UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. 1:10-cv-90-MMP

SHANE SWIFT, on Behalf of Himself and All Others Similarly Situated,

Plaintiff,

vs.

BANCORPSOUTH BANK,

Defendant.

PLAINTIFF'S AND CLASS COUNSEL'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR CERTIFICATION OF SETTLEMENT CLASS, AND INCORPORATED MEMORANDUM OF LAW

Plaintiff and Class Counsel respectfully move for Preliminary Approval of the Settlement Agreement and Release attached as Exhibit A ("Settlement" or "Agreement"), which will resolve all claims against BancorpSouth Bank ("BancorpSouth" or the "Bank") in the Action.[1] The Court should grant Preliminary Approval because the Settlement provides substantial relief for the Settlement Class, and because the terms of the Settlement are well within the range of reasonableness and consistent with applicable case law. Indeed, the Settlement – under which BancorpSouth will pay Twenty-Four Million and 00/100 Dollars ($24,000,000.00) in cash to create a Settlement Fund, plus up to Five Hundred Thousand and 00/100 Dollars ($500,000.00) in fees and costs associated with the Notice Program and administration of the Settlement – is an outstanding result for the Settlement Class. *See* Joint Declaration of Bruce S. Rogow, Robert C. Gilbert, and Jeffrey M. Ostrow ¶¶ 2, 4 attached hereto as Exhibit B ("Joint Decl."). The Settlement satisfies all Eleventh Circuit criteria for Preliminary Approval.

[1] All capitalized defined terms used herein have the same meanings ascribed in the Agreement.

Accordingly, Plaintiff and Class Counsel respectfully request that the Court take the following initial steps in the settlement approval process: (1) grant Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) approve the Notice Program set forth in the Agreement and approve the form and content of the Notices attached hereto as Exhibits C, D, and E; (4) approve and order the opt-out and objection procedures set forth in the Agreement; (5) appoint Plaintiff Shane Swift as Class Representative; (6) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 31 and 59 of the Agreement, respectively; (7) stay the Action against BancorpSouth pending Final Approval of the Settlement; and (8) schedule a Final Approval Hearing approximately 120 days following entry of the [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class attached hereto as Exhibit F.

I. INTRODUCTION

On May 18, 2010, Plaintiff sued on behalf of himself and all others similarly situated who incurred Overdraft Fees as a result of BancorpSouth's practice of posting Debit Card Transactions to an Account in order from highest to lowest dollar amount ("High-to-Low Posting"). Plaintiff alleged that BancorpSouth systemically engaged in High-to-Low Posting of Settlement Class Members' Debit Card Transactions to maximize the Bank's Overdraft Fee revenues. According to Plaintiff, BancorpSouth's practices violated the Bank's contractual and good faith duties, were substantively and procedurally unconscionable, and resulted in conversion and unjust enrichment. Joint Decl. ¶¶ 5, 8.

The Action involved sharply opposed positions on several fundamental legal questions, including whether BancorpSouth breached its duty of good faith and fair dealing to its customers when it engaged in High-to-Low Posting. Joint Decl. ¶ 3. BancorpSouth consistently argued

that the relevant Account agreements expressly authorized it to engage in High-to-Low Posting, that there was nothing wrong with the High-to-Low Posting process it used and that it complied, at all times, with applicable laws and regulations and the terms of the Account agreements with its customers. *Id.* at ¶ 6.

Plaintiff and Class Counsel actively litigated the Action for more than five years. The litigation was hard-fought. Joint Decl. ¶ 2. The Parties engaged in significant motion practice and extensive formal discovery, including approximately 14 depositions and the production of more than 100,000 pages of documents and voluminous electronically stored information. *Id*. at ¶¶ 15-16. The Court granted a contested motion for class certification, and the Eleventh Circuit denied BancorpSouth's petition for permission to appeal pursuant to Fed. R. Civ. P. 23(f). *Id*. at ¶¶ 17-18. Class Counsel and their expert completed an exhaustive analysis of BancorpSouth's electronic customer data to identify all members of the certified class who sustained harm and to determine the amount of their damages. *Id*. at ¶ 34.

The Parties participated in mediation in August 2012 with Professor Eric Green of Resolutions LLC serving as mediator. Joint Decl. ¶ 19. That mediation resulted in an impasse, and the Parties resumed active litigation for three more years. *Id*. On October 28, 2015, at the Court's direction, the Parties participated in mediation again, with Jonathan B. Marks of MarksADR, LLC serving as the mediator. *Id*. at ¶ 29. Although an agreement was not reached at the October 28, 2015 session, the Parties continued mediation discussions with the assistance of Mr. Marks during the weeks thereafter. *Id*. Ultimately, on December 4, 2015, the Parties reached an agreement in principle to resolve the Action based on BancorpSouth's payment of $24,000,000, plus up to $500,000 in fees and costs associated with Notice and administration of

the Settlement. *Id*. at ¶ 30. On January 5, 2016, the Parties executed a Summary Agreement that memorialized the material terms of the Settlement. *Id*.

On January 6, 2016, Settlement Class Counsel and BancorpSouth filed a Joint Notice of Settlement (N.D. Fla. DE # 83), and requested a suspension of deadlines pending the drafting and execution of the Agreement; the Court granted the request on January 13, 2016 (N.D. Fla. DE # 84). Further discussions followed to draft a comprehensive written agreement that addressed, *inter alia*, various issues relating to approval and implementation of the Settlement. Once those issues were resolved, the Agreement was finalized and executed by the Parties in February 2016. Joint Decl. ¶ 31.

Under the Settlement, Settlement Class Members will not be asked to prove that they were damaged as a result of the Bank's High-to-Low Posting. Joint Decl. ¶ 33. Class Counsel and their expert used available BancorpSouth data to determine which BancorpSouth Account Holders were harmed by High-to-Low Posting, and applied the formula detailed in paragraph 93 of the Agreement to calculate each Settlement Class Member's total damages. *Id*. at ¶ 34. All Settlement Class Members who do not timely opt-out will automatically receive their *pro rata* share of the Net Settlement Fund. *Id*. at ¶ 33.

A testament to the reasonableness and fairness of the Settlement is the magnitude of the Settlement Fund. Settlement Class Counsel negotiated a $24,000,000 cash payment, which represents approximately 57% of the maximum recovery Settlement Class Members could have achieved at trial. Joint Decl. ¶ 53. In addition, BancorpSouth will pay up to $500,000 in fees and costs incurred in connection with the Notice Program and administration of the Settlement. *Id*.

Plaintiff and Class Counsel now seek Preliminary Approval so they can notify Settlement Class Members of the terms of the Settlement, and provide them with an opportunity to opt out of or object to the Settlement. For the reasons set forth herein, Plaintiff and Class Counsel respectfully request that the Court grant Preliminary Approval.

II. STATEMENT OF FACTS

A. Factual Background.

Given the extensive proceedings in the Action, much of which took place prior to remand to this Court, Class Counsel provide a comprehensive overview of the Action.

1. Procedural History.

Plaintiff sought monetary damages, restitution and declaratory relief from BancorpSouth, on behalf of himself and all others similarly situated, who incurred Overdraft Fees as a result of BancorpSouth's practice of High-to-Low Posting of Debit Card Transactions. Plaintiff alleged that BancorpSouth systemically engaged in High-to-Low Posting of Debit Card Transactions to maximize the Bank's Overdraft Fee revenues. According to Plaintiff, BancorpSouth's practices violated the Bank's contractual and good faith duties, were substantively and procedurally unconscionable, and resulted in conversion and unjust enrichment. Joint Decl. ¶ 5.

BancorpSouth denied all of Plaintiff's allegations of wrongdoing. The Bank consistently defended its conduct by, *inter alia*, highlighting language in the relevant Account agreements that it contended expressly advised its customers of and permitted the very High-to-Low Posting practices at issue. The Bank advanced additional defenses. Joint Decl. ¶ 6.

B. Class Counsel's Investigation

Class Counsel devoted substantial time to investigating the potential claims against BancorpSouth. Class Counsel interviewed customers and potential plaintiffs to gather information about the Bank's conduct and its impact upon customers. This information was

essential to Class Counsel's ability to understand the nature of BancorpSouth's conduct, the language of the Account agreements, and potential remedies. Joint Decl. ¶ 7.

C. The Course of Proceedings.

On May 18, 2010, Plaintiff Shane Swift initiated the Action against BancorpSouth in the United States District Court for the Northern District of Florida ("*Swift*"), alleging improper assessment and collection of Overdraft Fees and seeking, *inter alia*, monetary damages, interest, attorney's fees, restitution, and equitable relief. Joint Decl. ¶ 8.

In October 2010, the Judicial Panel on Multidistrict Litigation ("JPML") transferred *Swift* to the United States District Court for the Southern District of Florida, where it joined a number of other actions coordinated under the caption *In Re: Checking Account Overdraft Litigation*, Case No. 1:09-md-02036-JLK ("*MDL 2036*"). *Swift* was assigned to Senior Judge James Lawrence King and made part of the Fourth Tranche of cases in *MDL 2036*. Joint Decl. ¶ 9.

In December 2010, Plaintiff Swift filed a Second Amended Complaint, asserting claims for breach of contract/breach of the implied covenant of good faith and fair dealing (Count I), unconscionability (Count II), conversion (Count III), unjust enrichment (Count IV), and violation of Arkansas' Deceptive Trade Practices Act (Count V). [S.D. Fla. DE # 994]. Joint Decl. ¶ 10.

BancorpSouth filed a Motion to Dismiss the Second Amended Complaint. [S.D. Fla. DE # 1068]. Following briefing and oral argument, the Court denied BancorpSouth's motion. [S.D. Fla. DE # 1305]. Joint Decl. ¶ 11.

In April 2011, BancorpSouth filed its Answer and Affirmative Defenses. [S.D. Fla. DE #1335]. In response, Plaintiff moved to strike a number of BancorpSouth's affirmative defenses as legally insufficient. [S.D. Fla. DE #1390]. Prior to a ruling on that motion, the Court approved the Parties' stipulation authorizing BancorpSouth to file an Amended Answer and Affirmative Defenses. [S.D. Fla. DE # 1693]. Accordingly, the operative pleadings in *Swift* are Plaintiff's

Second Amended Complaint and BancorpSouth's Amended Answer and Affirmative Defenses. [DE # 994, 1693]. Joint Decl. ¶ 12.

In April 2011, the Court entered the Scheduling Order Pertaining to "Fourth Tranche" Cases, the first in a series of scheduling orders to be applicable to *Swift*. [S.D. Fla. DE # 1340]. Joint Decl. ¶ 13.

In July 2011, Class Counsel and counsel for the *Fourth Tranche* banks, including BancorpSouth, entered into a Stipulated Protective Order relating to the production of documents and information. [S.D. Fla. DE # 1774]. Thereafter, Class Counsel and BancorpSouth entered into a Stipulated Discovery Plan for Electronically Stored Information ("ESI"), which the Court adopted on October 11, 2011. [S.D. Fla. DE # 1968]. Joint Decl. ¶ 14.

Discovery commenced in May 2011. During the course of discovery, Class Counsel deposed approximately six (6) current and former BancorpSouth employees, including several who were designated under Rule 30(b)(6), and three (3) expert witnesses designated by BancorpSouth. BancorpSouth deposed Plaintiff Swift, his wife, and three (3) expert witnesses designated by Plaintiff. Joint Decl. ¶ 15.

During the course of discovery, Class Counsel also served written discovery requests on BancorpSouth. In response, BancorpSouth produced approximately 100,000 pages of documents, as well as voluminous electronic data files and spreadsheets in native format. Class Counsel and their experts reviewed and analyzed substantially all of the documents and electronic data files produced by BancorpSouth. Joint Decl. ¶ 16.

In December 2011, Plaintiff filed a Motion for Class Certification. [S.D. Fla. DE # 2271]. In February 2012, BancorpSouth filed it Opposition to Plaintiff's Motion for Class Certification

[S.D. Fla. DE # 2446], and Plaintiff filed its Reply in Support of Motion for Class Certification in March 2012 [S.D. Fla. DE # 2576]. Joint Decl. ¶ 17.

On May 4, 2012, following extensive briefing, the Court entered an Opinion and Order Granting Class Certification. [S.D. Fla. DE # 2673]. BancorpSouth filed a Petition for Permission to Appeal the Order Granting Class Certification Pursuant to Federal Rule of Civil Procedure 23(f). *See* 11th Cir. Case No. 12-90024-E. On February 13, 2013, following briefing, the Eleventh Circuit Court of Appeals denied the petition. [S.D. Fla. DE # 3294]. Joint Decl. ¶¶ 17-18.

On August 12, 2012, the Parties participated in their first mediation under the auspices of Professor Eric Green of Resolutions, LLC. The first mediation ended in an impasse, and the Parties continued their active litigation thereafter. Joint Decl. ¶ 19.

In February 2013, the Court approved the implementation and completion of the class notice plan to the certified class. [S.D. Fla. DE # 3242, 3338, 3342]. Pursuant to the Court's Order, notice was mailed to all members of the certified class for whom reasonably reliable mailing addresses were available, and 238 class members timely exercised their right to opt out of the certified class. [S.D. Fla. DE # 3589]. Joint Decl. ¶ 20.

In May 2013, BancorpSouth moved to decertify the class. [S.D. Fla. DE # 3455]. Following briefing, the Court denied BancorpSouth's Motion to Decertify. [S.D. Fla. # 3540]. BancorpSouth filed a second Petition for Permission to Appeal the Order Denying the Motion to Decertify Pursuant to Federal Rule of Civil Procedure 23(f), which the Eleventh Circuit Court of Appeals denied. *See* 11th Cir. Case No. 13-90019-E. Joint Decl. ¶ 21.

Following class certification, the Court entered a Revised Scheduling Order that directed the Parties to file all pretrial motions by certain deadlines. [S.D. Fla. DE # 2834]. The motion-

filing deadlines were extended by a subsequent Scheduling Order. [S.D. Fla. DE # 2891]. Joint Decl. ¶ 22.

Pursuant to the operative Scheduling Order, the Parties filed the following pretrial motions that were decided by the Court following extensive briefing and, in some instances, oral argument:[2]

- Plaintiff's Motion for Partial Summary Judgment was granted in part and denied in part. [S.D. Fla. DE # 2997, 3035, 3116, 3655, 3682];
- Plaintiff's Motion in Limine to preclude BancorpSouth from offering certain evidence at trial was granted. [S.D. Fla. DE # 2996, 3258];
- Plaintiff's Motion to Strike two of BancorpSouth's designated expert witnesses was denied. [S.D. Fla. DE # 3014, 3229];
- BancorpSouth's Motion for Summary Judgment was denied in its entirety. [S.D. Fla. DE # 2999, 3682]; and
- BancorpSouth's Motion to Strike two of Plaintiff's designated expert witnesses was denied. [S.D. Fla. DE # 3014, 3229].

Joint Decl. ¶ 23.

Upon the conclusion of three years of extensive pretrial proceedings, the Court entered a Suggestion of Remand. [S.D. Fla. DE # 3683, 3707]. Thereafter, the JPML remanded the Action to the Northern District of Florida. [N.D. Fla. DE # 25, 26]. Joint Decl. ¶ 24.

Following remand, BancorpSouth filed a Renewed Motion to Transfer Venue to the Eastern District of Arkansas, pursuant to 28 U.S.C. § 1404(a). [N.D. Fla. DE # 29, 33]. On June 4, 2014, following briefing and oral argument, this Court denied BancorpSouth's Renewed

[2] On October 2, 2013, the claim for conversion (Count III) was dismissed pursuant to a Stipulation and Order. [S.D. Fla. DE #3667, 3669]. Joint Decl. ¶ 23, n.2.

Motion to Transfer Venue. [N.D. Fla. DE # 48]. Joint Decl. ¶ 25.

On June 5, 2014, this Court entered an Order for Pre-Trial Conference and Setting Trial, which directed the Parties to file a series of memoranda and a Joint Pretrial Stipulation in advance of a Pretrial Conference scheduled for September 11, 2014. [N.D. Fla. DE # 49]. Pursuant to that Order, the Parties filed a series of memoranda addressing various issues. [N.D. Fla. DE # 54, 55, 56, 57, 60, 61]. The Parties also filed a Joint Pretrial Stipulation, along with their respective witnesses and exhibit lists, proposed jury instructions and verdict forms, and proposed findings of fact and conclusions of law. [N.D. Fla. DE # 63, 64, 65, 66]. On September 11, 2014, this Court held a Pretrial Conference, during which it heard extensive oral argument regarding the various issues addressed in the Parties' memoranda. [N.D. Fla. DE # 69]. Joint Decl. ¶¶ 26-27.

On August 27, 2015, this Court entered an Order denying BancorpSouth's request for reconsideration of certain pretrial rulings decided by the Court prior to remand. [N.D. Fla. DE # 77]. The Order also directed the Parties to participate in a second mediation no later than October 30, 2015. [N.D. Fla. DE # 77]. Joint Decl. ¶ 28.

On October 28, 2015, the Parties participated in a second mediation under the auspices of Jonathan B. Marks of MarksADR, LLC. Although an agreement to settle was not reached during that mediation conference, the Parties agreed that Mr. Marks would continue his mediation efforts thereafter. Throughout November and early December 2015, Mr. Marks conducted a series of mediation communications with both sides in an effort to assist the Parties in reaching an agreement in principle. Joint Decl. ¶ 29.

On December 4, 2015, following weeks of continued mediation efforts by Mr. Marks, the Parties reached an agreement in principle to resolve the Action. On January 5, 2016, following

further negotiations and discussions, the Parties resolved all remaining issues and executed a Summary Agreement that memorialized their binding and enforceable agreement to settle the Action. Further discussions and negotiations over the detailed terms and conditions to be included in the comprehensive Settlement Agreement and Release and related documents took place January and February. The Parties ultimately agreed on all such terms and conditions, completed the detailed process of drafting the Settlement Agreement and Release and related documents, and executed it immediately thereafter. Joint Decl. ¶¶ 29-30.

D. Summary of the Settlement Terms.

The Settlement's terms are detailed in the Agreement. The following is a summary of the material terms of the Settlement.

1. The Settlement Class.

The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rule of Civil Procedure. The Settlement Class is defined as:

> All Account Holders of a BancorpSouth Account who, during the Class Period applicable to the state in which the Account was opened, incurred one or more Overdraft Fees as a result of BancorpSouth's High-to-Low Posting.[3] Excluded from the Class are all current BancorpSouth officers and directors, and the judge presiding over this Action.

Agreement ¶ 64.

2. Monetary Relief for the Benefit of the Class.

The Settlement requires BancorpSouth to deposit Twenty-Four Million and 00/100 Dollars ($24,000,000.00) into an Escrow Account within 14 days following Preliminary Approval. Agreement ¶¶ 66, 87. That deposit will create the Settlement Fund.

[3] The Settlement Class consists solely of the 190,953 identifiable current and former BancorpSouth Account Holders identified based on the analysis set forth in the Expert Report of Arthur Olsen dated November 8, 2012, as supplemented by the Supplemental Expert Report of Arthur Olsen dated August 28, 2014, excluding the 238 class members who previously exercised their right to opt out of the certified class. [S.D. Fla. DE # 3589].

Settlement Class Members do not have to submit claims or take any other affirmative step to receive relief under the Settlement. As soon as practicable but no later than 60 days after the Effective Date, BancorpSouth and the Settlement Administrator will distribute the Net Settlement Fund to all eligible Settlement Class Members who do not opt out of the Settlement. Agreement ¶¶ 95-103. Payments to Settlement Class Members who are Current Account Holders will be made by the Bank crediting such Settlement Class Members' Accounts, and notifying them of the credit. Agreement ¶ 100. Settlement Class Members who are Past Account Holders will receive payments from the Settlement Fund by checks mailed by the Settlement Administrator. Agreement ¶ 102.

All Settlement Class Members who experienced a Differential Overdraft Fee will receive a *pro rata* distribution from the Net Settlement Fund. Agreement ¶ 95. The Differential Overdraft Fee analysis, which was conducted by Class Counsel's expert, determined, among other things, which BancorpSouth Account holders were assessed additional Overdraft Fees that would not have been assessed if the Bank had used a chronological posting sequence or method for Debit Card Transactions instead of High-to-Low Posting, and how much in additional Overdraft Fees those Account holders paid. The calculation involved a complex multi-step process described in detail in the Agreement. Agreement ¶ 93.

The Net Settlement Fund – which will be distributed pro rata among eligible Settlement Class Members who do not opt-out of the Settlement – is equal to the Settlement Fund plus any accrued interest and less: (a) the amount of the Court-awarded attorneys' fees, costs and expenses to Class Counsel; (b) the amount of the Court-awarded Service Award to the Plaintiff; (c) a reservation of a reasonable amount for prospective costs of Settlement administration that are not BancorpSouth's responsibility; and (d) all other costs and/or expenses incurred in

connection with the Settlement that are expressly provided for in the Agreement or are approved by Settlement Class Counsel and BancorpSouth. Agreement ¶ 96.

Any uncashed or returned checks will remain in the Settlement Fund for one year from the date the first Settlement Fund Payments are mailed by the Settlement Administrator, during which time the Settlement Administrator will make reasonable efforts to effectuate delivery of the Settlement Class Member Payments. Agreement ¶ 103. Any residual funds still remaining after that period will be distributed in accord with the detailed provisions set forth in the Agreement. Agreement ¶ 104.

3. Class Release.

In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not timely opt out will release BancorpSouth from claims relating to the subject matter of the Action. The detailed release language is found in Section XIV of the Agreement.

4. The Notice Program.

BancorpSouth will pay up to $500,000 in fees, costs and expenses of the Notice Administrator and the Settlement Administrator incurred in connection with the Notice Program. Agreement ¶¶ 67, 83. Any additional fees, costs and expenses incurred in connection with the Notice Program will be paid from the Settlement Fund. *Id.*

The Notice Program (Agreement, Section VIII) is designed to provide the best notice practicable, and was tailored to take advantage of the information BancorpSouth had available about Settlement Class Members. The Notice Program is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, class certification, the terms of the Settlement, Class Counsel's Fee Application and request for the Service Award for Plaintiff, and their rights to opt-out of the Settlement Class or object to the Settlement, Class Counsel's Fee Application, and/or the request for the Service Award for the Class

Representative. The Notice and Notice Program constitute sufficient notice to all persons entitled to notice. The Notice and Notice Program satisfy all applicable requirements of law including, but not limited to, Federal Rule of Civil Procedure 23 and the Constitutional requirement of due process. Joint Decl. ¶ 37.

The Notice Program is comprised of three different components: (1) direct mail postcard notice ("Mailed Notice") to all identifiable Settlement Class Members; (2) publication notice ("Published Notice") designed to reach those Settlement Class Members for whom direct mail notice is not possible or unsuccessful; and (3) a "Long Form" notice with more detail than the direct mail or publication notices, that will be available on the Settlement Website and via U.S. mail upon request. Agreement ¶ 77.

The Notice Program is designed to provide the Settlement Class with important information regarding the Settlement and their rights thereunder, including a description of the material terms of the Settlement; a date by which Settlement Class Members may exclude themselves from or "opt out" of the Settlement Class; a date by which Settlement Class Members may object to the Settlement, Class Counsel's Fee Application and/or the request for Service Awards; the date of the Final Approval Hearing; and the address of the Settlement Website at which Settlement Class Members may access the Agreement and other important documents and information. Agreement ¶¶ 73-84.

In addition to the information described above, the Long Form Notice will also describe the procedure Settlement Class Members must use to opt out of or object to the Settlement, and/or to Class Counsel's Fee Application and/or to the request for Service Awards. Agreement ¶¶ 73-76. All opt-outs and objections must be postmarked by last day of the Opt-Out Period. *Id.* at ¶¶ 75-76.

For an objection to be valid, it must include: the name of the Action; the objector's name, address, and telephone number; an explanation of how the objector is a member of the Settlement Class; the basis for the objection; a description of the number of times the objector or the objector's counsel has objected to a class settlement in the last five (5) years, the names of any such cases, and any relevant orders issued in response to such past objections; a statement confirming whether the objector will appear at the Final Approval Hearing and a description of counsel or witnesses who will appear on behalf of the objector at the Final Approval Hearing; and the objector's signature. Agreement ¶ 76.

(a) The Mailed Notice Program

Within 28 days from the date that the Settlement Administrator receives the data files that identify the names and last known addresses of the identifiable Settlement Class Members, the Settlement Administrator will run such addresses through the National Change of Address Database, and will mail to all such Settlement Class Members postcards substantially in the form attached hereto as Exhibit C that contain the Mailed Notice (the "Initial Mailed Notice"). Agreement ¶ 78. The Settlement Administrator will perform reasonable address traces for all Initial Mailed Notice postcards that are returned as undeliverable. Agreement ¶ 79. No later than 70 days before the Final Approval Hearing, the Settlement Administrator will complete the Mailed Notice Program, which is composed on the Initial Mailed Notice and the re-mailing of Mailed Notice postcards to those Settlement Class Members whose new addresses were identified as of that time through address traces (the "Notice Re-mailing Process"). Agreement ¶¶ 79-80.

(b) The Published Notice Program

The Notice Administrator will administer the Published Notice Program in the manner set forth in the Agreement, using the Published Notice substantially in the form attached hereto as

Exhibit D. Agreement ¶ 81. The Published Notice Program will be completed no later than 70 days before the Final Approval Hearing. *Id.*

(c) The Settlement Website and Toll-Free Hotline

The Settlement Administrator will establish a Settlement Website as a means for Settlement Class Members to obtain notice of, and information about, the Settlement. Agreement ¶ 62. The Settlement Website will be established as soon as practicable following Preliminary Approval, but no later than before commencement of the Notice Program. *Id.* The Settlement Website will include hyperlinks to the Settlement, the Long-Form Notice, the Preliminary Approval Order, and such other documents as Settlement Class Counsel and counsel for BancorpSouth agree to post or that the Court orders be posted on the Settlement Website. These documents will remain on the Settlement Website at least until Final Approval. *Id.*

The Settlement Administrator will also establish and maintain an automated and live operator toll-free telephone line for Settlement Class Members to call with Settlement-related inquiries, and answer the questions of Settlement Class Members who call with or otherwise communicate such inquiries. Agreement ¶ 72(iv).

5. Settlement Administration

The Settlement Administrator's responsibilities include:

a. Obtaining Settlement Class Members' name and address information (to the extent it is available), and verifying and updating the addresses received through the National Change of Address database, for the purpose of mailing the Mailed Notice, and later mailing distribution checks to Past Account Holder Settlement Class Members, and to Current Account Holder Settlement Class Members where it is not feasible or reasonable for BancorpSouth to make the payment by a credit to the Settlement Class Members' Accounts;

b. Establishing and maintaining a post office box for requests for exclusion from the Settlement Class;

c. Establishing and maintaining the Settlement Website;

d. Establishing and maintaining an automated toll-free telephone line for Settlement Class Members to call with Settlement-related inquiries, and answering the questions of Settlement Class Members who call with or otherwise communicate such inquiries;

e. Responding to any mailed Settlement Class Member inquiries;

f. Processing all requests for exclusion from the Settlement Class;

g. Providing weekly reports and, no later than five days after the end of the Opt-Out Period, a final report to Settlement Class Counsel and counsel for BancorpSouth that summarize the number of requests for exclusion received that week, the total number of exclusion requests received to date, and other pertinent information;

h. Performing all tax-related services for the Escrow Account as provided in this Agreement;

i. At Settlement Class Counsel's request in advance of the Final Approval Hearing, preparing an affidavit to submit to the Court that identifies each Settlement Class Member who timely and properly requested exclusion from the Settlement Class;

j. Processing and transmitting distributions to Settlement Class Members from the Settlement Fund;

k. Paying invoices, expenses and costs upon approval by Settlement Class Counsel and counsel for BancorpSouth, as provided in this Agreement; and

l. Performing the duties of Escrow Agent described in this Agreement, and any other Settlement-administration-related function at the instruction of

Settlement Class Counsel and counsel for BancorpSouth including, but not limited to, verifying that BancorpSouth has correctly made a distribution to Settlement Class Members pursuant to the Agreement. Agreement ¶ 72.

The Settlement Administrator's fees and expenses up to $500,000 associated with administration of the Settlement will be paid by BancorpSouth, and any excess fees and costs will be paid from the Settlement Fund. Agreement ¶ 67.

6. Settlement Termination

Either Party may terminate the Settlement if the Settlement is rejected or materially modified by the Court or by an appellate court. Agreement ¶ 113. BancorpSouth also has the right to terminate the Settlement if the number of Settlement Class Members who timely opt out of the Settlement equals or exceeds the number or percentage specified in the separate letter executed concurrently with the Agreement by BancorpSouth's counsel and Settlement Class Counsel. Agreement ¶ 114. The number or percentage will be confidential except to the Court, who upon request will be provided a copy of the letter for *in camera* review. *Id.*

7. Class Representative Service Award

Class Counsel will seek, and BancorpSouth will not oppose, a Service Award of $10,000 for the Class Representative. Agreement ¶ 111. If the Court approves it, the Service Award will be paid from the Settlement Fund, in addition to the relief the Class Representatives will be entitled to under the terms of the Settlement. *Id.* This Service Award will compensate the Class Representative for his time and effort in the Action, including preparing for and appearing at a deposition, and for the risks the assumed in prosecuting the Action against BancorpSouth. Joint Decl. ¶ 46.

8. Attorneys' Fees and Costs

Class Counsel will apply for, and BancorpSouth will not oppose, attorneys' fees of up to thirty-five percent (35%) of the Settlement Fund, plus reimbursement of litigation costs and expenses. Agreement ¶ 108. The Parties negotiated and reached this agreement regarding attorneys' fees and costs only after reaching agreement on all other material terms of this Settlement. Agreement ¶ 112; Joint Decl. ¶ 47.

III. ARGUMENT

A. The Legal Standard for Preliminary Approval.

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for the compromise of claims brought on a class basis. "Although class action settlements require court approval, such approval is committed to the sound discretion of the district court." *In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g., Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.") (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *see also 4 Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing cases).

The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the "range of reasonableness." 4 *Newberg on Class Actions* § 11.26. "Preliminary approval is appropriate where the proposed settlement is the result

of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.*, No. 09-cv-60646, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010). Settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See Manual for Complex Litigation, Third*, § 30.42 (West 1995) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

When determining whether a settlement is ultimately fair, adequate and reasonable, courts in this circuit have looked to six factors: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved." *Bennett*, 737 F.2d at 986. Courts have, at times, engaged in a "preliminary evaluation" of these factors to determine whether the settlement falls within the range of reason at the preliminary approval stage. *See, e.g., Smith*, 2010 WL 2401149 at *2.[4]

The Court's grant of preliminary approval will allow all Settlement Class Members to receive notice of the terms of the Settlement, and of the date and time of the Final Approval Hearing at which Settlement Class Members may be heard, and at which further evidence and argument concerning the fairness, adequacy and reasonableness of the Settlement may be presented by the Parties. *See Manual for Compl. Lit.*, §§ 13.14, 21.632. Neither formal notice

[4] Class Counsel do not address the fifth factor related to objections to the Settlement because, at the preliminary approval stage, notice has not yet been distributed.

nor a hearing is required at the preliminary approval stage; the Court may grant such relief upon an informal application by the settling parties, and may conduct any necessary hearing in court or in chambers, at the Court's discretion. *Id.* § 13.14.

B. This Settlement Satisfies the Criteria for Preliminary Approval.

Each of the relevant factors weighs heavily in favor of Preliminary Approval of this Settlement. First, the Settlement was reached in the absence of collusion, and is the product of good-faith, informed and arm's length negotiations by competent counsel. Furthermore, a preliminary review of the factors related to the fairness, adequacy and reasonableness of the Settlement demonstrates that it fits well within the range of reasonableness, such that Preliminary Approval is appropriate.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiff and Class Counsel believe that the claims asserted are meritorious and that Plaintiff would prevail if this matter proceeded to trial. BancorpSouth argues that Plaintiff's claims are unfounded, denies any liability, and has shown a willingness to litigate vigorously.

The Parties concluded that the benefits of the Settlement outweigh the risks and uncertainties attendant to continued litigation that include, but are not limited to, the risks, time and expenses associated with completing trial and final appellate review, particularly in the context of a large and complex multi-district litigation. Joint Decl. ¶¶ 48-56.

1. This Settlement Is The Product Of Good Faith, Informed and Arm's Length Negotiations.

A class action settlement should be approved so long as a district court finds that "the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *see also Lipuma v. American*

Express Co., 406 F. Supp. 2d 1298, 318-19 (S.D. Fla. 2005) (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel").

The Settlement here is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this Action. The Parties engaged in formal mediation in 2012 and again in 2015 before two experienced and respected mediators. All of these negotiations were arm's-length and extensive. Joint Decl. ¶¶ 19, 28-30, 48; *see also Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator").

Furthermore, Class Counsel are particularly experienced in the litigation, certification, trial, and settlement of nationwide class action cases. Joint Decl. ¶ 48. Class Counsel zealously represented their clients throughout the litigation including, *inter alia*, defeating the motion to dismiss, prevailing on the motion for class certification and defeating BancorpSouth's rule 23(f) petition, throughout the discovery process, which included review of over 100,000 pages of documents and electronic data as well as taking and defending approximately 14 depositions of party and non-party witnesses, and in defeating the Bank's motion for summary judgment. Joint Decl. ¶ 11, 15-18, 23, 27-28, 51.

In negotiating this Settlement, Class Counsel had the benefit of years of experience, a familiarity with the facts of the Action, as well as with other cases involving similar claims. As detailed above, Class Counsel conducted a thorough investigation and analysis of Plaintiff's claims and engaged in extensive discovery with BancorpSouth. Class Counsel's review of that discovery enabled them to gain an understanding of the evidence related to central questions in

the Action, and prepared them for well-informed settlement negotiations. Joint Decl. ¶¶ 48-50; *see also Francisco v. Numismatic Guaranty Corp. of America*, 2008 WL 649124, *11 (S.D. Fla. Jan. 31, 2008) (stating that "Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation" where counsel conducted two 30(b)(6) depositions and obtained "thousands" of pages of documentary discovery).

2. The Facts Support a Preliminary Determination that the Settlement is Fair, Adequate and Reasonable.

As noted, this Court may conduct a preliminary review of the *Bennett* factors to determine whether the Settlement falls within the "range of reason" such that notice and a final hearing as to the fairness, adequacy and reasonableness of the Settlement is warranted.

(a) Likelihood of Success at Trial.

Class Counsel are confident in the strength of Plaintiff and the certified Class's case, but are also pragmatic in their awareness of the various defenses available to BancorpSouth, and the risks inherent in trial and post-judgment appeal. As noted above, Plaintiff and the certified Class avoided dismissal and summary judgment. The success of Plaintiff's and the certified Class's claims, however, turned on these and other questions that would arise again at trial and during an inevitable post-judgment appeal. Joint Decl. ¶ 51-52. Under the circumstances, Class Counsel appropriately determined that the Settlement outweighs the risks of continued litigation. *Id.*

Even if Plaintiff and the certified Class prevailed at trial, any recovery could be delayed for years by an appeal. *Lipuma*, 406 F. Supp. 2d at 1322 (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement). This Settlement provides substantial relief to Settlement Class Members, without further delays.

(b) Range of Possible Recovery and the Point on or Below the Range of Recovery at Which a Settlement Is Fair.

When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330. "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.*

Courts have determined that settlements may be reasonable even where plaintiffs recover only part of their actual losses. *See Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988) ("[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate"). "The existence of strong defenses to the claims presented makes the possibility of a low recovery quite reasonable." *Lipuma*, 406 F. Supp. 2d at 1323.

The $24,000,000 cash recovery in this case is outstanding, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of Settlement including, but not limited to the pending trial as well as appellate review following a final judgment. Based on BancorpSouth's transactional data, the $24,000,000 Settlement Fund represents approximately 57% of Plaintiff's and Settlement Class Members' most probable damages recovery *if* Plaintiff and the certified class were successful in all respects through trial and on plenary appeal. Joint Decl. ¶ 53. BancorpSouth's payment of up to $500,000 in fees and costs associated with the Notice Program and administration of the Settlement further increases the value of the Settlement. *Id.*

There can be no doubt that this Settlement is a fair and reasonable recovery for the Settlement Class in light of the Bank's defenses, and the challenging and unpredictable path of litigation Plaintiff and all Settlement Class Members would face absent a settlement.

(c) Complexity, Expense and Duration of Litigation.

The traditional means for handling claims like those at issue here would tax the court system, require a massive expenditure of public and private resources, and, given the relatively small value of the claims of the individual class members, would be impracticable. Thus, the Settlement is the best vehicle for Settlement Class Members to receive the relief to which they are entitled in a prompt and efficient manner. Joint Decl. ¶ 54. These considerations, and the other considerations noted above, militate heavily in favor of the Settlement. *See Behrens*, 118 F.R.D. at 542 (noting likely "battle of experts" at trial regarding damages, which would pose "great difficulty" for plaintiffs).

(d) Stage of the Proceedings.

Courts consider the stage of proceedings at which settlement is achieved "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." *Lipuma*, 406 F. Supp. 2d at 1324.

The Settlement was reached after extensive pretrial discovery, including the production and review of more than 100,000 pages of documents produced by BancorpSouth, following approximately 14 lengthy depositions, after a litigated class was certified and the Bank's Rule 23(f) petition was denied by the Eleventh Circuit, after expert discovery, and following the filing and disposition of all pretrial motions. Joint Decl. ¶¶ 15-18, 23, 27-28, 55. As a result, Class Counsel were extremely well-positioned to confidently evaluate the strengths and weaknesses of Plaintiff's claims and prospects for success at trial and on appeal. *Id*. Class Counsel are also highly familiar with the challenged practices and defenses at issue in the Action through their experience litigating similar cases in MDL 2036 and elsewhere. Joint Decl. ¶ 56.

C. Certification of the Settlement Class Is Appropriate.

For settlement purposes, Plaintiff and Class Counsel respectfully request that the Court certify the Settlement Class defined in paragraph 64 of the Agreement. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Certification of the proposed Settlement Class will allow notice of the Settlement to issue to inform Settlement Class Members of the existence and terms of the Settlement, of their right to object and be heard on its fairness, of their right to opt out, and of the date, time and place of the Final Approval Hearing. *See Manual for Compl. Lit.*, at §§ 21.632, 21.633. For the reasons set forth below, certification is appropriate under Rule 23(a) and (b)(3).

Certification under Rule 23(a) of the Federal Rules of Civil Procedure requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Under Rule 23(b)(3), certification is appropriate if the questions of law or fact common to the members of the class predominate over individual issues of law or fact and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

This Court previously found all of the applicable Rule 23(b) requirements satisfied in the context of Plaintiff's motion for class certification (S.D. Fla. DE # 2673). Those findings may be adopted here for purposes of certifying the Settlement Class.

The numerosity requirement of Rule 23(a) is satisfied because the Settlement Class consists of holders of 190,953 BancorpSouth Accounts, excluding the 238 Account Holders who

timely opted out following the May 2013 notice, and joinder of all such persons is impracticable. Joint Decl. ¶ 59. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area").

"Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2551 (2011) (citation omitted). Here, the commonality requirement is readily satisfied. There are multiple questions of law and fact – centering on BancorpSouth's practice of High-to-Low Posting – that are common to the Settlement Class, that are alleged to have injured all Settlement Class Members in the same way, and that would generate common answers central to the viability of the claims were the Action to proceed to trial. Joint Decl. ¶ 60.

For similar reasons, Plaintiff's claims are reasonably coextensive with those of the absent class members, such that the Rule 23(a)(3) typicality requirement is satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims "arise from the same event or pattern or practice and are based on the same legal theory"); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they "possess the same interest and suffer the same injury as the class members"). Plaintiff is typical of absent Settlement Class Members because he was subjected to the same BancorpSouth practices and claim to have suffered from the same injuries, and because they will all benefit from the relief provided by the Settlement. Joint Decl. ¶ 61.

Plaintiff and Class Counsel also satisfy the adequacy of representation requirement. Adequacy under Rule 23(a)(4) relates to (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this litigation. *Fabricant*, 202 F.R.D. at 314. The determinative factor "is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000) (internal quotation marks omitted). Plaintiff's interests are coextensive with, not antagonistic to, the interests of the Settlement Class, because Plaintiff and the absent Settlement Class Members have the same interest in the relief afforded by the Settlement, and the absent Settlement Class Members have no diverging interests. Further, Plaintiff and the Settlement Class are represented by qualified and competent Class Counsel who have extensive experience and expertise prosecuting complex class actions, including consumer actions similar to this Action. Joint Decl. ¶ 62. Class Counsel devoted substantial time and resources to vigorous litigation of the Action. *Id.*

Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (internal quotation marks omitted). Plaintiff readily satisfies the Rule 23(b)(3) predominance requirement because liability questions common to all Settlement Class Members substantially outweigh any possible issues that are individual to each Settlement Class Member. For example, each Settlement Class Member's relationship with BancorpSouth arises from an Account agreement that is the same or substantially similar in all relevant respects to other

Settlement Class Members' Account agreements. Joint Decl. ¶ 63. *See Sacred Heart Health Sys.*, 601 F.3d at 1171 ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment."). Further, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). For these reasons, the Court should certify the Settlement Class.

D. The Court Should Approve the Proposed Notice Program.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." *Manual for Compl. Lit*. § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co*., 153 F.3d 1222, 1227 (11th Cir. 1998) (internal quotation marks omitted); *see also* Manual for Compl. Lit., § 21.312 (listing relevant information).

The Notice Program satisfies all of these criteria. As recited in the Settlement and above, the Notice Program will inform Settlement Class Members of the substantive terms of the Settlement. It will advise Settlement Class Members of their options for remaining part of the Settlement Class, for objecting to the Settlement, Class Counsel's Fee Application and/or request for Service Award, or for opting-out of the Settlement, and how to obtain additional information

about the Settlement. The Notice Program is designed to reach a high percentage of Settlement Class Members (including most by direct mail, the best possible form of notice), and exceeds the requirements of constitutional due process. Joint Decl. ¶ 37. Therefore, the Court should approve the Notice Program and the form and content of the Notices attached to this motion as Exhibits C, D and E.

E. The Court Should Schedule a Final Approval Hearing.

The last step in the Settlement approval process is a Final Approval Hearing, at which the Court will hear evidence and argument necessary to make its final evaluation of the Settlement. Proponents of the Settlement may explain the terms and conditions of the Settlement, and offer argument in support of Final Approval. The Court will determine at or after the Final Approval Hearing whether the Settlement should be approved; whether to enter the Final Approval Order under Rule 23(e); and whether to approve Class Counsel's Fee Application, and request for Service Award for the Class Representative. Plaintiff and Class Counsel request that the Court schedule the Final Approval Hearing approximately 120 days following entry of the [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class attached as Exhibit F. Plaintiff and Class Counsel will file their motion for Final Approval and Fee Application and request for Service Award no later than 56 days prior to the Final Approval Hearing.

IV. CONCLUSION

Based on the foregoing, Plaintiff and Class Counsel respectfully request that the Court: (1) grant Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed Settlement Class, pursuant to Rule 23(b)(3) and (e) of the Federal Rules of Civil Procedure; (3) approve the Notice Program set forth in the Agreement and approve the form and content of the Notices, attached to this motion as Exhibits C, D and E; (4) approve and order the

opt-out and objection procedures set forth in the Agreement; (5) appoint Plaintiff Shane Swift as Class Representative; (6) appoint as Class Counsel and Settlement Class Counsel the law firms and attorneys listed in paragraphs 31 and 59 of the Agreement, respectively; (7) stay the Action against BancorpSouth pending Final Approval of the Settlement; and (8) schedule a Final Approval Hearing approximately 120 days following entry of the [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class attached as Exhibit F.

N.D. FLA. LOCAL RULE 7.1(B) CERTIFICATE

Pursuant to N.D. Fla. Local Rule 7.1(B), I hereby certify that Class Counsel has conferred with Defendant's counsel in a good faith effort to resolve by agreement the relief sought in this motion. Defendant does not oppose the request for Preliminary Approval of Class Settlement and for Certification of Settlement Class.

Dated: February 24, 2016.

Respectfully submitted,

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Motion for Admission to be Filed

Counsel for Plaintiff and the Certified Class

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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