchase a \$2 cup of coffee and unknowingly  24 incurring \$32 or \$35, overdraft fees abound."  25 Do you see that?</p>
<p style="text-align: right;"><b>Page 111</b></p> <p>1 THE WITNESS: No, it's just because it's  2 such a broad question. I mean, I don't know how  3 to answer it.  4 BY MR. TAYLOR:  5 Q. Based on your experience in the  6 industry, do you know any banks that post debit  7 transactions chronologically?  8 A. Let me break it down as between larger  9 banks and smaller banks.  10 Q. Sure.  11 A. And let me add to that the fact that --  12 I mean, there's 7,000 banks in this country. I  13 don't know what each one of the other -- if you  14 take the smaller 6,900 banks, I don't know what  15 each one of them does. So I'm not going to give  16 you the name of a bank that posts chronologically.  17 Okay.  18 Among the major banks, you're talking  19 about BofA or Union Bank or Wells Fargo or US  20 BankCorp, my understanding is that most of them,  21 if not all of them, do not post chronologically.  22 Q. Okay. Since we're using a negative  23 here, I'm going to try to phrase it in a way  24 that's not confusing.  25 In your opinion, is not posting</p>	<p style="text-align: right;"><b>Page 113</b></p> <p>1 A. I do.  2 Q. On what do you base that opinion?  3 A. Consumers Union documents, the documents  4 that I reviewed, newspaper articles, you know,  5 publicly available information. You can read, for  6 example, the Wells Fargo case, okay, or any of  7 those cases similar. Those are all published in  8 the newspapers. And if you read the accounts of  9 those, or you read some of the stories in some of  10 the Consumers Union or other places, those stories  11 are all over the place.  12 Q. That sentence then doesn't refer  13 specifically to anything you saw related to  14 BancorpSouth, right?  15 A. No. It refers to the system that  16 BancorpSouth is using to charge overdraft fees.  17 Q. But you -- you didn't see any examples  18 of that in what you reviewed in the BancorpSouth  19 documents, right?  20 A. I might have, but I don't remember.  21 For example, there were some documents,  22 there was some discussion about Shane Swift and  23 whether it was, you know, excerpts from deposition  24 or whether it was in some other document. There  25 are portions that related.</p>

# **Exhibit 9**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO:

Swift v. BancorpSouth, Inc.  
N.D. FL Case No. 1:10-cv-00090-SPM  
S.D. FL Case No. 1:10-cv-23872-JLK

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DEPOSITION OF MICHAEL LINDSEY

\*\*\*\*\*

TAKEN AT THE INSTANCE OF THE PLAINTIFF  
IN THE BANCORPSOUTH CONFERENCE CENTER  
387 WEST MAIN STREET, TUPELO, MISSISSIPPI  
ON MAY 10, 2012, BEGINNING AT 9:00 A.M.

(APPEARANCES NOTED HEREIN)

Reported by: LUANNE FUNDERBURK, CSR 1046

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ADVANCED COURT REPORTING  
P.O. BOX 761  
TUPELO, MS 38802-0761  
(662) 690-1500

190	192
<p>1 the Mississippi Department of Banking had similar</p> <p>2 language that the fee associated with NSF/OD should</p> <p>3 be punitive so as not to encourage the customer to</p> <p>4 utilize that or to overdraw their account. I believe</p> <p>5 the state banking department had that law at that</p> <p>6 time or had that recommendation.</p> <p>7 Q. To charge a higher fee so people don't use</p> <p>8 it?</p> <p>9 A. Yes?</p> <p>10 Q. Is that something that the bank considered</p> <p>11 in terms of setting the various rates we've talked</p> <p>12 about today?</p> <p>13 A. I can't say that that was specifically</p> <p>14 used. I can say that guidance was out there.</p> <p>15 Q. Do you know whether the bank followed the</p> <p>16 guidance?</p> <p>17 A. The bank's intent is to follow all</p> <p>18 regulatory guidance and be in compliance.</p> <p>19 Q. Was the bank complying with any Mississippi</p> <p>20 regulation in setting the rate for its fees?</p> <p>21 A. I don't know of any regulation that deals</p> <p>22 with specifically setting fees.</p> <p>23 Q. Okay. I appreciate your time, Mr. Lindsey.</p> <p>24 I have no further questions for you at this time.</p> <p>25 EXAMINATION</p>	<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
191	193
<p>1 BY MR. TAYLOR:</p> <p>2 Q. Mr. Lindsey, do you recall you were asked</p> <p>3 some questions earlier and looked at a couple of</p> <p>4 monthly account statements? Do you recall that line</p> <p>5 of questioning?</p> <p>6 A. Yes.</p> <p>7 Q. Aside from the monthly account statements,</p> <p>8 are there any other documents that a customer who has</p> <p>9 an item that goes into overdraft, is there anything</p> <p>10 else that those customers receive from BancorpSouth?</p> <p>11 A. They receive a notice that lists the</p> <p>12 individual items that were overdrawn.</p> <p>13 Q. How frequently do they receive that kind of</p> <p>14 list?</p> <p>15 A. They receive one of those notices any</p> <p>16 processing day that they have NSF/OD activity.</p> <p>17 Q. When did that notification process start?</p> <p>18 A. From my knowledge it's been in place since</p> <p>19 I started at the bank in 1989.</p> <p>20 Q. Is that true today?</p> <p>21 A. Yes.</p> <p>22 Q. That's all. Thank you.</p> <p>23 MR. STREISFELD: Appreciate your</p> <p>24 time. Thank you.</p> <p>25 (Deposition concluded at 3:30 p.m.)</p>	<p>1 CERTIFICATE</p> <p>2 STATE OF MISSISSIPPI )</p> <p>3 COUNTY OF LEE )</p> <p>4 RE: ORAL DEPOSITION OF MICHAEL LINDSEY</p> <p>5 I, LuAnne Funderburk, CSR 1046, a Notary</p> <p>6 Public within and for the aforesaid county and state,</p> <p>7 duly commissioned and acting, hereby certify that the</p> <p>8 foregoing proceedings were taken before me at the</p> <p>9 time and place set forth above; that the statements</p> <p>10 were written by me in machine shorthand; that the</p> <p>11 statements were thereafter transcribed by me, or</p> <p>12 under my direct supervision, by means of</p> <p>13 computer-aided transcription, constituting a true and</p> <p>14 correct transcription of the proceedings; and that</p> <p>15 the witness was by me duly sworn to testify to the</p> <p>16 truth and nothing but the truth in this cause.</p> <p>17 I further certify that I am not a relative or</p> <p>18 employee of any of the parties, or of counsel, nor am</p> <p>19 I financially or otherwise interested in the outcome</p> <p>20 of this action.</p> <p>21 Witness my hand and seal on this 29th day of</p> <p>22 May, 2012.</p> <p>23 _____</p> <p>24 My Commission Expires: CSR 1046</p> <p>25 February 28, 2015 Notary Public</p>