UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO: FOUTH TRANCHE ACTION

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

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND INCORPORATED MEMORANDUM OF LAW

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MOTION AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 23, Plaintiff, through his undersigned counsel, respectfully moves for class certification based on the facts and authorities set forth in the following memorandum of law and accompanying Appendices I-IV.

The proposed Class is defined as follows:

> All BancorpSouth Bank customers in the United States who, within the applicable statute of limitations preceding the filing of this action to August 13, 2010 (the "Class Period"), maintained a non-commercial account, and incurred an overdraft fee as a result of BancorpSouth's practice of re-sequencing debit card transactions from highest to lowest dollar amount.
>
> Excluded from the Class are BancorpSouth Bank; its parents, subsidiaries, affiliates, officers and directors; any entity in which BancorpSouth Bank has a controlling interest; all customers who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.[1]

Plaintiff also moves to be appointed representatives of the Class, and for the appointment of the following firms as Class Counsel pursuant to Fed. R. Civ. P. 23(g): Bruce S. Rogow, P.A.; Podhurst Orseck, P.A.; Grossman Roth, P.A.; Baron & Budd, P.C.; Golomb & Honik, P.C.; Lieff Cabraser Heimann & Bernstein LLP; Trief & Olk; Webb, Klase & Lemond, L.L.C.; The Kopelowitz Ostrow Firm, P.A.; and Chitwood Harley Harnes LLP.

I. INTRODUCTION

Through the use of specially designed software programs, BancorpSouth Bank ("BancorpSouth") engaged in a systematic scheme to extract the greatest possible number of overdraft fees from Plaintiff and similarly situated BancorpSouth consumers across the country. BancorpSouth collected hundreds-of-millions of dollars in excessive overdraft fees as a result of

[1]Plaintiff also requests that the Court certify a subclass for a specific claim as set forth in Plaintiffs' Proposed Trial Plan for Trial of Class Claims (the "Trial Plan"), which is submitted herewith as Appendix I.

this systematic scheme, much of it from BancorpSouth's most vulnerable customers. In doing so, BancorpSouth abused the discretion afforded it under its standard customer agreements and committed other well-recognized violations of law.

To carry out this scheme, BancorpSouth manipulated debit card transactions by, among other things, employing a bookkeeping trick to re-sequence these transactions from highest-to-lowest dollar amount at the time of posting. These account manipulations, which were applied in the same manner to all Class members as a result of BancorpSouth's standardized computer software, caused funds in customer accounts to be depleted more rapidly, resulting in more overdrafts and, consequently, more overdraft fees. In many instances, overdraft fees were levied at times when, but for BancorpSouth's manipulation, there would have been sufficient funds in the consumers' accounts. BancorpSouth did not fairly disclose its manipulations and even took active steps to keep it secret, which was contrary to its Code of Business Conduct and Ethics:

> **7. Fair Dealing in All Activities is Expected.**
>
> Each employee, officer and director should endeavor to deal fairly with the Company's customers. . . . An employee, officer or director should not take unfair advantage of anyone through manipulations, concealment, abuse of privileged information, misrepresentation of material facts or any other intentional unfair-dealing practice in connection with the Company's business.

Ex. 32 at 2. One Court, after a full bench trial, emphatically condemned similar practices as "***gouging and profiteering***." *See Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1104 (N.D. Cal. 2010) (emphasis added).

Plaintiff now moves for certification of his claims for breach of contract and the breach of the duty of good faith and fair dealing, unjust enrichment, unconscionability, and violation of

the Arkansas Deceptive Trade Practice Act.[2] Because all required elements of Fed. R. Civ. P. 23(a) and (b)(3) are satisfied, the Court should certify the proposed Class.

As Plaintiff demonstrates below, Rule 23(a)(1) numerosity is satisfied because the proposed Class is comprised of thousands of BancorpSouth customers who have been subjected to BancorpSouth's re-sequencing practice, thereby making joinder of them all impracticable. *See infra* at 28 to 29. There are many common questions of law and fact arising from BancorpSouth's form contracts and its uniform high-to-low re-sequencing practice, thus satisfying Rule 23(a)(2)'s commonality requirement. Questions about whether BancorpSouth properly disclosed its debit transaction manipulations (it did not), and how those manipulations and the resultant overdraft fees adversely impacted BancorpSouth's customers (they did), are common to Plaintiff and all members of the Class. *See infra* at 29 to 30.

Plaintiff's claims are typical of the claims of all Class members because Plaintiff and member of the Class, whose accounts were governed by common and materially uniform agreements, were subjected to BancorpSouth's practice of re-sequencing debit transactions from high-to-low, and were assessed overdraft fees as a result. Plaintiff and the Class thus seek redress via common legal claims arising out of the same course of BancorpSouth conduct. *See infra* at 30 to 32. Plaintiffs' claims are also typical of other Class members that they seek to represent through proposed subclasses.

The final Rule 23(a) requirement – adequacy of representation under Rule 23(a)(4) – is fulfilled because Plaintiff does not have interests that conflict with the Class, and he is represented by well-qualified counsel who are diligently prosecuting these claims on behalf of

[2]Plaintiff does not seek to certify for class treatment his claim for conversion at this time.

the Class. Plaintiff, like each Class member, has a strong interest in proving the unlawfulness of BancorpSouth's scheme and obtaining redress. *See infra* at 32 to 34.

Plaintiff is entitled to certification under Rule 23(b)(3). Common issues predominate because the salient legal and factual questions in this case will be resolved with proof common to Plaintiff and Class members. Plaintiff will prove his case with, among other things, evidence that BancorpSouth's form adhesion contracts, which the bank admits were non-negotiable for its retail customers, apply to all Class members and contain similar terms; that BancorpSouth systematically re-sequenced debt transactions from high-to-low for all Class members in the same manner and through the same means; and that BancorpSouth established a secret "Matrix" overdraft limit for all Class members through its overdraft payment service so that BancorpSouth could charge its customers more overdraft fees. All of this evidence, and more, will have a direct impact on every Class member's effort to establish liability and on every Class member's entitlement to relief. Common issues thus predominate. *See infra* at 34 to 43.

Predominance of common questions is also highlighted by the nature of the proof required to ascertain members of the Class and calculate their individual damages. Both exercises will be accomplished by Plaintiff's highly-qualified expert, Arthur Olsen, through an automated process using BancorpSouth's detailed transaction history records. Using BancorpSouth's data, and without the need for any input from individual Class members, Mr. Olsen will identify and segregate those customers who were charged overdraft fees due to BancorpSouth's manipulation of debits through high-to-low re-sequencing, as opposed to those who would have incurred the fees regardless of posting order. The amount of damages incurred by each Class member will be calculated in a similar manner using the same data. *See infra* at 39 to 43. Indeed, Mr. Olsen persuasively identified Class members and their damages using a very

similar approach in the related *Gutierrez* case, where the Court found his methods and conclusions highly reliable. *See* 730 F. Supp. 2d at 1139.

Individual issues relating to affirmative defenses will not detract from the common, predominating issues in this litigation. BancorpSouth's defenses are ill-defined and cannot upset the determinative constellation of common issues that bind the Class together. Further, many defenses, such as waiver and the statute of limitations, apply, if at all, on a class-wide basis. *See infra* at 42 to 44.

Nor does applying multi-state law defeat predominance here. In Appendix I, Plaintiff submits a companion Trial Plan and extensive survey of applicable law that present a comprehensive roadmap for trying the Class's claims. On the basis of these detailed legal surveys, Plaintiff proposes certification of discrete subclasses for claims containing materially-identical legal standards. This approach, which has been expressly approved by the Eleventh Circuit in *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004), demonstrates that common legal issues will remain the predominant focus of this litigation, notwithstanding the application of multi-state law. *See infra* at 44 to 51.

Turning to the superiority prong of Rule 23(b)(3), nearly all Class members have claims that are too small to litigate on an individual basis. Unless the proposed Class is certified, the courthouse doors will be closed to almost all of these consumers, and BancorpSouth will retain the ill-gotten gains of its unlawful conduct. Further, adjudicating claims in a single proceeding before this Court, which is already intimately familiar with the subject matter of this case, is much more efficient than a multiplicity of suits here and elsewhere that would unduly burden the judicial system. As his proposed Trial Plan demonstrates, Plaintiff does not foresee any serious manageability problems. *See infra* at 51 to 54.

II. FACTUAL BACKGROUND

Though discovery is still in its early stages, the evidence adduced to date establishes that class-wide issues predominate over individual questions. Below is a sampling of the types of evidence that Plaintiff will present at trial to demonstrate how those common issues will be proven on a class-wide basis. The recitation of evidence highlights the predominance of common issues, typicality of Plaintiff's claims, and the superiority of the class action as a vehicle for resolving these claims.

A. BancorpSouth Provided Checking and Debit Card Services in Eight States During the Class Period

BancorpSouth is a privately held corporation, headquartered in Tupelo, Mississippi. It is a wholly-owned subsidiary of BancorpSouth, Inc., which operates a financial services empire holding approximately $13.25 Billion in assets and grossing approximately $850 Million in annual revenues. Ex. 1 at 157:9-11 (as to assets); Ex. 20 (as to revenues).[3] BancorpSouth has a substantial retail banking presence in Alabama, Arkansas, Florida, Louisiana, Mississippi, Missouri, Tennessee, and Texas, providing checking and debit card services to approximately 400,000 account holders through approximately 275 branches, with approximately 85% of the accounts being retail accounts. Ex. 1 at 14, 18, and 201.

B. BancorpSouth Perpetrated a Standardized Scheme to Collect Unlawful Overdraft Charges from Plaintiffs and the Class

The common evidence described below identifies the practices challenged by Plaintiff and chronicles how each wrongful practice increased BancorpSouth's overdraft fee revenue at the expense of the Class.

[3]References to "Ex." are to exhibits included in Appendix III filed herewith. "Depo. Exhibit" refers to an exhibit to Ex. 1 of Appendix III.

1. During the Class Period, BancorpSouth uniformly re-sequenced transactions and posted debits from highest to lowest for all Class members.

Prior to 2003, BancorpSouth processed transactions in an order dictated by the type of transaction and posted high-to-low within each type of transaction, if there were multiple transactions of a particular type. Ex. 2 at p.11. Then, beginning in 2003, and continuing throughout the entire Class Period, BancorpSouth uniformly manipulated the order of its customers' debit transactions pursuant to a standardized scheme that re-sequenced and posted debits each day in the order of largest-to-smallest in dollar amount instead of in the order in which they were authorized. Ex. 1 at 68:2-9; 82:18-87:16; Ex. 2 at p.11. The high-to-low posting did not vary from state to state within BancorpSouth's footprint. Ex. 1 at 178:23-179:1.

BancorpSouth's re-sequencing was formulaic, automated, and applied to all debit transactions. The process begins with authorization, followed by posting.

a. Authorizing debit transactions.

When a customer initiates either a signature-based or PIN-based point-of-sale ("POS") transaction, the merchant must obtain authorization from BancorpSouth to process the sale.[4] Signature-based transactions involve the merchant sending BancorpSouth an electronic authorization request through the FDR system ("FDR"),[5] which is received by BancorpSouth's Stratus system ("Stratus"). Ex. 1 at 34:16-24. Using the customer's account information and the transaction information sent by the merchant via FDR to Stratus, FDR uses information provided by Stratus to determine whether to authorize the transaction. Ex. 1 at 36:12-37:9. In doing so, FDR determines the available balance by considering (a) the amount that Stratus indicates is

[4]There are two types of POS transactions: (i) "signature-based" POS transactions where the customer is required to provide a signature to the merchant at the point of sale; and (ii) "PIN-based" POS transactions, where the customer enters a pin number at the point of sale.

[5] The FDR system is a third party system with which BancorpSouth contracts for all of its signature-based POS transactions.

available, which is called the "available balance" and (b) any transactions that have been authorized by FDR in the past three days but have not yet been settled by the merchant. *Id.* BancorpSouth does not put any debit holds on any customer approved signature-based transactions,[6] but is aware that FDR considers authorized but unsettled transactions that have been approved in the last three days. *Id.* at 37:1-25. The available balance reflected in Stratus is calculated using the balance in (i) the customer's primary account tied to the debit card, (ii) any linked "overdraft protection" accounts,[7] and (iii) the customer's bank-assigned "Overdraft Matrix Limit" through the bank's overdraft payment service, a secret dollar limit provided by BancorpSouth in order to authorize transactions and collect overdraft fees if insufficient balances exist. *Id.* at 38:8-14; 42:20-43:21. "A customer can have both an overdraft protection product (such as a linked savings account, credit card, or line of credit to cover transactions that would overdraw the customer's account) and be enrolled in the overdraft payment service." Ex. 2 at p.21.

Customer-initiated PIN-based transactions, which include both POS transactions and ATM transactions, involve only the bank's Stratus system for authorizations. *Id.* at 62:9-17. When the customer initiates the PIN-based transaction, the merchant's request is sent directly to Stratus, which will then approve or decline the transaction. *Id.* at 62:18-63:11. The available balance reflected in Stratus will be the same as that which Stratus reflects for signature-based POS transactions, without accounting for any previous authorized but unsettled signature-based

[6] A "debit hold" refers to the bank deducting the "authorized" transaction amount from the account's available balance in expectation that the money will be used when the merchant seeks payment from the bank. In other words, the money is held aside and cannot be used in authorizing future debit transactions.

[7] During the Class period, BancorpSouth offered overdraft products, allowing customers to formally enroll in programs (as opposed to being enrolled by default) which link another bank account, a credit card, or a line of credit. Ex. 1 at 41:6-42:14.

POS transactions. *Id.* at 70:4-9. When Stratus authorizes a PIN-based transaction, BancorpSouth deducts the transaction amount, reducing the available balance immediately upon the completion of the transaction, but as detailed more fully *infra*, the bank "memo posts" the transactions for later nightly posting.

For all Class members' accounts, BancorpSouth keeps a "real time" running calculation of the account's "available balance" for purposes of determining whether sufficient funds exist at the time of an authorization request. At the beginning of each business day, each account has an opening "ledger balance" before any transactions occur that day. Ex. 1 at 116:21-117:5. This opening "ledger balance" is effectively the account's available balance at the start of the day. Ex. 1 at 118:5-7. The available balance in the account is then updated during the course of the day, decreasing it as BancorpSouth "memo posts" PIN-based transactions that are authorized, but that have not yet finally posted to the account. Ex. 1 at 64:17-66:11. Signature-based transactions are treated consistently for all customer accounts, but are not "memo posted" and, therefore, do not decrease the available balance until presented for settlement by the merchant through the FDR system. Ex. 1 at 72:21-73:14. This means that signature-based transaction may be authorized by FDR for BancorpSouth customers on a given day, but the amount of the transaction will not be deducted on the same day that the customer completes the transaction with the merchant. Ex. 1 at 50:1-51:9.

For example, a customer goes to a restaurant and uses the debit card to pay for the meal. *Id.* The restaurant merchant will request and receive an authorization on the account for the amount of the meal, not including the tip amount, which the customer fills in after the authorization is received. *Id.* It is only when the merchant seeks to settle the transaction that the merchant will formally request payment of the amount including the tip. *Id.* BancorpSouth

receives the FDR settlement demands for all merchants once a day in the early evening. *Id.* Thus, even though the customer believes a transaction is completed, the transaction has not affected the account balance. Because BancorpSouth does not "memo post hold" signature-based debit transactions at the authorization stage, other subsequent debit transactions, be it PIN-based or signature-based, will receive authorizations and may post to the account first, thereby deducting the running available balance for purposes of determining whether there are sufficient funds to cover the previously conducted debit transaction.

If the FDR system authorizes the signature-based transaction, or the Stratus system authorizes the PIN-based transaction, the system electronically communicates the approval to the merchant, who then completes the sale. Ex. 1 at 39:12-22 (as to signature-based transactions). The approval information provided to the merchant (and, in turn, the information the customer receives) does ***not*** indicate whether there were sufficient funds in the customer's primary account to cover the transaction or whether the transaction was approved into overdraft using to the overdraft limit the bank assigns using its Overdraft Matrix. *See* Ex. 1 at 40:1-19 (as to signature-based transactions).[8]

b. Posting transactions and assessing overdraft fees.

Pursuant to a standardized, automated process, BancorpSouth accumulates and then posts all debit transactions that settle on a given day to the appropriate account beginning late in the evening and ending early the following morning before business hours. Ex. 1 at 68:2-9; 82:18-87:16. The order in which the bank posts debit transactions directly corresponds to the order in which the funds are deducted from the account. Throughout the Class Period, it was BancorpSouth's uniform practice to post all debits on checking accounts for a given day from

[8]BancorpSouth's authorization process, including the information the bank receives and uses to authorize or deny the transaction, is essentially the same for ATM withdrawals as it is for PIN-based POS transactions. Ex. 1 at 60:11-15.

highest-to-lowest dollar amount. Ex 1 at 142:2-14 (noting that posting priority change to high to low did not vary between consumers within the consumer checking account group--"Q. Everbody got the same treatment, per se? A. Yes."); Ex. 2 at p.11. In fact, this posting order was implemented in the beginning of 2003.[9] Ex. 2 at p.11. On a given day, this would include all debits that were "memo posted" and all other debits. From 2003 forward, any transaction that would debit the account was placed in the same "bucket." Previously, the bank utilized a more elaborate posting system that separated types of debit transactions into a larger number of "buckets," but made the change in an effort to increase overdraft revenue. Ex. 1 at 138:15-139:13.

Following the re-sequencing of all debit transactions from highest-to-lowest on the given day, for each debit transaction that BancorpSouth posts to a customer's account during the bank's nighttime process, an automatic determination is made at the time of posting regarding whether there are sufficient funds to cover the transaction in question, and if there are insufficient funds to cover a transaction(s), then all such transactions are coded for exception processing (*i.e.* overdraft or NSF). Ex. 1 at 100:24-102:23; Ex. 43. This posting determination is distinct from the one the bank makes at the authorization stage in deciding to approve or decline a transaction. If there are sufficient funds in the primary account at the time of posting, no overdraft fee is assessed. If there are insufficient funds, BancorpSouth's system looks to whether there are funds in a linked overdraft protection product, be it another savings/checking

[9] BancorpSouth admits that if it wanted to go low to high when it implemented its posting priority in 2003, it could have done so, but the bank followed the recommendation of its third party consultant, discussed more fully *infra*, for the purpose of increasing bank revenue. Ex. 1 at 142:15-143:6. The bank considered the impact of low to high posting in 2007 and concluded that it would significantly decrease bank revenue, estimating a 17.5% decrease in revenue of more than $12 million. Ex. 26. It did so again in 2010 in light of the filing of this lawsuit, and noted concern that switching "could provide a different class of customer to claim unfair practice." Ex. 27.

account, a credit card account, or a line of credit account to cover the overages. Ex. 1 at 100:12-103:10. If so, then the bank will apply funds from such source(s) to cover the transaction, will not assess an overdraft fee, but will assess the disclosed, albeit smaller, fee associated with that overdraft protection product. Ex. 1 at 103:13-16; 103:20-104:18. But if the customer does not have an overdraft protection product in place, which is regularly the case with BancorpSouth customers, then BancorpSouth assesses an overdraft fee in an amount, which at the beginning of the class period was $25 and at the end $35, for each transaction the bank approved using funds falling within the Overdraft Matrix Limit approved for the customer.[10] The maximum Overdraft Matrix Limit available to a customer pursuant to the bank's Overdraft Matrix is $1,050, but there has never been a limit on the number of overdrafts that can occur in a single day or a minimum dollar amount that could trigger an overdraft fee. Ex. 1:104:19-105:5; 198:9-199:11; Ex. 26 (as to lack of a minimum dollar threshold to trigger overdraft).[11] One penny could trigger an overdraft.[12]

Each overdraft fee BancorpSouth assesses is tied to a particular debit transaction, and posts to the customer's account the day after the corresponding debit transaction posts (*e.g.*, an

[10]The amount BancorpSouth charged per overdraft increased during the Class Period as depicted in the following chart:

Jan. 1, 2001	$25
May 1, 2003	$29
Feb. 1, 2005	$30
Feb. 1, 2007	$32
May 10, 2010	$35

See Account Information Statements bearing above dates—Ex. 12, 13, 15, 16, and 17. Fee increases were done to match what competitors, including larger banks, were doing and to derive more income. Ex. 30.

[11] $500 is the maximum that the overdraft matrix may assign to an account for debit card authorizations occurring on a single day. Ex. 1 at 45:17-19.

[12] The bank looked at decreasing the overdraft fee to $15 for transactions under $5 and increasing the fee to $35 on everything else, and noted it could still bring an additional $2.2 million per year in gross revenue. Ex. 28.

overdraft fee assessed for a transaction posting on a Monday will post on Tuesday). Ex. 1 at 100:9-21 (customers do not see than overdraft will be assessed until the "whole next day"; 143:9-17 (overdraft fees as "bank-initiated fees" post first in the posting process). In the case of a transaction occurring over a weekend that is approved and results in an overdraft, the overdraft fee will not post to the account until Tuesday evening because the underlying transaction does not post until Monday evening. Ex. 1 at 133:15-134:16.

BancorpSouth's high-to-low posting order can have a dramatic impact on the number of overdraft charges assessed. If there are insufficient funds to cover all posted transactions, the bank's high-to-low posting order reduces customers' balances as quickly as possible, thereby maximizing the number of overdraft fees that are assessed. This is the fundamental reason why BancorpSouth adopted high-to-low posting in 2003. *See, e.g.,* Ex. 1 at 141:7-12; 144:22-146:4 ("the whole engagement [with third party consultant EPG] was for revenue enhancement"). Again, the Overdraft Matrix Limit could be as high as $1,050 for payment purposes depending on the bank's score for the account using its Overdraft Matrix. Ex. 1:104:19-105:5.

2. BancorpSouth utilized a secret "Overdraft Matrix Limit" throughout the Class Period.

Throughout the Class Period, if a customer's primary account and any linked overdraft protection account balances were not sufficient to cover the transaction amount, BancorpSouth secretly authorized customers' debit-card transactions into overdraft up to a maximum or ceiling amount that the bank determined was appropriate for each customer. This was done via an automated process utilizing the Overdraft Matrix that BancorpSouth built for the customers beginning in 2002, which the bank reviewed and re-calculated for the customers' accounts each time the customers' bank statements were generated. Ex. 1 at 126:20-127:15; 61:1-8 and Depo. Exhibits 4 and 6. The Overdraft Matrix was implemented at the recommendation of a third party

consultant, Earnings Performance Group, Inc. ("EPG"), in March 2002. Ex. 1 at 136:25-138:7 and Depo. Ex. 6.[13]

Augmenting its high-to-low re-sequencing practice, which went into effect in 2003, BancorpSouth's use of the Overdraft Matrix was integral to its overall scheme of increasing the number of completed debit transactions and, in turn, the number of overdrafts. And the entire Overdraft Matrix process of determining the amount which would be available and authorizing a transaction into overdraft was not disclosed to the customers during the class period. Ex. 1 at 60:19-25; 126:20-127:15. BancorpSouth's Rule 30(b)(6) representative pegged the percentage of retail customer accounts that were subject to the Overdraft Matrix and related overdraft limit at 96%. *Id.* at 229:21-231:3.

3. BancorpSouth adopted re-sequencing at the recommendation of consultants in order to increase revenue.

Beginning in 2002 and during the class period, BancorpSouth worked with EPG, a consulting firm that focused on the financial services industry and offered fee revenue optimization as one of its services. Ex. 1 at 136:25-146:16; Ex. 2 at p.11-12; Ex. 3 (BXS Swift H-006724); Ex. 24 (EPG proposal). BancorpSouth was approached by EPG in offering consulting services that EPG represented would increase the bank's revenue. *Id.* When engaged, EPG proposed policies for increasing bank profitability, including adopting a high-to-low posting order which commingled all debits. *Id.* Adopting that policy would increase non-interest revenue and streamline posting by eliminating the distinctions between types of transactions. *Id.* In its recommendation to the bank, EPG stated: "It is anticipated that the bank

[13] Changes to the Overdraft Matrix were made from time to time to enhance the benefit it provided to the bank and to reflect certain types of accounts to which it would not apply. *See* Ex. 37 to 42.

will also realize an increase in NSF/OD fee revenue, as more items will be paid into overdraft or returned." Ex. 24 at 3.

There is no doubt that the main purpose driving BancorpSouth's switch to high-to-low posting was to increase overdraft occurrences in order to generate more overdraft fees. In a presentation document which EPG provided to BancorpSouth, EPG wrote: "Currently, the bank posts debits to an account from Highest-to-Lowest amount within four buckets. The transactions migration that has occurred means that certain types of transactions are not being treated uniformly." Ex. 3 (BXS Swift H-006726); Ex. 24. EPG's stated solution was to reduce the buckets from 4 to 2, which EPG stated would create a $3.5 million benefit to the bank. *Id.* The bank adopted this recommendation by simplifying its posting system into 2 buckets and applying it to all consumer accounts: "all customer transactions in one bucket, high to low" and "bank initiated transactions in one bucket, high to low". Ex. 1 at 139:23-140:6. EPG had also recommended the concept of BancorpSouth offering the overdraft limit through the Overdraft Matrix. *Id.* at 207:19-23.[14]

With EPG's assistance, BancorpSouth implemented high-to-low re-sequencing in the beginning of 2003. Ex. 2 at p.11. Combined overdraft and NSF fee revenue, which had been around $35 million in 2002, grew to over $48 million in 2003, a 36% increase.[15] Ex. 18.

Even though high-to-low re-sequencing provided significant fee revenue, one regional bank president questioned posting high-to-low in 2005 in an email to BancorpSouth's top management. He wrote:

[14] Previous to the Overdraft Matrix, the bank used "an arbitrary overdraft limit that was assigned at account opening time of $25" to every account. Ex. 1 at 207:24-208:3.

[15] BancorpSouth did not segregate NSF and overdraft fees for revenue tracking purposes, but the large percentage increase experienced in Year 1 of high to low posting surely was the cause.

> PLEASE EXPLAIN THE RATIONALE BEHIND OUR POLICY OF POSTING LARGEST ITEMS FIRST. WHAT CAN BE DONE TO PROTECT OUR BANK FROM LOSS AND OUR TELLERS FROM CRITICISM IN SITUATIONS WHERE TRANSIT ITEMS COME THROUGH AND PAY AHEAD OF ITEMS WE HANDLE PROPERLY DURING OPERATING HOURS?

Ex. 36.

C. BancorpSouth's Deceptive Overdraft Fee Practices Ensnared the Class Representatives

The proposed class representative has claims that are typical of the claims of other Class members. Just like each Class member, Plaintiff was charged overdraft fees as a result of BancorpSouth's uniformly deceptive practice of re-sequencing debit card transactions from high-to-low. The narrative included in Appendix II demonstrates that Plaintiff would have been assessed fewer overdraft fees had BancorpSouth posted his debit card transactions in chronological order. In fact, Plaintiffs' expert, Arthur Olsen, has already calculated Plaintiff's damages during the Class Period using the limited data that BancorpSouth has produced to date in this case for Plaintiff. Declaration of Arthur Olsen in Support of Plaintiffs' Motion for Class Certification ("Olsen Decl.," attached as Appendix IV), ¶54. This initial analysis not only demonstrates that Plaintiff was harmed by BancorpSouth's practices, it also constitutes additional evidence that Mr. Olsen can perform a comprehensive damages analysis for the entire Class once BancorpSouth releases the class-wide data. Olsen Decl., ¶46-47.

D. BancorpSouth Failed to Disclose its Practices and Provided Misleading Information to All Class Members

BancorpSouth leveraged its overdraft fee scheme into a revenue stream of tens of millions of dollars annually by providing inaccurate and misleading information to Class members. BancorpSouth's so-called "disclosures" never advised that the bank would *always* manipulate transactions from high to low during the posting process. Ex. 1 at 209:13-25.

BancorpSouth kept its disclosures about its posting practices deliberately vague and pervasively misrepresented to customers how it would process debit transactions.

1. BancorpSouth's standardized agreements were vague and misleading.

BancorpSouth's account agreements derive from standardized form adhesion contracts that are uniform across the states in which BancorpSouth does business, and which were *not negotiable* for any retail customers. Ex. 1 at 179:1-180:24; 202:10-22. Upon implementing high-to-low posting in 2003 and continuing throughout the Class Period, the form contracts BancorpSouth provided to its retail banking customers contained similar disclosures regarding high-to-low sequencing and overdraft fee practices. BancorpSouth's Deposit Account Terms and Conditions provided the following relevant language for the first time in the October 22, 2008 version:

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

Ex. 8 (emphasis added).[16] This provision was buried deep in the account agreement which, throughout the Class Period, was a single-spaced, small-font form contract of adhesion. Nor is it accurate. BancorpSouth *always* posts such items from highest to lowest.

[16]Previous versions excluded the phrase: "Unless otherwise provided in the Account Information Statement (see OTHER TERMS section below)". *See* Ex. 4 to 7. Thus, prior to October 2008, customers were not directed by the Deposit Account Terms and Condition document to directly refer to the Account Information Statement, discussed *infra*.

BancorpSouth's Account Information Statement ("AIS"), referenced in the Deposit Account Terms and Conditions, was equally misleading in (a) its failure to refer to the uniform high-to-low posting order that had been established for all retail accounts and (b) its failure to inform the customers that they could opt out of the bank's so-called discretionary overdraft process, instead choosing to only inform customers that overdraft fees could be avoided if they enrolled in one of the bank's overdraft protection products.[17] The AIS from September 1, 2004 for the first time provided:

ABOUT OVERDRAFTS

> An "overdraft" occurs any time a check or other transaction is presented for payment against an account and the available balance of the account is insufficient to pay the check or transaction. When an overdraft occurs, we ***may***, at our discretion, return the check and refuse the transaction, or, alternatively, we ***may*** choose to pay the check or transaction, in which case a negative account balance will result. If we return the check and refuse the transaction, you will be charged an Insufficient Funds (NSF) Item fee for each returned check and refused transaction. ***If we pay*** the check or transaction, you will be charged an Overdraft (OD) Item fee for each check or transaction paid in overdraft.
>
> Determining whether to pay a check or other transaction in overdraft is ***strictly discretionary*** with us. We are not required to pay any check or other transaction in overdraft, even if we have paid overdrafts many times previously and even if we have permitted an account to remain in overdrawn status for an extended period. Also, if more than one check or other 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 of them in any order we choose, even if the order we choose results in greater Overdraft Item or Insufficient Funds item

[17] BancorpSouth's Rule 30(b)(6) representative noted the following in discussing the bank's overdraft limit practice using the Overdraft Matrix and its credit overdraft protection products: "Historically speaking, most customers don't apply and obtain credit overdraft protection. . . . Many of them, when they do apply, don't qualify for a credit facility. . . .And the overdraft limit criteria is really a payment decision tool to, No. 1, treat customers as consistently as possible across the spectrum of customers, throughout all the different branches and all – and where they're located." Ex. 1 at 205:14-206:2.

> fees than if we had chosen to pay them in some other order. We ***may*** also choose to first pay checks or other transactions which are payable to BancorpSouth and our affiliates.
>
> You ***may*** avoid Overdraft Item and Insufficient Funds Item fees on checking accounts through Overdraft Protection. Credit Card Overdraft Protection works by charging your BancorpSouth MasterCard or Visa credit card for cash advances in the amounts of checks or other transactions drawn against insufficient funds, with resulting deposits of the case advance amounts into your account to cover such checks or other transactions, up to the credit line of your credit card. Credit card fees, interest charges and cash advance charges will be assessed to your credit card account in accordance with your credit card terms and conditions. You ***may*** also avoid Overdraft Item and Insufficient Funds Item fees on checking accounts by establishing a BancorpSouth Equity Credit Line, which is a line of credit. In the event of an overdraft, the bank transfers the amount of the overdraft into your account and charges the amount as an advance against your Equity Credit Line, up to the limit of your credit line. An Overdraft Equity Credit Line fee will be charged to your checking account in accordance with the terms of your Equity Credit Line overdraft protection agreement. Ask your BancorpSouth customer service representative about Overdraft Protection. Also, ask a customer service representative for a copy of our brochure, "How to Avoid Paying Bank Fees."

See Ex. 14 (emphasis added).

Previous versions of the AIS included a vague reference to debiting multiple debit transactions presented for payment on a single banking day in descending order of the dollar amount of the transactions, but this process would have been part of BancorpSouth's pre-2003 posting order. Ex. 12 (BXS Swift H-006918). Also, some of these prior versions mentioned: "A description of the categories, method, and order of payment/posting is available upon request." *Id.* Notably, the bank removed this verbiage from the AIS as of the May 1, 2003 version. Ex. 13.

BancorpSouth never disclosed to customers its practice of re-sequencing debit transactions to artificially increase the number of overdrafts and overdraft fees. While the bank's

posting practice remained consistent throughout the Class Period, and could have easily been described in clear, certain terms, the Deposit Account Terms and Conditions and AIS never disclosed BancorpSouth's actual posting practice. It merely cryptically stated that BancorpSouth "***may*** pay any of them in any order we choose." Plus, the bank removed the offer to provide customers with a description of the actual posting order.[18]

Comparing BancorpSouth's account agreement documentation to what the Court should recall Union Bank represented to its customers, there was not even a reference to a concept that larger checks would ***generally*** be paid first so as to even suggest that high-to-low posting would be the bank's preference and could increase the frequency of overdrafts for the bank's benefit. Dkt. No. 1387 at 25. BancorpSouth did not disclose to its customers that it ***always*** posted debit transactions in the order of highest-to-lowest in dollar amount throughout the Class Period. And while the BancorpSouth did indicate that the order it chose could result in greater insufficient funds fees than if the bank chose some other order, in fact, BancorpSouth's high-to-low re-sequencing was implemented in 2003 and never changed thereafter.

2. BancorpSouth actively sought to conceal its scheme.

BancorpSouth's vaguely worded account agreements were purposeful, as BancorpSouth took active measures ***not*** to communicate to Class members the bank's high-to-low re-sequencing and method of setting the customer's Overdraft Matrix Limit. When it adopted high-to-low posting in 2003, BancorpSouth made the conscious decision not to disclose the change or

[18] In 2007, high level bank personnel discussed the level of customer communications regarding NSF and overdraft fees in an e-mail. Reference was made to a How to Avoid Fees brochure that only briefly touched on NSF and overdraft fees without mention of the bank's uniform high-to-low posting process or the Overdraft Matrix Limit. The email author noted: "We do not monitor and communicate to a targeted group of customers using parameters such as number of times the account is overdrawn. We can do this if requested." Ex. 26. This never changed during the class period. Apparently in 2010, after Regulation E changes went into effect, the bank committed to the FDIC to improve customer communications. Ex. 27.

the new posting order to customers and maintained that policy throughout the Class Period. A prime example of such active concealment came in the form of a Frequently Asked Questions training document given to the bank's call center employees discussing the Overdraft Matrix, which includes the following verbiage:

> Seldom do we have the opportunity to present our customers with such outstanding financial and customer service benefits while at the same time providing improved branch and back office productivity together with a ***fair and consistent decision-making process*** and improved risk control. As you will see in reviewing the following questions and answers regarding BancorpSouth's ***new automated pay/return check decision process***, our new Overdraft Matrix is a win – win for our customers as well as BXS.
>
> BancorpSouth is joining a number of other banking systems already providing some form of check/ATM/POS, pay/return system. Regional ***competitors*** such as AmSouth, Compass, Union Planters and Trustmark offer a similar automated system. . . . Our new soon-to-be partner in Little Rock, Pinnacle Bank, also currently offers such an arrangement.
>
> . . . .
>
> The Matrix Overdraft Limit itself **<u>should not</u>** be disclosed to the customer. Because the limit will fluctuate with account age and activity, disclosure may cause confusion. This is an internal process and should be transparent [sic][[19]] to the customer.

Ex. 1 at Depo. Exhibit 6 (bold and underline in original).[20]

[19] The bank used the word "transparent" when it should have used "opaque" because it was not willing to disclose the Overdraft Matrix Limit. The use of the word transparent in this document should not be chalked up as an anomaly because the bank's Deposit Operations manual used the same incorrect word. Ex. 25 (BXS Swift H-006442).

[20] A full reading of Deposition Exhibit 6 reflects other evasive answers that call center employees were trained to give customers in response to questions about the bank's then new practice. Another frequently asked customer questions document provided similarly evasive scripted responses to be used by retail banking staff and call center employees in the event of customer inquiries. Ex. 1 at Depo. Exhibit 5. This script was misleading because the scheme was precisely intended to charge additional overdraft fees to provide BancorpSouth with huge revenue flow, not to cover extra costs.

As addressed above, the ABOUT OVERDRAFTS section of the AIS, implemented for the first time in September 1, 2004, did not disclose the uniform high-to-low posting policy that was geared toward increasing overdraft revenue, and the bank did not promote the opportunity to opt out, but instead offered information about overdraft protection products that the bank knew most customers did not apply for and/or lacked the credit to qualify. Ex. 1 at 205:14-206:2.[21] BancorpSouth thus deliberately chose to be vague and not specifically disclose that it would systematically re-sequence all debit transactions from high-to-low and that the change would generate substantially more overdraft charges. Although the bank used "statement messages" on the bank statements to inform customers of changes affecting their accounts from time to time, the bank never did it regarding its change in posting order. Ex. 1 at 177:18-22.

BancorpSouth also took measures to keep the Overdraft Matrix and assigned overdraft limit secret. Ex. 1 at 226:16-227:8. The bank's Rule 30(b)(6) representative testified to his knowledge that a local competitor, Renasant Bank, did disclose the overdraft limits and the underlying matrix to its customers. *Id.* In 2004, a year into the high-to-low posting practice, the bank's Payment Strategy Group made up of top-level bank management, discussed the possibility of disclosing the Overdraft Matrix Limit to customers, and conferred with EPG regarding doing so, but never did thereafter. Ex. 34, 35.

Having admonished employees that the Overdraft Matrix Limit "**should not** be disclosed" to the customers, it would be difficult for Class members to otherwise discover the secret line of credit because when BancorpSouth authorized a POS debit-card transaction pursuant to Overdraft Matrix, the customer was not notified at the point of sale that the

[21] The bank's internal procedures required high level bank approval to approve a customer's opt out request. *See* Ex. 25 (BXS Swift H-006443) (requiring regional president and bank president signatures required).

transaction would overdraw their account or that they may be assessed an overdraft charge if they proceeded. This is true as to both PIN-based and signature-based transactions. And in the unlikely event that a customer actually discovered the secret line of credit, and wanted to be excluded from the bank's overdraft payment service, BancorpSouth representatives were directed that they would need authorization to turn off the Overdraft Matrix decision making on the account. Ex. 1 at Depo. Exhibit 6 (BXS Swift H-007250).

BancorpSouth did the foregoing throughout the Class period despite the fact that it had requested and circulated amongst senior management white papers provided by the American Bankers Association in 2004, which specifically discussed the importance of educating the consumers:

- As to POS transactions: "**Because of the inability to proactively notify the customer prior to authorizing the transaction, the financial institution should carefully consider whether or not to make the overdraft limit available through the POS channel.**"

- For Online Banking transactions: "If a financial institution extends overdraft services to its online banking channel, **the best practice is to notify the customer when the transaction is initiated** that the account will be overdrawn and the NBF fee will be assessed. Additionally, **the overdraft limit should not be included in the available balance presented to the customer on the screen**, unless it clearly states that the balance includes the overdraft limit.

- "When balancing the risk of automating the payment of items into an overdraft situation, a conservative approach strongly suggests that a financial institution should make every attempt to inform its customers about what types of transactions will cause an overdraft and the applicable fees charged. . . . Only clear, consistent communication with customers will eliminate the unknown and allow customers to make informed choices when utilizing the service at any channel available to them."

Ex. 31 at 2 (bold emphasis in original).

E. The Common Impact on the Class: BancorpSouth Reaped Millions of Dollars in Unlawful Overdraft Fees

1. BancorpSouth's deceptive overdraft practices produced enormous profits.

BancorpSouth made enormous profits during the Class Period from overdraft fees, much of its taken from the banks most vulnerable customers. NSF/OD fees "increased dramatically since 2001" with the following figures:

Year	Net NSF/OD Fee Total
2001	$29,237,000
2002	$35,489,984
2003	$48,126,638
2004	$49,057,362
2005	$51,060,536
2006	$56,665,846
2007	$62,481,696
2008	$61,957,356
2009	$57,512,689
2010	$54,761,357

Ex. 45 (as to 2001 total); Ex. 18 (as to 2002-2010 totals). Again, 2002 marked the first year BancorpSouth used the Overdraft Matrix, and in 2003 the bank's implementation of high-to-low re-sequencing allowed it to achieve a 36% increase in Net NSF/OD fee revenue during that first year.

BancorpSouth closely monitored overdraft fee income, generating quarterly reports that demonstrate this. *See* Ex. 1 at 158-159 ("since 2006, you know, we've averaged between 50, 51, 52 million to 60 million in NSF/OD revenue on an annualized basis"). The bank also had a clear policy of trying to avoid refunding overdraft fees in order to allow branches to make budget. *See* Ex. 29. The bank adopted a written goal in its Deposit Operations manual for each branch to collect 90% of the NSF/OD fees, and refunds counted against branch income. Ex. 19 (BXS Swift H-003239). Monthly, senior management reviewed reports reflecting gross NSF/OD fees, waived fees, refunded fees, and charged off fees to determine total lost fees at the individual

branch level. *See, e.g.* Ex. 46 (providing an example of the tracking reports); Ex. 44 ("matrix makes the decision to pay therefore the controllable part is the refunds" in context of setting goal of 95% collection goal excluding chargeoffs).

2. Customer complaints relating to BancorpSouth's overdraft practices highlight the egregiousness of BancorpSouth's uniform conduct.

BancorpSouth's conduct prompted Class members to complain, but absent formal complaints, that is, complaints made to regulatory agency, BancorpSouth did not maintain records of such complaints to its call center. Ex. 1 at 199:12-22; 200:2-17. Complaints to the bank's call center are not kept. *Id.* at 199:12-22 ("But if it's a call center, you know, inquiry, you know, hey, you know you charged me three fees yesterday. I don't like that. No, there's no record kept."). One customer recently responding negatively to the bank's September 2010 request that she provide her opinion of its Online Banking system, noting that she had moved her account from Regions Bank to BancorpSouth, and describing shortcomings with completing fund transfers initiated online, tracking account balances, and understanding the account balances. Ex. 21 (BXS Swift E-001187-001189). This critique resulted in an exchange between bank personnel, making it up the bank's management hierarchy, the highlights of which include: "we get this type of questions [sic] presented to us quite frequently about our Online Banking. Just wanted to pass this on from one our customers that is very tech savy" and "[t]his is starting to get embarrassing. . ." *Id.*

BancorpSouth also knew that its overdraft policies confused consumers. *See* Ex. 22 (BXS Swift E-005619-000620) (bank employees referring to a confused customer who had at one point actually been inadvertently advised of her assigned Overdraft Matrix Limit, and later expressed confusion when assessed an NSF fee after the bank lowered her limit). Bank employees were also confused about the bank's high to low posting method and the mechanics

of the Overdraft Matrix.. *See* Ex. 23, 33. The foregoing complaints and confusion amongst customers and employees alike constitute additional evidence of BancorpSouth's uniform course of conduct in imposing overdraft fees on the class and highlight the egregiousness of that conduct.

III. ARGUMENT

Class actions have long been recognized by the courts as an essential tool for adjudicating cases involving multiple claims that have similar factual and/or legal inquiries and that might be too modest to warrant prosecuting on an individual basis. In crafting Rule 23, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Class actions thus give voice to plaintiffs who "would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *see also Holmes v. Continental Can Co.*, 706 F.2d 1144, 1154 (11th Cir. 1983) (describing "the policies of Rule 23" and observing "the individual might be unable to obtain counsel to prosecute his action when the amount of individual damages is relatively small") (quoting *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1220-21 n.80 (5th Cir. 1978)). Class actions also serve an important deterrent function. "The public at large . . . benefit[s] from a class action and expeditious adjudication of the issues involved, since class actions reinforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement." *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727, 733 (N.D. Ill. 1977) (citations and quotations omitted).

Thus, "[i]t is well-established that class actions are a particularly appropriate and desirable means of redressing common claims for uniform legal violations that affect large

numbers of persons in the same way." *Brown v. SCI Funeral Servs. of Fla., Inc.*, 212 F.R.D. 602, 603 (S.D. Fla. 2003); *see also Smilow v. Southwestern Bell Mobile Sys.*, 323 F.3d 32, 41-42 (1st Cir. 2003) (classes of consumers are particularly ripe for certification). The policies underlying the need for class action litigation require that certification under Rule 23 be liberally construed. *See, e.g., Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) (citations omitted) ("The interests of justice require that in a doubtful case … any error, if there is to be one, should be committed in favor of allowing a class action."); *Lessard v. Metropolitan Life Ins. Co.*, 103 F.R.D. 608, 610 (D. Me. 1984) ("Rule 23(a) should be liberally construed in order not to undermine the policies underlying the class action rule.").

Although the Court must undertake a rigorous analysis of the Rule 23 prerequisites, the Court has broad discretion to certify. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1251 (11th Cir. 2004). In making the decision, the Court does ***not*** determine whether plaintiffs will ultimately prevail on the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). But it may consider the factual record in deciding whether the requirements of Rule 23 are satisfied. *Valley Drug. Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003). Courts "formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Waste Mgmt. Holdings v. Mowbray*, 208 F.3d 288, 298 (1st Cir. 2000). In other words, the Court undertakes "an analysis of the issues and the nature of required proof at trial to determine whether the matters in dispute and the nature of plaintiffs' proofs are principally individual in nature or ***are susceptible of common proof*** equally applicable to all class members." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 334 (E.D. Mich. 2001) (emphasis added) (quoting *Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236, 241 (E.D. Mich. 1997)).

In this case, the record supports certification of the Class pursuant to Rule 23(b)(3). By proving his own case, the named Plaintiff will succeed in proving absent Class members' claims against BancorpSouth.

A. Plaintiff and This Case Satisfy the Requirements of Rule 23(a)

Rule 23(a) requires a party seeking class certification to satisfy four prerequisites: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. *Klay*, 382 F.3d at 1250.

1. The Class is so numerous that joinder of all members is impracticable.

Rule 23(a)(1) requires that the proposed Class be so numerous that joinder of all members is impracticable. Joinder need not be impossible; the rule only requires that the difficulty or inconvenience of joining all members make use of the class action appropriate. "[A] numerical yardstick is not the determinant for class certification; rather a court should examine the numbers involved to see if joinder of all is impossible or impracticable." *Hastings-Murtagh v. Texas Air Corp.*, 119 F.R.D. 450, 459 (S.D. Fla. 1988) (King, J.). Courts in the Southern District and the Middle District have found numerosity where the class numbered 500, 4,700 and 9,000. *See Brown*, 212 F.R.D. at 604 (9,000); *Miles v. America Online, Inc.*, 202 F.R.D. 297 (M.D. Fla. 2001) (4,700); *CV Reit, Inc. v. Levy*, 144 F.R.D. 690, 696 (S.D. Fla. 1992) (500); *see also Larsen v. Union Bank, N.A.*, [D.E. #1763 at 8] ("*Larsen*") (certifying proposed class in the tens- or hundreds-of-thousands).

This case easily satisfies the numerosity requirement. Although the exact number of Class members is unknown at this time, BancorpSouth's discovery responses indicate that the proposed Class is comprised of thousands of BancorpSouth customers, making joinder of them all impracticable if not impossible. Accordingly, BancorpSouth stipulates that "[f]or purposes of class certification only, BancorpSouth Bank does not contest that during the course of the Class

Period thousands of consumer account holders had at least one day during the Class Period on which they had more than one overdraft fee in a single day." Ex. 47.

2. There are questions of law and fact common to all Class members.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. The "commonality" requirement of Rule 23(a)(2) "is a 'low hurdle' easily surmounted." *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 63 (D. Mass. 1997) (citations omitted); *see also Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003) (commonality threshold is "not high"). It only requires "at least one issue common to all class members." *Brown*, 212 F.R.D. at 604. Where the defendant is alleged to have "engaged in a standardized course of conduct that affects all class members," commonality is satisfied. *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 685-86 (S.D. Fla. 2004); *see also Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 74 (E.D.N.Y. 2004) ("claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action"). Moreover, "Plaintiffs' legal claims need not be completely identical and factual differences concerning treatment or damages will not defeat a finding of commonality." *Brown*, 212 F.R.D. at 604.

The Class satisfies the commonality test. The allegations and proof (summarized above) focus on the existence, scope, duration and efficacy of BancorpSouth's scheme. The liability proof will place the actions of BancorpSouth at center stage – proof common to all of the thousands of Class members: BancorpSouth's disclosures to all Class members were materially uniform, as were its re-sequencing policies; BancorpSouth's debit card transaction re-sequencing was done using the same computer programs and systems for all Class members; and BancorpSouth assessed all Class members overdraft fees based on re-sequencing.

Thus, while only one question of law ***or*** fact is required, there are many questions of law and fact common to the proposed Class, including whether BancorpSouth:

- Disclosed and/or refused to allow its Class members to opt out of the overdraft payments service and the undisclosed Overdraft Matrix Limit assigned to the customers;

- Alerted Class members that a debit card transaction would trigger an overdraft fee if processed and provided them with an opportunity to cancel the transaction;

- Manipulated and re-ordered transactions in order to increase the number of overdraft fees imposed;

- Imposed overdraft fees when, but for re-sequencing, there would be sufficient funds in the account; and

- Breached its covenant of good faith and fair dealing with Plaintiffs and the Class; engaged in practices that were substantively and procedurally unconscionable; was unjustly enriched at the expense of Plaintiffs and the Class; and violated the Arkansas Deceptive Trade Practice Act.

This Court found the same or similar issues to satisfy the commonality requirements of Rule 23(a)(3) in *Larsen* [D.E. #1763 at 9]. Other common questions of law and fact include the proper method by which to measure damages and the declaratory relief to which the Class is entitled.

3. Plaintiff's claims are typical of those of the Class.

Rule 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." This "typicality" requirement is met when the claims of the representative plaintiffs arise from the same course of conduct that gives rise to the claims of the other class members, and where the claims are based upon similar legal theories and are not antagonistic to those of the class. *Pottinger v. Miami*, 720 F. Supp. 955, 959 (S.D. Fla. 1989). Typicality and commonality are related, with commonality referring to the group characteristics of the class as a whole, and typicality focusing on the named plaintiffs' claims in relation to the class. *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. at 686 n.23.

Typicality does not require identical claims or defenses, and a "factual variation will not render a class representative's claim atypical unless the factual position of the representative

markedly differs from that of other members of the class." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). Indeed, any alleged atypicality between the named plaintiffs' claims and those of the class "must be clear and must be such that the interests of the class are placed in significant jeopardy." *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 326 (S.D. Fla. 1996). Nor do variations in the amount of damages vitiate typicality. *Kornberg*, 741 F.2d at 1337; *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. at 687.[22]

Plaintiff's claims here arise out of the same course of conduct and are based on the same legal theories as those of the absent Class members. Plaintiff and members of the Class, governed by common and materially uniform agreements, were subjected to BancorpSouth's practice of re-sequencing debit card transactions from high-to-low, and was assessed overdraft fees as a result. Plaintiff and the Class seek redress via common legal claims for breach of the duty of good faith and fair dealing, unjust enrichment, unconscionability, and the Arkansas Deceptive Trade Practice Act. Thus, the claims of Plaintiff and the Class arise from the same course of BancorpSouth's conduct and are based on the same legal theories, thereby satisfying Rule 23(a)(3). Moreover, Plaintiff proposes discrete multi-state subclasses for some of the state law claims to ensure the proposed class representatives' claims are materially identical to all

[22]Courts have consistently refused to deny class certification where the named plaintiffs may have been subject to unique defenses such as lack of reliance, statute of limitations, or compulsory counterclaims. *See, e.g., Margaret Hall Found. v. Atlantic Fin. Mgmt.*, 1987 U.S. Dist. LEXIS 7528, at *7 (D. Mass. Jul. 30, 1987) ("possible statute of limitations defenses, like possible nonreliance defenses, do not vitiate typicality"); *Lessard v. Metropolitan Life Ins. Co.*, 103 F.R.D. 608, 611 (D. Me. 1984) (holding that named plaintiff is not atypical because she may be subject to compulsory counterclaims). This is because "typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff." *Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. at 687 (quoting *In re Playmobile Antitrust Litig.*, 35 F. Supp. 2d 231, 242 (E.D.N.Y. 1998)). It is only when a unique defense "will consume the merits of a case that a class should not be certified." *In re Synthroid Mktg. Litig.*, 188 F.R.D. 287, 291 (N.D. Ill. 1999). BancorpSouth can make no such showing here.

other Class members that they seek to represent. *See infra* at 44 to 51. And the Court found typicality under similar circumstances in *Larsen*. [DE #1763 at 10-11.]

4. Plaintiff will fairly and adequately protect the interests of the Class.

Rule 23(a)(4) requires that the representative parties will "fairly and adequately protect the interests of the class." This requirement is satisfied when (i) the class representatives have no interests conflicting with the class; and (ii) the representatives and their attorneys will properly prosecute the case. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d at 1189. Both prongs are satisfied here.

a. Plaintiff's interests do not conflict with the interests of the Class.

The named plaintiff is adequate if he shares common interests with the class members and seeks the same type of relief for himself as he seeks for the class. *Pottinger*, 720 F. Supp. at 959. The existence of minor conflicts of interest between the plaintiff and the class "alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy." *Valley Drug*, 350 F.3d at 1189. A fundamental conflict exists where the economic interests and objectives of the class representatives "differ significantly from the economic interests and objectives of unnamed class members," such as when other members of the class actually benefited from the conduct challenged by the plaintiff. *Id.* at 1189-90. No such fundamental conflict exists here.

Neither the Plaintiff nor his counsel have any interests that are antagonistic to those of the absent Class members. The central issues in this case – the existence, unlawfulness and effect of BancorpSouth's scheme to manipulate debit card transactions and increase the number of overdraft fees assessed – are common to the claims of Plaintiff and the other members of the Class. Plaintiff, like each absent Class member, has a strong interest in proving BancorpSouth's scheme, establishing its unlawfulness, demonstrating the impact of the illegal conduct and

obtaining redress. Certainly, no Class member has an interest in paying ***more*** overdraft fees, and there is no colorable argument to be made that BancorpSouth's assessment of excessive overdraft fees benefited the Class. As Plaintiff proves his own claims, he also will be proving the claims of thousands of absent Class members. Plaintiff thus "share[s] the true interests of the class." *Texas Air*, 119 F.R.D. at 459; *see also Tefel v. Reno*, 972 F. Supp. 608, 617 (S.D. Fla. 1997) (King, J.) (the "common goal of each member of the class" is to remedy the unlawful conduct, and "[i]f the Plaintiffs succeed, the benefits will inure to all class members."). *See also Larsen* [DE #1763] at 11-12.

b. Plaintiff's counsel are qualified.

Class counsel must be qualified to represent the Class, and the Plaintiff must participate in the prosecution of the litigation. *Brown*, 212 F.R.D. at 605. The law firms seeking to represent the Class here include very qualified lawyers experienced in the successful prosecution of consumer class actions, and they have collectively recovered billions-of-dollars for class members in other litigation. To support the determinations required under Fed. R. Civ. P. 23(a)(4) and 23(g), the firms seeking appointment as Class Counsel, including those appointed to leadership positions in the Court's prior orders, each provide a firm resume setting forth their experience and expertise in class actions. *See* Ex. 84.[23] These firms and their co-counsel stand ready, willing and able to devote the resources necessary to litigate this case vigorously and to see it through to the best possible resolution. The Court has already so found in the *Larsen v.*

[23]These firms are Bruce S. Rogow, P.A.; Podhurst Orseck, P.A.; Grossman Roth, P.A.; Baron & Budd, P.C.; Golomb & Honik, P.C.; Lieff Cabraser Heimann & Bernstein LLP; Trief & Olk; Webb, Klase & Lemond, L.L.C.; The Kopelowitz Ostrow Firm, P.A.; and Chitwood Harley Harnes LLP.

Union Bank, N.A. case. And Plaintiff has expressed his commitment to overseeing the attorneys and participating in the prosecution of the case.[24]

B. Plaintiff and This Case Satisfy the Requirements of Rule 23(b)

In addition to establishing the elements of Rule 23(a), Plaintiff also must show that this case satisfies at least one of the conditions of Rule 23(b). *Klay*, 382 F.3d at 1250. Under Rule 23(b)(3), certification is appropriate if: (i) common questions of law or fact predominate over questions affecting the individual class members only; and (ii) class treatment is superior to other methods available for adjudicating the controversy.

1. Common questions of law or fact predominate.

a. Common issues predominate because legal and factual questions here will be resolved with proof common to Plaintiff and Class members.

"Common issues of fact and law predominate if they 'have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief.'" *Klay*, 382 F.3d at 1255 (quoting *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001)); *see also Moore v. Painewebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (Common issues predominate "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."). It is not necessary that all questions of law or fact be common; only some questions must be common, and they must predominate over individual questions. *Klay*, 382 F.3d at 1254; *see also In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001) (the rule "calls only for predominance, not exclusivity, of common questions").

[24] *See* Declaration of Plaintiff Shane Swift, which is included in Appendix II.

The predominance inquiry seeks to determine the evidentiary effect of adding plaintiffs to the Class. If adding more plaintiffs requires the introduction of "significant amounts of new evidence," this suggests that individual issues are important. Conversely, if adding more plaintiffs leaves the amount of evidence needed to prove the claims "relatively undisturbed," common issues likely predominate. *Klay*, 382 F.3d at 1255.

Numerous courts have held that "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003) (citing *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001)).

Rule 23(b)(3) is satisfied here. As the evidentiary proffer summarized above and in the accompanying Trial Plan demonstrate, the salient evidence necessary to establish Plaintiff's claims is common to both Plaintiff and all members of the Class; they all seek to prove that BancorpSouth's high-to-low re-sequencing practice was wrongful. And the evidentiary presentation changes little if there are 100 class members or 100,000: in either instance, Plaintiff would present the ***same*** evidence of (i) BancorpSouth's form adhesion contracts, with similar terms, applicable to Plaintiff and Class members;[25] (ii) BancorpSouth's systematic re-sequencing of debt transactions from high-to-low for Plaintiff and Class members through its automated software programs;[26] and (iii) the secret "Overdraft Matrix" that BancorpSouth secretly established for Plaintiff and Class members in order to charge them overdraft fees.[27] In the words of the Eleventh Circuit, the foregoing evidence has a direct impact on every Class

[25] *See, e.g.*, Ex. 1 at 179:1-180:24; 202:10-22.

[26] *See, e.g.*, Ex. 1 at 68:2-9; 82:18-87:16; Ex. 2 at p.11 (high-to-low posting for all retail accounts); Ex. 1 at 178:23-179:1 (high-to-low posting same from state to state within BancorpSouth footprint).

[27] *See, e.g.*, Ex. 1 at 226:16-227:8.

member's effort to establish liability and on every Class member's entitlement to relief. *Klay*, 382 F.3d at 1255

This Court, in its decision certifying the class in *Larsen*, found predominance to be satisfied by form contracts with similar terms applicable to Plaintiffs and the Class members, the bank's "systematic re-sequencing of debt transactions from high-to-low for all Plaintiffs and class members through its automated software programs," and a line of credit that the bank secretly established for all plaintiffs and class members in order to impose overdraft fees on them. DE #1763 at 14. Those elements are likewise present in this case.

Similarly, in certifying the class in *Gutierrez v. Wells Fargo Bank, N.A.*, 2008 U.S. Dist. LEXIS 70124, at *48-49 (N.D. Cal. Sept. 11, 2008), under similar circumstances, U.S. District Judge William Alsup found that common issues predominated:

> The challenged practice is a standardized one applied on a routine basis to all customers. . . . [I]ndividual variations will not predominate over the pervasive commonality of the highest-to-lowest method and its adverse impact on hundreds of thousands of depositors.

In rejecting Wells Fargo's motion to decertify the class on the eve of trial, Judge Alsup again concluded that "there is no question that common questions predominate in this action." *Gutierrez v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 29117, at *41 (N.D. Cal. Mar. 26, 2010). The Court also noted:

> The legal claims of the "re-sequencing" class target the alleged overcharging of overdraft fees for over a million different Wells Fargo customers. . . . All members of the "re-sequencing" class were charged overdraft fees due to defendant's accused high-to-low posting of transactions. The fees themselves, however, were only around $34 each. Given this backdrop, it cannot be disputed that a denial of class-certification would close the door of justice to a staggering amount of claimants. The deterrent value of class litigation and the desirability of providing recourse for the injured consumer who would otherwise be financially incapable of bringing suit clearly render the class action a viable and important

> mechanism in challenging an alleged fraud on the public. This is *especially* important here, where the allegedly unlawful practice disproportionately gouges those who maintain, due to choice or (more likely) financial hardship, a shallow amount of funds in their checking accounts. [*Id*. at *40.]

Judge Alsup's certification decision in *Gutierrez* is even more persuasive given that consumer class actions are particularly appropriate where, as here, the defendant exhibits a common course of conduct. *See, e.g., Amchem Prods. Inc., v. Windsor*, 521 U.S. at 625 ("[p]redominance is a test readily met in certain cases alleging consumer . . . fraud"); *Allapattah Servs., Inc. v. Exxon Corp*., 333 F.3d 1248 (11th Cir. 2003); *Roper v. Consurve, Inc*., 578 F.2d 1106 (5th Cir. 1978).

In *Allapattah Services,* Exxon dealers alleged that Exxon breached their agreements and violated the duty of good faith and fair dealing by overcharging them for fuel purchases. At issue was an "open price term" in Exxon's form contracts with each dealer, which permitted Exxon to adjust the price of the gasoline that it delivered in response to commercial dynamics in various distribution markets. Exxon used that clause to charge dealers a three percent processing fee on sales to consumers who paid by credit card. Exxon promised to offset this charge by reducing the wholesale price that each dealer paid for the gasoline, actually provided the offset for approximately six months, but then stopped the offset without informing the dealers. 333 F.3d at 1251.

The Eleventh Circuit upheld certification of a class of 10,000 dealers in 35 states. In focusing on the materially similar nature of both the agreements and the breach, the Court rejected Exxon's plea that individual issues inherent in each dealer's breach of contract claim predominated:

> Because all of the dealer agreements were materially similar and Exxon purported to reduce the price of wholesale gas for all dealers, the duty of good faith was an obligation that it owed to the dealers as a whole. Whether it breached that obligation was a

> question common to the class and the issue of liability was appropriately determined on a class-wide basis.

Id. at 1261.[28] Just as BancorpSouth did, Exxon cheated all of the dealers in the exact same way. Thus, "[o]nce the plaintiffs proved that Exxon engaged in this behavior, each individual plaintiff's breach of contract claim was substantially advanced" by this class-wide evidence.[29] And so it is here.

Similarly, in *Roper*, the Fifth Circuit supported certification of a class of 90,000 credit card holders who accused a national bank of imposing usurious interest on the unpaid portion of prior bills. Common issues predominated even though an individual inquiry needed to be made into each class member's transaction history, a process that could be done systematically by the plaintiffs' expert using defendant's data. Defendants' billing program harmed each customer in the same way through the use of the same allegedly illegal formula, and proof of this common course of conduct substantially advanced all class members' claims. The Court thus found that Rule 23(b)(3) was satisfied:

> This is a classic case for a Rule 23(b)(3) class action. The claims of a large number of individuals can be adjudicated at one time, with less expense than would be incurred in any other form of litigation. The claims are relatively small, said even by the plaintiffs to average less than $100 each, and the question of law is one that applies alike to all. While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps with some clerical assistance. It will not be necessary to hear evidence on each claim.

578 F.2d at 1112.

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[28]Notably, before appeal, the jury returned a special verdict in favor of the plaintiffs on a class-wide basis, *id.* at 1252, thereby demonstrating the manageability of the multi-state claims, which Exxon did not even bother to challenge on appeal.

[29]This quotation was how the *Klay* court described the import of *Allapattah Services* decision. *See* 382 F.3d at 1266.

As in the foregoing cases, Plaintiff here challenges a uniform deception perpetrated on all Class members by BancorpSouth. Once Plaintiff proves BancorpSouth's common course of conduct, the claims of Plaintiff and all Class members are substantially advanced. Common issues thus predominate.

b. Common issues will also predominate because BancorpSouth's records will be used to systematically ascertain the Class and calculate each Class member's individual damages.

BancorpSouth maintains meticulous records of the amounts of overdraft fees charged the Class members during the Class Period in its payment decision reports, in addition to the detailed transaction data that resulted in those charges. Ex. 1 at 150:15-25. Although the bank did not regularly track overdraft revenue using a separate transaction code until 2009 to comply with Federal Regulation E, the Bank's 30(b)(6) representative indicated that the bank maintains data concerning the individual transactions from which overdraft fees were generated from which the Plaintiff's expert could calculate the bank's overdraft revenue. *Id.* at 141:8-142:1; 149:18-22; 150:15-25. This information will be used to identify Class members and calculate the total, adverse impact to the Class. Olsen Decl., ¶¶ 37-54-.

Courts regularly certify classes where the defendant's records can be mined to identify class members and the harm that they suffered. For instance, in *Roper v. Consurve, Inc*., 578 F.2d 1106 (5th Cir. 1978), the plaintiffs' expert testified that he could utilize the bank's detailed computer data to isolate the amount of interest that was usurious. He would do this by determining billing dates, charges, credits, finance charges, payment, and payment dates for each cardholder, thereby "reconstruct[ing] every account in full by again processing the transactions." *Id*. at 1109-10. The Fifth Circuit found this methodology sufficed to ensure that individual issues did not swamp the common ones. *Id*.; *see also Smilow*, 323 F.3d at 40 (common issues predominate "where individual factual determinations can be accomplished using computer

records, clerical assistance, and objective criteria – thus rendering unnecessary an evidentiary hearing on each claim"); *Sadler v. Midland Credit Mgmt.*, 2009 U.S. Dist. LEXIS 26771, at *4-5 (N.D. Ill. Mar. 31, 2009) (automated query of defendants' database would yield "objective criteria" necessary to ascertain the class); *Stern v. AT&T Mobility Corp.*, 2008 U.S. Dist. LEXIS 110305, at *12-13 (C.D. Cal. Aug. 22, 2008) (defendants' business records provided sufficient information to identify individuals who purchased cellular telephone service and were enrolled in either one of the challenged services without ever having requested the service); *In re Diet Drugs Prods. Liab. Litig.*, 1999 U.S. Dist. LEXIS 13228, at *34-35 (E.D. Pa. Aug. 26, 1999) (finding class definition was adequate because there were reliable means to determine who had actually taken the drug where fact sheets, prescription records, and records of medical treatment were available to verify consumption).

As in the foregoing cases, Class members here are readily ascertainable through objective criteria: BancorpSouth's own records of individuals who were assessed overdraft fees. Plaintiff's expert will formulate calculations that can identify members of the Class simply by running queries in BancorpSouth's computer records. Such calculations would be merely ministerial in nature, and will not require resolution of individual Class member issues.[30] Likewise, damages will be calculated using the same BancorpSouth records used to identify the Class members.

[30]In *Gutierrez v. Wells Fargo Bank, N.A.*, Plaintiff's expert, Arthur Olsen, withstood Wells Fargo's *Daubert* challenge to his methodology and conclusions. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). At the conclusion of the trial, Judge Alsup found Mr. Olsen's methodology to be "professional" and "careful," and the Court concluded that Mr. Olsen had "convincingly" identified the class members and isolated the amounts that were wrongfully taken by Wells Fargo from the class. *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1139 (N.D. Cal. 2010).

"[W]here damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification." *Klay*, 382 F.3d at 1259-60 (footnotes omitted). By applying an "algebraic formula" for the computation of damages, Plaintiff meets the predominance requirement of Rule 23(b)(3) even if "the jury will also have to consider some individualized evidence in rendering individual damage calculations." *In re Terazosin Hydrochloride Antitrust Litig.*, 203 F.R.D. 551, 559 (S.D. Fla. 2001); *see also Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1310 (11th Cir. 2008) (class treatment appropriate where plaintiffs contended that damages could be determined "with relative ease through basic forensic accounting" using defendant's own data); *Pickett v. IBP, Inc*. 2001 U.S. Dist. LEXIS 22453, at *35 (M.D. Ala. Dec. 21, 2001) ("If damages can be computed using 'statistical techniques, the existence of individualized damage claims does not pose a barrier to certification."); *Walsh v. Pittsburgh Press Co.*, 160 F.R.D. 527, 531 (W.D. Pa. 1994) (noting that where damages "are largely a matter of mathematical calculation" courts may find that common questions predominate); *Brown v. Pro Football*, 146 F.R.D. 1, 5 (D.D.C. 1992) (Where proof of injury and damages "breaks down on what may be characterized as 'virtually a mechanical task,' 'capable of mathematical or formula calculations,' the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability.") (quoting *Windham v. American Brands*, 565 F.2d 59, 68 (4th Cir. 1977)); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1994 U.S. Dist. LEXIS 16658, at *13-14 (N.D. Ill. Nov. 15, 1994) ("the possible complexity of a damage calculation" should not preclude class certification).

Plaintiff will be able to use BancorpSouth's records to apply formulaic damage calculations, again demonstrating that common issues predominate.

c. BancorpSouth's affirmative defenses do not vitiate predominance.

In scattershot fashion, BancorpSouth asserts a number of affirmative defenses. These defenses generally lack detail or foundation, making it difficult for Plaintiffs to discern what they mean or what facts, if any, support them. For these and other reasons, the defenses cannot serve to defeat class certification.

In this Court, affirmative defenses must meet the pleading standards of *Iqbal* and *Twombly*. *See Castillo v. Roche Labs., Inc.*, 2010 U.S. Dist. LEXIS 87681, at *5 (S.D. Fla. Aug. 2, 2010) (noting that "a majority of district courts in Florida have applied this heightened pleading standard to affirmative defenses."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Affirmative defenses that merely offer "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.*; *Mid-Continent Cas. Co. v. Active Drywall South, Inc.*, 2011 U.S. Dist. LEXIS 19978, at *6 (S.D. Fla. Feb. 25, 2011) (striking affirmative defense under *Twombly* because, as pled, it involved "nothing more than bare conclusions" without "any factual basis"). Plaintiff sought and obtained BancorpSouth's agreement to amend its affirmative defenses, which resulted in some additional detail being provided in an amended pleading. However, the fact that such amendments were made does not vary the analysis of the defenses that this Court should undertake from what occurred with Union Bank. To the extent that any of the BancorpSouth's defenses continue to not meet the pleading standard, they are insufficient and cannot impede class certification. *See generally Torres v. TPUSA, Inc.*, 2009 U.S. Dist. LEXIS 22033, at *3-5 (M.D. Fla. Mar. 19, 2009) (holding that defenses that simply claim "statute of limitations," "waiver," and "estoppel" are insufficiently plead); *Pujals ex rel. El Rey De Los Habanos, Inc. v. Garcia*, 2011 WL

1134989, at *6 (S.D. Fla. Mar. 28, 2011) (striking waiver defense where defendants failed to allege "any facts detailing how Plaintiff waived his claims").[31]

In any event, it is clear that many of BancorpSouth's affirmative defenses cannot defeat certification, just as they did not in *Larsen*. *See* DE #1763 at 16-17. . For example, the bank asserts course of dealing as defense, Dkt. No. 1693 at 25, yet its own account agreement was drafted with the specific intent of avoiding any course of dealing. Ex. 4 ("you agree that no course of dealing regarding the payment of items or orders in overdraft will be created between us").[32] Other defenses simply appear not to apply here, as they are unrelated to any of Plaintiffs' claims. *See, e.g.*, Dkt. No. 1693 at 22 (consent). This highlights the problems caused by thoughtless, shotgun pleadings of the type propounded by BancorpSouth, permitting the Court to ignore or strike them. *See, e.g., Torres*, 2009 U.S. Dist. LEXIS 22033, at *3.

Other purported affirmative defenses, even if debatably improper, apply equally to all members of the proposed Class. This leads courts to commonly find that affirmative defenses do not upset the predominance of common issues as long as a sufficient constellation of common issues binds the class together. *See, e.g.*, *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (statute of limitations defenses do not vitiate Rule 23(b)(3) predominance); *Smilow v. Southwestern Bell Mobile Sys.*, 323 F.3d at 39 ("Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses

[31]Further, "shotgun" pleadings such as BancorpSouth's affirmative defenses are frowned upon because they are asserted *en masse*, with little thought, and are indicative of automatic list-making rather than any serious consideration of applicable defenses. Accordingly, courts are encouraged to dismiss them *sua sponte*. *See, e.g., Byrne v. Nezhat*, 261 F. 3d 1075, 1132-33 & n.114 (11th Cir. 2001) (explaining the district court's duty to dismiss shotgun pleadings *sua sponte*, whether they be in a complaint or an answer); *see also* Fed. R. Civ. P. 12(f) (noting that a court "may strike from a pleading an insufficient defense…on its own").

[32] Independently, Plaintiff notes that he does not believe that course of dealing is applicable in any event.

may be available against individual members.") (waiver defense common to the class); *see also Allapattah Servs.*, 333 F.3d at 1262-63 (jury was instructed on statute of limitations and law of fraudulent concealment in 35 states). Thus, if BancorpSouth can present sufficient facts to survive a motion for summary judgment, the jury can readily decide their application on a class-wide basis. *See, e.g.*, Dkt. No. 1693 at 24 (voluntary payment) and19-20 (statute of limitations). And some specific denials can be dealt with, if need be, during the claims process. *See, e.g.*, Dkt. No. 1693 at 26 (offset); *see also Allapattah Servs.*, 333 F.3d at 1259 (if liability is established, set-off claims can be handled on a class member-by-class member basis during claims administration); *Carbajal v. Capital One F.S.B.*, 219 F.R.D. 437, 441 n.2 (N.D. Ill. 2004) (setoffs would not be a significant focus of the case and would likely involve nothing more than a mere calculation).

d. Applying multi-state law does not preclude predominance.

When seeking certification of a class for which the laws of several states potentially apply, the plaintiff bears the burden of demonstrating a suitable and realistic plan for trial of the class claims and must submit an extensive analysis showing that there are no material variations among the law of the states for which certification is sought. *Klay*, 382 F.3d at 1262.[33] "[I]f the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate." *Id.*[34]

[33]In a later decision, the Eleventh Circuit declined to explain precisely what "extensive" specifically means other than to say it must be "more than [] perfunctory." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1180 (11th Cir. 2010).

[34]In *Klay*, although the Court reversed certification of claims for breach of contract and unjust enrichment, the Court recognized that state law claims "based on a principle of law that is uniform among the states" can form a "realistic possibility" of certification. *Id.* at 1261.

Numerous courts have recognized that differences in state law can be appropriately managed in a class action when the core facts are common to the class. *See, e.g., In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 315 (3d Cir. 1998); *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986); *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1022 (9th Cir. 1998); *Hansen v. Monumental Life Ins. Co.*, 2008 U.S. Dist. LEXIS 112254, at *22-29 (D. Conn. Mar. 6, 2008); *In re Pharmaceutical Indus. Average Wholesale Price Litig*., 252 F.R.D. 83, 93-101 (D. Mass 2008); *Steinberg v. Nationwide Mut. Ins. Co.*, 224 at 76-80; *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 956-57 (E.D. Tex. 2000); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 71 (D. Mass. 1999); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 962 F. Supp. 450, 525 (D.N.J. 1997); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. at 64; *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271 (S.D. Ohio 1997); *Deadwyler v. Volkswagen of Am. Inc.*, 1986 U.S. Dist. LEXIS 28449, at *4-5 (W.D.N.C. 1986).

The Court need not find complete uniformity of state law, only that there are no material conflicts among the laws so that they can be divided into a small number of sub-groups. *See Simon v. Phillip Morris*, 124 F. Supp. 2d 46, 77 (E.D.N.Y. 2000); *see also* American Law Institute, *Principles of the Law: Aggregate Litigation*§ 2.05(b) (2010) ("The court may authorize aggregate treatment of multiple claims, or of a common issue therein, by way of a class action if the court determines that (1) a single body of law applies to all such claims or issues; (2) different claims or issues are subject to different bodies of law that are the same in functional content; or (3) different claims or issues are subject to different bodies of law that are not the same in functional content but nonetheless present a limited number of patterns that the court . . . can manage by means of identified adjudicatory procedures.").

In *Prudential*, the Court endorsed the use of comprehensive surveys to demonstrate that certain state laws, including claims for breach of contract and the implied duty of good faith and fair dealing, are substantially similar, with any differences falling into a limited number of predictable patterns:

> Plaintiffs have demonstrated, consistent with the approach endorsed in *School Asbestos* and cited with approval in *Georgine*, that any state-by-state variations in the governing legal standards are manageable. . . . Plaintiffs have submitted a series of charts setting forth comprehensive analyses of the various states' laws potentially applicable to their common law claims for fraud, breach of contract, implied obligations of good faith and fair dealing, negligence, and negligent misrepresentation. . . . These charts compare state-by-state the elements of the claims alleged in the Second Amended Complaint with citations to the pertinent authorities in each of the fifty states – the same approach used in the School Asbestos litigation. The elements of these common law claims are substantially similar and any differences fall into a limited number of predictable patterns. Issacharoff Decl. at P 22 ("Any variations among legal standards [of the state laws] are neither particularly great nor insuperable to the certification of a litigation class. To the extent that such variations exist, they could be readily handled by instructions and structured questions to the jury and, if necessary, appropriate subclasses."). Thus, plaintiffs' claims can be grouped into a manageable number of categories accommodating any variations in the elements of the potentially applicable states' laws. . . . And, the Court finds that a manageable number of jury instructions could be fashioned to comport with the elements of the common law claims in the many jurisdictions.

962 F. Supp. at 525 (citations and footnotes omitted).

The plaintiffs in *Prudential* also submitted special verdict forms to illustrate that variations among potentially applicable state laws can be managed to permit a fair and efficient adjudication by the fact finder at trial. *Id.* at n.49. The court ultimately certified a class of eight million consumers nationwide who purchased life insurance policies from Prudential, including claims for breach of contract and implied obligations of good faith and fair dealing. The Third

Circuit expressly affirmed the district court's predominance findings, which were based on the state law surveys submitted by the plaintiffs. 148 F.3d at 315.

In *Telectronics*, the court rejected suggestions that nationwide classes could not be certified under Rule 23 and held that "minute and insignificant" differences in state law do not preclude certification. 172 F.R.D. at 292. Recognizing that state law is not universal, the Court carefully highlighted the appropriate inquiry for courts to make: "[C]an the relevant variations be dealt with in a simple and efficient manner?" *Id.* In conducting that inquiry, it is important for courts to distinguish between variations that "are pertinent to the issues being certified and those which are unimportant to these questions." *Id.* The Court further explained that a careful inquiry will ordinarily lead to three options: "(1) find that state law is sufficiently similar that a single class is appropriate, (2) find that the state law varies so much that class certification is inappropriate, or (3) find that state law variations can be categorized and then divided into subclasses." *Id.* Judge Spiegel chose the latter option and certified a nationwide class of implant recipients using subclasses.[35]

Accordingly, common issues of law and fact will remain the predominant focus of this litigation, notwithstanding the potential application of multiple states' laws. In denying the first tranche defendants' omnibus motion to dismiss, the Court found that state laws governing the common law claims were materially similar: "Without conducting an extensive choice of law analysis, it appears that, for purposes of this motion, there are no relevant differences in how each state interprets these various causes of action." Dkt. No. 305 at 17. The Court also

[35]The Sixth Circuit ultimately reversed certification of a no-opt-out settlement class on the basis of constitutional considerations. *See In re Telectronics Pacing Sys.*, 221 F.3d 870 (6th Cir. 2000). The Court, however, left intact Judge Spiegel's rationale supporting nationwide certification.

observed that "Defendants generally acknowledge that the elements of the common law claims asserted are the same in every state." *Id.*[36]

Plaintiff's Trial Plan, included in Appendix I, contains an extensive analysis of state law breach of contract/breach of the duty of good faith and fair dealing, unjust enrichment, unconscionability, and violation of Arkansas' unfair and deceptive trade practice act. As the surveys demonstrate, variations are minimal. In those few instances where variations are material, Plaintiff proposes that the Court group state laws into subclasses, as contemplated by *Klay* and other authorities.[37] More specifically, Plaintiff proposes subclasses for each claim summarized as follows. The Court has already endorsed this approach in its previous order certifying subclasses against Union Bank, finding that "[t]he proposed special verdict forms and supporting surveys of law submitted by Plaintiffs with their Trial Plan illustrate that the variations among the potentially applicable state laws are not material and can be managed to permit a fair and efficient adjudication by the fact finder at trial." *Larsen*, DE #1763 at 21.

Breach of Contract and the Duty of Good Faith and Fair Dealing Subclass. In *Klay*, the court "accept[ed] the proposition that the applicable state laws governing contract interpretation and breach are sufficiently identical to constitute common legal issues . . . ." 382 F.3d at 1263. As the Court explained, determining breach is a simple question of contract interpretation that does not vary from state to state: "A breach is a breach, whether you are on

[36]Plaintiff submits that a lengthy choice of law analysis is not needed here given the choice of law clause on utilized by BancorpSouth: "With regard to any account established online, this Agreement is governed by the laws of Mississippi and by federal law and regulation. Otherwise, this Agreement is governed by the law of the state of the location of our branch identified on the signature page and by federal law and regulation." *See* Ex. 11 at 5. Plaintiff concedes that the laws of his home state, as well as the home states of all Class members, will apply, except as to customer who opened accounts online whose accounts are governed by Mississippi law.

[37]Rule 23 expressly authorizes subclasses: "When appropriate, a class may be divided into subclasses that are each treated as a class under this rule." Fed. R. Civ. P. 23(c)(5).

the sunny shores of California or enjoying a sweet autumn breeze in New Jersey." *Id*. at 1262-63.[38] And the Court in *In re Conseco Life Ins. Co. Lifetrend Ins. Sales & Mktg. Litig.*, 270 F.R.D. 521 (N.D. Cal. 2010), certified 48-state breach of contract class in a case involving form policy contracts and also found that "the law relating to the element of breach does not vary greatly from state to state." *Id.* at 529. As Plaintiffs' survey shows, this law is relatively uniform between Alabama, Arkansas, Florida, Mississippi, and Tennessee. At this time, Plaintiff is not seeking to represent Class members who relationship with BancorpSouth is governed by Louisiana or Missouri law for reasons explained in the Trial Plan. Texas is the one state that does not recognize this claim. *See* Trial Plan at 11-12 & Exhibit A. The cause of action in each of the other five states share common elements, with each requiring a valid contract; some level of unreasonable interference with the contract by the defendant; and resulting damages. *Id.*

Unjust Enrichment Subclass. In *Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. at 697 n.40, Judge Seitz certified a 17-state unjust enrichment subclass, finding that unjust enrichment law is "virtually identical" from state to state. *See also In re Mercedes Benz Tele Aid Contract Litig.*, 267 F.R.D. 113, 119 (D.N.J. 2010) (the minor variations in the elements of

[38]Even though questions of contract law were common to the whole class, the *Klay* Court ultimately found certification of the breach of contract claims inappropriate given the individualized issues of fact they entailed. *Id*. at 1261. There were many different defendants with many different contracts with many different provider groups. Moreover, because the defendants breached the contracts through a variety of means and differing computer algorithms that were not subject to generalized proof, each physician would have to prove a variety of individual circumstances leading to the breach. *Id.* at 1263-64. The same problem bedeviled the proposed class in *Sacred Heart*, where there were substantial variations in the terms of over 300 hospital contracts that were individually negotiated, leading the Court to find that "the diversity of the material terms is overwhelming." 601 F.3d at 1171-72. The facts in *Klay* and *Sacred Heart* stand in sharp contrast to those here, where the agreements at issue are uniform form contracts offered on a take-it-or-leave it basis and were not the product of any individual negotiation. *See Sacred Heart*, 601 F.3d at 1171 ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment."). Nor does Plaintiff here have to prove a variety of individual circumstances supporting the breach, as BancorpSouth's standard re-sequencing policy resulted in uniform conduct directed at all members of the Class.

unjust enrichment in the laws of the various states are not material and do not create conflicts). Here, Plaintiff proposes the creation of a single unjust enrichment subclass on behalf of Class members who reside in Arkansas and Mississippi, and reserves the right to amend to add potential class representatives for the other six states within BancorpSouth's footprint. *See* Trial Plan at 12-13 & Exhibit B. Arkansas and Mississippi base unjust enrichment on the RESTATEMENT (FIRST) OF RESTITUTION §1 and require the presence of the following basic elements: (i) the plaintiff conferred a benefit; (ii) the defendant accepted or retained that benefit; (iii) under circumstances that would be unjust for the defendant to retain the benefit.[39]

Unconscionability Subclass. The law of unconscionability is substantially uniform across all states. All of the states, with the exception of Louisiana, have adopted statutes that are the same or substantially identical to Uniform Commercial Code ("U.C.C.") §2-302. The only difference between states is whether they require both procedural and substantive unconscionability, or just one of the two. Therefore, this minimal variation is easily managed through the creation of a single subclass for all eight states. *See* Trial Plan at 13-14 & Exhibit C.

Unfair And Deceptive Trade Practices Acts Subclass. The Court has ruled that plaintiffs may only assert a state statutory claim if a named plaintiff resides in that state. Dkt. No. 305 at 40. Accordingly, Plaintiff does not propose state unfair and deceptive trade practices act groupings and instead seek to certify a single-state subclass under the Arkansas Deceptive Trade

[39]Other courts have likewise certified multi-state unjust enrichment classes. *See, e.g.*, *In re Abbott Labs. Norvir Anti-Trust Litig.*, 2007 U.S. Dist. LEXIS 44459, at *9 (N.D. Cal. June 11, 2007) (certifying multi-state class of unjust enrichment claims); *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (N.S.D. 2004) (certifying multi-state unjust enrichment claims for South Dakota and states with identical claims); *cf. Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 569-70 (E.D. Mich. 2009) (agreeing with courts that decided unjust enrichment doctrines are materially same); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 518 (E.D. Mich. 2003) (characterizing unjust enrichment standards in various states as "virtually identical").

Practices Act (Ark. Code Ann. § 4-88-101). The elements required to prove a violation of the statute are set forth in Exhibit D to the Trial Plan.

As further evidence demonstrating the manageability of applying multi-state law in this case, Plaintiff also provides the Court with Proposed Special Verdict Forms that encapsulate the salient elements of each cause of action and account for the minor state law variations. The Proposed Special Verdict Forms are attached as Appendix E to the Trial Plan. As these proposed forms demonstrate, the differences that do exist among state laws can easily be taken into account, thus ensuring careful adherence to legal requirements and eliminating any manageability issues.

2. A class action is superior to the adjudication of thousands of separate individual cases.

The superiority analysis of Rule 23(b) requires that the Court examine whether the class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3). The focus is "not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Klay*, 382 F.3d at 1269. As the *Klay* Court recognized, there are four non-exhaustive factors a court should consider in assessing whether a class action is superior to individual litigation:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and]
>
> (D) the difficulties likely to be encountered in the management of a class action.

Id. (citing Fed. R. Civ. P. 23(b)(3)). All of these factors favor class treatment here.

With respect to the first factor, nearly all of the Class members in this case have claims that are so small that it would cost them much more to litigate an individual case than they could ever hope to recover in damages. Thus, "[t]here is no reason to believe that the putative class members in this case have any particular interest in controlling their own litigation[.]" *Id*.

The second superiority factor also favors class certification. Numerous class action lawsuits based on the same facts at issue here have been filed against BancorpSouth and other defendants. Through the MDL process, those cases were transferred to this Court and are part of this consolidated litigation, along with a few individual cases. That the Judicial Panel on Multidistrict Litigation chose this Court to be the transferee court is one indication that having a single case –as opposed to multiple cases – makes sense.

Concentrating the litigation in this forum is also logical and desirable for other reasons, which tilt the third superiority factor in favor of certification. First, through handling defendants' serial motions to dismiss, and numerous discovery disputes, this Court has become familiar with the factual and legal issues. *Id.* at 1271 ("it is desirable to concentrate claims in a particular forum when that forum has already handled several preliminary matters"). As this Court recognized in *Texas Air*, controversies are often "best managed as a class action, for this method allows all the [parties] to conduct all relevant discovery without repetition." 119 F.R.D. at 460. Second, holding separate trials for claims that could be tried together would be costly, inefficient and burden the court system; they should instead be tried together. *Klay*, 382 F.3d at 1270. Neither the parties nor the judicial system would benefit from redundant litigation in these matters. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 1994 U.S. Dist. LEXIS 16658, at *15 (N.D. Ill. Nov. 18, 1994) ("[w]e fail to see the logic in defendants' contention that

50,000 individual actions are less complex than a single class action"). Indeed, "[w]here predominance is established, this consideration will almost always mitigate in favor of certifying a class." *Klay*, 382 F.3d at 1270. Third, the small value of the individual claims supports certification, especially, as here, the amounts in controversy make it unlikely that individual plaintiffs could find legal representation on a contingency fee basis "when the defendants are corporate behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings." *Id*. at 1271.

The final superiority factor – manageability – focuses on the "practical problems that may render the class action format inappropriate for a particular suit." *Eisen*, 417 U.S. at 164. The question is whether multiple individual lawsuits would be more manageable than a class action, and not whether a class here will create significant management problems. *Klay*, 382 F.3d at 1273. Indeed, this fourth factor "will rarely, if ever, be in itself sufficient to prevent certification." *Id*. at 1272; *see also Visa Check/MasterMoney*, 280 F.3d at 140 (refusal to certify a class solely on grounds of manageability is disfavored and "should be the exception rather than the rule"); *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 356 (E.D. Pa. 1976) ("denial of class certification because of suspected manageability problems is disfavored"). Here, Plaintiffs cannot foresee any serious manageability problems and certainly none that make thousands of individual actions a better alternative. This is particularly true given the recent experience in the *Gutierrez* case, which involved very similar facts and claims and a class of hundreds-of-thousands of members. As discussed in more detail above, Plaintiff's Trial Plan, the extensive analysis of applicable law provided in its appendix surveys, and the proposed Special Verdict Forms, these issues will be resolved based upon common proof. Simply put, this case can be

tried in an efficient manner. This is what the Court concluded in *Larsen*, and there is no reason to alter course here. *See* DE #1763 at 20.

IV. CONCLUSION

Plaintiff has demonstrated that they satisfy all of the elements of Rule 23(a) and (b)(3). The class action mechanism is not only the best and most efficient way to adjudicate the Class members' claims in this case, it is also the only viable method of doing so. For all of the foregoing reasons, Plaintiff respectfully requests that the Court grant his motion to certify the Class pursuant to Fed. R. Civ. P. 23(b)(3).

Dated: December 20, 2011.

Respectfully submitted,

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Plaintiffs' Executive Committee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

CERTIFICATE OF SERVICE

I hereby certify that on December 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 all counsel of record 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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