

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.,¹)
S.D. Fla. Case No. 1:10-cv-23872-JLK)

**DEFENDANT BANCORPSOUTH BANK'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO CERTAIN OF
DEFENDANT BANCORPSOUTH BANK'S AFFIRMATIVE DEFENSES**

¹ BancorpSouth, Inc. previously asserted that it is not a proper defendant in this matter and, as a result, Plaintiff Swift named BancorpSouth Bank as the sole defendant in the Second Amended Complaint (DE #994).

BancorpSouth Bank (“BancorpSouth” or the “Bank”) opposes Plaintiffs' Motion for Summary Judgment as to Certain of Defendant BancorpSouth Bank's Affirmative Defenses (DE #2997) (the “Motion”). The Court should deny Plaintiff's Motion because it ignores key, dispositive evidence in the record -- including Plaintiff's own testimony and the contracts that govern his relationship with BancorpSouth -- which supports BancorpSouth's affirmative defenses and creates issues of material fact. Plaintiff wholly fails to address the record evidence in this case which shows substantial support for each of BancorpSouth's affirmative defenses.

Plaintiff's Motion is a premature and improper effort to cripple BancorpSouth's ability to put on a defense at trial. In his Motion, Plaintiff asserts arguments that would be more appropriate in a motion to dismiss, insisting that certain of BancorpSouth's defenses fail as a matter of law under any set of facts. Although Plaintiff's approach is a convenient way for him to ignore the disputes of fact that prevent summary judgment, Plaintiff is simply wrong on the law. Stripped of his arguments that BancorpSouth's defenses would fail in **any case**, Plaintiff has no answer for the evidence in **this case**.

Finally, at this time BancorpSouth is still unable to identify the members of the certified *Swift* class as defined by Plaintiff's class definition adopted by the Court in its Order on Class Certification (DE #2673).² Because BancorpSouth cannot know who is in the certified class, it is impossible for BancorpSouth to determine what defenses may apply to class members other than Swift. Furthermore, this Court's rulings are not binding on the absent class members unless and until they receive adequate notice. *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012). Indeed, allowing full briefing on summary judgment before absent class members are provided notice may violate absent class members' due process rights, preventing the application of any summary judgment rulings to these absent class members. *See, e.g., Haynes v. Shoney's, Inc.*, 1992 WL 752127 (N.D. Fla. June 22, 1992) (class action judgment is binding on all class members who receive notice and do not request exclusion). For these reasons, Plaintiff's summary judgment motion as to certain of BancorpSouth's affirmative defenses is premature.

² BancorpSouth has petitioned the Eleventh Circuit for permission to immediately appeal this Court's class certification order, pursuant to Federal Rule of Civil Procedure 23(f). The Eleventh Circuit has yet to rule on BancorpSouth's Rule 23(f) petition.

I. RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 56.1(a), BancorpSouth responds to each numbered paragraph of Plaintiff Shane Swift's Undisputed Facts Entitling Plaintiffs to Summary Judgment ("Plaintiff's Statement of Material Facts").

BancorpSouth's Response to Plaintiff's Statements of Fact

BancorpSouth responds to the numbered Statements as follows:

Statement No. 1: Plaintiff Swift was not aware until shortly before this lawsuit was filed that BancorpSouth engaged in the practice of re-sequencing and posting his debit card transactions from high to low dollar amount, and that he incurred overdraft fees as a result of Defendant's practice.

Response: Throughout the class period, BancorpSouth explicitly disclosed to its customers via its Account Information Statement that it would pay transactions that would result in an overdraft at BancorpSouth's discretion and would pay transactions in an order determined by BancorpSouth, even if these resulted in more overdraft or insufficient funds fees. (DE #2999-3 at ¶¶ 11, 19.) Plaintiff understood that BancorpSouth's discretionary posting policy as disclosed in the Account Information Statement could lead to more overdraft and insufficient funds fees on his account, and testified that he would have understood these facts since 2006 if he simply had read BancorpSouth's Account Information Statement. (*Id.* at ¶ 33.) Plaintiff was aware that BancorpSouth could post debits in any order, including from high-to-low, from reviewing his transaction history. (*Id.* at ¶ 21.) Both Plaintiff and his co-account-holder (his wife) admit that they understand BancorpSouth's disclosures regarding its discretionary posting order in the Account Information Statement and Deposit Agreement, and would have understood the same earlier if they had read the disclosures when they received them. (*Id.* at ¶25.) Plaintiff admitted that if he had reviewed his account statements and disclosures during the entire period he incurred overdraft fees, he would have seen that his transactions were ordered from high-to-low. (*Id.* at ¶ 36.)

Statement No. 2: Plaintiff Swift's bank account statements did not disclose BancorpSouth's practice of re-sequencing and posting debit card transactions from high to low dollar value.

Response: Plaintiff testified that he learned by reading his account statements and overdraft notices that BancorpSouth did not post transactions in chronological order. (DE #2999-

3 at ¶ 30.) Plaintiff admitted that if he had reviewed his account statements and disclosures during the entire period he incurred overdraft fees, he would have seen that his transactions were ordered from high to low. (*Id.* at ¶ 36.) Throughout the class period, BancorpSouth explicitly disclosed to its customers via its Account Information Statement that it would pay transactions in an order determined by BancorpSouth, even if the posting order resulted in more overdraft or insufficient funds fees. (*Id.* at ¶¶ 11, 19.) Plaintiff understood that BancorpSouth's discretionary posting policy as disclosed in the Account Information Statement could lead to more overdraft and insufficient funds fees on his account, and testified that he would have understood these facts since 2006 if he had simply read BancorpSouth's Account Information Statement. (*Id.* at ¶¶ 23, 33.) Plaintiff was aware that BancorpSouth could post debits in any order, including from high-to-low, from looking at his transaction history during the Class Period. (*Id.* at ¶ 21.)

Statement No. 3: BancorpSouth's Deposit Account Terms and Conditions ("Deposit Agreement") did not disclose its high to low posting order.

Response: Throughout the class period, BancorpSouth explicitly disclosed to its customers via its Account Information Statement that it would pay transactions in an order determined by BancorpSouth, even if the posting order resulted in more overdraft or insufficient funds fees. (DE #2999-3 at ¶¶ 11, 19.) Plaintiff explicitly agreed to BancorpSouth's posting and overdraft policies in the Deposit Agreement. (*Id.* at ¶ 29.) Indeed, the 2009 Deposit Agreement explicitly authorizes BancorpSouth to post debits to an account in any order, including but not limited to, the order of largest to smallest dollar amount. (Deposit Agreement at 4, attached as Exhibit A to 2d Am. Compl.) Both Plaintiff and his wife admit that they understand BancorpSouth's disclosures regarding its discretionary posting order in the Account Information Statement and Deposit Agreement, and would have understood the same earlier if they had read the disclosures when they received them. (DE #2999-3 at ¶ 25.)

Statement No. 4: In addition, the Deposit Agreement states that the order in which BancorpSouth posts customers' transactions and its payment of transactions in overdraft do not create a course of dealing.

Response: BancorpSouth objects to Statement No. 4 because it states a legal conclusion, not a fact. BancorpSouth further states that the 2009 Deposit Agreement states, in relevant part, "[o]ur 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." (Deposit Agreement at 4, attached as Exhibit A to 2d. Am. Compl.).

Statement No. 5: Since 2003, BancorpSouth has engaged in the practice of re-sequencing customers' debit card transactions that are at issue in this lawsuit.

Response: BancorpSouth does not "re-sequence" checking account transactions. BancorpSouth receives debit transactions at different times throughout the day in no particular order. After all transactions are captured and the entire system is balanced, BancorpSouth then 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. (Transcript of Deposition of Jeff Jagers taken on October 12, 2011 ("2011 Jagers Dep.") at 82-96³; Expert Report of Paul A. Carrubba, September 24, 2012 ("Carrubba Report") at 5.)⁴

BancorpSouth's Statement of Additional Material Facts

1. Plaintiff admitted that the first time he reviewed his BancorpSouth monthly account statements "in-depth" was May 2010. (Swift Dep. at 63:19-23).⁵

2. Either Plaintiff or his wife authorized every transaction on their BancorpSouth account, including every transaction that triggered an overdraft fee. (Plaintiff's Supplemental Responses to Defendant BancorpSouth's Second Requests for Admissions to Plaintiff ("Plaintiff's Supplemental RFA Responses"), attached here as Exhibit D, at 2; DE #2999-3 at ¶ 35; Transcript of 30(b)(6) deposition of Jeff Jagers taken on August 15, 2012 ("Jagers 30(b)(6) Dep.")⁶ at 38:13-21; 39:18-40:22.)⁷

3. BancorpSouth discloses all of its fees for its services and products to its customers and requires that customers agree to the terms and conditions surrounding those fees. (Jagers

³ A copy of the relevant portions of the 2011 Jagers Dep. is attached here as Exhibit A.

⁴ A copy of the Carrubba Report is attached here as Exhibit B.

⁵ Any relevant portions of the Swift Dep. not previously submitted as an exhibit to BancorpSouth's Statement of Material Facts as to Which There is No Genuine Issue to Be Tried (DE #2999-3) ("Stmt. Facts") are attached here as Exhibit C.

⁶ Any relevant portions of the Jagers 30(b)(6) Dep. not previously submitted as an exhibit to the Stmt. Facts (DE #2999-3) are attached here as Exhibit E.

⁷ Plaintiff took a Rule 30(b)(6) deposition of BancorpSouth on August 15, 2012 limited solely to BancorpSouth's affirmative defenses. (Ex. 39 to Jagers 30(b)(6) Dep.) Notably, despite taking a full deposition of BancorpSouth on its affirmative defenses, Swift does not cite BancorpSouth's testimony **even one time** in his summary judgment motion.

30(b)(6) Dep. at 42:10-23.)

4. When a customer opens an account with BancorpSouth, he or she signs an agreement that discloses the Bank's fees and services. (Jaggers 30(b)(6) Dep. at 43:8-24; 44:14-20.)

5. BancorpSouth reasonably believes that its customers make a voluntary decision to do business with BancorpSouth and to incur any fees on their BancorpSouth account. (Jaggers 30(b)(6) Dep. at 48:8-22.)

6. BancorpSouth's customers have full knowledge of transactions on their BancorpSouth account, and BancorpSouth does not know about some transactions until they are presented to the Bank. (Plaintiff's Supplemental RFA Responses at 6-7; Jaggers 30(b)(6) Dep. at 52:8-53:8; Transcript of Deposition of Michael Lindsey taken on August 23, 2012 ("Lindsey Dep.") at 18-19.)⁸

7. Plaintiff and his wife were in the best position to know what transactions they conducted on their BancorpSouth account. (Plaintiff's Supplemental RFA Responses at 6-7; Jaggers 30(b)(6) Dep. at 55-56; Lindsey Dep. at 18-19.)

8. Plaintiff admitted that overdraft fees can only be incurred if an account does not have sufficient funds to cover a transaction. (Swift Dep. at 37:24-38:8.)

9. Plaintiff admitted that BancorpSouth's high-to-low posting order does not necessarily lead to an overdraft fee. (Swift Dep. at 37:20-23.)

10. Plaintiff and his wife initiated transactions on their BancorpSouth account when they knew sufficient funds were not available. (Jaggers 30(b)(6) Dep. at 98:7-99:9.) They initiated these transactions although they knew they did not have funds to cover the transactions, because they knew BancorpSouth would honor those transactions through its Overdraft Payment Service. (DE #2999-3 at ¶¶ 60-63.)

11. BancorpSouth does not know when a customer has paid for a transaction using a check on a BancorpSouth deposit account until the check payee submits that check for payment. (Plaintiff's Supplemental RFA Responses at 6-7; Lindsey Dep. at 18-19.)

II. STANDARD FOR ENTRY OF SUMMARY JUDGMENT

On a motion for summary judgment, if there is any conflict between the parties' allegation or evidence, the non-movant's evidence is presumed to be true and all reasonable

⁸ A copy of the relevant portions of the Lindsey Dep. is attached here as Exhibit F.

inferences must be drawn in its favor. This is equally true whether the motion seeks summary judgment on offensive claims or affirmative defenses. *Hetrick v. Ideal Image Dev. Corp.*, 758 F.Supp.2d 1220 (M.D. Fla. 2010) (denying plaintiff's motion for summary judgment on the affirmative defense of waiver and estoppel because of "inconclusive and conflicting evidence"). In order for a Plaintiff to win summary judgment on a defendant's affirmative defenses, he must either "disprove the affirmative defenses raised by evidence or establish the legal insufficiency of the defenses." *Pacific Employers Ins. Co., v. Wausau Bus. Ins. Co.*, 508 F. Supp. 2d 1167, 1180 (M.D. Fla. 2007) (denying plaintiffs' motion for summary judgment on affirmative defenses for lack of sufficient evidence); *see also Augusta Iron and Steel Works v. Employers Ins. of Wausau*, 835 F.2d 855 (11th Cir. 1988) (reversing the district court's grant of summary judgment on affirmative defense of waiver, stating that under the undisputed facts a fact finder could reasonably draw the inference that plaintiff had waived its option under a contract).

III. ARGUMENT AND CITATION OF AUTHORITY

Plaintiff has moved for summary judgment on the following of BancorpSouth's affirmative defenses: statutes of limitations, statutes of repose, laches, accord and satisfaction, ratification, *res judicata* and/or judicial estoppel, voluntary payment doctrine, and course of dealing. (DE #2997.) Plaintiff's Motion relies on legal arguments that BancorpSouth's affirmative defenses fail under any set of facts -- arguments that simply are incorrect -- while ignoring the facts in the record. Contrary to Plaintiff's arguments, the record contains evidence in support of BancorpSouth's affirmative defenses. When properly construed in favor of BancorpSouth, however, the record evidence is clear that material facts remain in dispute as to BancorpSouth's defenses challenged by Plaintiff's Motion. Because Plaintiff cannot disprove BancorpSouth's affirmative defenses or demonstrate the legal insufficiency of BancorpSouth's defenses, the Court should deny Plaintiff's Motion.

A. Plaintiff Cannot Simultaneously Reject and Enforce the Deposit Agreement to Attack BancorpSouth's Course of Dealing Defense.

Plaintiff argues that he is entitled to summary judgment on BancorpSouth's course of dealing defense because the Deposit Agreement bars any course of dealing. (DE #2997 at 18.) BancorpSouth agrees that the Deposit Agreement states that no course of dealing will be created between the Bank and the accountholder to vary the terms of the parties contract. (*Id.*) BancorpSouth further agrees, as it has stated throughout this litigation, that the express terms of the Deposit Agreement govern the relationship between the parties; indeed, the terms of the

governing contract bar Plaintiff's claims. Plaintiff cannot, however, invoke the strict terms of the Deposit Agreement in seeking dismissal of BancorpSouth's course of dealing defense while *simultaneously* disregarding other terms in the same contract in pursuit of his good faith and fair dealing claim and unjust enrichment claim. Either the contract governs or it does not.

As BancorpSouth explained in its motion for summary judgment, the implied covenant of good faith and fair dealing cannot be used to limit an expressly bargained-for term under Arkansas law. *See Gunn v. Farmers Ins. Exch.*, 372 S.W.3d 346, 352 (Ark. 2010) ("an implied covenant should not be used to limit an expressly bargained-for term"); *see also Burger King Corp. v. Weaver; M-W-M, Inc.*, 169 F.3d 1310, 1316 (11th Cir. 1999) ("the implied obligation of good faith cannot be used to vary the terms of an express contract") (citation and quotation marks omitted). In the very same section cited by Plaintiff in its Motion, the Deposit Agreement clearly provides that BancorpSouth may post debit transactions in an order of its choosing. (DE #2999-3 at ¶ 17.) BancorpSouth's Account Information Statement also states that BancorpSouth may decide to pay transactions in any order, including largest to smallest. (DE #2999-3 at ¶¶ 18-19.) As such, the contractual provisions to which Plaintiff explicitly agreed bar his claims. (DE #2999-1 at 4-7.) Indeed, the case law cited by Plaintiff for the proposition that the terms of an express contract govern the relationship between the parties to the contract further highlights Plaintiff's tenuous position. Plaintiff simply cannot reject the explicit terms of the governing account documents that allow for high-to-low posting order in service of his offensive claims while simultaneously arguing that BancorpSouth cannot vary the terms of the contract to show a course of dealing.

Should Plaintiff be allowed to depart from the terms of the Deposit Agreement and Account Information Statement to support his claims of good faith and fair dealing and unconscionability, then BancorpSouth similarly should be allowed to put on evidence of a course of dealing defense at trial. The course of dealing evidence at trial would include Plaintiff's failure to cease the practice of voluntarily authorizing transactions that caused overdraft fees even after receiving notice of those fees. In so doing, Plaintiff and purported class members took advantage of knowledge that BancorpSouth would honor transactions for which Plaintiff's account had insufficient funds. This evidence creates questions of material fact regarding whether a course of dealing was created; therefore the Court should deny Plaintiff's motion for summary judgment on course of dealing.

B. Plaintiff's Repeated Deposits to his Account upon Incurring Overdraft Fees Constitute Voluntary Payments.

The Court should deny Plaintiff's motion for summary judgment on BancorpSouth's voluntary payment defense. The record is clear that Plaintiff specifically agreed to be charged overdraft fees when he overdrawed his account, and repeatedly made voluntary payments to BancorpSouth to bring his account into a positive balance after overdrawing his account. As such, questions of material fact remain as to BancorpSouth's voluntary payment defense, and Plaintiff's motion for summary judgment must be denied.

In his Motion, Plaintiff states that he "did not voluntarily pay the overdraft fees at issue," and that "because the funds were taken from Plaintiffs without their acquiescence, BancorpSouth's demand for payment was manifestly unenforceable." (DE #2997 at 17.) These statements miscomprehend the voluntary payment doctrine: the voluntary payment in question is not BancorpSouth's overdraft fee charge, but rather the Plaintiff's deposit of money into his BancorpSouth account to bring the account to a positive balance. It is Plaintiff's payment of funds into his BancorpSouth account *after* overdrawing his account and *after* incurring an overdraft fee, to bring that account to a positive balance, which constitutes a voluntary payment that satisfies the defense under Arkansas law.⁹

After BancorpSouth charged Plaintiff an overdraft fee, he voluntarily deposited funds into his account, over and over, to pay the fee. "Absent fraud, duress, mistake of fact, coercion or extortion, voluntary payments cannot be recovered." *TB of Blythesville, Inc. v. Little Rock Sign & Emblem, Inc.*, 946 S.W.2d 930, 932 (Ark. 1997) (quoting *Boswell v. Gillett*, 295 S.W.2d 758, 761 (Ark. 1956)). Plaintiff paid each and every overdraft fee incurred on his account during the Class Period by voluntarily and independently depositing funds into his BancorpSouth account upon notification of the overdraft. (DE #2999-3 at ¶¶ 40, 43.) In fact, the Notice for Charge for Overdrawn Account that Plaintiff received after every overdraft transaction stated: "[t]he items

⁹ Plaintiff further mischaracterizes the nature of the voluntary payment doctrine by stating that his payment of overdraft fees to BancorpSouth was made under a "mistake of fact." (DE #2997 at 17.) The amount and occurrence of each and every transaction into overdraft and the related fee was disclosed to him in the Notices for Charge for Overdrawn Account he received. (DE #2999-3 at ¶ 40.) Before these notices even arrived in the mail, Plaintiff could have reviewed his account online to determine the amount of any overdraft fees. These fees were also disclosed on his monthly statements. (*Id.* at ¶ 41.) As a result, there is at least a question of material fact regarding whether Plaintiff paid overdraft fees under a "mistake of fact."

below were listed for payment. Our records indicate that funds were insufficient to pay these items. The items were paid and the charges indicated were assessed to cover the costs of handling. Please adjust your checkbook and **deposit funds to cover these items.**" (emphasis added) (Exhibit 75 to Defendant BancorpSouth's First Requests for Admissions to Plaintiff and Plaintiff Shane Swift's Objections and Responses to Defendant BancorpSouth Bank's First Request for Admissions to Plaintiff, collectively attached here as Exhibit G.) Furthermore, Plaintiff paid the overdraft fees without ever complaining to BancorpSouth. (DE #2999-3 at ¶ 38.) As a result, Plaintiff may not recover any part of these payments. *See, e.g., Vandiver v. Banks*, 962 S.W.2d 349 (Ark. 1998) (holding that payments made above and beyond those mandated by a divorce decree were voluntary and therefore not recoverable); *Boswell*, 295 S.W.2d 758 (voluntary payment doctrine barred tenant's recovery of rent payments for unexpired portion of lease).

At a minimum, there is a factual dispute that Plaintiff voluntarily and repeatedly made these payments to bring his account back to a positive balance, a balance that included the amount of the overdraft fee. Accordingly, the Court should deny Plaintiff's motion for summary judgment on the affirmative defense of voluntary payment.¹⁰

C. Plaintiff's Conduct Evidences Accord and Satisfaction Relating to BancorpSouth's Overdraft Fees.

Plaintiff voluntarily participated in, agreed to, and accepted BancorpSouth's practices which he now claims are compensable wrongs. At a minimum, questions of material fact remain on BancorpSouth's defense of accord and satisfaction.

"An accord and satisfaction is a settlement in which one party agrees to pay and the other to receive different consideration or a sum less than the amount to which the latter believes he is entitled." *Housley v. Hensley*, 265 S.W.3d 136, 142 (Ark. App. 2007). "The validity of an accord and satisfaction is dependent on the same basic factors and principles that govern contracts

¹⁰ Plaintiff's summary judgment argument as to BancorpSouth's voluntary payment defense also fails because Plaintiff specifically agreed to pay overdraft fees incurred on his BancorpSouth checking account. (Deposit Agreement at 2, attached as Exhibit A to 2d Am. Compl.) Plaintiff authorized BancorpSouth to deduct those fees directly from his account. (*Id.*). The Deposit Agreement expressly authorizes BancorpSouth to impose and deduct overdraft fees directly from Plaintiff's account as they accrue. (DE #2999-3 at ¶ 15.) To the extent Plaintiff argues that funds were taken from his account by BancorpSouth without his consent, this is directly contradicted by the terms of the Deposit Agreement. (*Id.* at ¶ 13.)

generally, and the burden of proving the agreement is simply the burden of proving a contract: offer, acceptance, and consideration." *Inge v. Walker*, 15 S.W.3d 348, 353 (Ark. App. 2000).

Here, Plaintiff maintains that BancorpSouth's high-to-low posting order and overdraft policies violate the law and entitle him to compensation. The parties' conduct, though, in connection with BancorpSouth's overdraft and posting order policies, and Plaintiff's use of same, evidences an agreement between the parties.¹¹ BancorpSouth made an offer to Plaintiff when it paid Plaintiff's transactions when he did not have sufficient funds and charged him a fee for that service, and Plaintiff accepted this offer by continuing to deposit sufficient funds to cover these overdrafts and continuing to incur overdraft fees without complaining or requesting a refund of these fees. Plaintiff agreed to BancorpSouth's practices through his own conduct, and he is now bound by that agreement.

1) *BancorpSouth's Payment of Plaintiff's Transactions into Overdraft Constitutes an Offer.*

During the Class Period, Plaintiff knowingly conducted numerous transactions on his BancorpSouth account for which he had insufficient funds. (DE #2999-3 at ¶¶ 34-35, 60-63; BancorpSouth's Additional Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("Addtl. Stmt. Facts") at ¶¶ 2, 10.) BancorpSouth paid these transactions into overdraft instead of rejecting or returning them, a practice that Plaintiff testified benefited him and which he preferred over the alternative. (DE #2999-3 at ¶¶ 52-54, 59.) BancorpSouth paid these transactions for Plaintiff although it had no obligation to do so. Under these facts, it is clear that BancorpSouth's recurring payment of transactions into overdraft on Plaintiff's account provided valuable consideration to Plaintiff. *See, e.g., Foundation Telecommunications, Inc. v. Moe Studio, Inc.*, 16 S.W.3d 531 (Ark. 2000) (consideration is an essential element of a contract). Every time BancorpSouth paid a transaction into overdraft which Plaintiff did not have sufficient funds in his account to pay, and charged Plaintiff a fee for this service, it made an offer to Plaintiff.

¹¹ Again, Plaintiff's theory of recovery requires the Court to ignore the contract between the parties which, if enforced, would bar Plaintiff's claim. All of Plaintiff's claims should be extinguished by the contract between the parties. To the extent that Plaintiff is allowed to depart from the governing contract, BancorpSouth also must be allowed to put on evidence of extra-contractual agreements created between the parties that demonstrate BancorpSouth's accord and satisfaction defense.

2) *Plaintiff's Conduct Amounts to Acceptance and a Meeting of the Minds As To BancorpSouth's Overdraft and Posting Order Policies.*

There was a meeting of the minds between Plaintiff and BancorpSouth demonstrated by Plaintiff's own conduct during the Class Period. (DE #2997 at 11.) This "meeting of the minds" is a key element of the defense of accord and satisfaction. *See, e.g., Glover v. Woodhaven Homes, Inc.*, 57 S.W.3d 211, 216 (Ark. 2001) ("[t]he key element is a meeting of the minds, such that there must be an objective indicator that the parties agreed that the payment tendered will discharge the debt.") "[C]ontract formation should be determined by focusing on objective manifestations of mutual assent" *Ward v. Williams*, 91 S.W.3d 102, 106 (Ark. App. 2002). "A party's manifestation of assent to a contract may be made wholly by spoken words **or** by conduct, and may be proved by circumstantial evidence." *Childs v. Adams*, 909 S.W.2d 641, 645 (Ark. 1995) (emphasis added).

When Plaintiff paid to cover his overdrafts and keep his account open every time that BancorpSouth paid his transactions into overdraft, Plaintiff demonstrated agreement with BancorpSouth's actions. Plaintiff received notice of and paid every overdraft charge on his account, yet continued to incur overdraft charges. (*Id.* at ¶¶ 40, 43, 47-49.) Plaintiff never complained or requested that the charges be waived; indeed, Plaintiff believes that BancorpSouth's action in paying transactions into overdraft provided him a valuable benefit. (*Id.* at ¶¶ 37-39, 42.) The record evidence shows that Plaintiff assented to BancorpSouth's posting order and overdraft practices and benefitted from them, creating a meeting of the minds sufficient to prove an agreement. In light of this evidence, at the very least a fact question exists with regard to BancorpSouth's accord and satisfaction defense. Thus, BancorpSouth must be allowed to present evidence at trial on its defense: "[w]hen testimony is in conflict on the issue of whether the parties agreed, a fact question arises that is to be determined by the trial court." *Ward*, 91 S.W.3d at 106.

C. Plaintiff Ratified BancorpSouth's Posting Order and Overdraft Fees By His Conduct.

Substantial evidence exists of BancorpSouth's ratification defense: Plaintiff voluntarily initiated all transactions which caused his account to be overdrawn, used BancorpSouth's Overdraft Payment Service to his benefit, and continued to incur overdraft fees after learning of BancorpSouth's posting order. (Add'l. Stmt. Facts at ¶ 2); DE #2999-3 at ¶¶ 35, 48-49, 50.)

In Arkansas, "silence or acquiescence in the contract for any considerable length of tim"

amounts to ratification." *Sims v. First Nat'l Bank, Harrison*, 590 S.W.2d 270, 274 (Ark. 1980). Indeed, ratification occurs in an implied or express manner by continuing to accept the benefits of a contract after learning of a mistake or misrepresentation. *See, e.g., Vibo Corp., Inc. v. State of Arkansas ex rel. Dustin McDaniel*, 2011 Ark. 124 (2011) (upholding lower court's ruling that party ratified contract where it continued to accept benefits of contract after learning of alleged misrepresentations).¹²

Plaintiff knowingly incurred overdraft fees and paid them without protest. Plaintiff regularly and repeatedly overdrew his BancorpSouth checking account and incurred overdraft fees, all in the face of repeated notices that he was being assessed a fee for such behavior. (DE #2999-3 at ¶¶ 34, 40.) In fact, Plaintiff testified that BancorpSouth's Overdraft Payment Service provides a benefit by preventing his transactions from being returned when he had insufficient funds in his account. (*Id.* ¶¶ 53-54.) Plaintiff paid all of the overdraft charges on his account and he never complained to BancorpSouth or requested they be refunded. (*Id.* ¶¶ 38, 43.) Even after learning about BancorpSouth's high-to-low posting order, Plaintiff chose to continue taking advantage of BancorpSouth's Overdraft Payment Service and continued to conduct transactions on his account that caused overdraft fees. (*Id.* ¶¶ 37-38, 47-49, 51.)

The record shows that Plaintiff repeatedly, and with knowledge, accepted the benefits of BancorpSouth's Overdraft Payment Service and repeatedly paid overdraft fees on his account without raising any objections to BancorpSouth. The Court should deny Plaintiff's motion for summary judgment on BancorpSouth's ratification defense.

E. Plaintiff's Damages are Limited to the Statutory Limitations Periods of Each Claim Asserted.

As currently pleaded, Plaintiff's complaint seeks compensation for overdraft charges and other damages that are so far in the past that recovery for those charges is barred by the statutes of limitations governing each purported class member's claims.¹³ There is no dispute that

¹² In light of the substantial evidence of Plaintiff's ratification of BancorpSouth's policies, BancorpSouth also moved for summary judgment on this defense. (DE #2999-1.)

¹³ Although Plaintiff's claims are governed by Arkansas law and class claims will generally stand or fall with Plaintiff, each class member is limited to what he can recover by: (1) the claims asserted on his behalf after class certification; and (2) the statutes of limitations for each of those claims. *See, e.g., Franze v. Equitable Assurance*, 296 F.3d 1250, 1253 (11th Cir. 2002) (purpose of Rule 23(a) requirements is to "limit class claims to those 'fairly encompassed' by the named plaintiffs' individual claims") (quoting *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346

Plaintiff, and therefore the certified class, cannot recover overdraft fees beyond the statutory limitations periods.¹⁴ In his motion for class certification, Plaintiff himself defined the time period to recover damages as "from applicable statutes of limitation through August 13, 2010" (the "Class Period"), a definition the Court adopted in its Order Granting Class Certification (DE #2673 at 4). Plaintiff, however, has never stipulated or otherwise agreed to what these limitations periods are for each remaining claim for each state. As the record currently stands, facts are in dispute regarding what limitations periods apply, and therefore what is the period for which each class member could recover damages. Until these questions are resolved, the Court should deny

(11th Cir. 2001)); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) (filing of class action commences suit for entire class for purpose of statute of limitations, regardless of whether or not class members are cognizant of the action).

¹⁴ The certified classes include the following claims (by state): Alabama: breach of contract/covenant of good faith and fair dealing, unconscionability; Arkansas: breach of contract/covenant of good faith and fair dealing, unconscionability, unjust enrichment, Arkansas Deceptive Trade Practices Act; Florida: breach of contract/covenant of good faith and fair dealing, unconscionability; Louisiana: unconscionability; Mississippi: breach of contract/covenant of good faith and fair dealing, unconscionability, unjust enrichment; Missouri: unconscionability; Tennessee: breach of contract/covenant of good faith and fair dealing, unconscionability; Texas: unconscionability. (DE #2272 at 9-14.) For the Court's convenience, BancorpSouth has attached a chart outlining these claims by state as Exhibit H. The earliest statute of limitation dates for the certified class claims in each state, based on Plaintiff's original filing date of May 19, 2010, are as follows: Alabama: May 19, 2004 (six years for breach of contract). ALA. CODE § 6-2-34 (1975). Arkansas: May 19, 2005 (five years for breach of contract/covenant of good faith and fair dealing). ARK. CODE ANN. § 16-56-111(2005); *Zufari v. Architecture Plus*, 914 S.W.2d 756 (Ark. 1996). Florida: May 19, 2005 (five years for breach of contract/covenant of good faith and fair dealing). FLA. STAT. § 95.11 (2012); *Brown v. Nationscredit Fin. Services Corp.*, 32 So.3d 661 at n. 1 (Fla. Dist. Ct. App. 2010). Louisiana: May 19, 2000 (ten years for breach of contract). LA. CIV. CODE ANN. art. 3499 (1984); *First Louisiana Bank v. Morris & Dickson, Co., LLC*, 55 So.3d 815 (La. Ct. App. 2010). Mississippi: May 19, 2007 (three years for breach of contract). MISS. CODE ANN. § 15-1-49 (1990); *Citifinancial Mortgage Co., Inc. v. Washington*, 967 So.2d 16 (Miss. 2007). Missouri: May 19, 2005 (five years for breach of contract). MO. ANN. STAT. § 516.120 (2003). Tennessee: May 19, 2004 (six years for breach of contract). TENN. CODE ANN. § 28-3-109. Texas: May 19, 2006 (four years for breach of contract). TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (West 1999); *Hoover v. Gregory*, 835 S.W.2d 668 (Tex. App. 1992). The governing statute of limitations is unclear for Louisiana, Missouri and Texas because unconscionability is the only remaining claim for class members from those states. In each of these states, unconscionability cannot be brought as an independent claim; because no such claim exists in these states, no statute of limitations exists for this non-existent claim. For convenience of the Court, BancorpSouth bases the statutes of limitations cited in this footnote on a breach of contract claim for Texas, Missouri, and Louisiana.

Plaintiff's motion for summary judgment as to BancorpSouth's statute of limitations defense.¹⁵

F. The Defense of Laches Bars Plaintiff's Unjust Enrichment and Unconscionability Claims.

As Plaintiff correctly notes, under Arkansas law the defense of laches applies only where Plaintiff seeks equitable relief. *Warford v. Union Bank of Benton*, No. CA 09-1301, 2010 WL 3770745, at *5 (Ark. App. Sept. 29, 2010). As such, BancorpSouth's laches defense appropriately applies to bar Plaintiff's claims of unjust enrichment and unconscionability. To the extent Plaintiff seeks compensation for overdraft charges so far after the time when he became aware of such charges as to make any claim for recovery prejudicial to BancorpSouth, BancorpSouth should be allowed to put on evidence at trial in support of its laches defense.

*1. Unjust Enrichment and Unconscionability are Equitable Claims Subject to Laches.*¹⁶

Plaintiff mischaracterizes his claim of unjust enrichment as seeking "legal relief in the form of money damages." (DE #2997 at 7.) This statement is flat wrong: unjust enrichment is an equitable doctrine, pure and simple. *See, e.g., Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 210 S.W.3d 101, 112 (Ark. 2005) ("unjust enrichment is an equitable doctrine"). Unjust enrichment is the equitable principle that "one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly." *Id.* (citing *Adkinson v. Kilgore*, 970 S.W.2d 327 (Ark. App. 1998)). Additionally, Plaintiff concedes that the defense of laches may be applied to his unconscionability claim. (DE #2997 at 7-8.)

Because Plaintiff's unjust enrichment and unconscionability claims are both equitable

¹⁵ If the parties stipulate or the Court orders that Plaintiff and class members cannot recover damages before specific dates governing each remaining class claim from each state, evidence regarding statutes of limitations will not be necessary at trial.

¹⁶ As BancorpSouth argued in its Motion for Summary Judgment, Plaintiff's claim for unjust enrichment fails outright because Arkansas law does not recognize an unjust enrichment cause of action by or against the parties to a written contract. (DE # 2999-1 at 15.) A claim for unjust enrichment cannot be made where there is a written contract between the parties. *Servewell*, 362 Ark. 598, 612; (DE #2999-1 at 15). As such, Plaintiff's unjust enrichment claim should be dismissed without ever reaching BancorpSouth's laches defense. If it is not, BancorpSouth is entitled to prove its laches defense at trial.

claims, laches properly applies to bar them. Plaintiff's argument that this defense fails as a matter of law is simply wrong. As such, the proper question to determine is whether BancorpSouth's laches defense survives summary judgment is whether the record reveals evidence in support of BancorpSouth's defense. Plainly it does.

(2) *At a Minimum, Plaintiff Had Constructive Knowledge of BancorpSouth's Posting Order – Creating a Dispute of Fact As to Laches.*

The laches defense is "based on the equitable principle that an unreasonable delay by the party seeking relief precludes recovery when the circumstances are such as to make it inequitable or unjust for the party to seek relief." *Larco, Inc. v. Strebeck*, 2010 Ark. App. 263 at *4 (Ark. App. 2010) (citing *Royal Oaks Vista*, 271 S.W.3d 479). Plaintiff argues that BancorpSouth's laches defense should fail because there was little or no delay in filing the complaint after Plaintiff learned of BancorpSouth's posting policies for debit transactions on his account. (DE #2997 at 8.) This argument misconstrues Arkansas law: the controlling type of knowledge for a laches defense is when Plaintiff should have known, based on reasonable inquiry, as opposed to when he actually learned of BancorpSouth's posting practices. Indeed, "the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence." *Jaramillo v. Adams*, 268 S.W.3d, 351, 357 (Ark. App. 2007); *see also Self v. Self*, 893 S.W.2d 775, 778 (Ark. 1995) (with laches, "a party is chargeable with such knowledge as might have been obtained upon reasonable inquiry"); *Schultz v. Rector-Phillips-Morse, Inc.*, 552 S.W.2d 4, 14 (Ark. 1977) ("delay is measured from date of constructive knowledge, not just actual knowledge of facts entitling plaintiffs to bring suit"). As such, when Plaintiff actually learned of BancorpSouth's posting order is not the relevant question.

The evidence shows that Plaintiff could have, with minimal inquiry, learned of BancorpSouth's posting order policy far earlier than he did, simply by reading his account documents, BancorpSouth's regular disclosures, and monthly statements. (DE #2999-3 at ¶¶ 21, 25-27, 29-30, 32.) Indeed, Plaintiff explicitly testified that he would have known of 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.) Plaintiff had full access to information regarding his account through multiple channels and could have filed suit years before he finally did in 2010. (*Id.* ¶¶ 20, 31.) Plaintiff testified that he never read the terms of the Deposit Agreement and Account Information Statement until 2010, and never voiced any concerns to BancorpSouth

regarding overdraft fees. (DE #2999-3 at ¶¶ 38, 42.) Indeed, the first time Plaintiff ever reviewed his monthly statements from BancorpSouth in any sort of detail was in May 2010, years after he opened his checking account.¹⁷ (Add'l. Smt. Facts at ¶ 1.)¹⁸ Put simply, Plaintiff agrees that he could have learned of BancorpSouth's posting order policies years before he filed his claim by simply reading the documents BancorpSouth sent him, but he never chose to do so. This evidence, construed in favor of BancorpSouth, creates an issue of material fact as to whether Plaintiff unreasonably delayed in bringing his claims. Because unreasonable delay is an essential element of BancorpSouth's laches defense, summary judgment cannot be granted on these facts.

IV. CONCLUSION

Plaintiff's Motion is a premature effort to cripple BancorpSouth's ability to put on a defense at trial. Plaintiff seeks summary judgment on certain of BancorpSouth's affirmative defenses despite the fact that Plaintiff has not identified the members of his class, and as BancorpSouth has argued here and at the Eleventh Circuit, Plaintiff is unable to identify the members of his class. Plaintiff also seeks summary judgment despite the fact that notice has not been provided to Plaintiff's class, making any summary judgment order a nullity as to absent class members. Finally, Plaintiff's summary judgment motion is premised on arguments that BancorpSouth's affirmative defenses fail as a matter of law under any set of facts. These arguments are simply wrong on the law, and once the record is examined, it becomes clear that multiple questions of material fact exist regarding BancorpSouth's affirmative defenses of course of dealing, voluntary payment, accord and satisfaction, statute of limitations, laches, and ratification. Because substantial questions of material fact remain as to each of these defenses, the Court should deny Plaintiff's summary judgment motion in its entirety.¹⁹

¹⁷ Plaintiff originally opened an account with American State Bank. (Swift Dep. at 69:2-18). American State Bank merged with BancorpSouth on or about November 30, 2005. (Defendant BancorpSouth Bank's Amended Responses to Plaintiff's Second Set of Interrogatories, attached here as Exhibit I, at 3).

¹⁸ Plaintiff (or his counsel) represents in his Motion that he only learned of BancorpSouth's posting order policies after he hired counsel. (DE #2997 at 8.) This representation plainly contradicts Plaintiff's testimony under oath that he learned the relevant facts regarding BancorpSouth's policies through his own investigation, then retained counsel. (Swift Dep. at 40-41.)

¹⁹ BancorpSouth does not anticipate at this time putting on evidence of its affirmative defenses of statute of repose, *res judicata*, and collateral estoppel. BancorpSouth nevertheless

Respectfully submitted this 8th day of November, 2012.

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preserves these defenses as to unidentified class members. BancorpSouth is unable at this time to identify the members of the certified class pursuant to the class definition in this Court's Order Granting Class Certification (DE # 2673). Additionally, this Court's rulings are not binding on absent class members unless and until they receive adequate notice. *Juris*, 685 F.3d 1294. As such, to the extent that notice has not been provided to absent class members at the time this Court considers or rules on summary judgment motions, and to the extent that class members are unidentified and unidentifiable, BancorpSouth hereby reserves its right to raise the defenses of statute of repose, *res judicata*, and collateral estoppel against *Swift* class members at a later date. For the same reasons, BancorpSouth reserves the right to reassert, as necessary, the arguments contained herein as to absent class members, or to assert arguments applicable to absent class members that have not been asserted herein.

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 8th day of November 2012.

/s/ Eric Jon Taylor
Eric Jon Taylor

Exhibit A

In Re: Checking Account Overdraft Litigation
Jeff Jagers

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

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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

1 we may archive a number of reports in what I
2 call X Net native. I'm not a programmer. But
3 it's --

4 Q. You're doing good.

5 A. It's the X Net standard, you know. And
6 its intent is to, you know, be efficient in the
7 storage of reports and be efficient in the
8 amount of space it takes to store reports, and
9 all like that. But if you -- if there's a
10 reason, a business reason, that we want to --
11 that report to be in Excel format, you know, the
12 system is capable of doing that. But now, I
13 can't take like the 2008 report that's already
14 been archived and say, now, I want to see it
15 Excel.

16 Q. Before you store it?

17 A. Right.

18 Q. Talk to me about the process of what
19 happens at night in terms of settlement. So
20 explain to me how that works.

21 A. On signature transactions or nightly
22 processing or both?

23 Q. Both.

24 A. Makes sense to do both.

25 Q. One at a time.

1 A. Would have that stuff in it for the
2 transactions. So that we can have that and pass
3 that information on in the form of an additional
4 description on a statement. So you know, so we
5 get two files, up to about 10:30 at night. And
6 then those are the two files, from a signature
7 process, that are going to go into tonight's
8 processing and post, or attempt to post to the
9 appropriate account.

10 Q. When something posts, it's fully
11 settled, right?

12 A. That is correct.

13 Q. And then it comes off of your available
14 balance?

15 A. Yes.

16 Q. And?

17 A. Want me to go through the nightly?

18 Q. Yes.

19 A. Throughout the day, there are multiple
20 types of transactions that customers may be
21 doing and or have asked someone else to do on
22 their behalf, whether it be drafts, you know,
23 that you've authorized some company to take
24 draft your insurance payment. Whether it's some
25 form of a bill payment that you've authorized to

1 be made. There's checks, there's transactions
2 that occur inside a branch.

3 There's ATM transactions. There's
4 signature transactions. There's PIN
5 transactions. There is systems generated
6 transactions you previously authorized on every
7 day, you know, you want a -- a transfer made
8 from your account on the 15th of every month to
9 your child's account, who's in college in XYZ.

10 You know, it's not an online banking
11 transfer, it's more of a system generated.
12 There are system generated transactions, you
13 know, to pay interest, to charge fees to -- all
14 of those type things. Well, the collection of
15 customer initiated transactions, you know,
16 occurs throughout the day in those forms; debit
17 card, ATM ACH, over the counter, checks, et
18 cetera.

19 We accumulate those somewhere around
20 midnight. You know, we've processed all the
21 checks that we've taken from them, all of our
22 branches. We've processed all the checks that
23 we received from the federal reserve, from other
24 banks. We've gotten our debit card files from
25 FDR. We've processed all the ACH draft files

1 for that day.

2 And so we're going to post what we call
3 our core applications, which IMPHCS is the
4 checking application, core application. And we
5 are going to create posting files, based upon
6 whether it was a checking account transaction
7 that needs to post, a loan payment that needs to
8 post, a CD that was purchased or renewed or
9 whatever.

10 You know, across the different types of
11 application, we're going to post those, normally
12 starting around midnight. That posting is going
13 to -- posting process is going to take about
14 four hours. Those programs run out of West
15 Jackson Street, Tupelo.

16 Somewhere around 4 a.m., we've
17 processed all of our customer core
18 applications. And then we're going to have
19 produced the reports for that posting. And they
20 will be archived into X Net. We're going to
21 update our online banking.

22 Q. When you say the reports, you mean the
23 individual customer reports?

24 A. Either individual customer reports or
25 bank generated aggregate reports. It could be

1 notices. It could be statements, it could be a
2 system report

3 Q. So everything happens while we're
4 sleeping?

5 A. Everything happens when everybody is
6 asleep.

7 Q. Pretty amazing, if you think about it.

8 A. And so at 4 a.m., we'll start getting
9 ready for the next day. At 5 a.m. in the
10 morning, we'll start accepting, if you will,
11 files for that day from the Federal Reserve.
12 You know, they got, you know, ACH files. You
13 know, we'll start processing next day. We, you
14 know, we want to be ready for our branches to
15 open and our call center to open and be current.
16 So that's a simple explanation.

17 Q. That was an excellent explanation.
18 When FDR sends over their information to you for
19 the debit signature authorizations, which have
20 now been settled, okay, the good stuff that
21 matters to you all, what is in that report,
22 other than -- well, let me ask you this. You
23 already went through what's in the report and
24 told me about the entertainment category. Is
25 there a date and time information on that report

1 as it relates to actual settlement time for each
2 one of those transactions?

3 A. My recollection is there's not. It
4 does not say that Wal-Mart settled at 5:40 on
5 Tuesday, and that -- you know.

6 Q. How does FDR, then, provide that
7 information? So let's say one of your customers
8 goes through ten debit signatures transactions
9 within a given day, and they have all settled.
10 And they settle at various times throughout the
11 day, correct?

12 A. Yes. They would have to because
13 different merchants have different settlement
14 processes and procedures.

15 Q. Right.

16 MR. TAYLOR: I'm not sure I understood,
17 presented for settlement or actually settle in
18 the account?

19 MR. OSTROW: Well, they're going to --
20 FDR is going to, for instance, Wal-Mart.
21 Wal-Mart, you know, that transaction is settled,
22 they're done, right, that's the first --

23 MR. TAYLOR: As to Wal-Mart?

24 BY MR. OSTROW:

25 Q. And Wal-Mart was a PIN based, what we

1 Q. Well, not from the merchant side, but
2 when FDR is collecting information, like FDR --
3 if there's ten transactions?

4 A. Right.

5 Q. You know that are open?

6 A. Across multiple merchants.

7 Q. That were there were authorizations
8 for. And then all of a sudden, they start
9 settling. And No. 1 settles first, and two
10 settles after it, and three, whatever those are,
11 okay. They settle in a certain order. I want
12 to know whether, when FDR tells you, go ahead
13 and take it out of the account, are you getting
14 information that No. 1 came in first, two came
15 in second? Because I know what you then do with
16 it. You're going to tell me, yes, you put them
17 in buckets and you go high to low, right?

18 A. Right.

19 Q. So to you, it doesn't really matter the
20 order?

21 A. Right.

22 Q. But, obviously, for our case, that
23 matters.

24 A. I understand, right, right. And with
25 -- if I had a report in front of me, I could

1 look at that. But right off the top of my head,
2 I cannot say that there is a time of settlement
3 on what we -- on what we get from FDR as the
4 transaction report for that day.

5 There is -- there's certainly
6 identification of what the transaction is.
7 Going back to, we know, you know, again, not
8 every transaction is authorized, but it doesn't
9 matter. When the transactions come in to us,
10 you know, they're unique and they're uniquely
11 identified transactions.

12 And it has the information that we're
13 going to pass on to the application for posting,
14 you know, that, you know, so that the customer
15 knows, you know, that they did the, you know,
16 \$38 purchase at Wal-Mart. And in that
17 description, the -- my --

18 Q. If the best way is for us to see a
19 report, then let's not guess.

20 A. Let's look at a report. And I would be
21 more than happy to explain how that.

22 Q. Is there a specific name to that
23 report, so if I need to follow up with Eric, and
24 say, Eric, I want to get that report. And he
25 says, Jeff, I don't know what you're talking

1 about. You've been going for eight hours now.

2 I want to know what you're talking about.

3 A. I would refer -- I would refer to it,
4 if Eric called me and said, Jeff wanted the FDR
5 transaction detail report for a day, or you
6 know, three pages of it, you know --

7 Q. I don't want the whole report. But
8 that's a different report than the FDR
9 authorization report, which you got, we talked
10 about an hour ago?

11 A. Yes. Two different reports.

12 Q. So we talked about this pretty amazing
13 process that all you banks go through in the
14 middle of the night. All these software
15 applications are talking to another. And next
16 thing you know, you wake up and everything is in
17 whatever order the bank wanted to put it in, but
18 it's all there, and your account balance is what
19 it is?

20 A. Right.

21 Q. Is there anything that shows up, other
22 than what we talked about earlier, which was the
23 PIN based transaction which used to be two
24 hours, now, it's ten minutes, five minutes
25 intraday that will show up on an online

1 statement?

2 A. If the -- anything that we can -- that
3 we have the information to memo post today,
4 which would be an ACH transaction, an over-the-
5 counter transaction that's an individual
6 transaction. I mean, if your check is one of a
7 thousand of Wal-Mart's deposits, you know, when
8 they're at the teller, they don't go through at
9 the teller and, you know, go through those
10 thousand checks. You know, we have a back
11 office process that will take that thousand
12 check deposit, and yours may be in it, which we
13 won't know until that night.

14 Q. You keep saying Wal-Mart, you guys are
15 in Wal-Mart?

16 A. Yes, they're just one of the largest.

17 Q. I would say whoever did that one, that
18 was a good one.

19 A. But the transactions that we can make
20 available to our customers by knowing what they
21 are, we try to. Again, that would be an over-
22 the-counter deposit, an over-the-counter
23 withdrawal, an ATM withdrawal, an ATM deposit or
24 transfer.

25 Q. And when you keep saying memo posted,

1 is that because it hasn't done its magic at
2 night and become final?

3 A. That's right.

4 Q. So it's there on the -- on the ledger,
5 but it's not a final available balance?

6 A. That's correct.

7 Q. Calculated transaction?

8 A. That is correct. We will do that. And
9 we will make as many of the transactions that we
10 can, and we, you know, we want our customers,
11 you know, it's in our best interest for our
12 customers to know what they did if they're not
13 keeping up with it. You know, I mean, we wish
14 they would keep up with their transactions.

15 But most of them, or many of them, I
16 don't know any percentage, but I would estimate
17 most, you know, in today's world, they mobile
18 bank, Internet bank, call the call center at
19 eight o'clock in the morning, and then call back
20 at 5:00 in the afternoon, you know, what did my
21 wife do today, you know, those type things.

22 Q. So let's talk about, then, the
23 transactions that you can show intraday. When
24 they're memo posted, and let's say I've got my
25 iPad, and I'm every hour, going on to see what

1 my account looks like. But they're not settled
2 and they're not posted. And so do they just
3 show up as they're done in whatever order
4 they're done for that intraday?

5 A. For the intraday, yes, it is -- it
6 is as the transactions occur. We don't go back
7 and do some posting order change intraday to
8 say, okay, let's recalculate this, you know.

9 Q. So let me ask you this, if I do five
10 PIN based transactions, and your system knows
11 right away and it shows on the online, and I do
12 a one-dollar, and then next a two and a three
13 and a four and a five, it should show up
14 intraday; the one, the two, the three, the four,
15 the five in that order, correct?

16 A. That would -- that is my recollection,
17 yes.

18 Q. And then we'll talk, obviously, you
19 know, why we're here later. It's then going to,
20 at night when everything is doing its thing,
21 it's going to then take those, if they are
22 within a certain priority bucket, and put them
23 in the order that you want them to be in?

24 MR. TAYLOR: Let me object to the form
25 on assuming how the buckets.

1 BY MR. OSTROW:

2 Q. Let's take the word bucket out. So
3 even though it's one, two, three, four, five,
4 because that's the order I did it in, at night,
5 when we get the settlement, it's going to then
6 change online at some point in the middle of the
7 night or early in morning to the order that the
8 bank has told the software to change it to?

9 A. We are going to post according to our
10 posting order criteria, which, you know, takes
11 across multiple types of transactions that may
12 or may not have been memo posted during the
13 day. But in your example of five transactions
14 that are PIN based transactions that memo post
15 to online banking during the day, at night, they
16 may not post in the same order.

17 Q. Okay. That's the answer. Thank you.
18 There's several different types of fees that you
19 all charge your customers, right?

20 A. Yes.

21 Q. One of those is the overdraft fee?

22 A. Yes.

23 Q. One is an NSF fee?

24 A. Yes.

25 Q. Then there's ATM fees?

Exhibit B

CONFIDENTIAL

Expert Report of Paul A. Carrubba

September 24, 2012

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 1:09-02036-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**

making all or a portion of the vast majority of deposits available immediately or the next day after deposit is more favorable to customers than is required by these legal requirements, a fact that tends to reduce overdrafts and overdraft fees.²

B. The Process of Posting

A bank receives debits (e.g., checks, ACH, debit card transactions) from a number of different sources. These items may be received over the counter, internally from the bank, or from other financial institutions, the Federal Reserve Bank, or networks via cash letters, ACH files, and Debit Card files. Likewise, as previously discussed, credits are received from a number of sources. It is my experience that most commercial banks accumulate these entries throughout the day and post the transactions to the checking account after an established cut-off in a process referred to as "batch posting." BancorpSouth uses batch posting to post transactions.³ After all of the transactions are captured and the entire system is balanced, the bank will sort the transactions in a predetermined sequence and post the transactions to the accounts. While transactions may be posted in a number of different ways, it is my experience that the main categories of sorting the transactions are first based on the type of transactions and then follow a sub-sequence within those types or categories of transactions.

It is my experience that most banks sort and post transactions in the following order:

- Post deposits and other credits first
- Post a selected category of transactions (wire transfers, certain other internal debits) second

² July 18, 2012 Telephone Interview with Lee McAllister and Jeff Jagers.

³ July 18, 2012 Telephone Interview with Lee McAllister and Jeff Jagers.

Exhibit C

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.,
S.D. Fla. Case No. 1:10-cv23872-JLK

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:
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On behalf of Shane Swift:
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- - -

1 BancorpSouth customers?

2 A. Yes.

3 Q. Do you think that all BancorpSouth
4 customers would agree with you?

5 MR. OSTROW: Form.

6 A. Rephrase that question.

7 BY MR. TAYLOR:

8 Q. Do you have any reason to believe that
9 all BancorpSouth customers would agree with you that
10 reordering transactions from high to low is unfair?

11 A. Do I have any reason? Yes, I have any
12 reason to believe that.

13 Q. What reason do you have to believe that
14 all BancorpSouth customers would agree with you?

15 A. Because it is their money that is
16 getting deducted with those fees.

17 Q. I want to make sure that you understand
18 my question. We weren't talking about overdrafts. We
19 were talking about reordering.

20 So would you agree with me that
21 reordering doesn't necessarily lead to an overdraft,
22 right?

23 A. Yes.

24 Q. If you have enough money in your
25 account to cover any transactions you take part in

1 over a weekend, you won't have any overdrafts, right?

2 A. That's correct.

3 Q. And that's just --

4 A. I know where you're coming from.

5 Q. That's just a general rule that if you
6 have enough money to cover any transactions you make,
7 you're not going to have an overdraft?

8 A. Yes.

9 Q. So you only have an overdraft if you
10 don't have enough money to cover all the transactions,
11 right?

12 A. Yes. Please ask me the question over
13 again.

14 Q. Let me try this and I'm not trying to
15 be difficult.

16 A. I'm not trying to be difficult.

17 Q. I don't sense that in you at all, but
18 we're very careful with words.

19 A. Yes. I'm not a counsel, but yes.

20 Q. Understood.

21 A. I'm just an ordinary guy.

22 Q. Do you have any reason to believe that
23 all BancorpSouth customers believe that resequencing
24 is unfair?

25 A. No.

1 MR. OSTROW: I'm fine with the answer
2 either way. I'll withdraw the objection. I
3 think you're technically correct.

4 MR. TAYLOR: Yes, I'm trying to ask
5 questions so I don't get an objection because
6 I don't want to know what I'm not entitled to
7 know.

8 MR. OSTROW: No, it's not that juicy
9 so don't worry about it.

10 A. In '09 when I started doing research on
11 my account and finding out that the overdraft charges
12 I was receiving was a -- the extra overdraft charges
13 that I received was because of resequencing.

14 BY MR. TAYLOR:

15 Q. Tell me what you mean by extra
16 overdraft charges.

17 A. Caused by resequencing. I gathered up
18 receipts from my bank account, printouts or you
19 know -- and I looked at my receipts as opposed to the
20 statement and the date of the receipts to the date of
21 the statement and as further research was done, I
22 started noticing that overdraft charges -- not
23 overdraft charges, but the transactions were being
24 resequenced from out of chronological order.

25 So I was concerned with that, so I

1 sought counsel. I sought counsel. I sought counsel
2 to see if this was the right way to perform business
3 by a financial institution.

4 Q. This was from when in '09?

5 A. There's a date -- it's in the documents
6 somewhere, the exact date, but I don't recall the
7 exact date.

8 Q. I don't mean the exact date you filed
9 the lawsuit. I mean the analysis you're talking
10 about.

11 A. That would be in the documents. It's
12 in there somewhere. I mean I don't even know the
13 month.

14 MR. TAYLOR: Let me see if I can help
15 you. Would you please mark that as Exhibit 1?

16 (Thereupon, Exhibit No. 1 was marked
17 for identification.)

18 BY MR. TAYLOR:

19 Q. Mr. Swift, let me show you what I asked
20 the court reporter to label as Exhibit 1. Can you
21 identify this, please?

22 A. Yes. You want me to say yes or no if I
23 can identify it?

24 Q. Can you identify it for the record?

25 A. Yes.

1 the Complaint and I just want to kind of get back into
2 the discussion we were having.

3 Do I remember correctly that you were
4 reviewing a BancorpSouth statement as a part of your
5 trying to understand the overdraft fees for the month
6 of May?

7 A. I was reviewing to try to understand
8 it, exactly.

9 Q. But it was a BancorpSouth monthly
10 statement that we're talking about?

11 A. To the best of my knowledge, it was a
12 printout of the statement.

13 Q. Okay. It was information from
14 BancorpSouth that you were looking at?

15 A. Information from BancorpSouth.

16 Q. And then you were looking at receipts,
17 as well?

18 A. Yes.

19 Q. Was that the first time that you had
20 reviewed one of your BancorpSouth monthly account
21 statements?

22 A. First time to my knowledge as in-depth
23 as that.

24 Q. If you turn over to Page 22 and I'm
25 going to be looking at Paragraph 71 where it says --

Exhibit D

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

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*

**PLAINTIFF'S SUPPLEMENTAL RESPONSES TO DEFENDANT
BANCORPSOUTH'S SECOND REQUESTS FOR ADMISSIONS TO PLAINTIFF**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiff Shane Swift ("Swift" or "Plaintiff"), based on the agreement of the parties, hereby serves his supplemental responses to certain of requests set forth in Defendant BancorpSouth's Second Requests for Admissions to Plaintiff ("Requests"). In providing these supplemental responses, Swift incorporates the General Responses and Objections set forth in his initial Objections and Responses to the Requests served on June 25, 2012.

SUPPLEMENTAL RESPONSES

4. Admit that You initiated all debit card, check, ATM, and ACH transactions for which an OD or NSF charge was applied to your account.

RESPONSE TO REQUEST FOR ADMISSION NO. 4

Admitted that Plaintiff does not claim that the charges were the result of fraud or theft at the hands of a third party not authorized to use Plaintiff's account, but denied that the OD or NSF charges were proper.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 4

With Defendant's clarification that the request does not request an admission that an OD or NSF charge was proper, Plaintiff admits that he initiated all of the underlying debit card, check, ATM, and ACH transactions for which an OD or NSF charge was applied by Defendant to his account.

6. Admit that BancorpSouth does not "memo post" or place "memo holds" on deposit accounts based on transaction authorization requests submitted by merchants or other third party payees.

RESPONSE TO REQUEST FOR ADMISSION NO. 6

Objection. Plaintiff objects to this Request as irrelevant. Plaintiff further objects that this Request is vague in particular with regard to the Defendant's failure to define "transaction authorization requests," "memo post" or "memo holds." Finally, Plaintiff objects that this Request is compound.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 6

Subject to and without waiving the foregoing objections, Plaintiff admits that bank does not "memo post" or place "memo holds" on signature-based debit card transaction authorization requests. Plaintiff denies the Request as to PIN-based debit card transactions.

7. Admit that BancorpSouth has only two physical bank branches in the state of Florida.

RESPONSE TO REQUEST FOR ADMISSION NO. 7

Objection. Plaintiff objects to this request as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to this objection, Plaintiff acknowledges that a review of the FDIC's website reflects that as of the date of this Response Defendant has 2 offices in Florida.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 7

Subject to and without waiving the foregoing objections, Plaintiff admits the Request based on publicly available information from the FDIC website.

8. Admit that You have not conducted any transactions on your BancorpSouth account at any BancorpSouth branch in the state of Florida during the class period.

RESPONSE TO REQUEST FOR ADMISSION NO. 8

Objection. Plaintiff objects to this Request as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waive this objection, Plaintiff states that there is evidence of the use of a debit card in the State of Florida within the class period. See account statements for the Plaintiff's accounts produced by Defendant in this lawsuit.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 8

Subject to and without waiving the foregoing objections, and with Defendant's clarification that the request does not address whether Plaintiff used his debit card to pay a Florida merchant, only that he did not conduct any transactions during the Class Period at a Florida BancorpSouth branch, admitted.

9. Admit that BancorpSouth has over 50 physical bank branches in the state of Arkansas, your state of residence.

RESPONSE TO REQUEST FOR ADMISSION NO. 9

Objection. Plaintiff objects to this Request as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Subject to this objection, Plaintiff acknowledges that a review of the FDIC's website reflects that as of the date of this Response Defendant has 55 offices in Arkansas.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 9

Subject to and without waiving the foregoing objections, admitted based on the information publicly available to Plaintiff at the time of service of his initial response to this request and that is currently available from the FDIC website.

10. Admit that none of the individuals listed on Defendant BancorpSouth Bank's Preliminary Non-Expert Witness List, submitted to counsel for Swift on May 14, 2012, reside in Florida.

RESPONSE TO ADMISSION NO. 10

Objection. Plaintiff objects to this Request as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 10

Admitted.

11. Admit that none of the individuals listed on Plaintiffs Lay Witness List for Trial, submitted to counsel for Swift on May 14, 2012, reside in Florida.

RESPONSE TO REQUEST FOR ADMISSION NO. 11

Objection. Plaintiff objects to this Request as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 11

Admitted.

12. Admit that BancorpSouth has no control over the timing and manner of presentation of debit transactions to BancorpSouth by account holders, or merchants, or other third parties.

RESPONSE TO REQUEST FOR ADMISSION NO. 12

Objection. Plaintiff objects to this Request as vague and irrelevant. "Debit transactions" is not defined. Plaintiff further objects to the phrase "no control" as being manifestly overbroad and improper. This Request does not identify an applicable time frame.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 12

With Defendant's clarification that the time frame is the class period, denied.

14. Admit that BancorpSouth does not post debit transactions in any order that is contrary to the posting order disclosed in your BancorpSouth Deposit Account Terms and Conditions and/or your Account Information Statement.

RESPONSE TO REQUEST FOR ADMISSION NO. 14

Objection. Plaintiff objects to this Request as vague and overbroad in failing to identify an applicable time frame or to identify which version of the Deposit Account Terms and Conditions or Account Information Statement covered by this request.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 14

With Defendant's clarification that the time frame is the class period, denied.

15. Admit that BancorpSouth does not post debit transactions in any order that is contrary to the posting order disclosed in BancorpSouth's Deposit Account Terms and Conditions and/or Account Information Statement.

RESPONSE TO REQUEST FOR ADMISSION NO. 15

Objection. Plaintiff objects to this Request as vague and overbroad in failing to identify an applicable time frame or to identify which version of the Deposit Account Terms and Conditions or Account Information Statement covered by this request.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 15

With Defendant's clarification that the time frame is the class period, denied.

18. Admit that You are the only person or entity who has the capacity to know, at any given moment, what transactions have been initiated in your BancorpSouth deposit account.

RESPONSE TO REQUEST FOR ADMISSION NO. 18

Objection. Plaintiff objects to this Request as vague in failing to define "transactions" and in failing to identify or an applicable time frame.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 18

With Defendant's clarification that the time frame is the class period, denied.

19. Admit that the account holder of a BancorpSouth deposit account is the only person or entity who has the capacity to know, at any given moment, what transactions have been initiated on his or her deposit account.

RESPONSE TO REQUEST FOR ADMISSION NO. 19

Objection. Plaintiff objects to this Request as vague and overbroad in failing to define "transactions" and in failing to identify an applicable time frame.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 19

With Defendant's clarification that the time frame is the class period, denied.

20. Admit that BancorpSouth does not know that You have paid for a transaction using a check on your BancorpSouth deposit account until the check payee submits that check for payment.

RESPONSE TO REQUEST FOR ADMISSION NO. 20

Objection. Plaintiff objects to this Request as vague and overbroad in failing to define "check" and in failing to identify an applicable time frame.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 20

With Defendant's clarification that the time frame is the class period and that the request addresses paper checks only, admitted.

21. Admit that BancorpSouth does not know that a deposit account holder has paid for a transaction using a check on a BancorpSouth deposit account until the check payee submits that check for payment.

RESPONSE TO REQUEST FOR ADMISSION NO. 21

Objection. Plaintiff objects to this Request as vague and overbroad in failing to define "check" and in failing to identify an applicable time frame.

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 20

With Defendant's clarification that the time frame is the class period and that the request addresses paper checks only, admitted.

Date: October 22, 2012

By: /s/ Jonathan Streisfeld

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Counsel for Plaintiffs and the Certified Classes

**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:
FOURTH TRANCHE ACTIONS**

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

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2012, I served Plaintiff's Objections and Responses to Defendant BancorpSouth's Second Requests for Admissions to Plaintiff by electronic mail on Eric Jon Taylor, Esq., Darren E. Gaynor, Esq., Parker, Hudson, et. al., 1500 Marquis Two Tower, 285 Peachtree Center Avenue, N.E., Atlanta, GA 30303 and Thomas E. Scott, Cole, Scott & Kissane, P.A., Dadeland Centre II, 14th Floor, 9150 South Dadeland Blvd., Miami, Florida 33156.

/s/ Jonathan M. Streisfeld
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Counsel for Plaintiff and the Certified Classes

Exhibit E

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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)
)
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)
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 30(b)6 DEPOSITION OF
JEFF JAGGERS
Taken on Behalf of the Plaintiffs
August 15, 2012
8:57 A.M. - 11:33 A.M.

Edward F. Kidd, RPR, LCR #501

My License Expires: 6/30/14

1 referring to -- am I aware of specific
2 transactions that occurred on the Swift
3 account?

4 BY MR. KAPLAN:

5 Q. Yes.

6 A. Yes, I have reviewed some of the
7 account statements, transactions related,
8 that are on those transactions, and notices
9 of the plaintiffs.

10 Q. Do you understand from reviewing
11 those statements that those transactions were
12 voluntarily initiated by the plaintiff?

13 A. I don't -- don't know from a legal
14 perspective what volume -- in the legal term
15 of our defense what voluntarily initiated
16 means legally. But I, if there is a review
17 of the transactions related to the statements
18 that I reviewed, the transactions on the
19 Swift's account were authorized by the
20 Swifts, the account holders, that incurred an
21 overdraft.

22 Q. All transactions are authorized by
23 the Swifts?

24 MR. TAYLOR: Object to the form.

25 But --

1 THE WITNESS: Are you asking all
2 transactions are initiated by --

3 BY MR. KAPLAN:

4 Q. I want to know was that all
5 transactions or specific transactions.

6 A. I was referring to all transactions
7 which caused their accounts to be overdrawn.

8 Q. Were --

9 A. There are other transactions that can
10 occur on a customer's statement in which,
11 that the bank would initiate such as a fee.

12 Q. Such as a fee?

13 A. Right.

14 Q. Right?

15 A. So there are other types of
16 transactions that would occur on a bank
17 statement or on a customer's account.

18 Q. But all the transactions that which
19 caused Mr. Swift's accounts to become
20 overdrawn were transactions that he
21 initiated?

22 A. The account holders.

23 Q. The account holders, that he
24 initiated?

25 A. The account that we're referring to

1 is a joint account. So there was more than
2 one person authorized and who conducted
3 transactions.

4 Q. Right. Thank you for the
5 clarification, because this is a joint
6 account. But it is the bank's position that
7 the transactions which caused the accounts to
8 become overdrawn were authorized by either
9 Shane or Trina Swift?

10 A. That the -- the account statements
11 that I reviewed --

12 Q. Yes.

13 A. -- on this account, those account
14 statements had different types of
15 transactions.

16 Q. Uh-huh.

17 A. And those transactions, I am not
18 aware of any of those transactions that
19 caused an overdraft to occur being a
20 transaction that the customer did not
21 initiate, either in whatever channel or form
22 that transaction was processed or authorized.

23 Q. Are you aware of any transactions
24 that were in the nature of fees that caused
25 the Swifts' accounts to become overdrawn?

1 BY MR. KAPLAN:

2 Q. So is it your testimony that a fee
3 that BancorpSouth charges is a transaction
4 that is not voluntarily initiated by the
5 account holder?

6 MR. TAYLOR: Object to the form.

7 BY MR. KAPLAN:

8 Q. I'm listening. Go ahead. Sorry.
9 I'm trying to turn this off.

10 A. There are -- you know, BancorpSouth,
11 you know, discloses all of its fees across
12 the spectrum of services and products and,
13 you know, from the bank's position is that
14 those fees are, you know, voluntarily
15 initiated by the customer because those are
16 disclosed fees that the customer knows
17 they'll incur depending upon the service that
18 they use or the type of account they have.
19 So they have voluntarily agreed through the,
20 you know, terms and conditions and
21 disclosures that those fees will be assessed
22 for the services and products that we
23 provide.

24 Q. Okay. So when we talk about
25 voluntarily initiating all transactions, per

1 BancorpSouth's understanding, that would
2 include fees that BancorpSouth charges a
3 customer?

4 A. Again, I want to go back and say I am
5 not a lawyer regarding what the term
6 voluntary might mean --

7 Q. Right.

8 A. -- in a legal context of an
9 affirmative defense. But the bank's position
10 is that the customer who initiates a
11 relationship with BancorpSouth and obtains a
12 product of BancorpSouth in which we disclose
13 the product features and functions and
14 services and fees associated with that, that
15 those customers, you know, sign an agreement
16 and are, you know, that there is no pressure
17 from the bank to have a checking account with
18 us. They are voluntarily selecting
19 BancorpSouth as the bank they choose to do
20 business with and the product they choose to
21 have and we disclose how we process that.
22 But voluntarily from a legal position of
23 affirmative, you know, I struggle with what
24 that means.

25 Q. I think what you're telling me is

1 that, correct me if I'm wrong, that if it's
2 disclosed and the customer engages in the
3 transaction, knowing that a fee has been
4 disclosed will result, that that's a
5 voluntary type of transaction?

6 A. From the --

7 Q. The bank's perspective?

8 A. The bank's perspective --

9 Q. Yes.

10 A. -- yes, we believe that is a
11 voluntary, you know, the bank selected our
12 products and services -- I mean the customer.

13 Q. The customer?

14 A. I'm sorry. The customer selected our
15 products and services, and when they, you
16 know, became a customer of ours, you know, we
17 gave them the information that goes along
18 with those products and services and they
19 agreed to those. Yeah. I believe that, I
20 mean, the bank believes that.

21 Q. So when we're talking about fees, why
22 don't we make it more specific. We're
23 talking about, that would include overdraft
24 fees, the fee that is charged when a
25 transaction overdrafts an account; correct?

1 the -- thinking about all types of
2 services and fees and other things that
3 BancorpSouth provides its customers, and
4 not having a clear understanding of what
5 the legal voluntary is, you know, that
6 we have been talking about here, I am,
7 you know, I am not aware -- I'm trying
8 to -- sitting here today, I don't recall
9 fees that we would not consider
10 voluntary in the sense that they,
11 through, you know, our contracts,
12 agreements, disclosures and everything
13 we have that the bank would have -- you
14 know, that the customer agreed to all
15 those terms and facts regarding how
16 their products and services would work.
17 So it would be the customer voluntarily
18 doing business with us, they can do any
19 business with any bank they so choose.
20 They don't have to do business with us.
21 So they have, you know, it's a voluntary
22 decision on their part.

23 BY MR. KAPLAN:

24 Q. Okay. And the voluntary decision is
25 premised on the fact that the fee has been

1 A. It is the bank's position that the
2 customers who open checking accounts with
3 BancorpSouth open those accounts, with the
4 disclosures, the way the account will work
5 and the products and services related to the
6 overdrafts.

7 Q. Uh-huh.

8 A. The fees associated with an overdraft
9 is disclosed to the customer and the
10 customers are -- have a -- the customers know
11 the transactions they're conducting and the
12 bank does not. The customer knows that they
13 wrote a check on Sunday. The bank does not
14 know that until the check gets to the bank,
15 whenever that is. It could be one day, or 10
16 days later.

17 Q. Uh-huh?

18 A. The bank won't know that. So the
19 customer knows that. The bank does not know
20 that a customer has authorized, you know, a
21 third party to debit their account through an
22 automated clearing house transaction and that
23 debit is going to be \$112 on the 15th for
24 their utility bill that the customer got a
25 notice on. The bank did not get a notice the

1 customer had \$112 utility bill. The customer
2 did. So the bank's position is that the
3 customer knows the transactions that they're
4 conducting on their account. And through
5 that understanding of the transactions that
6 they're conducting, they also know the
7 services and fees in which the, we're talking
8 about overdraft fees.

9 Q. Uh-huh?

10 A. There is a fee, we disclose there is
11 a fee for overdrawing your account. And that
12 we assess that fee. And so, yes, it's the
13 bank's position that they do that
14 voluntarily.

15 Q. Okay. What about with a continuing
16 overdraft fee, the fee that is charged for
17 the account being in overdraft status on a
18 subsequent day?

19 A. Just so we're clear, I want to
20 make -- I'm not sure if you knew, you know,
21 we didn't start a continuous overdraft fee
22 until Reg E.

23 Q. Right. I do understand that. I'm
24 talking about more from a hypothetical
25 standpoint?

1 for which they knew their accounts did not
2 possess the necessary funds. Did I read that
3 correctly?

4 A. Yes, you did.

5 Q. Okay. And as you sit here today,
6 just with regard to plaintiff Shane Swift, do
7 you have any specific knowledge that
8 plaintiff Shane Swift engaged in the
9 transaction in which he knew that his account
10 did not possess the necessary funds?

11 MR. TAYLOR: Object to the form.

12 THE WITNESS: From the bank's
13 perspective.

14 BY MR. KAPLAN: --

15 Q. Yes.

16 A. -- Mr., or the plaintiffs, Mr. and
17 Mrs. Swift, were in the best position to know
18 the transactions that were being conducted on
19 their account and whether or not their
20 account was overdrawn, the plaintiffs would
21 have received overdraft notices, depending
22 upon -- and their transactions, you know, the
23 plaintiffs conducted multiple occurrences of
24 the account being overdrawn and multiple
25 notices that were sent. Their monthly

1 statements included information regarding
2 their account activity and the date the
3 account might have been overdrawn or not.
4 So, yes, the bank's position is the
5 plaintiffs knew the transactions they were
6 conducting. They were the ones who should.
7 They have all the information to know the
8 transactions that they are authorizing on
9 their account.

10 Q. So from the bank's perspective, their
11 position is that every time the plaintiff
12 Shane Swift initiated a transaction that
13 resulted in an overdraft, he knew that he did
14 not possess the necessary funds in the
15 account?

16 A. The bank's position is that the
17 customer, the plaintiffs, the Swifts, are the
18 best person to know the transactions that
19 they're conducting on their account and would
20 have the most knowledge about those
21 transactions and when they conducted them,
22 when they wrote the checks, when they
23 authorized the transactions on their account.
24 So, yes, they would be in the best position
25 to know that.

1 A. From the bank's perspective.

2 Q. Yes, sir.

3 A. From the bank's perspective, the
4 Swifts used this service on numerous
5 occasions.

6 Q. Uh-huh?

7 A. And were aware of the service and
8 were conducting transactions with the
9 knowledge that the bank would honor those
10 transactions and even if they didn't have the
11 funds. So, yes, they -- and the transactions
12 occurred with their knowledge, they were the
13 ones who initiated transactions and they were
14 the ones who knew the funds were not
15 available for those transactions and they
16 knew that we would honor those.

17 Q. Does BancorpSouth always honor a
18 transaction which overdrafts an account?

19 MR. TAYLOR: Object to the form.

20 THE WITNESS: No.

21 BY MR. KAPLAN:

22 Q. Okay. So how does a -- how did
23 plaintiff Shane Swift know that you would
24 honor a transaction even though it
25 overdrafted his account?

1 MR. TAYLOR: Object to the form.

2 THE WITNESS: I think he knew
3 from the experience of his account and
4 the transactions that he conducted and
5 that overdrew his account and he knew
6 that those were paid into overdraft and
7 so he learned that we would pay them
8 into overdraft and used the service
9 again.

10 BY MR. KAPLAN:

11 Q. Okay. And correct me if I'm wrong,
12 but BancorpSouth determines whether or not to
13 pay an overdrafted item based on an overdraft
14 matrix; is that correct?

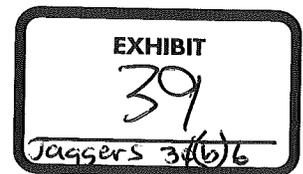
15 A. That's one.

16 Q. That's one methodology?

17 A. One method, yes.

18 Q. For purposes of the record, what are
19 the other methodologies that you would use?

20 A. There are certain transactions that
21 are conducted, you know, in which the bank
22 will -- they are called forced pay
23 transactions. Those are transactions in
24 which once they are authorized, there is not
25 a mechanism to return those transactions.



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

**PLAINTIFF'S NOTICE OF DEPOSITION OF
DEFENDANT BANCORPSOUTH PURSUANT TO FED. R. CIV. P. 30(b)(6)**

PLEASE TAKE NOTICE that the deposition of Defendant, Bancorpsouth, will be taken in this action on August 15, 2012, at 9:00 a.m., before a certified court reporter in Memphis, TN, location to be identified by Defendant. Pursuant to Federal Rule of Civil Procedure 30(b)(6), Bancorpsouth shall designate one or more officers, directors, managing agents, or other persons to testify on its behalf on each topic listed below. As used in this notice, "Bancorpsouth" or "Bank" includes Bancorpsouth and its officers, directors, employees, and other representatives. The person or persons so designated shall testify as to all information known or reasonably available to Bancorpsouth on each topic listed below.

Topics

1. The following Affirmative Defenses you have asserted in this lawsuit, both as to the Named Plaintiff and the putative Classes:

A. First Affirmative Defense—Unclean Hands

- B. Second Affirmative Defense—Statute of Limitations
- C. Third Affirmative Defense—Statute of Repose
- D. Fourth Affirmative Defense—Laches
- E. Fifth Affirmative Defense—Accord and Satisfaction
- F. Sixth Affirmative Defense—Waiver
- G. Sixth Affirmative Defense—License
- H. Seventh Affirmative Defense—Consent
- I. Eighth Affirmative Defense—Ratification
- J. Eighth Affirmative Defense—Acceptance
- K. Eighth Affirmative Defense—Release
- L. Ninth Affirmative Defense—Res Judicata
- M. Ninth Affirmative Defense—Judicial Estoppel
- N. Tenth Affirmative Defense—Failure to Satisfy Conditions Precedent or Statutory Prerequisites
- O. Eleventh Affirmative Defense—Failure to Mitigate Damages
- P. Fourteenth Affirmative Defense—Voluntary Payment Doctrine or Similar Legal Theory
- Q. Fifteenth Affirmative Defense—Course of Dealing/Acquiescence

2. The following Specific Denials you have asserted in this lawsuit, both as to the Named Plaintiff and the putative Classes:

- A. Third Specific Denial—BancorpSouth has acted in good faith.
- B. Fourth Specific Denial—Outstanding obligations to BancorpSouth, which would bar or reduce claims

- C. Sixth Specific Denial—Failure to notify BancorpSouth of any alleged unauthorized debits in a timely manner following distribution of account statements
- D. Seventh Specific Denial—Bar to challenging BancorpSouth’s honoring of debits to accounts that the accountholder initiated or authorized to be initiated
- E. Seventh Specific Denial—Bar to challenging BancorpSouth’s honoring of debits when accountholder knew or should have known that he or she had entered into a contract the terms of which provided for Defendant to post debits in the order followed by BancorpSouth
- F. Eighth Specific Denial—Bar because accountholder exploited the benefit of Defendant’s policies and practices regarding acceptance and posting of debits.

This deposition pursuant to Federal Rule of Civil Procedure 30(b)(6) is subject to continuance or rescheduling from time to time or place to place until completed.

Dated: August 9, 2012.

**KOPELOWITZ OSTROW
FERGUSON WEISELBERG KEECHL**
200 S.W. First Avenue, 12th Floor
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100
Facsimile: (954) 525-4300
Counsel for Plaintiffs and the Proposed Classes

By: /s/ Jonathan Streisfeld
Jeffrey M. Ostrow
Florida Bar No. 121452
ostrow@kolawyers.com
Jonathan M. Streisfeld
Florida Bar No. 117447
streisfeld@kolawyers.com

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

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2012, I served the Notice of Deposition of Defendant Bancorpsouth pursuant to Fed. R. Civ. P. 36(b)(6), by electronic mail on the following:

Eric Jon Taylor, Esq.
Darren E. Gaynor, Esq.
PARKER, HUDSON, ET AL.
1500 Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, GA 30303
Telephone: 404-523-5300
Facsimile: 404-522-8409
E-mail: etaylor@phrd.com
E-mail: deg@phrd.com

/s/ Jonathan Streisfeld
JONATHAN STREISFELD

Exhibit F

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

DEPOSITION OF MICHAEL LINDSEY

TAKEN AT THE INSTANCE OF THE PLAINTIFF
IN THE BANCORPSOUTH CONFERENCE CENTER
387 WEST MAIN STREET, TUPELO, MISSISSIPPI
ON AUGUST 23, 2012, BEGINNING AT 2:36 P.M.

(APPEARANCES NOTED HEREIN)

Reported by: LUANNE FUNDERBURK, CSR 1046

ADVANCED COURT REPORTING
P.O. BOX 761
TUPELO, MS 38802-0761

1 day to refer to on the Homesite system?

2 MR. TAYLOR: Object to the form.

3 A. The customer has the balance of their check
4 register and they would have the balance that is
5 displayed on Homesite.

6 Q. So, by that answer you're suggesting that a
7 customer who uses a check register could have a
8 balance notated based upon the mathematics that that
9 customer is doing during the day; is that right?

10 A. I would say that the customer is the only
11 person that knows what the true balance of the
12 account is.

13 Q. Why do you say that?

14 A. Because the customer knows what checks they
15 have outstanding. I do not until they are presented
16 for processing.

17 Q. And for a customer that doesn't use any
18 checks in their deposit account but uses a debit
19 card, let's say only, does the bank have the same
20 capability to know the cash balance in the account
21 during the 2003 to 2010 time frame?

22 MR. TAYLOR: Object to the form.

23 A. The customer is the only one that knows if
24 there are unsettled merchant transactions out,
25 especially if during that period of time if the

1 merchant used a paper ticket, didn't receive an
2 authorization, the customer is the only one that
3 knows what the true balance of that account is.

4 Q. But if the customer -- if the merchant is
5 not using a paper ticket, then the bank would be
6 aware -- strike that. If the merchant is not using a
7 paper ticket as you described it, the bank would be
8 equally aware of the authorization of both PIN based
9 and signature based transactions; isn't that correct?

10 MR. TAYLOR: Object to the form.

11 A. I would say no.

12 Q. Why not?

13 A. A PIN transaction I know is going to settle
14 because I'm going to settle it. An authorization on
15 a signature transaction may or may not ever settle.

16 Q. But my question to you, which we can read
17 back if it is helpful to you --

18 A. Please do.

19 Q. Okay.

20 MR. STREISFELD: Could you read it
21 back?

22 (Whereupon, the court reporter read
23 back the previous question).

24 A. I would be aware an authorization occurred.
25 I would not be aware of what the transaction amount

Exhibit G

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.,)
S.D. Fla. Case No. 1:10-cv-23872-JLK)

**DEFENDANT BANCORPSOUTH'S
FIRST REQUESTS FOR ADMISSIONS TO PLAINTIFF**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Defendant BancorpSouth Bank ("BancorpSouth" or "Defendant") propounds these First Requests for Admissions to Plaintiff Shane Swift ("Plaintiff").

In accordance with Rule 36 of the Federal Rules of Civil Procedure, if the requests are not answered within thirty (30) days after service, the matters herein are deemed admitted. In addition, pursuant to Rule 37(c) of the Federal Rules of Civil Procedure, the Court may award expenses of proof, including reasonable attorneys' fees, concerning any matter contained in a request that Plaintiff denies if Defendant thereafter proves the genuineness of the document or truth of the matter in question at trial.

DEFINITIONS

For purposes of these Requests, the following terms shall have the meaning indicated.

EXHIBIT 75

NOTICE OF CHARGE FOR OVERDRAWN ACCOUNT
THE ITEMS LISTED BELOW WERE PRESENTED FOR PAYMENT. OUR RECORDS INDICATE THAT FUNDS WERE INSUFFICIENT TO PAY THESE ITEMS. THE ITEMS WERE PAID AND THE CHARGES INDICATED BELOW WERE ASSESSED TO COVER THE COSTS OF HANDLING. PLEASE ADJUST YOUR CHECKBOOK AND DEPOSIT FUNDS TO COVER THESE ITEMS.

ACCOUNT NUMBER	BALANCE	HANDLING CHARGE	CHECK NUMBER	AMOUNT
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[REDACTED]	43.53-	30.00	0	59.51
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TRINA N SWIFT OR
TERRY S SWIFT

[REDACTED]

DATE OF NOTICE 05/01/06
BANCORPSOUTH

BRANCH - 555

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.,)
S.D. Fla. Case No. 1:10-cv-23872-JLK)

**PLAINTIFF SHANE SWIFT’S OBJECTIONS AND
RESPONSES TO DEFENDANT BANCORPSOUTH BANK’S
FIRST REQUEST FOR ADMISSIONS TO PLAINTIFF**

Pursuant to Fed. R. Civ. P. 26 and 36, Plaintiff, Shane Swift (“Plaintiff”) hereby responds to Defendant, BancorpSouth Bank’s (“BancorpSouth” or “Defendant”) First Request for Admissions to Plaintiff (“Requests”).

GENERAL OBJECTIONS

1. Plaintiff’s discovery and investigation with respect to the issues in this case are ongoing. The following responses and objections are provided without prejudice to Plaintiff’s right to revise or supplement their responses or objections based on subsequent discovery or investigation.

2. Plaintiff objects to each discovery request to the extent it seeks confidential or private personal or business information. To the extent that documents and other information requested by Defendant are not protected from discovery based on attorney-client privilege or

work product doctrine, and are otherwise discoverable, they will be produced subject to an appropriate protective order.

3. Plaintiff objects to each discovery request to the extent that it begs the question and/or assumes facts which have not been admitted. By responding to these Requests, Plaintiff does not admit, concede or agree with any explicit or implicit assumption made in the Requests.

4. Plaintiff's identification of documents and other information in response to these Requests is not intended and should not be construed as (a) an admission that the produced documents or other information are relevant or admissible; (b) a waiver of any of these General Objections; or (c) a waiver of any specific objections asserted in response to individual discovery Requests. Plaintiff reserves all proper objections regarding the competency, relevancy, materiality, privilege, authenticity and/or admissibility as evidence, for any purpose, of any and all documents and other information produced by Plaintiff in this litigation.

5. Plaintiff objects to the "Definitions," "Instructions," and to each discovery request to the extent they purport to impose any requirement or discovery obligation on Plaintiff greater than or different from those imposed by Rule 26 or 36 of the Federal Rules of Civil Procedure and the applicable rules of this Court.

6. Plaintiff objects to the definition of "you" and "your" to the extent it calls for information protected by the attorney-client privilege or work product doctrine, and to the extent it seeks documents or information relating to accounts held by anyone other than Plaintiff.

7. Plaintiff objects to each discovery request to the extent it seeks information about accounts other than those that are the subject of this litigation, or accounts other than Plaintiff's BancorpSouth debit card and/or checking account.

RESPONSES TO REQUESTS FOR ADMISSIONS

GIVEN THE REPETITIVE NATURE OF THE REQUESTS, PLAINTIFF IS RESPONDING TO THE REQUESTS IN SEVEN DISCRETE GROUPINGS AS IDENTIFIED BELOW BECAUSE THE RESPONSE IS CONSISTENT AS TO ALL SUCH GROUPED REQUESTS. BLANKS ARE USED IN PLACE OF THE EXHIBIT NUMBER AND DATES WHICH ACTUALLY APPEAR IN THE REQUESTS.

GROUP 1

Admit that the document attached hereto as Exhibit ___ accurately reflects the transaction activity with respect to your account with BancorpSouth (Account No. 5060990), for the time period of _____, 20__ through _____, 20__.

As to Requests 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 82, 85, 88, 91, 94, 97, 100, 103, 106, 109, 112, 115, 118, 121, 124, 127, 130, 133, 136, 139, 142, 145, 148, 151, 154, 157, 160, 163, 166, 169, 172, 175, 178, 181, 184, 187, 190, 193, 196, 199, 202, 205, 208, 211, 214, 217, and 220, Plaintiff objects to the Requests as vague because of the use of the phrase “accurately reflects the transactions activity with respect to your account with BancorpSouth (Account No. 5060990).” Plaintiff is not on notice as to Defendant’s definition of “transaction activity” applicable to these Requests, which is material to the responses which Plaintiff would give to these Requests. Additionally, statements beginning with the statement dated March 26, 2008 (Exhibit 39) refer to a related account number ending 253-7, which is not referenced in each of the Requests. Therefore, Plaintiff is not on notice as to whether Defendant is inquiring about “transaction activity” in that account. As a result, Plaintiff cannot admit or deny the Requests.

GROUP 2

Admit that the document attached hereto as Exhibit ___ is a true and correct copy of the monthly statement for Mr. Swift's account with BancorpSouth (Account No. 5060990), for the time period of _____, 20__ through _____, 20 __, and that the information on Exhibit __ is true and accurate.

As to Requests 2, 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, 65, 68, 71, 74, 77, 80, 83, 86, 89, 92, 95, 98, 101, 104, 107, 110, 113, 116, 119, 122, 125, 128, 131, 134, 137, 140, 143, 146, 149, 152, 155, 158, 161, 164, 167, 170, 173, 176, 179, 182, 185, 188, 191, 194, 197, 200, 203, 206, 209, 212, 215, 218, and 221, to the extent that Defendant is representing to the Plaintiff in each Request that the information contained on the Exhibit that corresponds with each Request is identical to the information contained on the monthly statement Defendant actually sent to the Plaintiff on the statement date written on the Exhibit, and is representing that the formatting and placement of the information displayed is the same, Plaintiff admits that the statements are copies and will not object to the authenticity of the document in this proceeding as a business record of the Defendant. If the Defendant is not making the representations set forth in the preceding sentence, then each of the Requests is denied, and Plaintiff does not admit to the authenticity of the document as a business record of the Defendant.

As for the portion of the Requests seeking an admission that each monthly statement is "true and correct copy" and that the information on the statement is "true and accurate," Plaintiff objects that the phrases are vague as being undefined. Plaintiff is not on notice of Defendant's definitions of those two phrases, which is material to the responses which Plaintiff would give to these Requests. Therefore, Plaintiff does not admit or deny those portions of the Requests.

GROUP 3

Admit that Mr. Swift received a copy of the monthly statement for Mr. Swift's account with BancorpSouth (Account No. 5060990) for the time period of _____, 20__ through _____, 20__, on or about _____, 20__.

As to Requests 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45, 48, 51, 54, 57, 60, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 93, 96, 99, 102, 105, 108, 111, 114, 117, 120, 123, 126, 129, 132, 135, 138, 141, 144, 147, 150, 153, 156, 159, 162, 165, 168, 171, 174, 177, 180, 183, 186, 189, 192, 195, 198, 201, 204, 207, 210, 213, 216, 219, and 222, Plaintiff observes that none of these Requests refer to an Exhibit to the Request for Admissions and, therefore, does not base his responses on any Exhibit supplied with the Request for Admissions. Assuming that the Defendant is representing in each Request that the "time period" stated in each Request is the accurate date range for each monthly statement that Defendant actually sent to Plaintiff, Plaintiff admits he received monthly statements covering such time periods. Plaintiff is producing copies of monthly statements that he received and retained in response to Defendant's document Requests served contemporaneously with these Requests, which is the best evidence of what Plaintiff received from Defendant.

However, Plaintiff cannot admit or deny the timing of his receipt of each monthly statement utilizing the definition of "on or about" in Definition #14 of the Request for Admissions. As written, that definition contemplates two limited date choices: (a) receipt on the 10th business date prior to the date identified in the Request or (b) receipt on the 10th business date after the date identified in the Request. Plaintiff has no reason to believe he received any monthly statement "ten (10) business days before" the date identified at the end of each of the subject Requests because that date would be before the end date of the "time period" for each

monthly statement. Plaintiff does not recall whether the monthly statement was received on the 10th date after the date identified in the Requests.

GROUP 4

Admit that the document attached hereto as Exhibit ___ is a true and correct copy of the Notice of Charge for Overdrawn Account for Mr. Swift's account with BancorpSouth (Account No. 5060990) dated _____, 20__.

As to Requests 223, 230, 233, 235, 237, 239, 241, 245, 247, 249, 251, 253, 255, 257, 259, 261, 263, 265, 267, 269, 273, 275, 277, 279, 281, 283, 285, 287, 289, 291, 293, 295, 299, 301, 303, 305, 307, 309, 311, 313, 315, 317, 319, 321, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 347, 349, 351, 353, 355, 357, 359, 363, 367, 369, 371, 373, 375, and 379, to the extent that Defendant is representing to the Plaintiff in each Request that the information contained on the Exhibit that corresponds with each Request is identical to the information contained on the Notice for Charge for Overdrawn Account that Defendant actually sent to the Plaintiff on the date written on the Exhibit, and is representing that the formatting and placement of the information displayed is the same, Plaintiff admits that the notices are copies and will not object to the authenticity of the document in this proceeding as a business record of the Defendant. If the Defendant is not making the representations set forth in the preceding sentence, then each of the Requests is denied, and Plaintiff does not admit to the authenticity of the document as a business record of the Defendant.

As for the portion of the requests seeking an admission that each Notice for Charge for Overdrawn Account is a "true and correct copy," Plaintiff objects that the phrase is vague as being undefined. Plaintiff is not on notice of Defendant's definitions of the phrase, which is material to the responses which Plaintiff would give to these Requests. Therefore, Plaintiff does not admit or deny those portions of the Requests.

GROUP 5

Admit that the document attached hereto as Exhibit __ is a true and correct copy of the Notice of Insufficient Funds for Mr. Swift's account with BancorpSouth (Account No. 5060990) dated _____, 20__.

As to Requests 225, 227, 231, 243, 271, 297, 361, 365, and 377, to the extent that Defendant is representing to the Plaintiff in each Request that the information contained on the Exhibit that corresponds with each Request is identical to the information contained on the Notice of Insufficient Funds that Defendant actually sent to the Plaintiff on the date written on the Exhibit, and is representing that the formatting and placement of the information displayed is the same, Plaintiff admits that the statements are copies and will not object to the authenticity of the document in this proceeding as a business record of the Defendant. If the Defendant is not making the representations set forth in the preceding sentence, then each of the Requests is denied, and Plaintiff does not admit to the authenticity of the document as a business record of the Defendant.

As for the portion of the Requests seeking an admission that each Notice of Insufficient Funds is a "true and correct copy," Plaintiff objects that the phrase is vague as being undefined. Plaintiff is not on notice of Defendant's definitions of the phrase, which is material to the responses which Plaintiff would give to these Requests. Therefore, Plaintiff does not admit or deny that portions of the Requests.

GROUP 6

Admit that Mr. Swift received a copy of the Notice of Charge for Overdrawn Account for Mr. Swift's account with BancorpSouth (Account No. 5060990), attached hereto as Exhibit __, on or about _____, 20__.

As to Requests 224, 231, 234, 236, 238, 240, 242, 246, 248, 250, 252, 254, 256, 258, 260, 262, 264, 266, 268, 270, 274, 276, 278, 280, 282, 284, 286, 288, 290, 292, 294, 296, 300, 302,

304, 306, 308, 310, 312, 314, 316, 318, 320, 322, 324, 326, 328, 330, 332, 334, 336, 338, 340, 342, 344, 346, 348, 350, 352, 354, 356, 358, 360, 364, 368, 370, 372, 374, 376, and 380, Plaintiff cannot admit or deny the timing of his receipt of each Notice of Charge for Overdrawn Account utilizing the definition of “on or about” in Definition #14 of the Request for Admissions. As written, that definition contemplates two limited date choices: (a) receipt on the 10th business date prior to the date identified in the Request or (b) receipt on the 10th business date after the date identified in the Request. Plaintiff has no reason to believe he received any Notice of Charge for Overdrawn Account “ten (10) business days before” the date identified at the end of each of the subject Requests because that date would be before the date that the notice was purportedly generated and sent. Plaintiff does not recall whether each notice was received on the 10th date after the date identified in the Requests.

GROUP 7

Admit that Mr. Swift received a copy of the Notice of Insufficient Funds for Mr. Swift’s account with BancorpSouth (Account No. 5060990), attached hereto as Exhibit ___, on or about _____, 20__.

As to Requests 226, 228, 232, 244, 272, 298, 362, 366, and 378, Plaintiff cannot admit or deny the timing of his receipt of each Notice of Insufficient Funds utilizing the definition of “on or about” in Definition #14 of the Request for Admissions. As written, that definition contemplates two limited date choices: (a) receipt on the 10th business date prior to the date identified in the Request or (b) receipt on the 10th business date after the date identified in the Request. Plaintiff has no reason to believe he received any Notice of Insufficient Funds “ten (10) business days before” the date identified at the end of each of the subject Requests because that date would be before the date that the notice was purportedly generated and sent. Plaintiff

does not recall whether each notice was received on the 10th date after the date identified in the Requests.

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)
<i>Fourth Tranche</i>)
_____)
)
THIS DOCUMENT RELATES TO:)
)
<i>Shane Swift v. BancorpSouth, Inc.,</i>)
S.D. Fla. Case No. 1:10-cv-23872-JLK)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2011, I served the foregoing Objections and Responses to BancorpSouth Bank’s First Request for Admissions to Plaintiff by electronic mail on the following:

Eric Jon Taylor
Darren E. Gaynor
PARKER, HUDSON,
RAINER & DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Avenue N.E.
Atlanta, Georgia 30303
Telephone: (404) 523-5000
Facsimile: (404) 522-8409

/s/ Jeffrey M. Ostrow
JEFFREY M. OSTROW
Florida Bar No. 121452
ostrow@kolawyers.com
KOPELOWITZ OSTROW
FERGUSON WEISELBERG KEECHL
200 S.W. First Avenue, 12th Floor
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100
Facsimile: (954) 525-4300
Counsel for Plaintiff and the Proposed Classes

Exhibit H

PLAINTIFF SWIFT'S CERTIFIED CLASS CLAIMS:

	Breach of Contract / Breach of Covenant of Good Faith¹	Unconscionability²	Conversion³	Unjust Enrichment⁴	Arkansas Deceptive Trade Practices Act⁵
Alabama	X	X			
Arkansas	X	X		X	X
Florida	X	X			
Louisiana		X			
Mississippi	X	X		X	
Missouri		X			
Tennessee	X	X			
Texas		X			

¹ Plaintiff's Proposed Trial Plan for Trial of Class Claims (DE # 2272) ("Plaintiff's Trial Plan") at 11-12; Order Granting Class Certification (DE # 2673) ("Order") at 22.

² Plaintiff's Trial Plan at 13-14; Order at 22.

³ Plaintiff is not pursuing conversion as a class claim. Plaintiff's Trial Plan at 9-14.

⁴ Plaintiff's Trial Plan at 12-13; Order at 22.

⁵ Plaintiff's Trial Plan at 14; Order at 22.

Exhibit I

**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)
<i>Fourth Tranche</i>)
_____)
)
THIS DOCUMENT RELATES TO:)
)
<i>Shane Swift v. BancorpSouth, Inc.,</i>)
S.D. Fla. Case No. 1:10-cv-23872-JLK)
_____)

**DEFENDANT BANCORPSOUTH BANK’S AMENDED RESPONSES
TO PLAINTIFF’S SECOND SET OF INTERROGATORIES**

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

GENERAL ANSWERS AND OBJECTIONS

BancorpSouth hereby incorporates its General Responses and Objections from its Responses to Plaintiff's First Set of Interrogatories, as well as its Responses and Objections to Plaintiff's First, Second, Third, and Fourth Requests for Production, as if fully set forth herein. BancorpSouth sets

¹ 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 Second 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 Second Interrogatories, and BancorpSouth Bank interprets any references to "Defendant" in Plaintiff's Second Interrogatories to refer to BancorpSouth Bank.

forth additional enumerated general responses and objections below. BancorpSouth incorporates each of its general responses and objections into its specific responses and objections whether or not the general response and objection is specifically mentioned in a response to a specific request.

26. BancorpSouth objects to any discovery request seeking information regarding any members of the class certified in this matter in the Court's May 4, 2012 Order Granting Class Certification (DE # 2673) (the "Class Certification Order"), other than Shane Swift, because the Class Certification Order certified an impermissible class under Fed. R. Civ. P. 23. BancorpSouth has filed a petition under Fed. R. Civ. P. 23(f) for immediate appellate review of the Class Certification Order, and is seeking reversal of the Class Certification Order.

RESPONSES TO SECOND SET OF INTERROGATORIES

INTERROGATORY NO. 15: Describe with particularity all policies, practices, and procedures used to determine the sequence in which items were posted to customers' accounts that were in place at the time each of the following banks was acquired by BancorpSouth, and identify in your answer the length of time that BancorpSouth continued to use such policies, practices, and procedures following each bank's acquisition:

- a. **Pinnacle Bank in Little Rock, Arkansas ["Pinnacle Bank"]**
- b. **Premier Bank of Brentwood in Brentwood, Tennessee ["Premier Bank"]**
- c. **The Business Bank in Baton Rouge, Louisiana ["Business Bank"]**
- d. **American State Bank in Jonesboro, Arkansas ["American State Bank"]**
- e. **First Kensington Bank in Tampa, Florida ["First Kensington Bank"]**
- f. **The Signature Bank in Springfield, Missouri ["Signature Bank"]**

ANSWER TO INTERROGATORY NO. 15: BancorpSouth objects to Interrogatory No. 15 on the ground that it requests information that is neither relevant to any claims or defenses in this action nor reasonably calculated to lead to the discovery of admissible evidence. BancorpSouth also objects to the vague terms "policies, practices, and procedures used to determine the sequence in

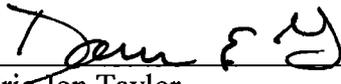
which items were posted to customers' accounts," and "acquired by BancorpSouth." BancorpSouth further objects to Interrogatory No. 15 to the extent that it requests information beyond any applicable statutes of limitations, requests information after the implementation of 12 CFR § 205 *et seq.* ("Reg. E"), and/or requests information outside of the Class Period defined by the Court's Order Granting Class Certification (DE# 2673). BancorpSouth objects to subpart (a) of Interrogatory No. 15 because Pinnacle Bank merged with BancorpSouth on or about February 28, 2002, and any claims brought by customers of the former Pinnacle Bank would be governed by Arkansas law; therefore, the statute of limitations has run on any absent class members' potential claims arising out of Pinnacle Bank's actions or omissions that occurred before Pinnacle Bank merged with BancorpSouth. Additionally, BancorpSouth objects to subpart (e) of Interrogatory No. 15 because First Kensington Bank did not have any customers at the time BancorpSouth acquired First Kensington Bank's charter. As such, BancorpSouth is not responding to subparts (a) and (e) of Interrogatory No. 15.

Subject to, and without waiving the foregoing general and specific objections, BancorpSouth states that, at the time that each of Pinnacle Bank, Premier Bank, Business Bank, American State Bank, and Signature Bank merged with BancorpSouth, BancorpSouth's posting order was immediately applied going forward to all customer checking accounts from these merged-in banks. BancorpSouth further states, subject to its general and specific objections, that Pinnacle Bank merged with BancorpSouth on or about February 28, 2002, Premier Bank merged with BancorpSouth on or about December 31, 2004, Business Bank merged with BancorpSouth on or about December 31, 2004, American State Bank merged with BancorpSouth on or about November 30, 2005, and Signature Bank merged with BancorpSouth on or about July 1, 2007. BancorpSouth further states the following, subject to its general and specific objections, regarding the intra-day

posting order of customer checking account transactions immediately prior to these institutions' respective mergers with BancorpSouth, on information and belief, and after a reasonable and diligent inquiry: (1) Pinnacle Bank posted credits before debits, and posted debits from highest dollar amount to lowest dollar amount; (2) Premier Bank posted credits before debits and BancorpSouth is not aware of the order in which Premier Bank posted debits; (3) Business Bank posted credits before debits and BancorpSouth is not aware of the order in which Business Bank posted debits; (4) American State Bank posted credits before debits, posted electronic transactions before checks, and posted checks in check number order, and (5) Signature Bank posted credits before debits, and posted debits from highest dollar amount to lowest dollar amount.

Respectfully submitted this 24th day of July, 2012.

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Counsel for Defendant BancorpSouth Bank

CERTIFICATE OF SERVICE

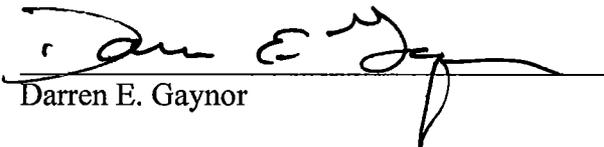
I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANT BANCORPSOUTH BANK'S AMENDED RESPONSES TO PLAINTIFF'S SECOND SET OF INTERROGATORIES** upon all parties to this matter via electronic mail, addressed to Plaintiff's counsel as follows:

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This 24th day of July, 2012.


Darren E. Gaynor