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 BANK'S MOTION TO DISMISS

BancorpSouth Bank ("BancorpSouth") hereby moves, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiff Shane Swift's ("Plaintiff") Second Amended Complaint (the "Complaint"). For the reasons set forth in BancorpSouth's contemporaneously-filed memorandum of law, Plaintiff's Complaint fails to state a claim upon which relief can be granted, and it should be dismissed in its entirety.

Respectfully submitted this 20th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2011, 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 identified on the attached Service List 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.

/s/ Eric Jon Taylor
Eric Jon Taylor

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Shane Swift v. BancorpSouth, Inc.,
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DEFENDANT BANCORPSOUTH BANK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

BancorpSouth Bank ("BancorpSouth" or the "Bank") hereby moves, pursuant to Fed. R. Civ. P. 12(b)(6), for dismissal of all claims in Plaintiff Shane Swift's ("Plaintiff") Second Amended Complaint (the "Complaint").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In the Complaint, Plaintiff seeks to challenge the order in which BancorpSouth posts transactions to its customers' checking accounts, alleging that the practice improperly increases the fees customers are charged when they overdraft their accounts. The "high to low" posting practice that Plaintiff seeks to challenge here has been explicitly recognized for years under both federal and state law. Moreover, BancorpSouth explicitly addresses the issue by contract in its account agreement with its customers. As demonstrated in this Motion, the Complaint fails in its entirety.

Plaintiff's claim for breach of contract fails because Plaintiff's contract with BancorpSouth explicitly authorizes the Bank to post from highest amount to lowest and provides for the assessment of fees for overdrafts. To the extent that Plaintiff bases his contract theory on the implied covenant of good faith and fair dealing, the covenant of good faith and fair dealing cannot be asserted to vary an express term of a contract. Nor may the implied covenant be invoked to preclude a party from doing that which the law explicitly authorizes. Courts across the country have rejected the claim that high-to-low posting violates the covenant of good faith and fair dealing.

Plaintiff also asserts claims for unconscionability, conversion, and unjust enrichment. These claims fail for the same reasons as Plaintiff's contract claim: the challenged practices are explicitly authorized in the parties' contract, by the UCC, and by federal regulatory authorities. Plaintiff's "unconscionability" claim fails for the further reason that there is no such cause of action recognized under any state law; unconscionability is only a *defense* to a claim of breach of contract. Plaintiff's conversion claim fails because he has not and cannot plead the necessary elements of a conversion claim. Plaintiff's unjust enrichment claim also fails because such a claim may be asserted only where there is no contract governing the parties' relationship.

Plaintiff's last claim is that BancorpSouth violated the Arkansas Unfair Trade Practices Law. This statutory claim fails because another Arkansas statute expressly *authorizes* banks to post transactions in an order convenient to them. Arkansas's Deceptive Trade Practices Act cannot reasonably be interpreted as condemning that same conduct.

In sum, each and every one of the claims in the Complaint fails, as a matter of law, for multiple independent reasons. The Complaint should be dismissed in its entirety.

II. STATEMENT OF THE CASE

A. Procedural Background

This lawsuit was originally filed in the Northern District of Florida. It was transferred to this District pursuant to orders of the Judicial Panel on Multidistrict Litigation. The Complaint alleges causes of action for breach of contract and/or breach of the implied covenant of good faith and fair dealing, unconscionability, conversion, unjust enrichment, and a violation of the Arkansas Deceptive Trade Practices Act.

B. The Parties

BancorpSouth is a regional bank incorporated in the State of Mississippi with its principal place of business in Tupelo, Mississippi. *See* Complaint at ¶ 13. BancorpSouth operates branches in eight states, including Mississippi, Arkansas (where Plaintiff opened an account), Tennessee, Louisiana, and Florida. *Id.*

Plaintiff, the putative class representative, is a resident of Arkansas and claims to be a current checking account customer of the Bank. *See* Complaint at ¶¶ 12, 31, 66. Plaintiff purports to represent a class of customers who incurred overdraft fees as a result of the order in which the Bank posts transactions to its customers' accounts. Specifically, Plaintiff seeks to represent both a nationwide class of customers of the Bank who "incurred an overdraft fee as a result of BancorpSouth's practice of re-sequencing debit card transactions from highest to lowest," and a subclass of customers of the Bank "having non-commercial accounts at branches in the state of Arkansas." *See* Complaint at ¶¶ 14-15.

C. The Challenged Banking Practice.

Plaintiff asserts that the posting order used by BancorpSouth caused its customers to pay allegedly excessive overdraft fees for transactions made with debit cards. *See* Complaint ¶ 30. Specifically, Plaintiff challenges the common industry practice of ordering debit transactions submitted for payment on a given day from highest amount to lowest when posting them to a customer's account. Plaintiff alleges posting order can cause a customer to be assessed more overdraft fees than otherwisewould have been assessed.[1]

Because checks, debit card purchases, and most other transactions are not received by banks for payment until sometime after customers initiate them, a bank must adopt a set of standardized rules to sort and post the transactions that arrive for settlement each day. *See generally* 74 Fed. Reg. 5498, 5548 (Jan. 29, 2009) (discussing the complexity of payment processing and the need for financial institutions to adopt and apply posting rules). Plaintiff claims that BancorpSouth employs a sophisticated software for the posting of debit card transactions to customers' accounts that result in more separate overdraft items – and hence more overdraft fees – than appropriate. *See* Complaint at ¶ 29.

The alleged connection between posting order and overdraft fees is neither immediate nor inevitable. Posting order cannot, by definition, cause an account to go into overdraft; rather, it can only affect the number of separate items that are paid into overdraft. The allegedly "excess" fees challenged by the Complaint can occur if the following chain of circumstances exists:

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1 There are passages in the Complaint, in conclusory terms, regarding other alleged conduct by BancorpSouth. None of those accusations is advanced as a violation of any identified legal obligation, and Plaintiff does not identify any compensable injury he has personally suffered as a result of any such conduct. If Plaintiff wishes to present genuine claims relating to any such alleged conduct, he must comply with the basic pleading requirements of Rule 8 and allege facts demonstrating a "plausible" claim of actual injury caused by it. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). As Plaintiff has failed to

- On a single business day, multiple debits (checks, debit card purchases, ATM withdrawals, etc.) are presented to the Bank for payment from a particular account;
- The total dollar amount of the debits to be posted that day is more than the total available in the account, including any deposits that are also posted that day;
- The Bank posts the debits, or some group of them, in order from highest amount to lowest;
- Two or more debit card transactions presented for payment that day post against insufficient funds and *might* result in overdraft fees;
- If the debits had instead been posted in a different order, fewer debit card transactions would have occasioned potential overdraft fees; and
- The "additional" overdraft fees potentially occasioned by the posting order were not subject to special rules exempting certain types of overdrafts from fees.[2]

D. BancorpSouth's Contract with Plaintiff

A deposit agreement is the agreement that sets out the terms and conditions applicable to a bank's customers' accounts. A copy of the Deposit Account Terms and Conditions governing Plaintiff's account with the Bank is attached as Exhibit A to the Complaint (the "Deposit Agreement"). When Plaintiff opened his account, he acknowledged receipt of the Deposit Agreement, related fee schedules and other disclosures and agreed to be bound by those documents. In fact, Plaintiff acknowledges that the Deposit Agreement and other related disclosures, including the Account Information Statement attached as Exhibit B to the Complaint, govern his relationship with the Bank, and in addition to attaching them to the

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do so, these allegations do not amount to claims and are not addressed herein.

[2]Even when all of these conditions exist, a customer will still not pay overdraft fees if the Bank subsequently reverses or waives the overdraft fees incurred, or if the customer is enrolled in an overdraft protection program. BancorpSouth encourages its customers to enroll in such programs, which cover overdrafts using other funding sources, such as a savings account or credit card. *See* Account Information Statement, Exhibit B to the Complaint, at 4.

Complaint, he also quotes these documents in the body of the Complaint. *See* Complaint at ¶¶ 32-33.

Among the subjects addressed in each agreement is the Bank's discretion to approve and pay transactions into overdraft and to assess associated fees. The Deposit Agreement expressly authorizes the Bank to impose and deduct charges (including overdraft charges) directly from Plaintiff's account as they accrue. *See* Deposit Agreement at 2. The Account Information Statement further provides:

> An "overdraft" occurs any time a check, ACH, ATM, debit card, bank fee (including any overdraft related fee) or any other transaction (collectively, a "Transaction") is presented for payment against an account and the available balance of the account is insufficient to pay the Transaction. When an overdraft occurs, we may, at our discretion, refuse the Transaction, or alternatively, we may choose to pay the Transaction, in which case a negative account balance will result. . . .
>
> BancorpSouth's Overdraft Payment Service is a service whereby we determine whether to pay a Transaction in overdraft. This determination is strictly discretionary with us. . . .
>
> Certain fees apply for our Overdraft Payment Service and to accounts which otherwise become overdrawn. If we decide to pay a Transaction in overdraft, you will be charged an Overdraft (OD) Item fee for each such Transaction. . . .

Account Information Statement at 3 (emphasis added).

In addition, the Deposit Agreement explicitly authorizes the Bank to post debits to an account in any order, including but not limited to, the order of largest to smallest dollar amount:

> **ORDER OF PAYMENT:** [I]f more than one item or order is presented for payment against this account on the same day and the available balance is insufficient to pay them all, we may pay any of them ***in any order we choose***, even if the order we choose results in greater insufficient funds fees than if we had chosen to pay them in some other order. Our payment of any item or order in overdraft does not create any obligation for us to pay any other item or order in overdraft in the future, and you agree that no course of dealing regarding the payment of items or orders in overdraft will be created between us.

Deposit Agreement at 4 (emphasis added).

Similarly, the Account Information Statement provides:

> [I]f more than one Transaction is presented for payment against your account on the same banking day and the available balance is insufficient to pay them all, we may pay any or all of them **in any order we choose. When we pay Transactions, we generally choose to pay the largest Transaction first and the smallest Transaction last.** Our choosing this order of payment for Transactions may result in greater Overdraft-related Fees than if we had chosen to pay them in some other order or had chosen not to pay them.

Account Information Statement at 3-4 (emphasis added).

Beyond merely informing Plaintiff of the potential for overdraft fees (and the discretion provided the Bank in posting transactions to the account), the Account Information Statement informed Plaintiff how he may avoid overdraft fees entirely. Specifically, the Account Information Statement informed Plaintiff that he may elect to participate in overdraft protection options offered by the Bank:

> [Y]ou may avoid Overdraft-related Fees through one of the Overdraft Protection products offered by BancorpSouth. Credit Card Overdraft Protection works by charging your BancorpSouth MasterCard or VISA credit card for cash advances in the total amount of Transactions drawn against insufficient funds, with resulting deposits of the cash advance amounts into your account to cover Transactions, up to the cash advance limit of your credit card. Credit Card Overdraft Protection transactions are subject to all the rules and finance charge provisions applicable to cash advances under the Cardholder Agreement. You may also avoid Overdraft-related Fees by establishing a BancorpSouth Equity Credit Line, which is a line of credit. . . .

Account Information Statement at 4. To the extent that Plaintiff had any questions regarding this service, the Bank advised him to "ask a customer service representative for a copy of our flier 'How to Avoid Paying Bank Fees.'" *Id.*

These written documents define the terms of Plaintiff's relationship with the Bank, and they specifically authorize the activity that Plaintiff claims to have been wrongful. Plaintiff cannot, through claims of breach of contract, unconscionability, unjust enrichment, conversion, or violation of a consumer protection statute, change the terms of his contract. As a result, his claims fail as a matter of law.[3]

III. ARGUMENT AND CITATION OF AUTHORITY

A. Standard on a Motion to Dismiss

Pursuant to Rule 12, a complaint should be dismissed if, on the facts alleged, the plaintiff has failed as a matter of law to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6), 12(c); *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1226 (11th Cir. 2002).

In considering a motion to dismiss, the Court must treat the Plaintiff's factual allegations as true, but those allegations cannot support the asserted claims unless they "raise a right to relief above the speculative level." *United Techs. Corp. v. Mazer,* 556 F.3d 1260, 1270 (11th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). A complaint cannot survive a motion to dismiss based on "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). Unless the complaint pleads sufficient factual allegations to cross the line "from [the] conceivable to [the] plausible," it must be dismissed. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009).[4]

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[3] The Omnibus Motion to Dismiss and/or For Judgment on the Pleadings (the "Omnibus MTD") filed in these proceedings more fully explores the statutory and regulatory treatment and assessment of overdraft charges, and is incorporated herein by reference. *See* Doc. 217 at pp. 13-18.

[4] The Court may properly consider both the allegations of the Complaint and the content of any contracts or other documents attached to it. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (when ruling on a motion to dismiss, "courts must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference"); *Harris v. Ivax Corp.*, 182 F.3d 799, 802, n.2 (11th Cir. 1999) (Rule 12(b)(6) motions).

B. Plaintiff's Claims Are Governed by Arkansas Law

When considering choice of law, a court sitting in diversity must look to the laws of the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Forzley v. AVCO Corp. Elecs. Div.*, 826 F.2d 974, 978 (11th Cir. 1987). In multidistrict litigation, the forum state is that in which the transferor district court sits. *Murphy v. F.D.I.C.*, 208 F.3d 959, 965 (11th Cir. 2000). Accordingly, this Court must apply Florida's choice-of-law principles.

Under Florida law, "when the parties to a contract have indicated their intention as to the law which is to govern, it will be governed by such law in accordance with the intent of the parties." *Dep't of Motor Vehicles v. Mercedes-Benz of N. America, Inc.*, 408 So. 2d 627 (Fla. App. 1981); *Forzley*, 826 F.2d at 978-79 (same). The parties' contractually specified choice of law "will be applied so long as there is a reasonable relationship between the contract and the state whose law is selected and the selected law does not conflict with Florida law...." *Forzley*, 826 F.2d at 979.[5]

Here, the Deposit Agreement contains a choice-of-law provision that selects the laws of the state in which the customer's account was either opened or maintained. The applicable choice of law provision states, in pertinent part: "[T]his Agreement is governed by the laws of the state of the location of our branch identified on the signature page and by federal law and regulation," which, in this case, is Arkansas. Complaint at Ex. A, Deposit Agreement at 5. Accordingly, Arkansas law governs Plaintiff's claims.

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[5] Arkansas is more than "reasonably related" to the Deposit Agreement and the transactions between the parties. Arkansas is where Plaintiff interacted with the Bank at local branches, where he maintained his account, and where he received his account statements and other communications from the Bank.

C. Plaintiff's Breach of Contract Claim Fails to State a Claim

Plaintiff's principal claim is for common law breach of contract. Plaintiff contends that BancorpSouth breached a contract by posting debits in high-to-low order, which resulted in increased overdraft fees. Plaintiff does not contend that the actual terms of the written contract required a different posting order. Nevertheless, Plaintiff claims that the implied covenant of good faith and fair dealing prohibits this posting order. According to Plaintiff's theory, *a bank's adherence to the actual contractual terms should, paradoxically, be deemed a breach of the contract.* Plaintiff's claims fail as a matter of law, for the multiple reasons set forth below.

1. BancorpSouth's Contract Specifically Authorizes Debits to Be Posted from Highest Amount to Lowest

Plaintiff concedes that his account is controlled by the Deposit Agreement: his claim is for breach of that contract. The Deposit Agreement expressly authorizes the Bank to post debits in high-to-low order. Deposit Agreement at 4 ("If more than one item or order is presented for payment against this account on the same day and the available balance is insufficient to pay them all, we may pay any of them ***in any order we choose***") (emphasis added). Similarly, the Account Information Statement provides: "[I]f more than one Transaction is presented for payment against your account on the same banking day and the available balance is insufficient to pay them all, we may pay any or all of them **in any order we choose. When we pay Transactions, we generally choose to pay the largest Transaction first and the smallest Transaction last.** Account Information Statement at 3-4 (emphasis added).

Insofar as Plaintiff is purporting to assert a straightforward breach-of-contract claim, any such claim fails at the threshold, as Plaintiff does not, and could not, contend that posting high-to-low is contractually impermissible under their actual contract terms. Plaintiff fails to identify any

obligation provided in the contract that the Bank has breached. Such an allegation is a requirement for any action for breach, and its absence is ground for dismissal. *See, e.g., Burger King Corp. v. Weaver; M-W-M, Inc.*, 169 F.3d 1310, 1318 (11th Cir. 1999) (claim for breach of the implied covenant failed as a matter of law because the plaintiff cited no contract provision that had been breached); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1429 (11th Cir. 1990) (same); *cf. Keys Jeep Eagle v. Chrysler Corp.*, 897 F. Supp. 1437, 1443 (S.D. Fla. 1995) (dismissing breach of contract claims on summary judgment where "Plaintiffs do not identify a single contract term or provision that [defendant] allegedly breached").

2. The Implied Covenant of Good Faith and Fair Dealing Does Not Preclude High-To-Low Posting

The real thrust of Plaintiff's claims is not that BancorpSouth has breached its contract, but rather that the implied covenant of good faith and fair dealing should prohibit any high-to-low posting order, notwithstanding the fact that the contracts specifically provide for it. That theory fails on multiple levels.

(a) Plaintiff's Contract Claim based on the Implied Covenant of Good Faith and Fair Dealing Fails Because Such Claim Has Not Been Recognized Under Arkansas Law

This Court should dismiss Plaintiff's contract claim to the extent it is based on the implied covenant of good faith and fair dealing because Arkansas courts have not recognized such a claim. *See Preston v. Stoops*, 285 S.W. 3d 606, 609-10 (Ark. 2008). In *Preston*, the Arkansas Supreme Court, though recognizing that every contract creates an obligation of good faith, found it unnecessary to reach the issue of whether Arkansas law recognized a claim a for breach of contract for failure to act in good faith where no provision of the contract is violated. *Id.* Further, subsequent to the *Preston* decision, several federal district courts interpreting

Arkansas law have predicted that Arkansas would not recognize such a claim. *See, e.g., Williams v. State Farm Mutual Auto. Ins. Co.*, 2010 U.S. Dist. LEXIS 61613, at *13-14 (June 22, 2010) (citing several federal district court decisions interpreting Arkansas law which have not recognized such a claim, and therefore dismissing plaintiff's breach of contract claim based on the implied covenant of good faith and fair dealing). As a claim for breach of contract based on an alleged violation of the implied covenant of good faith and fair dealing has not been recognized under Arkansas law, this Court should dismiss this claim for failure to state a claim.[6]

(b) The Implied Covenant of Good Faith and Fair Dealing Cannot Vary Actual Contract Terms Authorizing High-to-Low Posting

Even if Arkansas did recognize a breach of contract claim arising out of an alleged violation of the implied covenant of good faith and fair dealing, the claim asserted by Plaintiff must fail because the implied covenant is not breached if the contract at issue permits the actions of which Plaintiff complains. *See Gunn v. Farmers Ins. Exch.*, 2010 Ark. LEXIS 542, *6 (Ark. Nov. 11, 2010) (holding that the implied covenant of good faith and fair dealing "should not be used to limit an expressly bargained-for term"); *see also* 23 Williston on Contracts § 63:22 (4th ed.) ("as a general principle, there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract"); *Weaver,* 169 F.3d at 1316

[6] Courts have consistently held that high-to-low posting does not violate the implied covenant of good faith and fair dealing. *See, e.g., Hassler v. Sovereign Bank,* 644 F. Supp. 2d 509 (D.N.J. 2009); *Hill v. St. Paul Fed. Bank for Sav.*, 768 N.E.2d 322 (Ill. App. 2002); *Fetter v. Wells Fargo Bank Tex., N.A.*, 110 S.W.3d 683 (Tex. App. 2003); *Daniels v. PNC Bank, N.A.*, 738 N.E.2d 447 (Ohio App. 2000); *Smith v. First Union Nat'l Bank,* 958 S.W.2d 113 (Tenn. Ct. App. 1997); *Torres v. Wells Fargo,* 2008 WL 2397460 (N.D. Cal. Jun. 11, 2008); *Riddle v. Star Bank,* No. 98-CI-4098 (Ky. Cir. Ct. Mar. 19, 1999); *Stephens v. PNC Bank of Ky., Inc.*, No. 98-CI-04051 (Ky. Cir. Ct. Oct. 20, 1998); *but see Gutierrez v. Wells Fargo & Co.*, 622 F. Supp. 2d 946 (N.D. Cal. 2009).

(the implied obligation of good faith cannot be used to vary the terms of an express contract") (citation and quotation marks omitted).

As this Court stated in a recent case, "*Weaver* held that a cause of action for breach of the implied covenant of good faith cannot be maintained in derogation of the express terms of the underlying contract or in the absence of breach of an express term of the underlying agreement." *Marathon Resort & Marina, Ltd. v. Promus Hotels, Inc.,* No. 02-cv- 10085 (S.D. Fla. Dec. 9, 2002). This is so because the implied covenant is simply a tool to effectuate the parties' actual bargain – not to change it. *See Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting,* 908 F.2d 1351, 1357 (7th Cir. 1990) ("'[g]ood faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting"); *cf. Keys Jeep Eagle,* 897 F. Supp. at 1444 (claim failed as a matter of law where the parties' contract "specifically authorized all of [defendant's] actions").

In light of this well-settled rule, the implied covenant cannot be applied to prohibit high-to-low posting. The Deposit Agreement specifically addresses posting order and *explicitly authorizes* the Bank to post debits in that order. Precisely this reasoning has been applied to reject similar claims:

> We find that the contract clearly and unambiguously provides that the Bank will charge $20 per day for overdrafts.... The bank charged the overdraft fee within the parameters of the parties' agreement. Thus Saunders' awareness of the Bank's right to charge the overdraft fee negates any inference that the Bank's actions were so far outside the parties' reasonable expectations as to constitute a breach of good faith.

Saunders v. Michigan Ave. Nat'l Bank, 662 N.E.2d 602, 610 (Ill. App. 1996).

Plaintiff may now believe that contracting for a specific posting order different from the one used by the Bank would, in retrospect, have been more favorable to him in some

circumstances. But in the face of the specific language of the Deposit Agreement and related agreements explicitly providing that high-to-low posting is authorized, Plaintiff cannot claim that he had any basis to believe that he had actually contracted for something different.[7]

D. Plaintiff's Common Law Unconscionability Claim Fails as a Matter of Law

Plaintiff also asserts a cause of action for unconscionability. Plaintiff is not contending that overdraft fees are inherently unconscionable, or that the BancorpSouth's fees are unconscionable in all respects. Rather, he contends that the specific contract terms providing for high-to-low posting are unconscionable, and that the dollar amount of the overdraft fees is itself unconscionable when the fee exceeds the amount of the overdraft itself. The common law does not establish an affirmative right of action for damages on grounds of unconscionability. Moreover, the terms at issue here are not unconscionable: the challenged terms are broadly accepted in the marketplace and are in accordance with applicable statutory and regulatory requirements, the Bank's terms are spelled out in a detailed contract, and nothing prevented Plaintiff from reviewing the contract or taking his business elsewhere.

1. Unconscionability Is Not an Affirmative Cause of Action

Unconscionability is not a affirmative cause of action. As the Eleventh Circuit stated:

> [T]he equitable theory of unconscionability has never been utilized to allow for the affirmative recovery of money damages. ...[N]either the common law of Florida, *nor that of any other state,* empowers a court addressing allegations of unconscionability to do more than refuse *enforcement* of the unconscionable section or sections of the contract so as to avoid an unconscionable result.

Cowin Equip. Co. v. Gen. Motors Corp., 734 F.2d 1581, 1582 (11th Cir. 1984) (first emphasis

[7] Moreover, when applicable substantive law authorizes the conduct in question, there is no basis for a contention that such terms violate the implied covenant of good faith and fair dealing. *See, e.g.*, Omnibus MTD, (Doc. 217), at 46-49, incorporated herein by reference.

added; quoting *Bennett v. Behring Corp., 466 F. Supp. 689, 00 (S.D. Fla. 1979)).*[8] This universal common law principle applies with equal force here. *See Hughes v. Wet Seal Retail, Inc.,* 2010 U.S. Dist. LEXIS 121710, *5 (W.D. Ark. Nov. 16, 2010) (interpreting Arkansas law) (recognizing that unconscionability is a state law contract defense). Because Plaintiff does not assert a recognized cause of action upon which relief may be granted, Plaintiff's claim for "unconscionability" should be dismissed.

2. The Challenged Practices Are Not Unconscionable

Even if an affirmative cause of action for unconscionability existed, Plaintiff's claim would be subject to dismissal because, as a matter of law, there was no unconscionability. Under the laws of Arkansas, unconscionability involves procedural and substantive elements, both of which must be present for a finding of unconscionability. *See Gobeyn v. Travelers Indemnity Co.,* 2009 U.S. Dist. LEXIS 88824, *9 (E.D. Ark. 2009) ("A plaintiff must prove both procedural and substantive unconscionability for an agreement to be unforeceable"). Neither element is present here.

Procedural unconscionability focuses on the manner into which the contract was entered. *Id.* "Courts may look at various factors when determining whether an agreement is procedurally unconscionable, including whether the contract is 'oppressive,' which has been defined as arising from unequal bargaining power that results in an absence of meaningful choice, and the extent to which the person signing the agreement may be surprised by terms hidden in a form drafted by the party seeking to enforce its terms." *Hughes,* 2010 U.S. Dist. LEXIS

[8] *See also, e.g., Frye v. Am. Gen. Fin., Inc.,* 307 F. Supp. 2d 836, 844 (S.D. Miss. 2004) ("The doctrine of unconscionability is a defense to the enforcement of a contract, not a private cause of action that can be brought by a party seeking damages"); *Mitchell v. Ford Motor Credit Co.,* 68 F. Supp. 2d 1315, 1318 (N.D. Ga. 1998) (dismissing plaintiff's claim for damages for unconscionability under the UCC, which only "codifies the common law defense of unconscionability to the enforcement of a contract"); *Bennett,* 466 F. Supp. at 700 (rejecting claim for restitution based on unconscionability); *Best v. United States Nat'l Bank,* 714 P.2d 1049,

121710 at *6-7 (W.D. Ark. Nov. 16, 2010) (citations omitted). Plaintiff has alleged no facts to support any claim for procedural unconscionability. Plaintiff does not claim that he was ever surprised by the terms of the Deposit Agreement or that he was not given a choice but to open his account with BancorpSouth. *See, e.g., Best,* 303 Ore. at 561 (overdraft fees were not unconscionable where depositors could close their accounts at any time, and there was no evidence that the depositors were not of ordinary sophistication or that the bank obtained the deposit agreements through deception or improper means); *Saunders v. Michigan Ave. Nat'l Bank,* 662 N.E.2d 602, 611 (Ill. App. 1996) (overdraft fees were not unconscionable where the bank disclosed the fees, plaintiff was not intimidated or coerced into accepting the terms, and plaintiff could have chosen another bank). Nor does Plaintiff allege that the contracts are disorganized, or that the posting terms were hidden. To be sure, the Deposit Agreement and related documents are detailed, form documents. But it is wholly appropriate to use form documents to set out the terms of accounts whose computerized treatment must necessarily be uniform. And it is an inescapable fact that a modern deposit account, attended by many features and subject to many required disclosures, inherently calls for detailed documentation. Such disclosures cannot be deemed unconscionable.

"[S]ubstantive unconscionability . . . looks to the terms of the contract and whether they are harsh, one-sided, or oppressive." *See Gobeyn v. Travelers Indemnity Co.,* 2009 U.S. Dist. LEXIS 88824, *9 (E.D. Ark. 2009). A contract is not unconscionable in the eyes of the law merely because the bargain works out, in retrospect, to be more costly than a party expected – especially when that cost is due to the party's own conduct (in this case

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1056 (Or. Ct. App. 1986), *aff'd,* 303 Ore. 557 (1987) (same).

overdrawing the account). *See Bennett,* 466 F. Supp. at 699. Rather, the legal question is whether the terms were so shockingly improper, at the time they were entered into, that no court can enforce the contract even though the parties agreed to it. The classic standard is whether the contractual term "shocks the conscience" because it is "one which no sane man not acting under a delusion would make." *See, e.g., Enderlin v. XM Satellite Radio Holdings, 2008 U.S. Dist. LEXIS 27668, *38 (E.D. Ark. Mar. 25, 2008); see also Cal. Grocers Ass'n,* 22 Cal. App. 4th at 214-15; *BMW Fin. Servs., N.A. v. Smoke Rise Corp.,* 486 S.E.2d 629, 630 (Ga. Ct. App. 1997); *Saunders,* 662 N.E.2d at 610.

The high-to-low posting terms challenged here are hardly "shocking" or exceptional; rather, they authorize routine banking practices. The Complaint asserts that these terms are commonplace in the industry and are widely accepted, after disclosure, by millions of ordinary banking customers across the country. Perhaps more significantly, as discussed above, both the UCC and statements of federal bank regulatory agencies accept the authority of banks to post in high-to-low order, recognizing the significant arguments in favor of the practice and concluding that there is no single approach that is *a priori* preferable. In light of this approval, the practice cannot be deemed unconscionable. *See, e.g., White v. Wachovia, N.A.,* 563 F. Supp. 2d 1358, 1370 (N.D. Ga. 2008) (dismissing unconscionability claim directed at posting practice, observing that "there can be no substantive unconscionability because the text of the provision [allowing such posting] is consistent with [the UCC]"); *Daniels v. PNC Bank, N.A.,* 738 N.E.2d 447, 451 (Ohio App. 2000) ("because the practice of high-low posting is allowed by [the UCC], it cannot be said to be itself unconscionable").

Finally, the account-holder, who can avoid any possible disadvantage by simply not overdrawing his or her account, is not in a position to complain. *See* UCC § 4-303, cmt. 7. Overdrafts occur because the customer initiates payment orders that exceed the account balance. Plaintiff does not, and cannot, allege that the Bank's posting order actually caused his accounts to be overdrafted; he asserts only that posting order affects the total number of fees incurred. In light of this control, there is no possible claim of unconscionability: "[A] person who chronically writes bad checks does not have clean hands to seek equitable relief from the resulting fees, since such a person is engaged in bad banking practices and is merely experiencing the intended deterrent effect of those fees." *Daniels,* 738 N.E.2d at 451; *see also Saunders,* 662 N.E.2d at 611 (plaintiff's challenge to an allegedly excessive overdraft charge "ignores [plaintiff's] own role in establishing the [overdraft] charge").

To the extent Plaintiff alleges that "[t]he imposition of overdraft charges which exceed the amount overdrawn ... is itself unconscionable," his claim plainly lacks merit as a matter of law.[9] Plaintiff does not challenge the flat per-item overdraft fee across the board; rather, he simply asserts that, when that amount is charged for overdrafts of small transactions, it is disproportionate to the Bank's risks and costs for those particular transactions. But it has never been the law that flat per-transaction pricing is unconscionable or that companies must calibrate their pricing to match the specific costs associated with each transaction. *See Hernandez v. Wells Fargo Bank, N.A.,* 139 N.M. 68 (N.M. 2005) (rejecting claim that overdraft fee rates were unconscionable when imposed for small overdrafts).

[9] *See* Complaint at ¶ 90. Plaintiff's basis for this claim is that "[s]uch charges are not reasonably related to the Bank's cost of covering the overdraft and/or its risk of nonpayment (where the Bank pays the overdraft), or to the Bank's cost of returning the item unpaid (where the Bank does not pay the overdraft)."

E. Plaintiff's Conversion Claim Fails on Multiple Grounds

Plaintiff alleges that charging his account for overdraft fees resulting from high-to-low posting constitutes "conversion." This cause of action also is fatally flawed. Plaintiff fails to plead essential elements of conversion: "(1) ownership of property by the plaintiff and (2) the exercise of dominion over the property by the defendant in violation of the plaintiff's rights." *Delta Pride Catfish, Inc. v. Marine Midland Business Loans, Inc.*, 767 F. Supp. 951, 963 (E.D. Ark. 1991). As explained below, Plaintiff has not satisfied – and cannot satisfy – these elements; his claim for conversion therefore fails as a matter of law.

1. *BancorpSouth Did Not Convert Any Property Owned by Plaintiff When Assessing Fees on Plaintiff's Account*

To state a claim for conversion, the property allegedly converted must have belonged to the plaintiff. *See, e.g., Scholes Elec. & Commc'ns, Inc. v. Fraser*, 2006 WL 1644920, at *5 (D.N.J. June 14, 2006). Plaintiff does not, and cannot, claim that the Bank's assessment of fees against his account constituted an assumption of control by the Bank over property as to which he had personal ownership. On the contrary, it is well settled that when funds are deposited with a bank, the depositor cedes ownership over those funds and becomes instead a general creditor of the bank pursuant to the deposit contract. *See J.W. Reynolds Lumber Co. v. Smackover State Bank*, 836 S.W.2d 853, 855 (Ark. 1992) (holding that there was no conversion claim arising from deposit of money in an account); *see also In re Liquidation of Canal Bank & Trust Co.*, 160 So. 609, 611 (La. 1935) ("[T]here is no principle of the law of banking more firmly established than that relating to the title of money deposited generally in a bank. Such a deposit passes title to the banker immediately....."). Because he did not have title to the funds they claim were "converted," Plaintiff's conversion claims fail as a matter of law. *See, e.g., Lawrence v. Bank of Am.*, 163 Cal. App. 3d 431, 437 n.2 (1985) ("It is well settled ... that money on deposit with a bank may not be the subject of conversion") (citation omitted); *Transamerica Ins. Co.*

v. United States Nat'l Bank, 558 P.2d 328, 335 n.11 (Or. 1976) (conversion is not a tenable theory where plaintiff is seeking to enforce its right as a creditor to repayment of its deposits by the bank); *Upper Valley Aviation, Inc. v. Mercantile Nat'l Bank*, 656 S.W.2d 952, 955 (Tex. Ct. App. 1983) (holding that a "depositor may not sue in conversion to recover his deposit").[10]

2. *Plaintiff Cannot Show a "Wrongful" Taking of Property*

It is well settled that "[t]he crux of conversion is *wrongful* exercise of dominion or control over property of another without authorization and to the exclusion of the owner's rights in that property." *Chicago Title Ins. Co. v. Ellis*, 978 A.2d 281, 288 (N.J. Super. Ct. 2009) (emphasis added); *see McQuillian v. Mercedes-Benz Credit Corp.*, 961 S.W.2d 729 (1998). Even if Plaintiff had pleaded actual ownership of his account funds, he could not as a matter of law demonstrate a wrongful taking of that property, because the Bank's actions in assessing the challenged overdraft fees were authorized under the Deposit Agreement.[11]

F. Plaintiff's Unjust Enrichment Cause of Action Fails to State a Claim

Plaintiff also claims that BancorpSouth's collection of overdraft fees resulting from high-to-low

[10] This principle was recognized even in *Gutierrez v. Wells Fargo & Co.*, 622 F. Supp. 2d 946 (N.D. Cal. 2009), a decision on which Plaintiff likely will seek to rely on as authority for his positions in this lawsuit. There, the court correctly rejected a conversion claim identical to Plaintiff's, stating that the plaintiffs had "not demonstrated their ownership or right to possession of the property. The relationship between a bank and its depositor arising out of a general deposit is that of a debtor and creditor. A bank may not be sued for conversion of funds deposited with the bank." *Id.* at 956.

[11] What Plaintiff is really asserting here is that he was charged too much for his overdrafts. But it is well-settled that such a claim for an alleged overcharge does not provide a basis for a cause of action in conversion. *Gutierrez,* 622 F. Supp. 2d at 956 (citing *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1492 (2006) ("Plaintiffs cite no authority for the proposition that a cause of action for conversion may be based on an overcharge.")); *Belford,* 243 So. 2d at 648-49 (Fla. Ct. App. 1970); *Am. Gen. Life & Accident Ins. Co. v. Ward,* 509 F. Supp. 2d 1324, 1330 (N.D. Ga. 2007); *Song v. PIL, LLC,* 640 F. Supp. 2d 1011, 1017 (N.D. Ill. 2009) (citing *In re Thebus,* 483 N.E.2d 1258, 1260 (Ill. 1985)); *Silver v. Nelson,* 610 F. Supp. 505, 514 n.10 (E.D. La. 1985); *In re Salett,* 53 B.R. 925, 930 (Bankr. D. Mass. 1985); *Morrone Co. v. Barbour,* 241 F. Supp. 2d 683, 689 (S.D. Miss. 2002); *Winslow v. Corp. Express, Inc.*, 834 A.2d 1037, 1046 (N.J. Super. Ct. 2003);

posting constitutes "unjust enrichment." Complaint at ¶¶ 104-112. This claim fails for at least two reasons. First, Plaintiff acknowledges that his relationship with the Bank is defined by the terms of a written document. *Id.* at 31. This defeats a common law claim for unjust enrichment. It is well-settled that "unjust enrichment has no application when an express written contract exists." *Adkinson v. Kilgore*, 970 S.W.2d 327, 331 (Ark. Ct. App. 1998).[12] This Court recently held as much in a case applying Florida law. *See Reese v. JPMorgan Chase & Co.,* 2009 WL 3346783, at *14 (S.D. Fla. Oct. 15, 2009) (dismissing unjust enrichment claim where plaintiff's claim arose out of a contractual relationship with the defendant). At least two federal courts have dismissed similar "overdraft fee" unjust enrichment claims for precisely this reason. In *White v. Wachovia Bank, N.A.,* 563 F. Supp. 2d 1358, 1371-72 (N.D. Ga. 2008); *Hassler v. Sovereign Bank,* 644 F. Supp. 2d 509, 519 (D.N.J. 2009). The same rationale applies here.

Second, even if the unjust enrichment claim could coexist with the express contract, it would nevertheless fail because Plaintiff does not allege grounds on which the Bank's overdraft fees could lawfully be deemed unjust. As discussed above, the fees were specifically provided for under the parties' contract and were in accord with both the UCC and the applicable regulations and interpretations issued by federal regulators. As this Court has recently observed, "[t]he essential elements of an action for unjust enrichment are a benefit conferred upon the

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Elliott Indus. LP v. BP Am. Prod. Co., 407 F.3d 1091, 1115-16 (10th Cir. 2005); *Daniels v. Equitable Life Assurance Soc 'y of the United States,* 35 F.3d 210, 215 (5th Cir. 1994).

[12] 66 Am. Jur. 2d *Restitution and Implied Contracts* § 24; *see also id.* ("[A]n express contract precludes the existence of a contract implied by law or a quasi contract.") (citations omitted); *id.* § 8 (citing cases); *id.* § 9 ("Unjust enrichment describes a recovery for the value of the benefit retained *when there is no contractual relationship,* but when, on the grounds of fairness and justice, the law compels the performance of a legal and moral duty to pay.") (emphasis added) (citations omitted); Restatement (First) of Restitution § 107; 1 Arthur L. Corbin, Corbin on Contracts § 1.20 ("Where, however, there is an enforceable express or implied in fact contract that regulates the relations of the party or that part of their relations about which issues have arisen, there is no room for quasi contract." (citations omitted)).

defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention of such benefit by the defendant under such circumstances that it would be inequitable for him to retain it without paying the value thereof." *Jaffe v. Bank of Am., N.A.*, 2009 WL 2567488, at *20 (S.D. Fla. Aug. 28, 2009) (dismissing claim for unjust enrichment where it was not inequitable for defendant to retain benefit of payment).

G. Plaintiff's Claim brought pursuant to the Arkansas Deceptive Trade Practices Act Fails for Multiple Reasons

Finally, Plaintiff alleges that the Bank's posting practices violated the Arkansas Deceptive Trade Practices Act (the "ADTPA"), Ark. Code Ann. § 4-88-101. et seq. (Complaint at ¶¶ 13-120). Much like Plaintiff's other theories, this claim fails as well.

The ADTPA requires a showing of an "unconscionable, false, or deceptive act or practice in business, commerce, or trade." Ark Code. Ann. § 4-88-107(a)(10). However, the ADTPA includes a "safe harbor" provision such that the ADTPA *does not apply* to practices that are subject to and that comply with any rule, order, or statute administered by the Federal Trade Commission or to actions or transactions permitted under laws administered by a regulatory body or officer acting under statutory authority of Arkansas or the United States. *See* Ark. Code Ann. § 4-88-101(1) and (3). Because the Bank's alleged posting practice and imposition of overdraft charges is authorized by state and federal law, such conduct falls within the ADTPA's safe harbor and thus cannot provide the basis for a violation of the ADTPA. This reason alone should require dismissal of Plaintiff's claim. *See, e.g., DePriest v. AstraZeneca Pharms, L.P.*, 2009 Ark. LEXIS 722 (Ark. Sup. Ct. Nov. 5, 2009) (holding that plaintiffs' claims under the ADTPA must fail because the actions of which plaintiffs complained were permitted under laws administered by the FDA and were within the ADTPA's safe harbor provision).

Even if the Bank's actions were not authorized by state and federal law and, therefore, exempt from the ADTPA, Plaintiff's ADTPA claim would fail because the alleged collection of overdraft charges is not "unconscionable" and does not affront "the sense of justice, decency, or reasonableness," as is required to demonstrate an ADTPA claim. *See Baptist Health v. Murphy*, 226 S.W.3d 800, 811, n. 6 (Ark. Sup. Ct. 2006) (defining an unconscionable act as "is an act that affronts the sense of justice, decency, or reasonableness"). The Bank's actions were fully disclosed and expressly authorized in the Deposit Agreement and related disclosures as well as under state and federal law. Plaintiff cannot claim that that the imposition of these charges was somehow wrongful.

Nor is the alleged collection of overdraft charges a "deceptive" act as contemplated by the ADTPA. This is, simply put, not a "deceptive practices" case. Plaintiff's claims here relate to the practice of posting transactions in order from highest amount to lowest and charging allegedly excessive fees as a result. Plaintiff has not alleged that BancorpSouth engaged in any materially misleading conduct in connection with high-to-low posting. Any such allegation would be subject to the heightened pleading standards of Rule 9(b). *See Whatley v. Reconstrust Co. N.A.*, 2010 U.S. Dist. LEXIS 125122, *18 (E.D. Ark. Nov. 23, 2010) (dismissing without prejudice a claim asserted under the ADTPA for failure to plead the alleged "deceptive" acts with particularity as required by Rule 9(b)). Here, Plaintiff has not only failed to satisfy Rule 9(b); he has not alleged *any* misrepresentations made to him regarding the collection of overcharges.

Even if the requirements of Rule 9(b) did not exist, the facts presented in the Complaint could not possibly support a claim of deceptive conduct in violation of the ADTPA. As a matter

of law, a business practice cannot be deemed to be "deceptive" or "misleading" if it complies with the terms of a contract between the parties. *See, e.g., Hassler,* 644 F. Supp. 2d at 520-21. In *Hassler,* for example, the plaintiff alleged that a bank had violated New Jersey's Consumer Fraud Act by failing to disclose adequately that it would order transactions from highest to lowest, a practice the plaintiff contended resulted in a greater likelihood of depleting account funds and a corresponding increase in overdraft fees. *Id.* at 513-15. The account agreement indicated that the bank "generally" posted transactions from largest to smallest, but the bank reserved the right to pay transactions "in any order." *Id.* at 515. The district court dismissed the claims because the terms of the deposit agreement made clear that the bank reserved the right to process debit transactions in precisely the manner about which the plaintiff complained. *Id.* Reasoning that "it would be difficult for [the bank] to have disclosed its 'practice of posting charges in a non-chronological manner' in clearer or more understandable terms," the court concluded that the bank's practices were "not misleading or deceptive in any way." *Id.*

Plaintiff here does not (and cannot) allege that the Bank's high-to-low posting order was contrary to or in any way inconsistent with the Deposit Agreement. As in *Hassler,* the Bank's contract authorizes the very practice about which Plaintiff complains. The Deposit Agreement does not state that the Bank will post transactions in chronological order, from lowest amount to highest, or in any other order Plaintiff may prefer.

Moreover, Plaintiff fails to allege that he was actually misled by any statement or conduct of BancorpSouth. Nor does Plaintiff contend that he would have acted any differently had the Bank disclosed the practice differently. *See Bildstein,* 329 F. Supp. 2d at 414 (dismissing claim for failure to disclose credit card fee in card agreement because the plaintiffs failed to allege that

information about the fee would have affected their choice of credit cards). Plaintiff also fails to allege that any deceptive conduct by the Bank – or any failure to disclose a material fact – actually injured him. *See Whatley*, 2010 U.S Dist. LEXIS 125122, at *15-16 (recognizing that the ADTPA only grants a right of recovery to any "person who suffers actual damage or injury *as a result* of an offense or violation") (citations omitted) (emphasis in original).

For all of these reasons, Plaintiff's ADTPA claim fails as a matter of law and should be dismissed.

IV. CONCLUSION

Plaintiff's Second Amended Complaint fails to state a claim against BancorpSouth, as a matter of law. For all of the foregoing reasons, the Court should dismiss Plaintiff's Complaint in its entirety, pursuant to Rule 12(b)(6).

Respectfully submitted this 20th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2011, 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 identified on the attached Service List 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.

/s/ Eric Jon Taylor
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