

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

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

IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO:  
FOURTH TRANCHE ACTION

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

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT  
AS TO CERTAIN OF DEFENDANT BANCORPSOUTH BANK'S  
AFFIRMATIVE DEFENSES AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff Shane Swift, on behalf of himself and the certified class ("Plaintiffs"), pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.5, moves for summary judgment as to certain of Defendant BancorpSouth Bank's ("BancorpSouth" or "Defendant") affirmative defenses, and in support states:

**INTRODUCTION**

On July 6, 2011, BancorpSouth filed its Amended Answer and Defenses to Plaintiff's Second Amended Complaint and asserted fifteen (15) separate affirmative defenses. (DE # 1693). Pursuant to this Court's Revised Scheduling Order, fact discovery in this action is now closed. (DE # 2834). After more than two years of discovery, the record is devoid of facts necessary to establish the applicability of several of BancorpSouth's affirmative defenses. Plaintiffs are entitled to summary judgment as a matter of law because the undisputed facts in the record could not lead a rational fact-finder to find for BancorpSouth on its Second, Third, Fourth,

Fifth, Eighth, Ninth, Fourteenth and Fifteenth affirmative defenses. Because Plaintiffs intend to prove their case through Plaintiff Swift's affirmative case, the claims of which are governed by Arkansas law, Plaintiffs rely on Arkansas law in support of this Motion.

**I. Undisputed Facts Entitling Plaintiffs to Summary Judgment**

1. Plaintiff Swift was not aware until shortly before this lawsuit was filed that BancorpSouth engaged in the practice of re-sequencing and posting his debit card transactions from high to low dollar amount, and that he incurred overdraft fees as a result of Defendant's practice. January 18, 2012 Deposition of Shane Swift ("Shane Swift Depo.") at pp. 77-79, attached as *Exhibit A*; Plaintiff Shane Swift's Objections and Responses to Defendant BancorpSouth Bank's First Continuing Interrogatories to Plaintiff at No. 18 ("Plaintiff's Interrogatory Responses"), attached as *Exhibit B*; August 16, 2012 Deposition of Trina Swift ("Trina Swift Depo.") at pp. 42-44, attached as *Exhibit C*.

2. Plaintiff Swift's bank account statements did not disclose BancorpSouth's practice of re-sequencing and posting debit card transactions from high to low dollar value. May 10, 2012 Fed. R. Civ. P. 30(b)(6) Deposition of Michael Lindsey ("Lindsey Depo.") at p. 89, attached as *Exhibit D*.

3. BancorpSouth's Deposit Account Terms and Conditions ("Deposit Agreement") did not disclose its high to low posting order. (DE # 2274-4 at p. 4; DE # 2274-5 at p. 4; DE # 2274-6 at p. 7; DE # 2274-7 at p. 4; DE # 2274-8 at p. 4; DE # 2274-9 at p. 5; DE # 2274-10 at p. 4; and DE # 2274-11 at p. 4).<sup>1</sup>

4. In addition, the Deposit Agreement states that the order in which BancorpSouth

---

<sup>1</sup> Citations are to all versions of the Deposit Agreement that were produced to Plaintiff by BancorpSouth and subsequently attached as an exhibit to Plaintiff's Motion for Class Certification. (DE # 2271).

posts customers' transactions and its payment of transactions in overdraft do not create a course of dealing. (DE # 2274-4 at p. 4; DE # 2274-5 at p. 4; DE # 2274-6 at p. 7; DE # 2274-7 at p. 4; DE # 2274-8 at p. 4; DE # 2274-9 at p. 5; DE # 2274-10 at p. 4; and DE # 2274-11 at p. 4). Further, the Deposit Agreement states that a course of dealing cannot be established to vary the terms of the Deposit Agreement. (DE # 2274-4 at p. 5; DE # 2274-5 at p. 5; DE # 2274-6 at p. 8; DE # 2274-7 at p. 5; DE # 2274-8 at p. 5; DE # 2274-9 at p. 5; DE # 2274-10 at p. 5; and DE # 2274-11 at p. 5).

5. Since 2003, BancorpSouth has engaged in the practice of re-sequencing customers' debit card transactions that are at issue in this lawsuit. October 12, 2012 Fed. R. Civ. P. 30(b)(6) Deposition of Jeff Jagers ("Jagers Depo.") at p. 146, attached as *Exhibit E*.

## **II. Standard for Entry of Summary Judgment**

"Summary judgment is appropriate where the pleadings and supporting materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Evanston Ins. Co. v. Milton Const. Co.*, No. 08-22988, 2009 WL 3048488, at \*1 (S.D. Fla. Sept. 23, 2009) (citing Fed. R. Civ. P. 56). "If the record as a whole could not lead a rational fact-finder to find for the nonmoving party, there is no genuine issue of fact for trial." *Evanston Ins. Co.*, 2009 WL 3048488 at \*1. "The moving party bears the burden of pointing to the part of the record that shows the absence of a genuine issue of material fact." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to go beyond the pleadings and designate 'specific facts showing that there is a genuine issue for trial.'" *Evanston Ins. Co.*, 2009 WL 3048488 at \*1 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); see also *Chanel, Inc. v. Italian Activewear*

of Fla., Inc., 931 F.2d 1472, 1477 (11th Cir. 1991) (holding that, to meet its burden, the nonmoving party must “come forward with significant, probative evidence demonstrating the existence of a triable issue of fact”).

“On a motion for summary judgment, the court must view the evidence and resolve all inferences in the light most favorable to the nonmoving party; however, a mere scintilla of evidence in support of the nonmoving party’s position is insufficient to defeat a motion for summary judgment.” *Evanston Ins. Co.*, 2009 WL 3048488 at \*1 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-255 (1986)). “If the evidence offered by the nonmoving party is merely colorable or is not significantly probative, summary judgment is proper.” *Evanston Ins. Co.*, 2009 WL 3048488 at \*1 (citing *Anderson*, 477 U.S. at 252).

### **III. Plaintiffs are Entitled to Summary Judgment as to Certain of BancorpSouth’s Affirmative Defenses.**

For the Court’s convenience, BancorpSouth’s affirmative defenses (DE # 1693) on which summary judgment is sought are set forth in *italics*, and Plaintiffs’ argument for summary judgment with respect to each such defense follows immediately thereunder.

#### **a. Second Affirmative Defense – Statutes of Limitations**

*The claims of Plaintiff or purported class members against BancorpSouth are barred, in whole or in part, by applicable statutes of limitations. Due to the early stage of the proceedings in this matter and the fact that discovery has just begun, BancorpSouth is currently unable to determine with precision the specific claims asserted by Plaintiff or on behalf of the purported class which are time-barred. As currently pleaded, the complaint seeks compensation for overdraft charges and other damages that are so far in the past that recovery for those charges is barred by the applicable statutes of limitations in Alabama, Arkansas, Florida, Louisiana, Mississippi, Missouri, Tennessee, or Texas -- the states in which BancorpSouth does business. To the extent that Plaintiff or purported class members are seeking compensation for alleged improper overdraft charges beyond the number of years governing the limitations period for the claims asserted, such claims are barred.*

Plaintiffs are entitled to summary judgment on BancorpSouth’s statutes of limitations

affirmative defense because the certified class definition explicitly confines itself to claims that accrued within the applicable statutes of limitations. In this Court's Order Granting Class Certification, the Court certified the following class:

All BancorpSouth Bank customers in the United States who had on or more consumer accounts and who, from applicable statutes of limitation through August 13, 2010 (the "Class Period), incurred an overdraft fee as a result of BancorpSouth's practice of sequencing debit card transactions from highest to lowest.

(DE # 2673 at p. 22). Thus, pursuant to this Court's Order, all damages being sought by Plaintiffs fall within the applicable statute of limitations for each cause of action.

Accordingly, Plaintiffs are entitled to summary judgment on BancorpSouth's statutes of limitations affirmative defense.

**b. Third Affirmative Defense – Statutes of Repose**

*The claims of Plaintiff or purported class members against BancorpSouth are barred, in whole or in part, by applicable statutes of repose. Due to the early stage of the proceedings in this matter and the fact that discovery has just begun, BancorpSouth is currently unable to determine with precision the specific claims asserted by Plaintiff or on behalf of the purported class which are time-barred. As currently pleaded, the complaint seeks compensation for overdraft charges and other damages that are so far in the past that recovery for those charges is barred. To the extent that Plaintiff or purported class members are seeking compensation for alleged improper overdraft charges so far after the time when Plaintiff or purported class members became aware of such charges as to make any claim for recovery in this lawsuit prejudicial to BancorpSouth, such claims are barred.*

This Court can easily dispose of BancorpSouth's affirmative defense of statutes of repose because there is simply no statute of repose under the laws of Alabama, Arkansas, Florida, Louisiana, Mississippi, Missouri, Tennessee or Texas that would bar any of Plaintiffs' claims. Plaintiffs have brought claims for: (1) breach of contract and breach of the covenant of good faith and fair dealing; (2) conversion; (3) unjust enrichment; (4) unconscionability; and (5) violations of the Arkansas Deceptive Trade Practice Act. BancorpSouth cannot identify any

statutes of repose that would apply to these claims and Plaintiff has been unable to locate any applicable statutes of repose in his research for this Motion.

Accordingly, Plaintiffs are entitled to summary judgment as a matter of law on BancorpSouth's statutes of repose affirmative defense.

**c. Fourth Affirmative Defense – Laches**

*The claims of Plaintiff or purported class members against BancorpSouth are barred, in whole or in part, by the doctrine of laches. Due to the early stage of the proceedings in this matter and the fact that discovery has just begun, BancorpSouth is currently unable to determine with precision the specific claims asserted by Plaintiff or on behalf of the purported class which are time-barred. As currently pleaded, the complaint seeks compensation for overdraft charges and other damages that are so far in the past that recovery for those charges is barred. To the extent that Plaintiff or purported class members are seeking compensation for alleged improper overdraft charges so far after the time when Plaintiff or purported class members became aware of such charges as to make any claim for recovery in this lawsuit prejudicial to BancorpSouth, such claims are barred.*

BancorpSouth's defense of laches fails as a matter of law. The Arkansas Supreme Court has described the laches defense as requiring that it be "based on the equitable principle that an unreasonable delay by the party seeking relief precludes recovery when the circumstances are such as to make it inequitable or unjust for the party to seek relief." *Royal Oaks Vista, L.L.C. v. Maddox*, 271 S.W.3d 479, 483 (Ark. 2008).<sup>2</sup> Accordingly, "[t]he laches defense requires a

---

<sup>2</sup> Louisiana courts do not recognize the doctrine of laches at all, *Fishbein v. State ex rel. Louisiana State Univ. Health Sciences Center*, 898 So.2d 1260, 1270 (La. 2005), and the Mississippi Supreme Court has held that the doctrine of laches is inapplicable where the claim has not been barred by the applicable statute of limitations. *Mississippi Dept. of Human Services, v. Molden*, 644 So.2d 1230, 1231 (Miss. 1994). Accordingly, the defense does not apply to claims under these states as a matter of law. Courts in Alabama, Florida, Missouri, Tennessee and Texas only recognize the doctrine of laches in the same circumstances as the Arkansas courts. See *Elliott v. Navistar, Inc.*, 65 So.3d 389, 386 (Ala. 2010) (Alabama law); *Vassallo v. Goldwire*, 18 So. 3d 670, 672 (Fla. 1st DCA 2009) (Florida law); *O'Connell v. School Dist. of Springfield R-12*, 830 S.W.2d 410, 417 (Mo. 1992) (Missouri law); *In re Darwin's Estate*, 503 S.W.2d 511, 514 (Tenn. 1973) (Tennessee law); *In re Laibe Corp.*, 307 S.W.3d 314, 318 (Tex. 2010) (Texas law).

detrimental change in the position of the one asserting the doctrine, as well as an unreasonable delay by the one asserting his or her rights against whom laches is invoked.” *Royal Oaks Vista, L.L.C.*, 271 S.W.3d at 483.

As a threshold matter, the defense of laches may never be applied to Plaintiffs’ claims for breach of contract and breach of the covenant of good faith and fair dealing (Count I), conversion (Count III) and violations of the Arkansas Deceptive Trade Practice Act (Count V) because laches does not apply to actions at law. *See Warford v. Union Bank of Benton*, No. CA 09-1301, 2010 WL 3770745, at \*5 (Ark. App. Sept. 29, 2010). In Arkansas, “the doctrine of laches is only applicable where **equitable relief** is sought; where a party is only seeking to enforce a legal right not barred by the statute of limitations and is not seeking equitable relief, the doctrine of laches has no application even if it could otherwise apply.”<sup>3</sup> *Id.* (quoting *Landreth v. First Nat’l Bank of Cleburne County*, 45 F.3d 267, 271 (8th Cir. 1995) (emphasis added). Further, laches has no application to Plaintiffs’ claim for unjust enrichment (Count IV) because Plaintiffs do not seek equitable relief, but, rather, legal relief in the form of money damages. *See Rogers Iron & Metal Corp. v. K & M, Inc.*, 738 S.W.2d 110, 111 (Ark. App. 1987) (holding that laches, an equitable defense, has no application in a case where the plaintiff sued to obtain a money judgment – an action at law); *Landreth*, 45 F.3d at 271 (“Laches is not applicable to actions for damages.”).

Accordingly, the only claim to which the doctrine of laches could even arguably apply is

---

<sup>3</sup> As in Arkansas jurisprudence, courts in Alabama, Florida, Missouri, and Mississippi only apply the doctrine of laches when equitable relief is sought. *Elliott v. Navistar, Inc.*, 65 So.3d 379, 386-87 (Ala. 2010) (Alabama law); *Brumby v. Brumby*, 647 So.2d 330, 331 (Fla. 4th DCA 1994) (Florida law); *Littlefield v. Edmonds*, 172 S.W.3d 903, 908 (Mo. Ct. App. 2005) (Missouri law); *Bailey v. Estate of Kemp*, 955 So.2d 777, 783 (Miss. 2007). Although Texas and Tennessee courts have applied the doctrine of laches where a party is seeking to enforce a legal right and/or legal relief, the doctrine fails as to the claims brought under these states’ laws because, as argued below, BancorpSouth cannot satisfy the elements of unreasonable delay or prejudice.

the claim for unconscionability (Count III), which seeks a declaratory judgment. However, because BancorpSouth has not offered any evidence supporting the elements necessary to establish the defense of laches, the defense does not apply to the claim for unconscionability. As explained above, under Arkansas law, the laches defense “requires a detrimental change in the position of the one asserting the doctrine [BancorpSouth], as well as an unreasonable delay by the one asserting his or her rights against whom laches is invoked [Plaintiffs].” *Id.* Although “[a] defense based on laches presents a question of fact which normally must be decided by the trial court,” BancorpSouth is “still required to produce some evidence on all of the necessary elements in order to defeat” the instant Motion. *Gable v. Anthony*, No. CA 10-234, 2010 WL 4525401, at \*6 (Ark. App. Nov. 10, 2010) (affirming trial court’s grant of summary judgment in favor of appellees where appellant failed to produce evidence in support of laches). Here, BancorpSouth cannot meet that burden.

BancorpSouth cannot support its laches claim by claiming unreasonable delay because the undisputed facts establish that there was little or no delay in filing the instant action after Plaintiff Swift first became aware of BancorpSouth’s debit re-sequencing. Plaintiff Swift testified that it was only when he retained counsel that he was able to determine that BancorpSouth had been re-sequencing his debit card transactions from high to low dollar amount. Shane Swift Depo. at pp. 77-79; *see also* Plaintiff’s Interrogatory Responses at No. 18; Trina Swift Depo. at pp. 42-44. In addition, on May 10, 2012, BancorpSouth’s Center Vice-President, Michael Lindsey, admitted that Plaintiff’s account statements did not disclose BancorpSouth’s re-sequencing practice. Lindsey Depo. at p. 89. Further, BancorpSouth’s Deposit Account Terms and Conditions (“Deposit Agreement”) fails to disclose the high to low posting order. (DE # 2274-4 at p. 4; DE # 2274-5 at p. 4; DE # 2274-6 at p. 7; DE # 2274-7 at p.

4; DE # 2274-8 at p. 4; DE # 2274-9 at p. 5; DE # 2274-10 at p. 4; and DE # 2274-11 at p. 4). Rather, the Deposit Agreement merely states: “[i]f 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.” *Id.* Accordingly, the facts do not support any unreasonable delay on the part of Plaintiff Swift based on his knowledge of the high to low posting order.

In any event, Arkansas courts have made it clear that “the passage of time is not the only element necessary to establish the defense of laches.” *Gable*, 2010 WL 4525401 at \*6. Instead, “[l]aches requires a showing of some sort that the party asserting the doctrine has suffered or changed its position as a result of the lack of diligence or delay in assertion of rights.” *Id.* BancorpSouth has not offered any facts suggesting that it detrimentally relied on any action or inaction of Plaintiff Swift, or members of the certified class, in deciding to continue its practice of debit re-sequencing; nor can BancorpSouth produce evidence that it changed its position based on any action or inaction of Plaintiffs. Indeed, BancorpSouth continues to engage in debit re-sequencing to this day, despite the filing of this action almost two and a half years ago. *See Jagger Depo.* at p. 146. Accordingly, a reasonable finder of fact could not determine that BancorpSouth was harmed by any purported action or inaction of Plaintiffs. *Gable*, 2010 WL 4525401 at \*6.

Therefore, Plaintiffs are entitled to summary judgment on BancorpSouth’s laches affirmative defense.

**d. Fifth Affirmative Defense – Accord and Satisfaction**

*The claims of Plaintiff or purported class members against BancorpSouth are barred, in whole or in part, by principles of accord and satisfaction. Plaintiff and purported class members voluntarily initiated all transactions which caused their accounts to be overdrawn, and some portion of these transactions were*

*undertaken by Plaintiff or purported class members with knowledge that the transaction or transactions at issue would cause their accounts to be overdrawn and incur a fee, or that a substantial risk existed that such a transaction would cause an overdraft. Plaintiff or purported class members incurred overdraft fees in these situations and paid the fees without protest. Plaintiff's and purported class members' voluntary participation in and acceptance of what they now claim is a compensable wrong bars one or more of their claims.*

BancorpSouth's affirmative defense of accord and satisfaction fails as a matter of law because there are no set of facts that can establish an agreement between Plaintiff Swift and other members of the certified class, and BancorpSouth whereby the parties agreed to discharge the claims asserted in the instant action.

The Arkansas Supreme Court has defined accord and satisfaction "as a settlement in which one party agrees to pay and the other to receive a different consideration or a sum less than that amount to which the latter considers himself entitled." *Glover v. Woodhaven Homes, Inc.*, 57 S.W.3d 211, 216 (Ark. 2001). "The essential elements of accord and satisfaction are: (1) proper subject matter; (2) competent parties; (3) an assent or meeting of the minds; and (4) consideration." *Id.* Thus, "[t]he validity of an accord and satisfaction is dependent upon the same basic factors and principles that govern contracts generally and the burden of proving the agreement is simply the burden of proving a contract: offer, acceptance, and consideration." *Housely v. Hensley*, 265 S.W.3d 136, 142 (Ark. App. 2007).<sup>4</sup>

Consequently, the defense of accord and satisfaction simply does not fit the facts of this

---

<sup>4</sup> Courts in Alabama, Florida, Louisiana, Mississippi, Missouri, Tennessee, and Texas require substantially the same elements. *See Austin v. Cox*, 492 So.2d 1021, 1022 (Ala. 1986) (Alabama law); *Rudick v. Rudick*, 403 So.2d 1091, 1093-94 (Fla. 3d DCA 1981) (Florida law); *J.O. Miller v. Lumbermens Mutual Cas. Ins. Co.*, 488 So.2d 273, 279 (La. Ct. App. 1986) (Louisiana law); *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 754 (Miss. 2003) (Mississippi law); *Midwest Division-OPRMC, LLC v. Dept. of Social Serv., Div. of Medical Serv.*, 241 S.W.3d 371, 383 (Mo. Ct. App. 2007) (Missouri law); *Key v. Lyle*, No. M2009-01328-COA-R3-CV, 2010 WL 1486908, at \*3 (Tenn. Ct. App. Apr. 13, 2010) (Tennessee law); *City of Houston v. First City*, 827 S.W.2d 462, 472 (Tex. Ct. App. 1992) (Texas law).

case. In order for the defense to even be applicable here BancorpSouth would have had to make some type of payments to Plaintiffs, and Plaintiffs would have had to accept the payments in settlement of claims Plaintiffs had against BancorpSouth. There are simply no facts that could ever be adduced here that would support this scenario.

What is more, even if BancorpSouth were to contend that Plaintiffs accepted some type of consideration in satisfaction of a claim they had against BancorpSouth, there is no evidence that there was a meeting of the minds to the effect that Plaintiffs purportedly accepted the unidentified consideration in satisfaction of any claim that they had against BancorpSouth. As the Arkansas Supreme Court has stated with regard to accord and satisfaction, “[t]he key element is a meeting of the minds, such that there must be an objective indicator that the parties agreed that the payment tendered will discharge the debt.” *Glover*, 57 S.W.3d at 216. Here, BancorpSouth cannot present any objective indicator of an agreement between Plaintiffs and BancorpSouth that would operate as an accord and satisfaction.

Accordingly, Plaintiffs are entitled to summary judgment on BancorpSouth’s affirmative defense of accord and satisfaction.

**e. Eighth Affirmative Defense – Ratification, Acceptance and/or Release**

*The claims of Plaintiff or purported class members against BancorpSouth are barred, in whole or in part, by principles of ratification, acceptance and/or release. Plaintiff and purported class members voluntarily initiated all transactions which caused their accounts to be overdrawn, and some portion of these transactions were undertaken by Plaintiff or purported class members with knowledge that the transaction or transactions at issue would cause their accounts to be overdrawn and incur a fee, or that a substantial risk existed that such a transaction would cause an overdraft. Plaintiff or purported class members knowingly incurred overdraft fees in these situations and paid the fees without protest. Plaintiff and purported class members are estopped from seeking compensation for charges which were previously objected to, and subsequently waived or refunded by BancorpSouth, or accepted by Plaintiff or purported class members after explanation by BancorpSouth. Plaintiff’s and purported class members’ voluntary participation in and acceptance of what they now claim is a*

*compensable wrong bars one or more of their claims.*

For its eighth affirmative defense, BancorpSouth claims that Plaintiffs' claims are barred because Plaintiffs allegedly ratified BancorpSouth's wrongful conduct by accepting the purported benefits of BancorpSouth's overdraft policies and practices, thereby releasing the claims asserted in this lawsuit. This contention fails as a matter of law.

"Ratification is a doctrine of agency, which is well-established in the common law, and it refers to the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another without authority." *Arnold v. All Am. Assur. Co.*, 499 S.W.2d 861, 865 (Ark. 1973).<sup>5</sup> Although ratification is typically a question of fact for the jury, Arkansas courts have made it clear that "[t]he doctrine of ratification, however, has no application if there was no agency relationship." *Sterne, Agee & Leach, Inc. v. Way*, 270 S.W.3d 369, 376 (Ark. App. 2007) (citing *E.P. Dobson, Inc. v. Richard*, 705 S.W.2d 893, 894 (Ark. App. 1986) ("The doctrine of ratification is inapplicable when no agency relationship is proved.")). The "essential elements for a showing of the agency relationship [are] authorization and control." *Taylor v. Gill*, 934 S.W.2d 919, 921 (Ark. 1996). Here, it is undisputed that there is no agency relationship between Plaintiffs and BancorpSouth, and it would be impossible for BancorpSouth to show that Plaintiffs controlled BancorpSouth when it paid Plaintiffs' overdrafts, particularly given the previously cited language in the Deposit Agreement – "[i]f more than one item or order is presented for payment against the account on the same day and the available balance of the

---

<sup>5</sup> Courts in Alabama, Florida, Louisiana, Mississippi, Missouri, Tennessee and Texas follow the same basic principle. See *Austin v. Cox*, 523 So.2d 376, 378 (Ala. 1988) (Alabama law); *Zurstrassen v. Stonier*, 786 So.2d 65, 71 (Fla. 4th DCA 2001) (Florida law); *Cartinez v. Reliable Amusement Co., Inc.*, 746 So.2d 246, 252-53 (La. Ct. App. 1999) (Louisiana law); *Green Acres Farms, Inc. v. Brantley*, 651 So.2d 525, 529 (Miss. 1995) (Mississippi law); *Murphy v. Jackson Nat. Life Ins. Co.*, 83 S.W.3d 663, 668 (Mo. Ct. App. 2002) (Missouri law); *Bells Banking Co. v. Jackson Centre, Inc.*, 938 S.W.2d 421, 427 (Tenn. Ct. App. 1996) (Tennessee law); *Willis v. Donnelly*, 199 S.W.3d 262, 273 (Tex. 2006) (Texas law).

account is insufficient to pay them all, *we may pay any of them in any order we choose.*” (emphasis added). Thus, the affirmative defense of ratification and acceptance fail as a matter of law.

In addition, BancorpSouth’s affirmative defense of release fails as a matter of law because it is undisputed that no release exists. “A release agreement is a contractual agreement, and the essential elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Anaya v. Ford*, No. CA 11-757, 2012 WL 11274, at \*4 (Ark. App. Jan. 4, 2012).<sup>6</sup> Releases, like other contracts, “must contain terms that are definitely agreed upon and reasonably certain.” *Id.* at \*5. “Mutual agreement, as evidenced by objective indicators, is essential. If there is no meeting of the minds, there is no contract.” *Id.* Moreover, the intention of the releasor to release must be “manifest”. *Nall v. Scott*, 342 S.W.2d 418, 421 (Ark. 1961). BancorpSouth cannot provide evidence that there was ever any agreement of release between it and Plaintiffs which that would satisfy any of the essential elements of a contract apart from competent parties. There is certainly no evidence of a meeting of the minds between Plaintiffs and BancorpSouth whereby Plaintiffs were releasing their claims by paying the overdraft fees. Crucially, there is no evidence showing that Plaintiffs had any “manifest” intent to release their claims against BancorpSouth.

Accordingly, Plaintiffs are entitled to summary judgment as to BancorpSouth’s affirmative defense of release as a matter of law.

---

<sup>6</sup> Courts in Alabama, Florida, Louisiana, Mississippi, Missouri, Tennessee and Texas require the same contractual elements. *Whitman v. Walker County Bd. of Educ.*, 591 So.2d 481, 482 (Ala. 1991) (Alabama law); *Cain v. Banka*, 932 So.2d 575, 580 (Fla. 5th DCA 2006) (Florida law); *Jordan v. City of Baton Rouge Through City Police Dept.*, 529 So.2d 412, 415 (La. Ct. App. 1988) (Louisiana law); *Illinois Cent. R. Co. v. McDaniel*, 951 So.2d 523, 530 (Miss. 2006) (Mississippi law); *Kenney v. Vansittert*, 277 S.W.3d 713, 720 (Mo. Ct. App. 2008) (Missouri law); *Burks v. Belz-Wilson Properties*, 958 S.W.2d 773, 776 (Tenn. Ct. App. 1997) (Tennessee law); *Vera v. North Star Dodge Sales, Inc.*, 989 S.W.2d 13, 17 (Tex. Ct. App. 1998) (Texas law).

**f. Ninth Affirmative Defense – Res Judicata and/or Judicial Estoppel**

*The claims of Plaintiff or purported class members against BancorpSouth are barred, in whole or in part, by principles of res judicata and/or judicial estoppel. Any claims related to purported compensable or wrongful overdraft charges previously raised and resolved by Plaintiff or purported class members cannot form the basis of their claims herein.*

Contrary to BancorpSouth’s assertion, neither the principles of *res judicata* nor judicial estoppel are applicable in the instant case. Indeed, there are no facts that could ever support the application of these two principles to the instant case.

As held by the Arkansas Supreme Court, “[r]es judicata means that ‘a thing or matter has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction.’” *Baptist Health v. Murphy*, No. 09-1070, 2010 WL 3835844, at \*7 (Ark. Sept. 30, 2010) (quoting *Beebe v. Fountain Lake Sch. Dist.*, 231 S.W.3d 628, 634 (Ark. 2006)). Thus, “[r]es judicata bars not only the relitigation of claims that were actually litigated in the first suit, but also those that could have been litigated.” *Baptist Health*, 2010 WL 3835844 at \*8 (citing *Beebe*, 231 S.W.3d at 634).<sup>7</sup> As a threshold matter, BancorpSouth’s affirmative defense fails as a matter of law because there has never been a prior lawsuit between the parties from which *res judicata* could arise to bar the present lawsuit or any claims asserted therein. Accordingly, Plaintiffs are entitled to summary judgment on BancorpSouth’s *res judicata* affirmative defense.

---

<sup>7</sup> Courts in Alabama, Florida, Louisiana, Mississippi, Missouri, Tennessee and Texas follow the same basic principles. See *Equity Resources Mgmt., Inc., et al. v. Vinson*, 723 So.2d 634, 636 (Ala. 1998) (Alabama law); *W & W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc.*, 35 So.3d 79, 83 (Fla. 4th DCA 2010) (Florida law); *Hines v. Smith*, 16 So.3d 1234, 1238 (La. Ct. App. 2009) (Louisiana law); *Davis Island Land Co., LLC v. Vicksburg Warren School Dist.*, 949 SO.2d 754, 757 (Miss. Ct. App. 2006) (Mississippi law); *Spath v. Norris*, 281 S.W.3d 346, 350 (Mo. Ct. App. 2009) (Missouri law); *Mitrano v. Houser*, 240 S.W.3d 854, 860 (Tenn. Ct. App. 2007) (Tennessee Law); *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652-53 (Tex. 1996) (Texas law).

For the same reason, BancorpSouth's affirmative defense of judicial estoppel fails as a matter of law. "A party asserts the doctrine of judicial estoppel by arguing that 'a party may be prevented from taking inconsistent positions in successive cases with the same adversary.'" *Cox v. Miller*, 210 S.W.3d 842, 847 (Ark. 2005) (quoting *Dupwe v. Wallace*, 140 S.W.3d 464, 469 (Ark. 2004)). Thus, judicial estoppel cannot be established by BancorpSouth because there is no earlier case between Plaintiffs and BancorpSouth.<sup>8</sup> Further, neither judicial estoppel nor *res judicata* can be applied through a representative party doctrine given that there has been no other case in which Plaintiffs were represented. Such an application requires a "substantial identity of the parties" such that the "two parties are so identified with one another that they represent the same legal right." *Jayel Corp v. Cochran*, 234 S.W.3d 278, 282 (Ark. 2006). BancorpSouth cannot argue that with regard to the claims asserted here that Plaintiffs were "adequately represented by someone with the same interests who [wa]s a party' to [a] prior suit." *Yankton Sioux Tribe v. U.S. Dept. of Health and Human Services*, 533 F.3d 634, 640 (8th Cir. 2008).

Accordingly, Plaintiffs are entitled to summary judgment on BancorpSouth's judicial estoppel affirmative defense.

**g. Fourteenth Affirmative Defense – Voluntary Payment Doctrine**

*The claims of Plaintiff or purported class members against BancorpSouth are barred, in whole or in part, by the voluntary payment doctrine or similar legal theory in that the obligations and fees about which Plaintiff complains were paid voluntarily. Plaintiff or purported class members are barred from recovering for*

---

<sup>8</sup> For the same reason, judicial estoppel cannot be applied under Alabama, Florida, Mississippi, Missouri, Tennessee or Texas law. *See Martin v. Cash Exp., Inc.*, 60 So.3d 236, 245 (Ala. 2010) (Alabama law); *Bueno v. Workman*, 20 So.3d 993, 997 (Fla. 4th DCA 2009) (Florida law); *Thomas v. Bailey*, 375 So.2d 1049, 1052-53 (Miss. 1979) (Mississippi law); *Vinson v. Vinson*, 243 S.W.3d 418, 422 (Mo. Ct. App. 2007) (Missouri law); *Thrapp v. Thrapp*, No. E.2006-00088-COA-R3-CV, 2007 WL 700963, at \*7 (Tenn. Ct. App. Mar. 8, 2007) (Tennessee law); *Bailey v. Barnhart Interest, Inc.*, 287 S.W.3d 906, 910-11 (Tex. Ct. App. 2009) (Texas law). On the other hand, courts in Louisiana have held that judicial estoppel is not applicable under Louisiana law. *Miramon v. Woods*, 639 So.2d 353, 358 (La. Ct. App. 1994).

*any overdraft charges arising from transactions in which they voluntarily and actively engaged or from which they benefited. Plaintiff or purported class members incurred overdraft fees in these situations and paid the fees without protest. Plaintiff and purported class members are estopped from seeking compensation for charges which were previously objected to, and subsequently waived or reversed by BancorpSouth, or accepted by Plaintiff or purported class members after explanation by BancorpSouth. Plaintiff's and purported class members' voluntary participation in what they now claim is a compensable wrong bars one or more of their claims.*

BancorpSouth's voluntary payment doctrine affirmative defense fails as a matter of law because there is no evidence that Plaintiffs voluntarily paid the overdraft fees assessed to their accounts.

Under Arkansas' voluntary payment rule, "a person cannot recover money that he or she has voluntarily paid." *Curtis Lumber Co., Inc. v. Louisiana Pacific Corp.*, 618 F.3d 762, 782 (8th Cir. 2010) (citing *Boswell v. Gillett*, 295 S.W.2d 758, 761 (Ark. 1956)). "A payment is deemed voluntary, and thus not recoverable, 'when a person without mistake of fact or fraud, duress, coercion, or extortion pays money on a demand which is not enforceable against him.'" *Id.* (citation omitted). Thus, "one voluntarily paying a claim with knowledge of the facts or under such circumstances that he is affected with such knowledge cannot recover the payment on the ground that the claim was unenforceable." *Hall v. Hawkins Oil & Gas, Inc.*, 715 S.W.2d 462, 463 (Ark. App. 1986).<sup>9</sup>

This case is vastly different from cases in which a plaintiff affirmatively makes a payment to the defendant on a demand which is not enforceable and then sues to recover it.

---

<sup>9</sup> Courts in Alabama, Florida, Louisiana, Mississippi, Missouri, Tennessee and Texas apply the doctrine in the same circumstance. *Mount Airy Ins. Co. v. Doe Law Firm*, 668 So.2d 534, 537-38 (Ala. 1995) (Alabama law); *Ruiz v. Brink's Home Sec., Inc.*, 777 So.2d 1062, 1064 (Fla. 2d DCA 2001) (Florida law); *Ken Lawler Builders, Inc. v. Delaney*, 892 So.2d 778, 780 (La. Ct. App. 2005) (Louisiana law); *McDaniel Bros. Const. Co. v. Burk-Hallman Co.*, 175 So.2d 603, 605 (Miss. 1965) (Mississippi law); *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 726 (Mo. 2009) (Missouri law); *Pratt v. Smart Corp.*, 968 S.W.2d 868, 871 (Tenn. Ct. App.) (Tennessee law); *Miga v. Jensen*, 299 S.W.3d 98, 103 (Tex. 2009) (Texas law).

Here, Plaintiffs did not voluntarily pay the overdraft fees at issue. BancorpSouth exclusively decided, without any prior notice or opportunity to object or protest, to withdraw money from Plaintiffs' accounts to pay for the overdraft fees wrongfully assessed. The funds were taken from Plaintiffs, not paid by Plaintiffs, and because the funds were taken from Plaintiffs without their acquiescence, BancorpSouth's demand for payment was manifestly unenforceable. Because BancorpSouth's withdrawals were not "payments" as the term is recognized by Arkansas law, the voluntary payment doctrine has no applicability to the instant case.

Even assuming *arguendo* that this Court were prepared to consider bank-initiated withdrawals as payments, Plaintiffs' "payment" of overdraft fees assessed to their accounts upon demand by BancorpSouth was made under a *mistake of fact* that BancorpSouth had correctly calculated the amount of overdraft fees assessed to their accounts. BancorpSouth cannot present evidence that would support that Plaintiffs had full knowledge of the way in which BancorpSouth calculated the overdraft fees assessed to their accounts because it has already been established that Plaintiff Swift was unaware of BancorpSouth's practice of debit re-sequencing until May 2010, when he retained counsel. BancorpSouth not only is unable to present evidence that Plaintiffs possessed actual knowledge of the facts surrounding BancorpSouth's assessment of overdraft fees, but in light of BancorpSouth's admission that Plaintiffs' account statements did not disclose BancorpSouth's high to low posting order, BancorpSouth is unable to present any evidence that Plaintiffs had constructive knowledge of BancorpSouth's overdraft policies and practices. *See Lindsey Depo.* at p. 89.

Accordingly, Plaintiffs are entitled to summary judgment as to BancorpSouth's voluntary payment doctrine affirmative defense.

**h. Fifteenth Affirmative Defense – Course of Dealing**

*The claims that Plaintiff asserts against BancorpSouth are barred because Plaintiff acquiesced, as a course of dealing, in Defendant’s interpretation, application, and implementation of the contractual terms and provisions, and benefited from Defendant’s interpretation, application and implementation of the contractual terms and provisions. At one or more time, Plaintiff or purported class members took advantage of knowledge that BancorpSouth would honor transactions for which Plaintiff’s account had insufficient funds. Plaintiff or purported class members are barred from recovering any overdraft charges arising from transactions in which they actively engaged or from which they benefited. Plaintiff’s and purported class members’ failure to cease the practice of voluntarily authorizing transactions that caused overdraft fees after being notified that fees were imposed, in both fee notices and monthly statements constituted agreement to a course of dealing between the parties.*

BancorpSouth’s course of dealing affirmative defense fails as a matter of law because it expressly contradicts the express terms of the Deposit Agreement.

In the section entitled “Effect of Termination or Amendment” the Deposit Agreement states that “[n]o practice or course of dealing in connection with the account which is at variance with this Agreement shall constitute a modification or amendment of this Agreement.” (DE # 2274-4 at p. 4; DE # 2274-5 at p. 4; DE # 2274-6 at p. 7; DE # 2274-7 at p. 4; DE # 2274-8 at p. 4; DE # 2274-9 at p. 5; DE # 2274-10 at p. 4; and DE # 2274-11 at p. 4). In addition, the section entitled “Order of Payment” states that “[o]ur payment of any item or order in overdraft does not create any obligation for us to pay any other item or order in overdraft in the future, and you agree that no course of dealing regarding the payment of items or order in overdraft will be created between us.” *Id.* (emphasis added). Yet, in the face of clear language to the contrary in its own adhesive contract, BancorpSouth claims that its payment of transactions for which Plaintiffs purportedly had insufficient funds in their accounts somehow created a course of dealing between the parties. BancorpSouth cannot, on one hand, contractually preclude Plaintiffs from relying on a purported course of dealing between the parties and then, on the

other hand, unilaterally impose a course of dealing because it suits its purposes. The express terms of the Deposit Agreement bar BancorpSouth's fatuous attempt to insert a new contradictory provision into the Deposit Agreement.

While a course of dealing may be established to vary the terms of a contract when a contract does not contain a nonwaiver and/or no-unwritten-modification provision, Arkansas law is clear that, if a contract includes such clauses, a course of dealing cannot be established for such purpose. *Minor v. Chase Auto Finance Corp.*, 372 S.W.3d 762, 766-67 (Ark. 2010) (nonwaiver and no-unwritten-modification clauses in a contract preclude waiver of strict compliance with contract through course of dealing); *Webster v. Business Credit Corp. v. Bradley Lumber Co.*, No. 1:09-CV-1083, 2011 WL 5974582, at \*3 (W.D. Ark. Nov. 29, 2011) (holding no-modification-by-course-of-dealing provision precluded course of dealing from modifying or waiving provisions in contract). *See also Brach Banking & Trust Co. v. Houma Dollar Partners, L.L.C.*, No. 10-002670CB-M, 2012 WL 384484, at \*11 (S.D. Ala. Feb. 6, 2012) (non-waiver and no-unwritten-modification provision precluded course of dealing from modifying contract); *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999) (contract was unambiguous and could not be modified by course of dealing); *Terrebonne Fuel & Lube, Inc. v. Placed Refining Co.*, 681 So.2d 1292, 1296-97 (La. Ct. App. 1996) (course of dealing cannot override express contractual provision); *Melson v. Traxler*, 356 S.W.3d 264, 274 (Mo. Ct. App. 2011) (course of dealing cannot vary plain terms of contract); *General Plumbing & Heating, Inc. c. American Air Filter Co., Inc.*, 696 F.2d 375, 378 (5th Cir. 1983) (express terms of contract preclude evidence of course of dealing) (applying Mississippi law); *Buchholz v. Tenn. Farmers Life Reassurance Co.*, 145 S.W.3d 80, 84 (Tenn. Ct. App. 2003) ("modification of an existing contract cannot arise from an ambiguous course of dealing"); *Printing Center of*

*Texas, Inc. v. Supermind Pub. Co., Inc.*, 669 S.W.2d 779, 784 (Tex. Ct. App. 1984) (course of dealing may not be used to contradict express terms of contract).

Accordingly, Plaintiffs are entitled to summary judgment on BancorpSouth's course of dealing affirmative defense.

#### **IV. Conclusion**

Based on the foregoing, there is no genuine issue of material fact that BancorpSouth's Second, Third, Fourth, Fifth, Eighth, Ninth, Fourteenth and Fifteenth affirmative defenses are inapplicable and fail as a matter of law. Accordingly, Plaintiffs respectfully request that the Court enter an Order granting summary judgment in Plaintiffs' favor as to these affirmative defenses.

Dated: October 9, 2012.

Respectfully submitted,

/s/ Aaron S. Podhurst

Aaron S. Podhurst, Esquire

Florida Bar No. 063606

apodhurst@podhurst.com

Robert C. Josefsberg, Esquire

Florida Bar No. 40856

rjosefsberg@podhurst.com

Steven C. Marks, Esquire

Florida Bar No. 516414

smarks@podhurst.com

Peter Prieto, Esquire

Florida Bar No. 501492

pprieto@podhurst.com

Stephen F. Rosenthal, Esquire

Florida Bar No. 0131458

srosenthal@podhurst.com

Jon Gravante, III, Esquire

Florida Bar No. 617113

jgravante@podhurst.com

PODHURST ORSECK, P.A.

City National Bank Building

25 W. Flagler Street, Suite 800

Miami, FL 33130-1780

Tel: 305-358-2800

Fax: 305-358-2382

/s/ Bruce S. Rogow

Bruce S. Rogow, Esquire

Florida Bar No. 067999

brogow@rogowlaw.com

Bruce S. Rogow, P.A.

Broward Financial Center

500 East Broward Boulevard

Suite 1930

Fort Lauderdale, FL 33394

Tel: 954-767-8909

Fax: 954-764-1530

*Co-Lead Counsel for Plaintiffs*

/s/ Robert C. Gilbert  
Robert C. Gilbert, Esquire  
Florida Bar No. 561861  
rcg@grossmanroth.com  
Stuart Z. Grossman, Esquire  
Florida Bar No. 156113  
szg@grossmanroth.com  
David Buckner, Esquire  
Florida Bar No. 60550  
dbu@grossmanroth.com  
Seth E. Miles, Esquire  
Florida Bar No. 385530  
sem@grossmanroth.com  
GROSSMAN ROTH, P.A.  
2525 Ponce de Leon Boulevard  
Eleventh Floor  
Coral Gables, FL 33134  
Tel: 305-442-8666  
Fax: 305-779-9596

*Coordinating Counsel for Plaintiffs*

/s/ E. Adam Webb  
E. Adam Webb, Esquire  
Georgia Bar No. 743910  
Adam@WebbLLC.com  
Matthew C. Klase, Esquire  
Georgia Bar No. 141903  
Matt@WebbLLC.com  
G. Franklin Lemond, Jr., Esquire  
Georgia Bar No. 141315  
FLemond@WebbLLC.com  
WEBB, KLASE & LEMOND, L.L.C.  
1900 The Exchange, S.E.  
Suite 480  
Atlanta, GA 30339  
Tel: 770-444-9325  
Fax: 770-444-0271

/s/ Michael W. Sobol  
Michael W. Sobol, Esquire  
California Bar No. 194857  
msobol@lchb.com  
Roger N. Heller, Esquire  
California Bar No. 215348  
rheller@lchb.com  
Jordan Elias, Esquire  
California Bar No. 228731  
jelias@lchb.com  
LIEFF CABRASER HEIMANN &  
BERNSTEIN L.L.P.  
Embarcadero Center West  
275 Battery Street, 30th Floor  
San Francisco, CA 94111  
Tel: 415-956-1000  
Fax: 415-956-1008

/s/ Russell W. Budd

Russell W. Budd, Esquire  
Texas Bar No. 03312400  
[rbudd@baronbudd.com](mailto:rbudd@baronbudd.com)  
Bruce W. Steckler, Esquire  
Texas Bar No. 00785039  
[bsteckler@baronbudd.com](mailto:bsteckler@baronbudd.com)  
Mazin A. Sbaiti, Esquire  
Texas Bar No. 24058096  
[msbaiti@baronbudd.com](mailto:msbaiti@baronbudd.com)  
BARON & BUDD, P.C.  
3102 Oak Lawn Avenue  
Suite 1100  
Dallas, TX 75219  
Tel: 214-521-3605  
Fax: 214-520-1181

/s/ David S. Stellings

David S. Stellings, Esquire  
New York Bar No. 2635282  
[dstellings@lchb.com](mailto:dstellings@lchb.com)  
LIEFF CABRASER HEIMANN &  
BERNSTEIN L.L.P.  
250 Hudson Street  
8th Floor  
New York, NY 10013  
Tel: 212-355-9500  
Fax: 212-355-9592

/s/ Ruben Honik

Ruben Honik, Esquire  
Pennsylvania Bar No. 33109  
[rhonik@golombhonik.com](mailto:rhonik@golombhonik.com)  
Kenneth J. Grunfeld, Esquire  
Pennsylvania Bar No. 84121  
[kgrunfeld@golombhonik.com](mailto:kgrunfeld@golombhonik.com)  
GOLOMB & HONIK, P.C.  
1515 Market Street  
Suite 1100  
Philadelphia, PA 19102  
Tel: 215-985-9177  
Fax: 215-985-4169

/s/ Ted E. Trief

Ted E. Trief, Esquire  
New York Bar No. 1476662  
[ttrief@triefandolk.com](mailto:ttrief@triefandolk.com)  
Barbara E. Olk, Esquire  
New York Bar No. 1459643  
[bolk@triefandolk.com](mailto:bolk@triefandolk.com)  
TRIEF & OLK  
150 E. 58th Street  
34th Floor  
New York, NY 10155  
Tel: 212-486-6060  
Fax: 212-317-2946

*Plaintiffs' Executive Committee*

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

**CASE No. 09-MD-02036-JLK**

**IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION**

**MDL No. 2036**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 9, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

*/s/ Robert C. Gilbert*

\_\_\_\_\_  
Robert C. Gilbert  
Florida Bar No. 561861  
GROSSMAN ROTH, P.A.  
2525 Ponce de Leon Boulevard  
Eleventh Floor  
Coral Gables, FL 33134  
Tel: 305-442-8666  
Fax: 305-779-9596

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

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

IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION

MDL No. 2036  
Fourth Tranche

---

THIS DOCUMENT RELATES TO:

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

---

DEPOSITION OF SHANE SWIFT

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

APPEARANCES:

On behalf of BancorpSouth:  
Eric Jon Taylor, Esquire  
and Darren E. Gaynor, Esquire  
Parker, Hudson, Rainer & Dobbs, LLP  
1500 Marquis Two Tower  
285 Peachtree Center Avenue N.E.  
Atlanta, Georgia 30303  
(404) 523-5000  
etaylor@phrd.com

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

- - -

1 MR. OSTROW: Form.

2 A. I wouldn't know if I was responsible.  
3 But I'm fine with it.

4 BY MR. TAYLOR:

5 Q. All right. Going back to the Complaint  
6 and if you shift back to Page 21, am I right that what  
7 you noted when you looked at this statement was that  
8 the transactions were ordered high to low even though  
9 all of them took place on May 5, right?

10 A. Yes.

11 Q. And you were able to learn that just by  
12 looking at the BancorpSouth statement, right?

13 A. Yes.

14 Q. You had had overdraft charges in the  
15 past, right?

16 A. Yes.

17 Q. Before May 2010?

18 A. Yes.

19 Q. And if you'd looked at the statements  
20 for those time periods, you could have seen if any of  
21 those were in high to low ordering, as well, right?

22 A. Yes, and that's what I did at this  
23 point. I went back and looked at all my statements.

24 Q. Tell me about that.

25 A. I found out that we kept our receipts

1 and that not everything was in chronological order.  
2 Everything was resequenced as far back as I could see.  
3 That's what put me into doing research on corrupt  
4 practices.

5 Q. You think this is a corrupt practice?

6 A. I believe it is a corrupt practice.

7 Q. It's a practice that you learned was  
8 the case as far back as you researched your account,  
9 right?

10 MR. OSTROW: Form.

11 A. Yes, as far as I researched the account  
12 from these dates back.

13 BY MR. TAYLOR:

14 Q. From May 2010 looking back, do you  
15 recall how far back?

16 A. From around these dates. I don't  
17 recall how far back, but I went as far as I could.

18 Q. A few years?

19 A. I couldn't recall that. Pretty far  
20 back.

21 Q. Did you go back based on what you  
22 actually had at the house or did you ask BancorpSouth  
23 for statements?

24 A. No. I took my receipts and my  
25 statements that I had at home.

1 Q. But you never looked before to see if  
2 transactions were ordered?

3 A. Not this particular -- I mean when I  
4 came to the conclusion that this is happening, no, I  
5 never investigated prior to this date, around these  
6 dates.

7 Q. Did you look at any documents other  
8 than the BancorpSouth monthly statements?

9 A. Not to my knowledge, just the  
10 statements and receipts. I believe those are  
11 basically the only two, maybe some printouts from the  
12 bank, which are the statements anyway.

13 Q. Did you look at any of the documents  
14 that you received when you opened the account?

15 A. Yes, I looked at those documents.

16 Q. Do you recall what documents you looked  
17 at?

18 A. I don't recall, but again, BancorpSouth  
19 took over American State Bank and they sent everything  
20 via mail.

21 Q. Via --

22 A. Mail and E-Mail to the best of my  
23 knowledge.

24 Q. Do you recall receiving a deposit  
25 agreement from BancorpSouth?

# **EXHIBIT B**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

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

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

**PLAINTIFF SHANE SWIFT’S OBJECTIONS AND  
RESPONSES TO DEFENDANT BANCORPSOUTH BANK’S  
FIRST CONTINUING INTERROGATORIES TO PLAINTIFF**

Pursuant to Fed. R. Civ. P. 26 and 33, Plaintiff, Shane Swift (“Plaintiff”) hereby responds to Defendant, BancorpSouth Bank’s (“BancorpSouth” or “Defendant”) First Continuing Interrogatories to Plaintiff (“interrogatories”).

**GENERAL OBJECTIONS**

1. Plaintiff objects to each discovery request that asks for interrogatory response or the identification of documents that are inconsistent with what Judge James Lawrence King has already determined to be the proper scope of discovery for requests served on plaintiffs in his Opinion Setting Standards for Resolution of Discovery Interrogatories and Production of Documents dated December 15, 2010 (D.E. #1016).

2. Plaintiff objects to each discovery request to the extent it calls for documents or other information that are protected from discovery by the attorney-client privilege, work

product doctrine, or any other applicable privilege. Any inadvertent disclosure of privileged information shall not be deemed a waiver by Plaintiff of any applicable privilege or doctrine.

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

4. Plaintiff objects to each discovery request to the extent it seeks confidential or private personal or business information. To the extent that documents and other information requested by Defendant are not protected from discovery based on attorney-client privilege or work product doctrine, and are otherwise discoverable, they will be produced subject to an appropriate protective order.

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

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

7. Plaintiff objects to the "Definitions," "Instructions," and to each discovery request to the extent they purport to impose any requirement or discovery obligation on Plaintiff

greater than or different from those imposed by Rule 26 or 33 of the Federal Rules of Civil Procedure and the applicable rules of this Court.

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

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

10. Plaintiff objects to the interrogatories to the extent that they are premature contention interrogatories subject to later response under Federal Rules of Civil Procedure 26(a) and 33(a)(2). Plaintiff reserves the right to respond more fully later, or to supplement or amend any response after a sufficient opportunity for discovery.

11. Plaintiff objects to the interrogatories to the extent that they are unlimited in scope and time.

12. Plaintiff objects to the interrogatories to the extent that they use an overbroad definition of the term “identify,” and to the extent that the use of the term in certain interrogatories does not comport with any of the stated definitions.

13. Plaintiff objects to the interrogatories to the extent that they contain discreet subparts, and therefore, could exceed the allowable number of interrogatories under Rule 33 of the Federal Rules of Civil Procedure and/or under any applicable court order.

14. Plaintiff objects to the interrogatories to the extent that they seek information that Defendants already have in their possession, and are otherwise cumulative or duplicative of information in Defendant’s possession custody or control, or of information already requested or

sought in these interrogatories or contained in documents produced in response to Defendant's requests for production.

15. Plaintiff objects to the interrogatories to the extent that they request opinions or legal conclusions, for example, seeking "every material detail" calls for a legal conclusion about certain facts that might be omitted or included.

16. Plaintiff objects to the interrogatories to the extent that certain interrogatories seek "all" or "every" piece of information as overbroad and unduly burdensome, and as calling for information that is either irrelevant, or cumulative or duplicative of information already provided in these interrogatories, or of information provided in documents produced in response to Defendant's requests for production.

17. Plaintiff objects to any interrogatory that seeks legal argument that will be the subject of later proceedings in this case.

### **RESPONSES TO INTERROGATORIES**

1. Identify each person, other than BancorpSouth or its employees, or your counsel, who has knowledge of or information concerning any of the facts alleged in the Complaint and, for each person identified, state the facts of which that person has knowledge or information and identify any documents that reflect, support, or evidence such facts.

#### **RESPONSE:**

Plaintiff and Plaintiff's wife, Trina Swift, as the joint account holders of the account at issue in this lawsuit, have knowledge of facts alleged in the Complaint, including the debit card transactions made under their BancorpSouth accounts, their management of those accounts, and documents or other communications sent by Defendant relating to their accounts.

Earnings Performance Group, a third party consultant retained by BancorpSouth, assisted BancorpSouth with developing and implementing its high-to-low re-sequencing policy.

FDR, a third party which Defendant identifies in its discovery responses to date was involved in authorizing certain debit card transactions.

2. Other than documents provided to you by BancorpSouth or that you know to be in BancorpSouth's possession, identify each and every other document, tangible object or other item of real, documentary or demonstrative evidence which contains, or may contain, material or information which is, which may be, or which you contend substantiates or supports each of your contentions involved in this case, and identify the person presently having possession, custody or control of each item listed.

**RESPONSE:**

Pursuant to Federal Rule of Civil Procedure 33(d), Plaintiff will produce documents responsive to Defendant's First Continuing Request for Production of Documents to Plaintiff. The responsive documents are in the possession of Plaintiff.

3. Identify all persons from whom you have obtained written or oral statements regarding the subject matter of this litigation, the date each such statement was taken or made, the person who obtained the statement and specify the information contained within said statement.

**RESPONSE:**

None, other than the deposition of Jeff Jagers taken on October 12, 2011.

4. Identify each agent, person, corporation, firm, association or other entity that has been retained by you to conduct or has otherwise conducted an investigation to determine any of the facts pertaining to any of the issues in this case; describe the nature of each such

investigation; the date(s) that any investigation was started and completed; and the identity of the person to whom the results were submitted.

**RESPONSE:**

Plaintiff has retained attorneys from Kopelowitz Ostrow, P.A., and Chitwood Harley Harnes LLP to investigate Plaintiff's claims and file a class action lawsuit on his behalf. In light of interrogatory number 5, below, Plaintiff interprets this interrogatory as not seeking information regarding any expert witnesses.

5. Identify all expert witnesses you expect to call, whether live or by affidavit or deposition, in any trial or evidentiary hearing in this action, or whose testimony you intend to present in support of your motion to certify a class in this action or in support of any alleged damages, and state the subject matter on which the expert is expected to testify, the substance of the facts and opinions for the expert's expected testimony, all bases for each opinion, and all information considered by such expert (including, but not limited to, data, treatises, compilations, or other opinions) in arriving at his opinion.

**RESPONSE:**

At this time, Plaintiff has not determined the experts he expects to call at the trial or any evidentiary hearing in this action. Plaintiff will comply with Court's Scheduling Order Pertaining to "Fourth Tranche" Cases (D.E. # 1340) regarding the disclosure of expert witnesses for trial. Plaintiff has retained Art Olsen of Cassis Technology, LLC, 903 N. 130<sup>th</sup> Street #108, Seattle, WA 98133, as an expert in support of his Motion for Class Certification. See Mr. Olsen's declaration filed in support of Plaintiff's Motion for Class Certification for the subject matter, the substance of the facts and opinions, the bases for the opinions, and all information considered by Mr. Olsen in arriving at his expert opinions to date.

6. If you contend that BancorpSouth, its agents or representatives, or any of its predecessor's agents or representatives, have made any admissions against interest with respect to any of the allegations contained in the Complaint, state with specificity and particularity all such admissions against interest, identify the maker of each such admission, identify the substance of each such admission, identify the date each such admission was made, and identify all persons who witnessed or who possess information regarding each such admission.

**RESPONSE:**

Plaintiff objects to this interrogatory on the grounds that it seeks information protected by the word-product doctrine. In addition, Plaintiff objects because a response to this interrogatory calls for a legal conclusion. Subject to and without waiving the foregoing, Plaintiff contends the deposition transcript of Jeff Jagers taken in this case contains admissions against BancorpSouth.

7. Identify each person whom you expect to call or whom you may call as a witness at the trial of this case and, for each such person, provide a detailed summary of the facts, matters, or opinions about which each such witness will or may testify in this case.

**RESPONSE:**

At this time, Plaintiff has not determined each person who he expects to call at the trial of this case. Plaintiff will comply with Court's Scheduling Order Pertaining to "Fourth Tranche" Cases (D.E. # 1340) regarding the disclosure of lay witnesses expected to testify at trial. Plaintiff refers Defendant to the Trial Plan submitted with his Motion for Class Certification, which provides some detail as to witnesses that he would intend to call at trial.

8. Identify all persons (other than Plaintiff's legal counsel) who participated in preparing the response to these Interrogatories.

**RESPONSE:**

In addition to Plaintiff's legal counsel, Plaintiff, Shane Swift, participated in preparing the responses to these interrogatories.

9. With respect to your BancorpSouth account statements that have been produced to you and are attached to BancorpSouth's First Requests for Admissions to Plaintiff, identify each individual fee that you contend was assessed by BancorpSouth unfairly, unconscionably, unlawfully or in bad faith.

**RESPONSE:**

Plaintiff objects to this interrogatory because a response to this interrogatory calls for a legal conclusion. Subject to and without waiving the foregoing, Plaintiff relies on the analysis of his expert, Art Olsen, as to overdraft fees that were assessed by BancorpSouth as a result of re-sequencing for which Plaintiff seeks relief in this lawsuit.

10. With respect to your BancorpSouth account statements that have been produced to you and are attached to BancorpSouth's First Requests for Admissions to Plaintiff, identify each individual fee for which you seek recovery or restitution in this lawsuit.

**RESPONSE:**

See response to interrogatory #9.

11. For each individual fee identified in your response to the preceding Interrogatory, state all facts on which you base your contention that the fee was assessed unfairly, unconscionably, unlawfully or in bad faith.

**RESPONSE:**

See response to interrogatory #9. In summary, Plaintiff now understands that Defendant assessed and collected overdraft fees for debit card transactions based on the bank re-ordering

debit card transactions to high-to-low, which increased the frequency of overdraft fees being assessed.

12. If you have had any account in last 5 years at another financial institution to which overdraft fees or charges were assessed, and if so, please identify the financial institution and type of account.

**RESPONSE:**

In supplement to the General Objections above, Plaintiff objects to this interrogatory on the grounds that it is inconsistent with Section A. of the Opinion Setting Standards For Resolution of Discovery Interrogatories and Production of Documents dated December 15, 2010 (D.E. #1016), which Plaintiff contends should be applicable to this case. In response to the first tranche banks' request that the plaintiffs produce information regarding their finances on accounts that are not at issue in this litigation, the Court denied the banks' motion to compel ruling that such requests were irrelevant and unduly burdensome. Accordingly, Plaintiff objects to this interrogatory on the grounds that it is unduly burdensome, irrelevant, and not likely to lead to the discovery of admissible evidence.

13. Describe each and every fact that you contend supports your allegations in the complaint that you have incurred or suffered damages "as a result" of BancorpSouth's conduct.

**RESPONSE:**

Plaintiff objects to this interrogatory as having the potential to invade the attorney-client and work product privileges to identify every fact that Plaintiff contends supports his claims. The request is also unduly burdensome as it would require the Plaintiff to list every fact that could be inferred from the review of the thousands of pages of documents produced to date by Defendant, as well as the facts revealed by way of Defendant's written discovery responses and

the deposition testimony of Jeff Jagers, in his capacity as Defendant's Federal Rule of Civil Procedure 30(b)(6) deponent. Plaintiff additionally incorporates and relies on the Court's comments and rulings regarding contention interrogatories set forth in the order dated December 16, 2010 (D.E. # 1016), and the standards the Court imposed in that Order. Discovery is ongoing, and as such, Plaintiff does not know each and every fact that supports his allegations in the Complaint that he has suffered damages as a result of BancorpSouth's conduct.

Plaintiff's Motion for Class Certification and related Appendices, inclusive of exhibits, the deposition of Jeff Jagers, and the declaration of Art Olsen provide facts supportive of the allegations in Complaint. Plaintiff will comply with any other Order issued by the Court regarding the identification of trial exhibits.

14. Identify each and every lawsuit to which you have ever been a party, or in which you have ever given testimony under oath, in which a financial institution was also a party or the subject matter involved a product offered by a financial institution. Identify any such lawsuit by stating the name of the lawsuit, the date on which it was filed, and the court in which it is or was pending.

**RESPONSE:**

None. Plaintiff also notes the ruling that the Court made in its December 16, 2010 Order (D.E. # 1016 at 9-10) regarding inquiries into other litigation to which Plaintiff may have been a party.

15. Identify all receipts referred to in footnote 3 of your Complaint.

**RESPONSE:**

Pursuant to Federal Rule of Civil Procedure 33(d), Plaintiff will produce documents responsive to this request.

16. Identify all receipts in your possession from third-parties for transactions in which overdraft fees were charged to you by BancorpSouth as shown on the account statements that have been produced to you and are attached to BancorpSouth's First Requests for Admissions to Plaintiff.

**RESPONSE:**

Pursuant to Federal Rule of Civil Procedure 33(d), Plaintiff will produce documents that are responsive to this request that he possesses, but does not believe he maintains possession of every receipt for every transaction for which Defendant charged him an overdraft fee.

17. Identify the earliest date when you became aware that BancorpSouth engaged in “reorder[ing] debits from highest to lowest” as you allege in Paragraph 35 of the Complaint.

**RESPONSE:**

In supplement to the General Objections above, Plaintiff objects to this interrogatory on the grounds that it is vague, inasmuch as Plaintiff cannot be expected to know what the Defendant means by “when you became aware.” The interrogatory is also objectionable because it mischaracterizes the allegation in paragraph 35 of the Complaint, which reads: “The Deposit Agreement fails to indicate that the Bank will always reorder debits from highest to lowest.”

18. Identify the earliest date when you became aware that BancorpSouth might pay a debit card transaction although the transaction resulted in your account becoming overdrawn.

**RESPONSE:**

In supplement to the General Objections above, Plaintiff objects to this interrogatory on the grounds that it is vague, inasmuch as Plaintiff cannot be expected to know what the Defendant means by “when you became aware.” Subject to and without waiving the foregoing, Plaintiff does not recall when he first became aware that BancorpSouth “might pay a debit card

transaction although the transaction resulted in your account becoming overdrawn.” Plaintiff is aware that the Defendant did from time to time pay debit card transactions for which the bank assessed overdraft fees because the bank indicated funds in his account were insufficient to pay for such debit card transactions. However, he was not aware until shortly before this lawsuit was filed that Defendant had assessed certain overdraft fees on his account as a result of re-ordering debit card transactions on his account from highest to lowest.

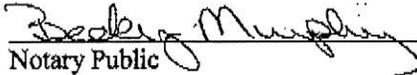
**VERIFICATION**

STATE OF ARKANSAS            )  
  )ss:  
COUNTY OF RANDOLPH        )

The undersigned, Shane Swift, states that he has reviewed the foregoing Responses to Defendant BancorpSouth Bank's First Continuing Interrogatories to Plaintiff and that the answers given are true and correct to the best of his knowledge, information and belief.

  
\_\_\_\_\_  
Shane Swift

SUBSCRIBED and sworn to before me this 6 day of Jan ~~2011~~ 2012 <sup>(a-v)</sup>

  
\_\_\_\_\_  
Notary Public

MY COMMISSION EXPIRES: 3-29-17



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

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

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

**CERTIFICATE OF SERVICE**

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

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

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

# **EXHIBIT C**



1 say that could be a case. That could be  
2 a situation.

3 BY MR. GAYNOR:

4 Q As we sit here today, is it your  
5 understanding -- what is your understanding of  
6 the order in which BancorpSouth posts  
7 transactions to checking accounts?

8 A My understanding is that they post  
9 from highest to lowest now during this -- the  
10 reason why I am here.

11 Q So as we sit here today, you  
12 understand that BancorpSouth posts debit  
13 transactions from highest to lowest dollar  
14 amount?

15 A Yes.

16 Q When did you come to know that?

17 A When Shane and I looked at that  
18 transaction and what started this process.

19 Q Were the transactions you are  
20 referring to -- there were a series of  
21 transactions that you and Mr. Swift reviewed  
22 in April or May of 2010 that raised some  
23 questions in your mind?

24 A Yes. We had the receipts right there  
25 with us, and we just looked at the receipts;

1 and we noticed that we did things on certain  
2 days.

3 It would have cleared, but we noticed  
4 that the thing that was done later on cleared  
5 first because it was -- and it was higher. We  
6 just noticed it was higher than the other two  
7 transactions.

8 Q Would it be fair to say that, when  
9 you reviewed that series of transactions, it  
10 was clear to you, at that point, that  
11 BancorpSouth posted transactions high to low?

12 A Once we looked at that, we just  
13 started going backwards and then really  
14 started paying attention to it. That is the  
15 way that it was arranged.

16 Q When you say you started going  
17 backwards, what does that mean?

18 A When we started looking at different  
19 -- sometimes keep different receipts on  
20 different things. I mean, I try to keep them;  
21 but after a while, it becomes a mess.

22 But we started looking at different  
23 receipts, and then we looked at the bank  
24 statements. And we looked on-line. And it  
25 was highest to lowest.

1 Q So you looked at older statements,  
2 statements from before that time period; and  
3 it was clear from looking at those statements  
4 that the bank posted high to low?

5 A (Witness nods head.)

6 Q She can't take down your head nod.

7 A Yes. Yes. I'm sorry.

8 Q Do you know how far back there were  
9 statements -- the statements that you looked  
10 at in that process, do you know how far back  
11 those went?

12 A Not exactly.

13 Q Do you have an estimate?

14 A Probably a month. I mean, probably  
15 just a month of going back comparing.

16 Q Did anyone at BancorpSouth ever tell  
17 you that they posted in any order other than  
18 high to low?

19 A No.

20 MR. GAYNOR: Let's go off the  
21 record for a minute.

22 (Whereupon, there was a discussion off  
23 the record, and the deposition  
24 continued as follows:)

25 BY MR. GAYNOR:

# **EXHIBIT D**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION  
MDL No. 2036

THIS DOCUMENT RELATES TO:

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

\*\*\*\*\*

DEPOSITION OF MICHAEL LINDSEY

\*\*\*\*\*

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

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

---

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

1 statements would have reported to Mr. Jagers?

2 MR. TAYLOR: Object to the form.

3 A. I would say that there's two determining  
4 factors, one being the way the statement is presented  
5 by our software vendor, Systematics, that produces  
6 those with some degree of customization. I would say  
7 there would be a programming area that at previous  
8 times did not report to Mr. Jagers, but that  
9 programming area currently does report to Mr. Jagers  
10 and the statement of rendering group does report to  
11 Mr. Jagers.

12 Q. (Mr. Streisfeld) Do you have any particular  
13 knowledge on behalf of the bank regarding the manner  
14 in which any changes were made to the way information  
15 was presented on bank statements between 2002 and  
16 August of 2010?

17 A. I have knowledge on behalf of the bank  
18 about changes that were made due to Regulation E and  
19 the requirements for reporting those.

20 Q. Okay. What changes are those?

21 A. The formatting of the cumulative NSF/OD  
22 fees paid for a particular statement.

23 Q. So, if I were to show you a statement --  
24 I'll show you a document we will mark as plaintiff's  
25 Exhibit 11.

1 (Exhibit No. 11 - Bank Statement  
2 dated 2/23/10 - marked for identification).

3 Q. (Mr. Streisfeld) Ask if you recognize that  
4 document?

5 A. It appears to be a statement for the  
6 plaintiff.

7 Q. And on the first page of this statement  
8 there's a box that's made up of stars maybe because  
9 of the way this is computer generated as a duplicate  
10 statement of Mr. Swift's, but you're referring to the  
11 reporting of cumulative overdraft information. Is  
12 the box I'm referring to on Page 1 where it says  
13 total for this period and total year to date was what  
14 you were talking about?

15 A. That's correct.

16 Q. And do you know when the bank began  
17 reporting this information on customer account  
18 statements?

19 A. Not specifically.

20 Q. Who would you think would know the answer  
21 as to when the bank first started printing this on  
22 consumer account customer statements?

23 A. Mr. Jagers would probably have the  
24 knowledge of the exact date of when that moved into  
25 production. We would have also records of that in

1 our programming move sheets and our transaction --  
2 our moving of code production to our operations  
3 group.

4 Q. Is there a particular manual that you would  
5 look in and get the answer to that question? Does it  
6 have a name?

7 A. I'm not aware of a name.

8 Q. All right. And it's your understanding  
9 that this information was added for regulatory  
10 compliance reasons associated with Regulation E; is  
11 that correct?

12 A. That's my understanding.

13 Q. Looking at this statement, is there  
14 anything else on this statement that you understand  
15 to have been involved with any type of Regulation E  
16 compliance? Just for the record let me mention,  
17 there's a circle on the fourth page and I think that  
18 that is my handwriting when I copied that. So, I had  
19 circled that and apparently somebody didn't take it  
20 off like I asked them to. So, anything else related  
21 to regulatory compliance?

22 A. It appears that the same box appears on  
23 Page 5.

24 Q. Okay. Is there anything else as far as  
25 you're aware with regard to Regulation E compliance

1 on this statement?

2 A. Not as far as I'm aware.

3 Q. Okay. Do you know whether this type of box  
4 appearing on the first page and on the fifth page in  
5 terms of organization was done across the board for  
6 the bank for consumer accounts?

7 A. It's my understanding it was done across  
8 the board.

9 Q. Describe for the record how this statement  
10 is organized in terms of information beginning on the  
11 first page and continuing to the various sections of  
12 the document.

13 A. Okay. The first section is the name and  
14 address of the account holder. Have the statement  
15 date, which is the date the statement's produced.  
16 Followed by the account number. The number for our  
17 call center is listed. The checking account summary.

18 Q. Just generally what does that describe?

19 A. Shows a starting balance of account as of  
20 the last statement, the number of credits, whatever  
21 those might be, credited to the account, and the  
22 dollar amount associated with those. It has the  
23 subtraction sign for the number of debits that were  
24 applied to the account and a dollar total of those.  
25 Also shows average balance calculation for the

1 account during the statement period. If it's an  
2 interest bearing account, it would show year to date  
3 interest paid. It would be fees paid this period.

4 Q. Let me jump in and try to help us move  
5 along. So, below this section you described before,  
6 which is where we summarize any year to date or  
7 returned items, returned items meaning NSF, right?  
8 Where it says returned items would be considered NSF  
9 in bank vernacular; is that correct? In the little  
10 box?

11 A. Yes.

12 Q. So then after that, there's a section that  
13 organizes deposits, I guess chronologically, correct?

14 A. Yeah, deposits and other credits  
15 chronologically.

16 Q. And there's a section that refers to  
17 checks, correct?

18 A. That is correct.

19 Q. And I notice that there's a date column, a  
20 check number column and amount column; is that  
21 correct?

22 A. That's correct.

23 Q. Do you know what the asterisks mean next to  
24 certain check numbers?

25 A. I believe that means they were presented

1 out of sequence.

2 Q. And what is the date that appears, what  
3 does that date refer to?

4 A. I believe that date refers to the date that  
5 that check posted to that account.

6 Q. So, on the right column of checks on this  
7 first time of Exhibit 11 there's some checks that  
8 posted on February 11, correct, and then there's a  
9 check that posted on February 12 and then it goes  
10 back to February 11 twice; is that correct?

11 A. That is correct.

12 Q. Okay. Do you have any explanation as to  
13 why the check that posted on February 12th would have  
14 posted before the February -- would not be listed  
15 below the two on February 11th, that are below it?  
16 Do you know what the explanation would be for that?

17 A. Can I review the document?

18 Q. Sure.

19 (Pause in proceedings)

20 Q. (Mr. Streisfeld) I'm not trying to rush you  
21 but it's been a few minutes and you're not able to  
22 make a --

23 A. I can't say with certainty.

24 Q. Now, the next section is a section devoted  
25 -- it's called other debits, correct?

1 A. Correct.

2 Q. And looks to me, but please confirm for me  
3 whether -- what is the types of things that would  
4 fall in a bank statement within this other debits  
5 category historically?

6 A. Historically, those would be pinpointed  
7 sales, signature debits and ATM transactions being  
8 withdrawals, and electronic drafts.

9 Q. Is that an ACH?

10 A. It could be termed an ACH, yes.

11 Q. When you say electronic, would it be  
12 something other than an ACH?

13 A. There is some companies that do online  
14 check billing from their web sites and things like  
15 that, but all basically clears to the ACH clearing  
16 system.

17 Q. Does BancorpSouth do what you just  
18 described?

19 A. Do what? Which process? We process ACH.

20 Q. You refer to --

21 A. A company may have a web site that --

22 Q. Online checks I think you said?

23 A. Correct.

24 Q. Does BancorpSouth have online checks?

25 A. What I was describing was you could go to

1 AT&T or some site like that and put in a check, a  
2 vendor, but not -- we would process those payments as  
3 they were presented to us, but we do not facilitate  
4 that.

5 Q. What is the bank's policy before organizing  
6 the information on these bank statements for consumer  
7 accounts as it pertains to this other debits  
8 category?

9 MR. TAYLOR: Object to the form.

10 A. I would not be able to answer it as far as  
11 the policy. That's outside my area of  
12 responsibility.

13 Q. Do you know how the system -- do you know  
14 how the banking system organizes the other debits  
15 category of information to be inserted in a  
16 particular way on this statement?

17 A. I do not.

18 Q. I notice that on Page 2 of this statement  
19 on February 8th, for example, there's a number of  
20 other debits. Do you see that?

21 A. I see the other debit section on Page 2.

22 Q. And you see it for February 8th there's  
23 one, two, three, four, five, six transactions that  
24 are all dated that day?

25 A. Yes.

1 Q. Okay. And I happen to observe that those  
2 transactions appear to be -- for that day appear to  
3 be in descending chronological order. Do you see  
4 that?

5 A. Descending chronological order?

6 Q. I'm sorry. Descending dollar amounts.  
7 Thank you.

8 A. Yes.

9 Q. Do you know why they appear that way?

10 A. As I said, I'm not familiar with the code  
11 that produces this document.

12 Q. If you look for example at the February 8th  
13 transaction that's \$55.96, do you see that?

14 A. Yes.

15 Q. Says a POS debit. That's at Walmart,  
16 right?

17 A. Yes.

18 Q. That would be a pin based transaction, do  
19 you know that?

20 A. Yes.

21 Q. Appears to be a date to the right of where  
22 it says POS debit of February 8, 2010; is that  
23 correct? Is that a date?

24 A. That appears to be, yes.

25 Q. Do you know why the date appears there?

1           A.    I believe that's the date the transaction  
2 was initiated.

3           Q.    And then there's a transaction that's for  
4 \$53.04 on that same day.  It says POS debit, and then  
5 it says I guess it's February 7, 2010; is that  
6 correct?

7           A.    That's correct.

8           Q.    So what is the difference between the date  
9 that says February 7, 2010, and the February 8th date  
10 to the left?

11          A.    The difference would be one day.

12          Q.    Okay.  What's the significance of the --  
13 why is it a different day if the transaction was on  
14 February 7 according to when it was initiated, I  
15 guess that's a Murphy -- I'm assuming Murphy Oil --  
16 why is that there and then why is there a February  
17 8th date which is a different date?

18                   MR. TAYLOR:  Object to the form.

19          A.    I would say that that transaction occurred  
20 on a different date.  When we received it for posting  
21 is outside the control -- outside the control of  
22 BancorpSouth.

23          Q.    So, this statement has the transactions  
24 that would debit an account in two separate sections;  
25 is that correct?

1 MR. TAYLOR: Object to the form but  
2 answer if you understand.

3 Q. (Mr. Streisfeld) I'm not trying to make it  
4 complicated. May be the way I asked it, but --

5 A. Yes, I believe the debits are in two  
6 separate sections.

7 Q. What would those two sections be that there  
8 are debits reflected on this bank statement?

9 A. One is labeled checks and the other being  
10 labeled other debits on Page 2.

11 Q. Is there anything reflected on this bank  
12 statement that identifies the interplay between check  
13 debits and the other debits to explain how those  
14 things go together in any particular way?

15 MR. TAYLOR: Object to the form.

16 A. I'm not sure I really understand what  
17 you're asking.

18 Q. (Mr. Streisfeld) So, you have transactions  
19 that are debiting the account that are checks,  
20 correct?

21 A. Correct.

22 Q. And those are summarized and organized in a  
23 manner independent of the way that the other debit  
24 section is organized; is that correct?

25 A. They are separate.

1 Q. And is there anything that brings those two  
2 sections together in terms of the way in which you  
3 would be depicting the information as to how the  
4 account -- these transactions posted to the account  
5 within this time frame?

6 MR. TAYLOR: Object to the form.

7 A. The customer's check register.

8 Q. (Mr. Streisfeld) The customer's -- assuming  
9 that a customer has a check register?

10 A. Correct.

11 Q. And if the customer were relying upon this  
12 bank statement to try to figure out, you know, the  
13 interplay between how their checks posted and how  
14 their other debits posted, how would they do that on  
15 this statement?

16 MR. TAYLOR: Object to the form.

17 A. I don't know what you're trying to -- what  
18 the customer -- what you're proposing the customer  
19 would try to be doing.

20 Q. (Mr. Streisfeld) Well, one of the issues in  
21 this case pertains to the concept that one would be  
22 able to understand how all the posting is happening  
23 and would understand that the posting of all  
24 transactions on a daily basis during the class period  
25 would be high to low, largest to smallest

1 transactions, but it seems to me from my review of  
2 this bank statement, that the bank separates the  
3 checks into one section of the statement versus  
4 another section where it's talking about the other  
5 debits, which are going to have all the debit card  
6 transactions in it, correct?

7 A. Yes.

8 MR. TAYLOR: Object to the form.

9 Q. (Mr. Streisfeld) So, the question is, is  
10 there in providing information -- the purpose of a  
11 bank statement is to provide information about  
12 account activity during a particular snapshot time  
13 period, correct?

14 A. Historical activity.

15 Q. Historical activity. And do the statements  
16 here, does it provide any information as to the  
17 posting order of transactions that debit an account?

18 A. Yeah. Each one of those, even though  
19 they're in two sections, have a date beside them and  
20 it was disclosed that they processed in a high to low  
21 format.

22 Q. Where was it disclosed that they processed  
23 in a high to low format?

24 A. In the account opening documents, which  
25 would be account information statement and -- I know

1 it's in the account information statement. It may be  
2 also in the signature card.

3 Q. Okay. But assuming that you're not at the  
4 time referring to the account information statement,  
5 this document is not identifying for the customer  
6 that the order in which the transactions were posted  
7 to the account was a combination of checks and other  
8 debits, correct?

9 MR. TAYLOR: Object to the form.

10 A. There is no combined list. It is in two  
11 separate sections back to back.

12 Q. (Mr. Streisfeld) And it doesn't tell the  
13 customer that you're posting high to low, correct.

14 A. The statement does not declare that, as  
15 previously disclosed.

16 Q. You say it was previously disclosed?

17 A. Previously disclosed in the other documents  
18 that we referenced.

19 Q. And do those documents, meaning -- I assume  
20 by that you mean the account information statement,  
21 correct?

22 A. Correct.

23 Q. And perhaps signature card, correct?

24 A. Correct. Perhaps.

25 Q. And to your knowledge between 2002 and

# **EXHIBIT E**

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

---

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

---

DEPOSITION  
OF  
JEFF JAGGERS  
OCTOBER 12, 2011

ALPHA REPORTING CORPORATION  
236 Adams Avenue  
Memphis, TN 38103  
901-523-8974  
www.alphareporting.com

1 our customers' accounts. And they also did  
2 recommendations. I don't remember how many --  
3 across a number of areas for revenue  
4 enhancement, and we worked with them for about  
5 two years.

6 Q. How was that engagement? Did you pay  
7 them a fixed amount, or was that a -- what I  
8 would call contingent agreement, based upon the  
9 amount of income that they generated for the  
10 bank? Did they get a percentage of it?

11 A. No, they did not. It was a fixed  
12 figure.

13 Q. And prior to meeting with them, how  
14 were you prioritizing your transactions in terms  
15 of debiting the account?

16 A. We were high to low. And what we were  
17 doing, from a high/low perspective, we had like  
18 maybe four buckets, high to low. And --

19 Q. This is pre EPG?

20 A. Yes. Yes.

21 Q. Okay. Four buckets?

22 A. Yes.

23 Q. Do you remember what they were? I know  
24 I'm challenging your memory.

25 A. Yeah, it was -- I believe it was

1 electronic transactions in one bucket, paper  
2 check transactions in one bucket. Bank  
3 initiated entries in one bucket, and bank,  
4 electronic, paper and check, and then there  
5 were -- I believe it was things like cash,  
6 checks, ATM withdrawals. My recollection is  
7 there was a bucket for transactions that  
8 involved cash. If cash left the bank, there was  
9 a bucket for transaction that involved cash.  
10 But those four buckets, and they all posted high  
11 to low.

12 Q. So were you involved with that  
13 engagement?

14 A. Yes.

15 Q. What was your role?

16 A. I managed that engagement. I led that  
17 engagement.

18 Q. And with respect to what I'm calling  
19 posting priority?

20 A. Yes.

21 Q. What we're talking about. What changed  
22 from the time that you engaged them, going  
23 forward?

24 A. We simplified out posting order. We --  
25 we basically went to a more simplified posting

1 order. All -- all customer transactions in one  
2 bucket, high to low. And you know, bank  
3 initiated transactions in one bucket, high to  
4 low. So it didn't matter what the transaction  
5 type was that the customer initiated, they would  
6 post high to low, instead of ACH and check in  
7 one bucket, and electronic transactions in  
8 another bucket, and over-the-counter  
9 transactions in another bucket.

10 Q. So you just went from those buckets  
11 to -- if you give me a check, ACH debit,  
12 whatever it is, we're just going to go high to  
13 low?

14 A. High to low. Didn't matter the  
15 transaction type the customer initiated.

16 MR. TAYLOR: And just so it's clear,  
17 EPG, the engagement included a number of  
18 suggestions. You're talking about only one of  
19 them, and not all of the suggestions were  
20 implemented. So in focusing on this one, I  
21 don't want you to lose sight of the larger  
22 engagement that EPG --

23 MR. OSTROW: No, I understand. I mean,  
24 it was clear from your response that there was  
25 things that you didn't go with. I'm assuming

1 that if there were anything that were directly  
2 relative to our case, you'd probably tell me.

3 MR. TAYLOR: Probably.

4 BY MR. OSTROW:

5 Q. Maybe a foolish question. But what did  
6 that do to your overdraft revenue?

7 A. What, when you say --

8 Q. What did the posting change do to the  
9 overdraft revenue?

10 A. Overdraft revenue increased.

11 Q. Obviously, you keep records of your  
12 overdraft revenues from year to year?

13 A. Yes.

14 Q. And can you analyze that on a month to  
15 month basis?

16 A. Yes.

17 Q. Have you done an analysis to determine  
18 what Reg E is going to do or has -- what it was  
19 going to do, and now what it has done to your  
20 overdraft revenue?

21 A. Yes.

22 Q. And you have all those reports? You  
23 don't have them with you, but you have those  
24 reports at the bank that you could pull if  
25 necessary?

1 A. Yes.

2 Q. Again, speaking specifically about  
3 consumer accounts. The posting priority to that  
4 change which went from high to low for  
5 everything, did that vary between any customers  
6 within the consumer checking account group?

7 A. No.

8 Q. Everybody got the same treatment, per  
9 se?

10 A. Yes.

11 Q. And this was a decision that the bank,  
12 obviously, decided to go with to change the  
13 priority, correct?

14 A. Yes.

15 Q. And if the bank wanted to, at that  
16 time, switch to go low to high, it could have  
17 done that as well, right?

18 MR. TAYLOR: Object to the form.

19 A. Yes. We received recommendations from  
20 EPG on a number of areas; this being one of  
21 them. And you know, we -- we implemented their  
22 recommendations. So if it had been a different  
23 recommendation and we made the decision to do  
24 it, we would have done that.

25 BY MR. OSTROW:

1 Q. Right. I guess my question was, you  
2 know, isn't really, you know, why or who, it's  
3 more of the bank can change the posting priority  
4 if it wants, correct?

5 A. Posting priority is -- yes, we  
6 determine the posting priority for our account.

7 Q. Where do fees fall? In the high to  
8 low, fees fall -- how do they fall in the high  
9 low hierarchy?

10 A. The fees would fall in the group  
11 considered bank initiated transactions. Bank  
12 initiated transactions post first. Overdraft  
13 fees are a day's delay, you know, they post the  
14 next day. But they will post first in the next  
15 day.

16 And a fee cannot generate another fee.  
17 You know, if you get an ATM withdrawal fee,  
18 you're not subject to incur an overdraft fee  
19 because you're overdrawn and you got an ATM  
20 withdrawal fee. So fees don't incur, you know,  
21 additional fees, but they do post first.

22 Q. Why is that?

23 A. The bank has always posted fees first.  
24 I mean, that's been our practice for --

25 Q. Do you know why you do that?

1 A. No, I have no idea. We always do it.  
2 That goes back, I mean, to me, that's standard  
3 banking practice, from my experience.

4 Q. I'm not suggesting it's not a good  
5 idea. I mean, I assume, and my assumption  
6 doesn't really mean anything in the case that,  
7 you know, you want to make sure you get our  
8 money for your own fees first.

9 A. I understand what you're saying. And  
10 again, from my experience, that's the way banks  
11 have always posted fees. But I've been doing it  
12 so long, I've never sat in a meeting where  
13 somebody said, here's why we are going to do,  
14 you know, post fees first.

15 Q. Did you sit in the meeting where EPG  
16 told you why you should switch everything from  
17 high to low?

18 MR. TAYLOR: Object to the form.

19 BY MR. OSTROW:

20 Q. Did EPG tell you that you should switch  
21 the posting order that you were currently using  
22 at the time that you met with them to a high to  
23 low for all transactions?

24 A. EPG made a number of recommendations.  
25 And yes, I participated in those conversations

1 and meetings regarding those recommendations,  
2 including the posting order recommendations that  
3 they made.

4 Q. What was the rationale for their  
5 suggestion to go high to low in every -- with  
6 all transactions?

7 A. Multiple reasons. You know,  
8 simplification was No. 1. We had buckets -- if  
9 you -- if you go back in time, customers wrote  
10 checks, and then they wrote checks that had  
11 ACH. And then they -- you introduced different  
12 types of transactions. So we had multiple  
13 buckets. You know, a customer were to call up  
14 and say, hey, I'm -- I had an overdraft fee last  
15 night, I can't figure out why.

16 You know, you said, well, you know, we  
17 posted you two checks first, and then we posted  
18 your debit card transaction, and then we posted  
19 this, no. If it's high to low, it's very simple  
20 for the customer to understand. Very simple for  
21 the bank to explain, so simplification was one  
22 reason.

23 Certainly, we discussed revenue. That  
24 was -- the whole engagement was for revenue  
25 enhancement. So for certain customers, there

1 would be additional revenue that the bank would  
2 generate from those account relationships.

3 Let's see. What else was there? I mean, you  
4 know, they had three or four points that  
5 supported their recommendation.

6 Q. Are you still posting the same way?

7 A. We -- yes. Since 2003, we've posted  
8 the same way. Not all the same transactions are  
9 subject to OD fees because of Reg E. But the  
10 posting order, it was not changed as a result of  
11 Reg E.

12 Q. So you're still doing every transaction  
13 high to low?

14 A. Yes.

15 Q. Did you keep notes from your meetings  
16 with EPG?

17 A. I don't -- you know, I provided counsel  
18 my EPG file. I can't remember if there were  
19 notes in them or not. I'm not a big note  
20 taker. But I know, you know, there were EPG  
21 related documents that they, you know,  
22 produced. I mean --

23 MR. TAYLOR: You have everything from  
24 his file.

25 A. Right. But I don't recall notes per