IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CHARLES DANIEL BICKERSTAFF, as administrator of the Estate of JEFF BICKERSTAFF, JR., on behalf of himself and others similarly situated, Plaintiff, vs. SUNTRUST BANK, Defendant.	CIVIL ACTION FILE NO.: 10EV010485

OMNIBUS ORDER

This case is before the Court on the following motions:[1]

I. SunTrust's Motion to Dismiss for Insufficiency of Service;

II. Motion to Compel Arbitration;

III. Motion to Modify Class Definition;

IV. Motion for Summary Judgment;

V. Motions and Requests for Leave to File Under Seal; and

VI. Motion to Modify Scheduling Order.

Having reviewed and considered the Motions, supporting materials, pleadings and evidence of record, applicable law, and oral argument of counsel, the Court finds as follows:

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The parties to this class action case have a decades-long history of litigation. The facts and background of this case have been summarized numerous times and the Court incorporates

[1] The Court will enter a separate order on SunTrust's Motion to Exclude Experts and Plaintiff's Motion to Exclude in Part SunTrust's Experts.

the summaries by reference to the Court's previous Orders and Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787 (2016) (Bickerstaff II), Bickerstaff v. SunTrust Bank, 340 Ga. App. 43, 796 S.E.2d 9 (2017) (adopting Bickerstaff II and declining to address "the issue of whether SunTrust waived a right to compel arbitration against putative class members other than Bickerstaff"), and SunTrust Bank v. Bickerstaff, 349 Ga. App. 794, 824 S.E.2d 717 (2019) (Bickerstaff III).

On February 2, 2009, Jeff Bickerstaff, Jr. opened a personal checking account with SunTrust "thereby agreeing to the terms of SunTrust's deposit agreement…." Bickerstaff II, 299 Ga. at 459; Bickerstaff III, 349 Ga. App. at 795; Triplett Aff. ¶ 4; Triplett Depo. 11:6-10; 20:11-16.

Overdraft Coverage: "Like many banking institutions, SunTrust provides an automated overdraft program that allows an account holder's ATM or debit card transaction to be approved even if the approved amount exceeds the account holder's available balance." Bickerstaff III, 349 Ga. App. at 794. Under the deposit agreement, SunTrust was not obligated to authorize such a transaction. Maher Aff. ¶¶ 5-6; Def. Stmt. of Undisp. Mat. Facts (SUMF) ¶ 3; Pl. Resp. to Def. SUMF ¶ 3.

> If a debit card or ATM transaction was previously authorized, SunTrust was required to honor the transaction at the time it was submitted for settlement and posted to the depositor's account, which could be days later. If there were not sufficient funds to cover the transaction at the time it posted to the depositor's account, an overdraft would occur resulting in a negative account balance and, unless waived, a flat overdraft fee was assessed. SunTrust did not know in advance of posting whether a depositor would deposit sufficient funds or have other credits coming into the account to avoid or limit the amount of an overdraft. Likewise, if an overdraft occurred, SunTrust did not know when a depositor would deposit sufficient funds or have other credits coming into the account to bring the account to a positive balance.

Maher Aff. ¶ 7. The Class argues a negative account balance "resulting from an overdraft was, in fact, a loan, an extension of credit, or an advance of money from SunTrust to or on behalf of the depositor." Pl. Resp. to Def. SUMF ¶ 4.

Under the Deposit Agreement,

> [a]ny items against insufficient funds were subject to a penalty, also referred to as a fee. The amount of the fee was flat and fixed by SunTrust's publicly-posted fee schedule. The fee did not vary according to the amount of the overdraft or the length of time the account balance remained negative. If an account balance remained negative for a certain period of time (either five consecutive business days or seven calendar days at different points during the Class Period), the account holder would be charged a flat extended overdraft fee. Account holders were not charged more than one extended overdraft fee no matter how long their balance remained negative.

Maher Aff. ¶ 11; Pl. Resp. to Def. SUMF ¶¶ 12-14. During the Class Period, SunTrust charged an overdraft fee that ranged from $32 to $36. Maher Aff. ¶ 14; Stip. Rel. to Class Cert. ¶ 5 (Dec. 19, 2012); Pl. Resp. to Def. SUMF ¶ 19. During the time his account was open, Bickerstaff used his overdraft coverage and incurred more than $1,800 in overdraft fees on his account. Ans. ¶¶ 91, 93; Key Aff. ¶ 19; Pl. Resp. to Def. SUMF ¶ 73. SunTrust refunded $1,044 in overdraft fees to Bickerstaff. Key Aff. ¶ 19; Pl. Resp. to Def. SUMF ¶ 74. Bickerstaff closed his SunTrust account on October 22, 2013. Key Aff. ¶ 21; Pl. Resp. to Def. SUMF ¶ 78.

Arbitration Agreement: "At the time Bickerstaff opened his account, thereby agreeing to the terms of SunTrust's deposit agreement, that agreement included a mandatory arbitration provision." Bickerstaff II, 299 Ga. at 459. The original mandatory arbitration provision was contained in SunTrust's Rules and Regulations for Deposit Accounts along with a "class-action waiver." Bickerstaff III, 349 Ga. App. at 795-797. SunTrust unilaterally changed the Rules and Regulations on two pertinent occasions after Bickerstaff opened his account.

First, on October 1, 2009, SunTrust changed the Rules and Regulations to include a provision allowing new customers to reject and opt out of the arbitration agreement. Triplett Aff. ¶ 6, Ex. C at 22-23; Triplett Depo. pp. 17-18. SunTrust did not provide Bickerstaff or any of its other existing customers with any notice of this change to the Rules and Regulations. Triplett Depo. pp. 42-43; Bickerstaff II, 299 Ga. at 460.

Second, on June 1, 2010, SunTrust changed the opt-out provision to extend the right to reject and opt out of the arbitration agreement to existing customers. Triplett Aff. ¶ 6; Triplett Depo. pp. 17-18. It was only "by language printed in monthly account statements distributed on August 24, 2010, that an updated version of the deposit agreement had been adopted, that a copy of the new agreement could be obtained at any branch office or online, and that all future transactions would be governed by the updated agreement." Bickerstaff II, 299 Ga. at 460.

Complaint: Bickerstaff filed his original Complaint on July 12, 2010 against SunTrust on behalf of himself and all other similarly situated alleging the SunTrust's overdraft fees amount to interest charges that exceed Georgia's civil and criminal usury limits. Bickerstaff II, 299 Ga. at 459; Compl. ¶¶ 14, 85-100. Bickerstaff asserts claims for: (1) violation of Georgia's civil usury laws, O.C.G.A. § 7-4-2; (2) violation of Georgia's criminal usury laws, O.C.G.A. § 7-4-18; (3) conversion; and (4) money had and received. First Am. Compl. ¶¶ 16, 87-119.[2]

[2] Jeff Bickerstaff, Jr. passed away on November 14, 2014. Not. of Sub. (Mar. 16, 2017). On Dec. 10, 2015, the Supreme Court of Georgia corrected the style of the case to read as follows: Ellen Rambo Bickerstaff v. SunTrust Bank. On March 20, 2023, the Court entered an Order Substituting Charles Daniel Bickerstaff as Plaintiff and as Class Representative and the case was styled as: Charles Daniel Bickerstaff, as Administrator of the Estate of Jeff Bickerstaff, Jr., on behalf of himself and others similarly situated, Plaintiff v. SunTrust Bank, Defendant.

Bickerstaff served SunTrust on July 14, 2010 and filed the Affidavit of Service on July 21, 2011. Bickerstaff filed his First Amended Complaint on August 9, 2010. SunTrust filed its Answer on September 13, 2010 and its Motion to Compel Arbitration and Stay Action on October 4, 2010. SunTrust's Answer asserts that Bickerstaff and the putative class members' claims "are subject to a valid and enforceable arbitration agreement." Ans. ¶ 21.

Default: On May 6, 2011, SunTrust paid to open default and on May 9, 2011, filed its Verified Answer to Plaintiff's Original Complaint and Motion for Declaration That It Is Not in Default or, in the Alternative, to Open Default. SunTrust argued that the parties stipulated SunTrust would answer Bickerstaff's amended complaint on or before September 13, 2010 and because SunTrust did so, the case did not fall into default. SunTrust also raised the argument that it could not be in default "because the summons served on SunTrust with the original complaint was not signed by the Clerk of Court." Br. on Mot. for Decl. p. 2. SunTrust moved the Court to "either declare that SunTrust is not in default or exercise its broad discretion to open default." Id.

Ultimately, the Court ruled that SunTrust was not in default, and alternately, that SunTrust met the preconditions for opening default and default should be opened. Order Grant. Mot. for Decl. p.3 (July 11, 2011). Thus, the Court did not rule on SunTrust's argument that it cannot be found in default because no jurisdiction over it was acquired because the summons failed to bear the actual signature of the Clerk of Court. Id. n. 1.

First Motion to Compel Arbitration: SunTrust's first Motion to Compel Arbitration argued that Bickerstaff's failure to send in the written notice specified in the June 1, 2010 opt-out provision rejecting arbitration required the Court to stay this action and compel Bickerstaff to submit his claims to arbitration. The parties litigated SunTrust's Motion to Compel

Arbitration for almost a year and a half. The Court held that although SunTrust's arbitration agreement was not unconscionable under Georgia law, arbitration should not be compelled because Bickerstaff effectively exercised his right to opt out of arbitration by filing this suit. Order Deny. Def. Mot. to Compel (Mar. 16, 2012). The interlocutory appeals of the Order were dismissed as improvidently granted and litigation proceeded to the class certification stage (A12A2547, A12A2548).

Class Certification: On December 19, 2012, the parties entered into a Scheduling Order which included a Stipulation Related to Class Certification. SunTrust stipulated in part, for the purposes of class certification proceedings only, that it would not argue: (1) "that systems or processes used to record an Overdraft and asses an Overdraft Fee during the Class Period differ materially from customer to customer"; and (2) "[a]n Overdraft Fee is accounted for as fee income to SunTrust on the day that the Overdraft Fee is charged to an individual's consumer deposit account…." Stip. Rel. to Class Cert. ¶¶ 4, 6.

On April 8, 2013, Bickerstaff filed his Motion for Class Certification moving for class certification pursuant to O.C.G.A. § 9-11-23 seeking certification of the class:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to the date the Court certifies the class, (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees.
>
> Simply put, plaintiff proposes to represent a Georgia class of SunTrust depositors who paid overdraft charges on overdrafts of $500 or less during the class period and have not received a refund.

Mot. for Class Cert. p. 6. On May 20, 2013, SunTrust filed its Response to Plaintiff's Motion for Class Certification and its Motion to Compel Arbitration of Claims of Class Members.

> SunTrust opposed class certification, arguing, in relevant part, that (1) the class-action waiver in the Rules and Regulations precluded certification; (2) Bickerstaff could not opt out of the arbitration agreement on behalf of the class;

> and (3) Bickerstaff could not satisfy the numerosity, commonality, typicality, and adequacy of representation requirements for class certification under OCGA § 9-11-23. In reply, Bickerstaff asserted, among other arguments, that the class-action waiver was unconscionable, and, alternatively, was unenforceable as a matter of law because it was a non-severable part of the unenforceable jury trial waiver.

Bickerstaff III, 349 Ga. App. at 797. On February 19, 2014, the Court denied Bickerstaff's Motion for Class Certification and denied SunTrust's Motion to Compel Arbitration. The Court of Appeals affirmed in Bickerstaff v. SunTrust Bank, 332 Ga. App. 121, 770 S.E.2d 903 (2015) (Bickerstaff I). Subsequently, the Supreme Court Bickerstaff II reversed and remanded the case for further proceedings holding that:

> the terms of the arbitration rejection provision of SunTrust's deposit agreement do not prevent Bickerstaff's class action complaint from tolling the contractual limitation for rejecting that provision on behalf of all putative class members until such time as the class may be certified and each member makes the election to opt out or remain in the class. Accordingly, the numerosity requirement of OCGA § 9-11-23 (a) (1) for pursuing a class complaint is not defeated on this ground.

Bickerstaff II, 299 Ga. at 470. Then, the Court of Appeals remanded the case to this Court, in part, to rule on class certification and "whether SunTrust waived a right to compel arbitration against putative class members other than Bickerstaff." Bickerstaff, 340 Ga. App. at 44.

On October 6, 2017, the Court entered its Order Granting Plaintiff's Motion for Class Certification holding that the purported class met the requirements of O.C.G.A. § 9-11-23(a), (b) and that the Litigation Class Action Waiver was unconscionable under Georgia law and therefore unenforceable. Accordingly, the Court certified the class as follows:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

Bickerstaff III, 349 Ga. App. at 798-99. Bickerstaff III affirmed the Court's ruling and held in part that the class-action waiver is unenforceable as a matter of law because "the class-action waiver is not severable because it was a part of a single integrated provision." Id. at 805. Bickerstaff III also affirmed the class certification, finding this Court did not abuse its discretion. Id. at 799. Although Bickerstaff III did not reach the merits of the claims of the certified class, or the class's scope, it did address the class action waiver that SunTrust now attempts to relitigate.

On reconsideration, SunTrust contended the class action waiver should be severed. The Court of Appeals found SunTrust waived this argument. Id. at 804. Notably, when the Court of Appeals reached this decision, the Class had already been certified.

Upon remand, SunTrust again moved to modify the class definition pursuant to O.C.G.A. § 9-1-23(c)(1) as follows: (1) begin the class period on June 12, 2009 (rather than July 12, 2006) because of the one-year statute of limitations governing usury claims; (2) end the class period on July 12, 2010 or July 1, 2011; and (3) to exclude individuals who closed their SunTrust accounts prior to June 2010 or opened their accounts after March 2013. In response, the Class filed its Motion to Defer Response to and Ruling on Defendant's Motion to Modify the Class Definition, arguing in part that the Court should defer ruling on SunTrust's Motion at the merits stage of the case.

On February 9, 2021, the Court entered its Order Denying Defendant's Motion to Modify the Class Definition and Denying Motion to Compel Arbitration. The Court held that SunTrust's arguments were indeed merit-based and declined to consider those arguments until after merits-based discovery concluded, including whether the Court should modify the Class.

Similarly, the Court denied SunTrust's renewed Motion to Compel Arbitration at that stage of litigation.

Subsequently, the parties engaged in years of intensive and voluminous merits-based discovery. The Court issued several orders on electronically stored information and account data discovery. The parties engaged an outside vendor, Ankura Consulting Services, LLC, in part, to identify accountholders who may have met the Class Definition. On April 7, 2022, the Court entered its Order Approving and Directing Issuance of Class Notice pursuant to O.C.G.A. § 9-11-23(c)(2): (1) appointing American Legal Claim Services, LLC to administer class notice in this case; (2) approving of the manner, form, and content of the notice provided by Plaintiff's Class Notice Plan; and (3) directing the Class Administrator "to issue class notice and to proceed with the Class Notice Plan, including by mailing the short-form postcard notices within thirty (30) days of the date of entry of his Order."

On July 5, 2022, SunTrust filed its Renewed Motion to Compel Arbitration Against Certain Class Members arguing again that the following class members' claims were compelled to arbitrate and should be excluded from the Class: (1) class members who closed their account prior to June 2010; (2) class members who opened their account or were first charged overdraft fees after July 12, 2010; and (3) class members who opened their account or were first charged overdraft fees on or after March 1, 2013. The parties continued with their exhaustive and voluminous discovery. Notably, given the volume of documents, remaining discovery schedule, the length of time the case had been pending, SunTrust's advice of counsel defense, and numerous privilege issues, the Court appointed Susan Kennicott as Special Master. Order App. Sp. Master (Apr. 13, 2023).

Pursuant to the relevant scheduling orders and the close of discovery, the parties filed their many dispositive and Rule 702 motions. The Court considered volumes of briefing and exhibits and heard lengthy oral arguments on the pending motions.

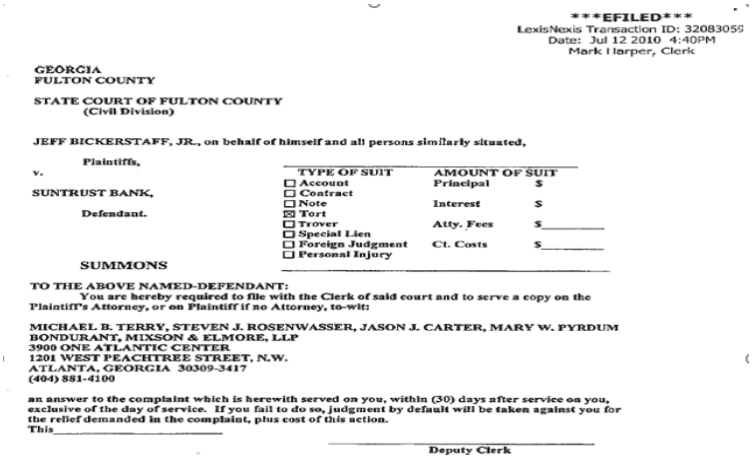
ANALYSIS

I. SunTrust's Motion to Dismiss on Insufficiency of Process Defense is DENIED

Bickerstaff served SunTrust on July 14, 2010 and filed the Affidavit of Service on July 21, 2011. Bickerstaff filed his First Amended Complaint on August 9, 2010. SunTrust filed its Answer on September 13, 2010. On May 6, 2011, SunTrust paid to open default and the next business day, on May 9, 2011, filed its Verified Answer to Plaintiff's Original Complaint and Motion for Declaration That It Is Not in Default or, in the Alternative, to Open Default. SunTrust argued that the parties stipulated SunTrust would answer Bickerstaff's amended complaint on or before September 13, 2010 and because SunTrust did so, the case did not fall into default. SunTrust also raised the argument that it could not be in default "because the summons served on SunTrust with the original complaint was not signed by the Clerk of Court." Br. on Mot. for Decl. p. 2. SunTrust moved the Court to "either declare that SunTrust is not in default or exercise its broad discretion to open default." Id.

Ultimately, the Court ruled that SunTrust was not in default, and alternately, that SunTrust met the preconditions for opening default and default should be opened because, in part, "whenever possible, cases should be decided on their merits, for default judgment is not favored in law." Utilicom Supply Assocs. v. Terra Tech, Inc., 360 Ga. App. 509, 512, 861 S.E.2d 449 (2021); Order Grant. Mot. for Decl. p. 3 (July 11, 2011). The Court did not rule on SunTrust's argument that it cannot be found in default because no jurisdiction over it was acquired because the summons failed to bear the actual signature of the Clerk of Court. Id. n. 1.

Once again, SunTrust moves to dismiss Plaintiff's Complaint pursuant to O.C.G.A. §§ 9-11-4(b) and 9-11-12(d) for insufficiency of process: "Plaintiff failed to serve it with a valid summons executed by the Clerk of Court and has been on notice of this fatal service defect since SunTrust Bank's answer was filed in 2010." Br. on Mot. to Dism. p. 1. Particularly, SunTrust argues that the summons served on SunTrust did not contain a signature of the Clerk of Court or deputy clerk. However, the summons is stamped "Efiled", dated July 12, 2010 and bears the name of Mark Harper, Clerk. That was sufficient under the Court's E-filing rules to satisfy the summons requirement.



EFILED
LexisNexis Transaction ID: 32083059
Date: Jul 12 2010 4:40PM
Mark Harper, Clerk

GEORGIA
FULTON COUNTY

STATE COURT OF FULTON COUNTY
(Civil Division)

JEFF BICKERSTAFF, JR., on behalf of himself and all persons similarly situated,

Plaintiffs,

v.

SUNTRUST BANK,

Defendant.

TYPE OF SUIT	AMOUNT OF SUIT	
☐ Account	Principal	$
☐ Contract		
☐ Note	Interest	$
☒ Tort		
☐ Trover	Atty. Fees	$_____
☐ Special Lien		
☐ Foreign Judgment	Ct. Costs	$_____
☐ Personal Injury		

SUMMONS

TO THE ABOVE NAMED-DEFENDANT:
You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

MICHAEL B. TERRY, STEVEN J. ROSENWASSER, JASON J. CARTER, MARY W. PYRDUM
BONDURANT, MIXSON & ELMORE, LLP
3900 ONE ATLANTIC CENTER
1201 WEST PEACHTREE STREET, N.W.
ATLANTA, GEORGIA 30309-3417
(404) 881-4100

an answer to the complaint which is herewith served on you, within (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action.
This_____

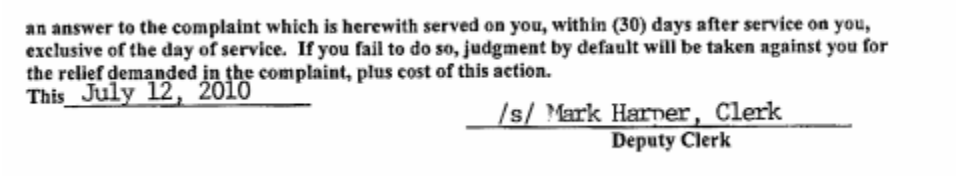
_____
Deputy Clerk

O.C.G.A. § 9-11-4(a) requires that "[u]pon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service." "The summons shall be signed by the clerk…." O.C.G.A. § 9-11-4(b). "The issuance of a summons signed by the clerk is a necessary part of acquisition of jurisdiction." Diaz v. First Nat'l Bank, 144 Ga. App. 582, 583, 241 S.E.2d 467 (1978). Pursuant to the newly-established E-filing rules at the time of Bickerstaff's initiation of this case, the summons was deemed to be signed electronically by the Clerk when

electronically filed. State Ct. of Fulton Co. Local E-Filing R. 2-106.[3] Counsel for SunTrust admits SunTrust was served with a copy of the original Complaint. SunTrust answered the Complaint pursuant to the parties' stipulation. Significantly, SunTrust actively participated in this litigation for the past fourteen years. SunTrust submitted to jurisdiction when it moved to compel arbitration. E.g., Mincey v. Stamper, 253 Ga. 301, 304, 253 S.E.2d 857 (1984); Tyree v. Jackson, 226 Ga. 690, 693, 177 S.E.2d 160 (1970) (discussing the purpose of process and service and holding "where it is clear that the defendant has been served, has appeared and has been heard on the merits of the controversy, the proceeding should not be vitiated by objections going merely to the form of process.") Accordingly,

IT IS HEREBY ORDERED that SunTrust's Motion to Dismiss on Insufficiency of Process Defense is **DENIED**.

On July 26, 2013, Plaintiff filed a Motion for Leave to Amend Summons and contemporaneously served three amended summonses on SunTrust's counsel and registered agent bearing electronic signatures. The first was an Amended Summons that changed the original summons by adding the electronic signature of Mark Harper, Clerk and dated July 12, 2010:


an answer to the complaint which is herewith served on you, within (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action.
This July 12, 2010
/s/ Mark Harper, Clerk
Deputy Clerk

The second and third summonses were the then-current E-Filing Summonses, with the electronic signature of the then-current Chief Clerk, Cicely Barber:

[3] "Every pleading, document, and instrument electronically filed or served shall be deemed to have been signed by the Judge, **clerk**, attorney or declarant and shall bear the typed name, address, telephone number, and Bar number of a signing attorney." (emphasis provided).

Defendant's Name, Address, City, State, Zip Code

AMENDED
SUMMONS

SECOND ORIGINAL

TO THE ABOVE NAMED-DEFENDANT:

You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

Name: MICHAEL B. TERRY, STEVEN J. ROSENWASSER, JASON J. CARTER

Address: 3900 One Atlantic Center, 1201 West Peachtree Street, N.W.

City, State, Zip Code: Atlanta, GA 30309-3417 Phone No.: (404) 881-4100

An answer to the complaint which is herewith served on you, within thirty (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action. **DEFENSE MAY BE MADE & JURY TRIAL DEMANDED**, via electronic filing through LexisNexis or, if desired, at the e-filing public access terminal in the Clerk's Office at 185 Central Ave., S.W., Room TG100, Atlanta, GA 30303.

This _____ Cicely Barber, Chief Clerk (electronic signature)

Pl. Mot. for Leave to File Am. Summs. Ex. 2. Having considered Plaintiff's Motion for Leave to Amend Summons, briefing, evidence of record, and applicable law,

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to Amend Summons is **GRANTED**.[4] Nazli v. Scott, 203 Ga. App. 523, 525, 417 S.E.2d 187 (1992) ("[I]t is well-established that process or proof of service thereof may be amended in the trial court's discretion and upon such terms as the trial court deems just.") (citing O.C.G.A. § 9-11-4(h), (i); punctuation omitted). The Summons stamped by Mark Harper, Clerk dated July 12, 2010 and served on SunTrust on July 14, 2010, is amended to bear the electronic signature of the Clerk of Court *nunc pro tunc* to July 12, 2010:

TO THE ABOVE NAMED-DEFENDANT:

You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

MICHAEL B. TERRY, STEVEN J. ROSENWASSER, JASON J. CARTER, MARY W. PYRDUM
BONDURANT, MIXSON & ELMORE, LLP
3900 ONE ATLANTIC CENTER
1201 WEST PEACHTREE STREET, N.W.
ATLANTA, GEORGIA 30309-3417
(404) 881-4100

an answer to the complaint which is herewith served on you, within (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action.

This March 4, 2024 *nunc pro tunc* to July 12, 2010 /s/Deputy Clerk
Deputy Clerk

[4] SunTrust's claims of prejudice are unavailing, especially given the holdings of Bickerstaff II and Bickerstaff III.

Compare Nazli, 203 Ga. App. at 525 (affirming the granting of the motion to dismiss, in part, because "appellee did not seek to amend or correct the deficiency by serving [the defendant] personally at any time before the trial court ruled on appellants' motion to dismiss….")

II. SunTrust's Motion to Compel Arbitration is GRANTED IN PART AND DENIED IN PART

Discovery is complete and the merits are now fully developed; thus, it is ripe to decide SunTrust's Third Motion to Compel Arbitration. The Court repeatedly declined to address the substantive arguments until after class notification. E.g., Order Deny. Def.'s Mot. to Mod. the Class Def. and Deny. Mot. to Compel Arb. (Feb. 9, 2021).

After considering the arguments raised, the Court hereby **GRANTS IN PART AND DENIES IN PART** SunTrust's motion, finding that the appellate courts already decided most of the issues, and this Court is bound by those decisions.

"Under the 'law of the case' doctrine, any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be." Southern States Chemical v. Tampa Tank & Welding, Inc., 316 Ga. 701, 716, 888 S.E.2d 553 (2023) (punctuation omitted); O.C.G.A. § 9-11-60(h). This Court is bound by Bickerstaff II and Bickerstaff III and is precluded by the law of the case from revisiting those prior holdings.

The law of the case doctrine "applies despite contentions that a ruling below is erroneous." Id. at 717 (citing Security Life Ins. Co. of America v. Clark, 273 Ga. 44, 46, 535 S.E.2d 234 (2000) ("[A]ppellate rulings remain binding as between parties to a case, so long as the evidentiary posture of the case remains unchanged, despite all contentions that prior rulings in the matter are erroneous.")). "But the mere fact that the evidentiary posture changed does not necessarily render the law of the case rule inapplicable. Instead, to determine if the

rule applies here, we must ask whether the new evidence requires a different conclusion…." Carson v. Brown, 366 Ga. App. 674, 683, 883 S.E.2d 908 (2023) (citation omitted). There has been no new evidence presented after the appellate courts rendered their decisions. The deposit agreements SunTrust now argues bar some of these claims are not new evidence; they existed during this case's multiple trips to the appellate courts.

SunTrust modified the arbitration provisions in the Deposit Agreements after Bickerstaff filed this lawsuit. SunTrust argues these changes made it impossible for Bickerstaff to opt out of arbitration through the filing of this lawsuit because some class members never had a right to opt out of the arbitration agreement that could have been exercised at the time Bickerstaff filed his complaint.[5] SunTrust contends only individuals who were putative members of the class when the lawsuit was filed are deemed to have opted out of arbitration. This argument is barred by the law of the case rule and the Supreme Court's decision in Bickerstaff II, which addressed whether Bickerstaff could reject arbitration on behalf of the yet-to-be certified class.[6]

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[5] SunTrust modified its deposit agreements numerous times since the filing of this lawsuit: June 1, 2010, July 2011, November 2011, September 2014. After this lawsuit was filed, each subsequent version contained a provision granting depositors the right to reject arbitration.

[6] The Court certified the class on October 6, 2017. In the Court's February 9, 2021 Order Denying Defendant's Motion to Modify the Class Definition and Denying Motion to Compel Arbitration the Court acknowledged that "when issuing its certification order, mistakenly overlooked Bickerstaff's admission [that those with no overdraft after July 1, 2011, are not in the class], and adopted Bickerstaff's initial proposed class definition, rather than the more limited class." The Class acknowledges that it previously agreed with SunTrust's position taken in opposition to class certification: "SunTrust argues that those with no overdraft before July 1, 2011 are not in the class. We agree." Pl.'s Suppl. Br. Class Certification, at 13, 15 n. 9. Even if this Court were to find this was an admission, the Class has since taken the position that Bickerstaff had the ability, based on Bickerstaff II, to opt out of arbitration for all class members. Because the arbitration clauses at issue were modified well before Bickerstaff II, this Court must assume they were before the Supreme Court when it made its decision on the ability of Bickerstaff to opt out of arbitration on behalf of the putative class.

In Bickerstaff II, the Supreme Court did not rule on the scope of the putative class, although it referenced Bickerstaff's proposed definition:

> On April 13, 2013, Bickerstaff moved to certify a class of all Georgia citizens with a SunTrust deposit agreement who, from a date four years prior to the date Bickerstaff filed his complaint, had at least one overdraft of $500 or less resulting from an ATM or debit card transaction and paid an overdraft fee on that transaction.

In holding that Bickerstaff's filing of the lawsuit tolled the time that putative class members were required to notify SunTrust of their intent to reject arbitration, the Supreme Court rejected the same arguments SunTrust now makes in support of its argument to compel arbitration for these certain subclasses of depositors: "[W]e are unconvinced by SunTrust's argument that a contractual deadline requiring individual action may not be suspended until the certification of a class (and the attendant opportunity of class members to opt out or remain bound by the result of the class action) . . ." Id. at 464. Thus, depositors' deadlines to provide notice to opt out of arbitration (generally 45 days from the opening of an account) were suspended between the time the lawsuit was filed and the class was certified.

> The determinative issue is whether the filing of Bickerstaff's complaint, thereby signaling his rejection of the arbitration agreement, tolled the time in which the putative class members were required to notify SunTrust of their intent to reject arbitration. The answer is yes.

Id. at 463. The Supreme Court reasoned that upon class certification and notification, class members would have to decide for themselves whether to reject the deposit agreement's arbitration clause:

> [E]ach class member will be notified and required to decide whether to opt out of the lawsuit. See O.C.G.A. 9-11-23(c)(2). At that point, each notified depositor will be exercising his or her own contractual right to reject, or not, the deposit agreement's arbitration clause. Bickerstaff will not be making that decision for the other depositors and thus will not be acting as a party to those depositors' contracts or as a person in privity with the other depositors and will not be acting as a beneficiary of anyone else's deposit agreement. Any member of the certified class who remains but does not opt out of the class will be

> deemed to have brought suit at the same time Bickerstaff's complaint was filed, which was within the deadline for rejecting arbitration for existing depositors, the class Bickerstaff seeks to represent.

Id. at 496.

"The entire scheme of class actions, as set forth in O.C.G.A. § 9-11-23 is that all putative class members benefit from the class representative's filing of the complaint, just as if each member had filed the complaint himself or herself." Id. at 468. Even though SunTrust altered the arbitration provision in the deposit agreement multiple times between the filing of the lawsuit and the appeal to the Supreme Court, that Court did not limit its holding to those depositors whose arbitration provisions were identical to Bickerstaff's. Instead, Bickerstaff II held that his rejection of arbitration applied to all members of the putative class who chose to remain in the class:

> [I]n this case it is the class representative's timely notification of rejection of arbitration by filing the complaint that serves to toll the time for the remaining class members to give notice. And for those members who ratify the class, the complaint provides the necessary notice. It demonstrates the member's intent to sue SunTrust in a court of law and to reject the requirement to arbitrate the claim.

Id. at 470. This is the law of the case. E.g., Hicks v. McGee, 289 Ga. 573, 579, 713 S.E.2d 841, 845 (2011) (law of the case rule applies to actual decisions, not to issues raised by the parties but never ruled upon); O.C.G.A. §9-11-60(h).

SunTrust nonetheless argues that the Class should be modified to remove individuals whose claims are subject to arbitration. Particularly, SunTrust argues the following accountholders should be excluded: (a) accountholders who closed their SunTrust accounts before June 1, 2010, when SunTrust amended its Deposit Agreement (because they never had a contractual right to opt out of arbitration); (b) accountholders who opened their account after July 12, 2010 because they had no contractual opt out right that Bickerstaff could have

preserved; (c) accountholders who opened their accounts or were first charged overdraft fees on or after March 1, 2013 when SunTrust amended its arbitration provision to provide that depositors could not reject arbitration by filing a lawsuit; and (d) class members who were not part of the definition of the class that Bickerstaff sought to represent when the complaint was filed. For the reasons stated above, the Court finds that the Motion to Compel Arbitration is **DENIED** as to subcategories (b), (c) and (d).

As to the claims of depositors who closed their accounts before June 1, 2010, SunTrust argues that these depositors never had the right to reject arbitration. Bickerstaff's filing of the Complaint could not have tolled the period to exercise the right to arbitration when that right never existed for them.[7] The Court agrees. Bickerstaff II allowed Bickerstaff to exercise the contractual right to opt out of arbitration on behalf of other putative class members who also had a right to opt out of arbitration: "Bickerstaff's complaint serves only to toll the contractual period for making such an election." Id. at 466 (emphasis added). The Supreme Court also referred to the rights of "existing depositors."[8] Depositors who closed their accounts prior to June 1, 2010 never had the contractual right to opt out of arbitration; thus, the Motion to Compel Arbitration is **GRANTED** as to depositors who closed their accounts before June 1, 2010.

[7] The October 2009 version of the Deposit Agreement contained a limited opt out provision permitting new depositors to reject arbitration within 45 days of opening their account, but no individuals who otherwise met the class definition opted out of arbitration in that period. Br. In Supp. of Its Third Mot. to Comp. Arb. p. 9 n.8; Hernandez Aff. ¶ 8.

[8] Bickerstaff argues that SunTrust waived this right by never filing a Motion to Compel arbitration. However, SunTrust did not waive this right, and filed three Motions to Arbitrate.

III. SunTrust's Motion to Modify Class Definition is GRANTED IN PART

SunTrust has filed multiple motions to modify the Class. The Court repeatedly declined to address the substantive arguments until after class notification. E.g., Order Deny. Mot. to Mod. the Class Def. and Deny. Mot. to Compel Arb. (Feb. 9, 2021). SunTrust's request to modify the class definition is now ripe. On October 6, 2017, this Court certified the following class:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

SunTrust contends the Class must be modified to:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who from July 12, 2009 to July 12, 2010 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees, but excluding those individuals whose accounts were closed prior to June 1, 2010.

After considering the arguments and the case law, this Court finds that modification of the class is not warranted, though clarification is. Many of the arguments made by SunTrust are substantive and are addressed elsewhere in this Order regarding the Motion for Summary Judgment or the Motion to Compel Arbitration.[9]

1. Class Action Waiver

[9] SunTrust moves to modify the class definition to remove the following subcategories:
1. Class period should begin on July 12, 2009 - see section IV (4) infra.
2. Class period should end on July 12, 2010, or July 1, 2011, or February 19, 2014. See section II supra and Section IV (4) infra.
3. The same subgroups are addressed in the Motion to Compel Arbitration, see Section II supra.

SunTrust argues that certain groups of depositors should be removed from the class because the class action waiver that was addressed in Bickerstaff III was changed in subsequent deposit agreements. The following waivers in SunTrust Deposit Agreements are at issue:

Deposit Agreement in Effect when Bickerstaff Opened his Account

JURY TRIAL WAIVER. FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. FURTHER, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

October 1, 2009

JURY TRIAL WAIVER. FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. FURTHER, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

June 2010 Deposit Agreement

JURY TRIAL WAIVER. FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. FURTHER, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

July 2011 Deposit Agreement

JURY TRIAL AND CLASS ACTION WAIVER. TO THE EXTENT PERMITTED BY APPLICABLE LAW FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY (A) KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US AND (B) AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

November 1, 2011

JURY TRIAL AND CLASS ACTION WAIVER

TO THE EXTENT PERMITTED BY APPLICABLE LAW, FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY (A) KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON OR ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US, AND (B) AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

September 2014

JURY TRIAL WAIVER

TO THE EXTENT PERMITTED BY APPLICABLE LAW, FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US OR ANY OF SUNTRUST'S EMPLOYEES, OFFICERS, DIRECTORS, PARENTS, CONTROLLING PERSONS, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS.

CLASS ACTION WAIVER

TO THE EXTENT PERMITTED BY APPLICABLE LAW, FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US OR ANY OF SUNTRUST'S EMPLOYEES, OFFICERS, DIRECTORS, PARENTS, CONTROLLING PERSONS, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION AND THE DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE ANY RIGHT TO PROCEED IN A CLASS ACTION OR TO SERVE AS A CLASS REPRESENTATIVE.

Triplett Aff. ¶¶ 5-8, Exs. A-D.

SunTrust now argues the Court should modify the class because subsequent class action waivers in Deposit Agreements have not been considered or resolved by this Court or any appellate court. But, Bickerstaff III went through detailed waiver analyses and held that "because the class-action waiver is a non-severable part of the unenforceable jury trial waiver provision, we agree with Bickerstaff that the class-action waiver is unenforceable as a matter of law" 349 Ga. App. at 800 (reaffirmed on motion for reconsideration). More specifically, the court stated:

> SunTrust's class-action waiver is not an independent provision. Rather it is a single sentence contained in the unenforceable jury trial waiver provision.
>
> * * *
>
> The severability clause, however, does not authorize SunTrust or the courts to excuse a single sentence (the class-action waiver) from a single integrated provision (the jury trial waiver).

Id. at 800.

The June 2010, July 2011, and November 2011 waivers contain virtually the same non-severable class action waiver as considered in Bickerstaff III. There were formatting changes, but both the class action waiver and unenforceable jury trial waiver were still included in the same paragraph with the same typeface. The September 2014 changes were the first time SunTrust separated the class action waiver from the unenforceable jury trial waiver. Although these changes may have solved the concern that the "class action waiver was unenforceable as a matter of law because it was a non-severable, integrated part of the legally unenforceable jury trial waiver," id. at 722, the Court of Appeals ruled that SunTrust waived these arguments in this litigation.

Regardless, relitigation of this issue is barred by the law of the case rule. At the time the Court of Appeals decided Bickerstaff III, the Court already certified the class and the

Deposit Agreement modifications now at issue had already been made. The issue of the enforceability of the class action waiver has already been decided and it is the law of the case. "The law of the case doctrine applies only when the same issue has been actually litigated and decided." Hall v. Hill, 366 Ga. App. 285, 292, 882 S.E.2d 34 (2022) (citations omitted). The Court of Appeals already ruled on the severability of these clauses when it denied SunTrust's motion for reconsideration:

> SunTrust has moved for reconsideration of our decision, focusing on our ruling in Division 1, regarding the issue of severability of the class-action waiver from the legally unenforceable jury trial waiver. In its motion, SunTrust substantively argues for the first time in this Court that the class-action waiver is an additional independent promise that can be severed and stand alone based on the waiver's plain language. SunTrust did not raise this argument in its appellate brief or reply brief in this Court, nor did it cite a majority of the cases on which it now relies for its position. Furthermore, a review of the record confirms that it did not make this substantive argument in the trial court. Thus, SunTrust waived this argument.

Bickerstaff III, 349 Ga. App. at 804. Thus, based on the law of the case rule, the Court denies SunTrust's request to modify the Class based upon changes to the Class Action waiver.

2. Class members must be Georgia Citizens

It is undisputed the Class is limited to Georgia citizens and the parties do not argue against limiting the class to Georgia citizens, but they differ in the definition of who is a Georgia citizen for purposes of the class. SunTrust contends that Georgia citizens cannot be defined merely as someone with a Georgia mailing address, as the Class now claims. In opposition, Bickerstaff argues that anyone with a Georgia mailing address during the class period is a Georgia citizen. Bickerstaff's position is contrary to the assertions made throughout this litigation - indeed, the positions upon which this Court relied in prior rulings.[10] Thus, the

[10] See, e.g., Order Denying Leave to Intervene or in the Alternative Motion for Joinder as Co-Plaintiffs p. 4 (June 13, 2011) ("Here, the Buffingtons are unable to meet any of these

Court clarifies that Class members must have been continuous citizens of Georgia between the filing of the case (or the overdraft fee if that occurred before the filing) and the certification of the Class.

In support of its position that class members must be Georgia citizens, SunTrust directs the Court to Plaintiff's Reply in Support of His Motion for Class Certification in which Bickerstaff argued that SunTrust's possession of "data as to the customer's place of residence, including the address the customer used when the bank account was opened and the customer's current mailing address" as well as accountholders' taxpayer identification numbers, state driver's license or state-issued ID cards could determine residency and/or citizenship. Rep. in Supp. of Class Cert. pp. 32-34. Bickerstaff also offered that "if SunTrust's residency information is somehow insufficient to establish citizenship, the class is still ascertainable by, for example, comparing SunTrust's customer data to Georgia's voting records, which are ***conclusive*** evidence of citizenship." Id. at p. 33 (emphasis in original); p. 34 ("Thus, upon certification, Plaintiffs and any class administrator could simply compare the list of SunTrust customers who were charged usurious interest to Georgia's voting records to determine which customers are Georgia citizens. The Georgia Court of Appeals has repeatedly found that class actions can be maintained and classes ascertained based upon similar analyses of publicly available databases.") (citations omitted). SunTrust argues that "Class counsel's proposed plan of action [to use voting records to determine which customers are Georgia citizens] was apparently sufficient [to the Court] to defeat SunTrust's objection that the class was not ascertainable, as the Court certified a class of 'Georgia citizens.'" Mot. to Mod. p. 34.

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requirements because, as residents of the State of Florida, they are admittedly not even members of the putative class in this case, which is limited to Georgia citizens.)

Throughout this litigation, and certainly in opposition to the motion to intervene, Bickerstaff took the position that class members had to be continuous citizens of the State of Georgia. Pl's Resp. to Mot. to Interv. p.2. Bickerstaff's First Amended Complaint proposed he represent all persons who meet the following definition ("Class Member"):

> a. Who was on the date Plaintiff filed this Complaint, and has thereafter **continuously remained through the date this Court certifies this action as a class action, a citizen of Georgia**; and
> b. To whom SunTrust in the administration of its Automated Overdraft Program made an advance of money in an amount less than $3,000; and
> c. From whom SunTrust collected such advance and one or more charges in connection with the advance, including, but not limited to, an Overdraft Fee and/or Extended Overdraft Fee, as applicable, within four years of the date Plaintiff filed this Complaint.

¶ 70 (emphasis supplied). Bickerstaff's Motion for Class Certification moved for certification of the following class:

> Every Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to the date the Court certifies the class, (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those Fees.
>
> Simply put, plaintiff proposes to represent a Georgia class of SunTrust depositors who paid overdraft charges on overdrafts of $500 or less during the class period and have not received a refund.

p. 6. Plaintiff's September 30, 2021 Reply in Support of Motion for Entry of Order Approving and Directing Issuance of Class Notice argued continuous citizenship is not required for Class Members. pp. 21-26. At the Class's behest, the Court directed notice be given "to individuals who ***may*** be Class Members, recognizing that whether those individuals are in fact Class Members will be adjudicated later, at the merits stage." Pl. Rep. in Supp. of Mot. for entry of Ord. App. and Direct. Iss. of Class Not. p. 8 (emphasis in original). The Court's April 7, 2022 Order Approving and Directing Issuance of Class Notice approved of the content of the Notice including: "To qualify as a 'Georgia citizen' for purposes of this definition, you must have

been a Georgia citizen on July 12, 2010 and on the date you paid an overdraft fee." This broader description includes depositors who have been citizens continuously of Georgia.

The Class's current position and interpretation should not and did not alter that requirement of continuous citizenship. Citizenship is not only a mailing address. An analysis of citizens for purposes of diversity jurisdiction is illustrative.

> Thus, there are two necessary inquiries regarding citizenship for diversity jurisdiction: (1) whether the person is a United States citizen, and (2) whether the person is domiciled in a particular state. Under the first inquiry, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. U.S. Const. Amend. XIV, § 1. Regarding the second inquiry, domicile – synonymous with "state citizenship" in diversity jurisprudence – generally requires two elements: (1) physical presence in a state and (2) the intent to make the state one's home.

Duff v. Beaty, 804 F. Supp. 332, 334 (N.D. Ga. 1992). A complaint merely alleging residency, as opposed to state citizenship or domicile, is insufficient to invoke diversity jurisdiction. Id. Domicile is not always the same as residence, as a person may reside in one place but be domiciled elsewhere. See Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L. Ed. 2d 29 (1989); Guideone Mut. Ins. Co. v. Daniel, No. 7:13-CV-126 (HL), 2013 U.S. Dist. LEXIS 137168, at *3-4 (M.D. Ga. Sep. 25, 2013). Plaintiff previously relied on the requirement of continuous Georgia citizenship to defeat the interpleader action.

Class Members must be continuous citizens of Georgia, i.e. citizens of the United States and domiciled in Georgia, for the entire Class Period. The Court does not believe it is necessary to modify the class definition, because the Class Definition was not altered. To provide clarity the Class Definition hereby specifies what is required of citizenship :

> Every **person who was a Georgia citizen on the date Plaintiff filed this Complaint, and has thereafter continuously remained through October 6, 2017, a citizen of Georgia** who had or has one or more accounts with SunTrust

> Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

IT IS HEREBY ORDERED that SunTrust's Motion to Modify Class Definition is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that the Class's motion for its attorneys' fees and expenses for responding to SunTrust's Motion is **DENIED**.

IV. SunTrust's Motion for Summary Judgment

SunTrust argues that the "overwhelming consensus" of "every legal authority" has determined that overdraft fees are not interest on loans for purposes of usury laws. Br. in Supp. of Mot. for Summ. J. pp. 25-29. These decisions rely on federal law or the law of states other than Georgia. This Court is bound by Georgia statutes and prior decisions of the Georgia appellate courts. Under Georgia law, whether the overdraft fees constitute usury are issues of fact to be decided by the jury.

1. Standard of Review

The Georgia Supreme Court, in Lau's Corp v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991), set forth the oft-quoted standard for summary judgment:

> To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact, and that the undisputed facts, viewed in a light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c). A *defendant* may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial. *See e.g., Holiday Inns, Inc. v. Newton*, 157 Ga. App. 436, 278 S.E.2d 85 (1981). A defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record

> that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue. O.C.G.A. § 9-11-56(e).

Id. at 491. Even "slight evidence will be sufficient to satisfy the plaintiff's burden of production of some evidence on a motion for summary judgment." Clark v. City of Atlanta, 322 Ga. App. 151, 153-54, 744 S.E.2d 122 (2013).

2. Whether overdraft fees constitute interest is a question of material fact to be resolved by the jury

The initial question to be addressed is whether Georgia's usury laws apply to SunTrust's overdraft protection program. SunTrust argues that "[t]he national judicial consensus" and "numerous regulatory agencies, including the Georgia DBF, as well as nearly 20 federal and state courts through the country" determined that overdraft fees are not interest on loans for purposes of usury laws. Br. in Supp. of Mot. for Summ. J. pp. 25-26. None of this "overwhelming" judicial authority from jurisdictions outside Georgia interprets Georgia statutes or Georgia case law that this Court must consider. Upon a review of binding authorities on this Court, it is for the jury to determine whether SunTrust's overdraft fees violate Georgia's usury laws.

As a matter of law, Georgia's usury laws apply because SunTrust's overdraft program constitutes an advance of funds to its depositors.

a. SunTrust's overdraft protection falls within the statutory definition of a loan or advance.

Georgia's civil usury statute defines interest as "a charge for the use of money computed over the term of the contract at the rate stated in the contract or precomputed at a stated rate on the scheduled principal balance or computed in any other way or any other form." O.C.G.A. § 7-4-1 (a)(3). The statute further provides:

> Where the principal amount involved is $3,000.00 or less, such rate shall not exceed 16 percent per annum simple interest on any **loan, advance, or forbearance** to enforce the collection of any sum of money unless the **loan, advance, or forbearance** to enforce the collection of any sum of money is made pursuant to another law.

O.C.G.A. §7-4-2 (emphasis provided).[11]

SunTrust contends overdraft coverage is not a loan because overdraft fees do not bear the traditional hallmarks of loans because the depositors did not undergo credit checks or sign written loan documents. Rather, SunTrust contends an overdrawn checking account is "a temporary imbalance of debits and credits in a checking account that must be corrected." Br. in Supp. of Mot. for Summ. J. p. 27. SunTrust argues that because the fees are contingent, they are not loans - i.e. it depends "entirely on [the account holder's] decision to overdraw their account and not to remedy their overdrawn account." Id. p. 34. Bickerstaff directs the Court to evidence that SunTrust also determined whether or not it would extend overdraft coverage to its depositors: "SunTrust pays overdrafts at our discretion, which means that we do not guarantee that we will always authorize and pay any type of transaction." Opp. to Def. Mot. for Summ. J. Ex. 66 ("What You Need to Know about Overdrafts and Overdraft Fees").

Georgia appellate courts have previously recognized that overdraft coverages are loans, though not addressing the specific issue of whether overdraft fees are considered interest. The Supreme Court of Georgia stated that "every overdraft, whether by previous arrangement or

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[11] The criminal usury statute's language is even broader applying to:

> any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than 5 percent per month, either directly or indirectly, by way of commission for advances, discount, exchange, or the purchase of salary or wages; by notarial or other fees; or by any contract, contrivance, or device whatsoever.

O.C.G.A. § 7-4-18 (emphasis supplied).

not, and whether secured or not, and whether drawing interest or not, is a loan." Duncan v. State, 172 Ga. 186, 189, 157 S.E. 670 (1931) (addressing the constitutionality of a statute imposing criminal liability on bank officers and employees who maintained overdrafts on their accounts, and noting that the question of whether the legislature could punish such conduct was separate inquiry from that under civil law, an overdraft constitutes a loan) (citations and punctuation omitted). The Court of Appeals recognized the same:

> [w]ith respect to an overdraft, the general rule seems to be that a bank may recover the amount of an overdraft from a depositor in the same manner in which it could recover an amount loaned to a customer in the regular course of business. A bank paying an overdraft for a depositor may maintain an action therefor against him in indebitatus assumpsit.

West v. Federal Deposit Ins. Corp., 149 Ga. App. 342, 346, 254 S.E.2d 392 (1979) (citations and punctuation omitted).

The Georgia legislature did not limit the usury statutes only to "loans" and included "advances" and "forbearance to collect any sum of money." Despite how SunTrust chooses to frame the overdraft coverage, this Court must look beyond the form and words to the substance of the transaction.

> [I]t is the duty of the court to look, not at the form and words, but at the substance of the transaction; and as on the one hand it should not pay attention to the words of the transaction or the manner in which it was negotiated, if the substance of it went to defeat the statute against usury, so on the other hand it ought not to rely upon the words, or form of the transaction, if in substance such transaction was legal.

Rushing v. Worsham & Co., 102 Ga. 825, 30 S.E. 541 (1898); Young v. First Nat'l Bank, 22 Ga. App. 58, 95 S.E. 381 (1918) ("If, however, there be doubt as to whether the transaction is a cover for usury or one bona fide entered into in the ordinary course of business, it should be left to a jury to determine from all the facts and circumstances of the case whether it was a legitimate transaction or a mere device to evade the laws against usury.")

> To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, the theory that a contract will be usurious or not according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance.

BankWest v. Oxendine, 266 Ga. App. 771, 776, 598 S.E.2d 343 (2004) (quoting Tribble v. State, 89 Ga. App. 593, 596, 80 S.E.2d 711 (1954)).

Although SunTrust now contends voluntary overdraft coverage is just part of maintaining a deposit account rather than a credit transaction, SunTrust cannot avoid the effect that overdraft coverage was an advance of funds to cover withdrawals for which SunTrust expected repayment, and the "accountholder was required to deposit sufficient funds to cover any overdraft and any penalties assessed immediately upon notice of any overdraft." Maher Aff. ¶ 10; Key Depo. 67:4-6. In fact, "[i]f an account balance remained negative for a certain period of time (either five consecutive business days or seven calendar days at different points during the Class Period), the account holder would be charged a flat extended overdraft fee." Maher Aff. ¶ 11. SunTrust's internal operating procedures provided the following definition of overdraft: "An overdraft is the extension of unsecured credit to deposit clients in the form of allowing them to withdraw more funds than they have on deposit." Pl's Br. in Opp. to Mot. for Summ. J. p. 15, Ex. 3. SunTrust's internal documents refer to the overdraft coverage as an extension of credit.[12]

Thus, SunTrust's overdraft coverage was an advance of funds from the bank to its customers. The Court turns to the next inquiry, whether there was a fee for the advance.

[12] Pl. Resp. to Def. Mot. for Summ. J. p. 15-17. For example, SunTrust prepared scripted answers to frequently asked customers about the overdraft fees which stated "Overdrafts are a liability for the bank and therefore have fees associated with them, just like loans, to cover the risk the bank is willing to take in order to provide this courtesy credit to you. Id. Ex. 8.

b. SunTrust charged a fee for the advance of money

SunTrust argues the overdraft fee was not interest because it was a flat fee; thus no rate was computed. Br. in Supp. of Mot. for Summ. J. p. 29. This position is unsupported by Georgia law. Flat fees are subject to Georgia's usury statutes. "[T]his court has uniformly and consistently held that a lender's charge for service, when no service was in fact rendered or to be rendered the borrower, is a charge for the use of the money advanced and is therefore interest." Williams v. First Bank & Tr. Co., 154 Ga. App. 879, 771, 269 S.E.2d 923, 935 (1980) ($600 service fee subject to a usury analysis); see First Fed. Sav. & Loan Assn. of Atlanta v. Norwood Realty Co., 212 Ga. 524, 531, 93 S.E.2d 763 (1956). Regardless of what SunTrust chose to call it, SunTrust charged a fee for providing overdraft coverage.

c. Whether overdraft fees constituted interest is a question of fact for the jury.

The Court finds as a matter of law that the overdraft fees at issue in this lawsuit are subject to the Georgia usury statutes. Whether the fee is considered interest that violates the usury statutes is a jury issue: "the question whether one intended to exact usury under cover of a contrivance or device, … is for the jury to determine." Tribble, 89 Ga. App. at 596-97. "And where the profit received by the lender, by whatever name it may be called, and whether lawful on its face or not, is in reality a contrivance or device to obtain an amount greater than lawful interest, and is made with intent to violate the usury laws, the transaction is illegal, and … the name by which it is called is altogether immaterial." Id.

> [T]he device of charging for services must not be used as a mere cover to exact an additional profit in excess of legal interest; and therefore, the rule has been laid down that to be considered as lawful and to rescue the contract from the taint of usury, such a charge must be shown to be based upon some service rendered, trouble encountered, inconvenience sustained or risk assumed by the lender, other than the advance of money.

Norwood Realty Co., 212 Ga. at 531 (denying general demurrer); Williams, 154 Ga. App.at 881.

> To determine if a contract is usurious, we critically examine the substance of the transaction, regardless of the name given it, or, stated another way, the theory that a contract will be usurious or not according to the kind of paper bag it is put up in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance. (Citations and footnotes omitted.) *BankWest*, supra, 266 Ga. App. at 776 (1). (Citations omitted.) *Tribble v. State*, 89 Ga. App. 593, 596 (2) (80 SE2d 711) (1954).

Ga. Cash Am. v. Greene, 318 Ga. App. 355, 362, 734 S.E.2d 67, 73 (2012) (denying grant of partial summary judgment to plaintiff and finding jury question as to usury under payday lending statutes).

It is for the jury to determine whether SunTrust offered services, other than the advance of the money, to justify the fee charged.

> The rule has been laid down that to be considered as lawful and to rescue the contract from the taint of usury, such a charge must be shown to be based upon some service rendered, trouble encountered, inconvenience sustained or risk assumed by the lender, other than the advance of money. And this court has uniformly and consistently held that a lender's charge for service, when no service was in fact rendered or to be rendered the borrower, is a charge for the use of the money advanced and is therefore interest.

Norwood Realty Co., 212 Ga. at 531-32 (finding that allegations that service charge, when no service rendered, was sufficient to sustain allegations of usury, denying demurrer); Williams, 154 Ga. App. at 881. SunTrust argues its fees are reasonable charges to compensate the bank for the numerous services it provided to its account holders and the costs of those services, which included:

1. notifying its account holders of overdraws;
2. providing customer support to customers who overdraft their accounts;
3. considering waivers of fees and refunds;
4. giving customers time to deposit funds after overdraft to avoid fees; and
5. reviewing programs to determine whether to close overdrawn accounts.

Br. in Supp. of Mot. for Summ. J. p. 35; SUMF ¶¶ 11, 27-35.

SunTrust also argues it incurred costs in providing the overdraft services, including:

1. creating managing and supervising the program;
2. implementing and maintaining electronic systems to monitor and administer the program;
3. licensing the software to administer the program;
4. training and compensating employees;
5. obtaining regulatory approval and ensuring compliance;
6. printing and mailing overdraw notices;
7. providing customer support; and
8. reviewing reports to determine if overdrawn accounts should be closed.

Br. in Supp. of Mot. for Summ. J. p. 36; SUMF ¶¶ 29-34.

In opposition, the Class argues SunTrust provided no additional services to its depositors that could justify the amount of the fee,[13] particularly as SunTrust did not produce evidence that the fee charged was designed to cover the expenses and costs that it allegedly incurred. See generally Br. in Opp. to Mot. for Summ. J. pp. 26-28. The Class contends this Court should follow the Court of Appeals decision in Synovus v. Griner, 321 Ga. App. 359, 739 S.E.2d 504 (2013) in which the Court of Appeals denied a motion to dismiss, finding that overdraft fees, such as those charged in this case could be considered interest for purposes of Georgia usury law:

> Viewing the definitions of interest found in Georgia's usury laws in conjunction with the holdings in Norwood Realty and Williams, we conclude that a "fee" imposed by a financial institution will be considered interest where the financial institution: (1) advances money to a customer; (2) charges the fee in exchange

[13] SunTrust contends there is extensive evidence that the fee for the overdraft coverage was justified. For example, the on-line opt in form for overdraft coverage stated: "By filling out and then submitting the information below, you are giving your bank permission to cover overdrafts for ATM and card (Check Card) transactions and to assess a fee for this service." Br. in Opp. to MSJ, Ex. 31. As an answer to frequently asked questions, SunTrust stated, "Overdraft coverage is when you authorize the bank to pay an ATM or one-time debit card transaction when the available balance in your account is not sufficient to cover that transaction amount and charge a fee of $36 for each item that is paid in overdraft." Ex. 33; e.g., Exs. 83, 65.

> for the advance of money; and (3) renders no service to the customer in exchange for that fee, other than the advance of the money. The overdraft fees at issue in this case appear to meet the first two requirements, and there is not enough evidence at this stage of the litigation to determine whether the third requirement has been satisfied. Accordingly, the trial court acted correctly when it denied the motion to dismiss.

Id. at 368-69. The Georgia Supreme Court vacated the Court of Appeals decision:

> with direction that the Court of Appeals remand the case to the trial court for further consideration in light of the effect, if any, of the July 3, 2013 Declaratory Order issued by the Georgia Department of Banking and Finance, which declares that to provide parity with national banks, overdraft fees imposed by state-chartered banks in connection with deposit accounts are not subject to Georgia's usury laws.

Synovus Bank v. Griner, 2013 Ga. LEXIS 838 (2013). The Court of Appeals decision, while not binding on this Court, is nonetheless persuasive in its reasoning.

SunTrust argues that decisions by the Georgia Attorney General and one by the Georgia Department of Banking and Finance demand a finding, as a matter of law, that the overdraft fees are not interest. Op. Atty. Gen. 2003-9 (August 12, 2003); Op. Atty. Gen. 2003-8 (July 31, 2003); July 3, 2013 Declaratory Order Georgia Department of Banking and Finance. Neither the decisions of the Attorney General nor the Commissioner are binding on this Court. See Moore v. Ray, 269 Ga. 457, 459, 499 S.E.2d 636 (1998) ("While opinions of the Attorney General are persuasive authority, they are not binding on the appellate courts.") While not binding, the Attorney General Opinions are consistent with this Court's determination that whether the fee in this case constitutes interest is a factual determination.

In Opinion 2003-9, the Attorney General addressed the question of whether an overdraft fee charged in connection with a check transaction constituted interest. The opinion concluded that it likely did not, because the fee was not based on the time value of money. Specifically, the opinion reasoned:

> [A] transaction that involves an extension of credit and a charge that is based on a time value of money calculation generally will fall under the usury statute unless a statutory exception exists. A charge that is not truly based on a "time value of money" calculation will not, then, be "interest," *provided* that the lender is actually providing a service for which the charge is assessed *and provided* that the charge bears a reasonable relationship to the cost of providing the service. *These provisos have their origin in decisions of the appellate courts of Georgia*.

Id. at p. 2 (citing Norwood Realty). Further, the opinion recognized that "[w]hether a particular overdraft protection plan involves the extension of credit and the charging of interest is a fact-intensive review, and each situation must be considered on a case-by-case basis." Id. As recognized by the Attorney General, this issue of whether an overdraft protection plan involves the charging of interest is a fact intensive review; one that is appropriate for the trier of fact, and not a decision as a matter of law.

Another decision by the Attorney General issued two weeks before, determined whether a fee is to be considered interest is a factual determination:

> Therefore, it is my official opinion that if a loan or origination fee charged in connection with a non-real estate loan of under $3,000 is not adduced based on the time value of the money involved, if its use merely increases the lender's expectation of collecting in full the principal amount of the loan plus interest or if the fee is attributable to a service or benefit other than the extension of credit, and if the fee's factual justification is clearly documented in sufficient detail, such a fee should not be considered prepaid interest. As noted in 1980 Op. Att'y Gen. 80-21, at 50, however, '[e]very fee must be judged on its own particular merits, so the amount, variability, and justification should be weighed in determining whether to treat it as prepaid interest.'

Op. Atty. Gen. 2003-8 (July 31, 2003). Both these Attorney General opinions support this Court's determination that a fact finder must decide whether or not the fee charged is attributable to a service or benefit provided.

The Declaratory Order issued by the Commissioner of the Department of Banking and Finance on July 3, 2013 is not binding on this Court for a variety of reasons. It does not, as SunTrust insists, require summary judgment in its favor. To be clear the Declaratory Order is

not before the Court on a challenge to its authority, but SunTrust contends this Court is bound to follow its conclusion. The Supreme Court previously directed the Georgia Court of Appeals to consider the effect, if any, of this Declaratory Order in its consideration of the overdraft fees to be subject to Georgia's usury laws. Synovus Bank v. Griner, 2013 Ga. LEXIS 838 (2013). For the following reasons, this Court finds that the Declaratory Order has no effect on the issues before this Court.

Asserting its authority to modify the deposit taking authority of state chartered banks, the Commissioner issued a Declaratory Order "to provide that overdraft fees on deposit accounts are non-interest fees and charges related to the receipt and withdrawal of deposits in order to achieve parity with national banks." Decl. Order (July 3, 2013) p.4.; O.C.G.A. § 7-1-61(e)(5) (now O.C.G.A. § 7-1-61.1); O.C.G.A. § 7-1-280. The Declaratory Order stated:

> [I]n the event an overdraft is a loan or advance of money, the Commissioner modifies O.C.G.A. § 7-1-292 to provide that the interest and usury limitations incorporated into the statute do not apply to overdraft fees imposed by state-chartered banks. For purposes of clarity, the Commissioner is modifying the phrase 'at rates not exceeding the limits set by the laws of this state,' so that interest and usury limitations under Georgia law do not apply to overdraft fees imposed by state-chartered banks on deposit accounts.

p. 5. The Declaratory Order purportedly had retroactive effect to June 2, 2003.

The Declaratory Order, which purportedly modified Georgia statutes and the application of Georgia usury laws, has no effect on this Court because it violated the constitutional requirement of separation of powers. Ga. Const. Art. I, § 2, ¶ 3. This attempt by a state agency to alter the applicability of Georgia statutes is an invalid exercise of legislative power by the executive branch. E.g., HCA Health Services of Georgia, Inc. v. Roach, 265 Ga. 501, 458 S.E.2d 118 (1995); Central G. R. Co. v. State, 104 Ga. 831, 838, 31 S.E. 531 (1898).

Not only was it an improper attempt to change the laws – an area delegated to the legislature – but also an improper attempt to construe and modify the meaning of statutory terms such as "interest." This too is a violation of the separation of powers: "Only the judiciary has the constitutional authority to interpret statutes, and we do not delegate that responsibility to either the legislative or executive branch." Schrenko v. DeKalb Cnty. Sch. Dist., 276 Ga. 786, 797, 582 S.E.2d 109 (2003). The Declaratory Order cites Synovus Bank and the Commissioner's recognition "that some cases indicate the possibility that under state law an overdraft can, in certain circumstances, be a loan or an advance of money and, as such, any related fees could be viewed as interest." p. 4 (footnote omitted). The Declaratory Order is an overreach into the authority of the judiciary, and an improper attempt by an executive agency to overrule decisions of the courts.

Assuming *arguendo*, the Declaratory Order's interpretation was valid, it is not possible for it to have a retroactive application for ten years prior to the issuance of the Declaratory Order. The Commissioner stated:

> [T]he provisions of this order apply as of June 2, 2003, the date of the Supreme Court's decision in Beneficial National Bank v. Anderson. As such, overdraft fees charged by state-chartered banks in connection with deposit account transactions on or after June 2, 2003, are non-interest fees directly related to the receipt of deposits and the maintenance of deposit accounts and are not subject to the usury limits set by the laws of this state.

p. 6. This is an improper attempt to retroactively change the law.

> A statute is retroactive in its legal sense which creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribe to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character. It is well established that this applies to agency regulations and actions as well.

United Am. Ins. Co. v. Ins. Dep't of Ga., 258 Ga. App. 735, 738, 574 S.E.2d 830 (2002) (citations and punctuation omitted). The Declaratory Order's purported mandate violates the constitutional ban on retroactive laws as it "impairs the obligation of contract" in addition to purportedly changing the law. Ga. Const. Art. I, §I, ¶ X.

Therefore, the Declaratory Order is neither binding on this Court nor does it support SunTrust's argument that any of the claims pending in this lawsuit are barred.

d. The 2014 legislative changes to the usury statutes do not apply to this litigation.

In 2014, the General Assembly amended Georgia's usury statutes to add a new subsection that specifically excludes overdraft fees from the definition of interest. Notably, the Georgia General Assembly expressly provided that the changes would not apply to pending litigation: "It is not the intent of the General Assembly to affect the law applicable to litigation pending as of February 19, 2014." 2014 Ga. L. 213 § 3. House Bill 824 amended both the civil usury statute, O.C.G.A. § 7-4-2, and the criminal usury statute, § 7-4-18, to exclude certain charges from the definition of interest:

> (d) Notwithstanding the foregoing, fees and other charges agreed upon by a financial institution and depositor, as defined in Code Section 7-1-4, in a written agreement governing a deposit, share, or other account, including, but not limited to, overdraft and nonsufficient funds, delinquency or default charges, returned payment charges, stop payment charges, or automated teller machine charges, shall not be considered interest.

The law went into effect on April 15, 2014.

SunTrust provided no legal rationale why this legislation applies to the claims made in this litigation. The lawsuit was pending when the law was passed. To be sure, the changes would apply to similar claims that are not included in this class action litigation, but this litigation - and all the claims brought therein - are not subject to these legislative changes.

e. Intent is an issue of fact to be determined by the jury

Intent is an issue of fact to be determined by the jury. See McCrory v. Young, 158 Ga. App. 678, 282 S.E.2d 163 (1981). Intent is an element of usury. Knight v. First Federal Sav. & Loan Asso., 151 Ga. App. 447, 449, 260 S.E.2d 511 (1979).[14] SunTrust contends it did not intend to violate the law and it had a reasonable and good faith belief that its overdraft coverage program was lawful, turning to a variety of sources on which it based its good faith belief, including both Georgia and federal regulators, court decisions from outside Georgia, and reliance on legal opinions from its in-house attorneys. Br. in Supp. of Mot. for Summ. J. pp. 44-48. Not surprisingly, Bickerstaff argues there is a plethora of evidence that SunTrust intended to charge usurious rates. Opp. to Def. Mot. for Summ. J. pp. 80-99. The inquiry, however, is not whether SunTrust intended to violate Georgia's usury laws, but whether SunTrust intended to charge its customers, and that charge violated Georgia's usury laws. In this case, the Court cannot rule on intent as a matter of law. This is a jury issue.

3. SunTrust is entitled to summary judgment on Plaintiff's claims for Criminal Usury

The Class concedes it does not have an independent cause of action under the criminal usury statute; thus, to the extent SunTrust moved for summary judgment on a count of criminal usury, summary judgment is granted. See Anthony v. Am. Gen. Fin. Servs., Inc. 287 Ga. 448, 459, 697 S.E.2d 448 (2010).

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[14] "There are four requisites of every usurious transaction: (1) A loan or forbearance of money, either express or implied. (2) Upon an understanding that the principal shall or may be returned. (3) And that for such loan or forbearance a greater profit than is authorized by law *shall be paid or is agreed to be paid*. (4) That the contract was made with an intent to violate the law." (Emphasis in original; citing Bank of Lumpkin v. Farmers State Bank, 161 Ga. 801, 810, 132 SE 221 (1926)).

4. The One Year Statute of Limitations for Usury bars claims that accrued before July 12, 2009.

SunTrust argues that some of the Class's claims are barred by the usury statute's one-year statute of limitation, effectively foreclosing claims that accrued more than a year before the complaint was filed, i.e. before July 12, 2009. The Class alleges the 4-year statute of limitations for the two common-law counts – conversion[15] and money had and received[16] – applies to all the Class's claims. O.C.G.A. §§ 9-3-32; 9-3-25.

The Georgia legislature established a one-year statute of limitations for usury claims. O.C.G.A. §7-4-10 (d). The only basis for the Class's common law claims of conversion and money had and received, as it acknowledges, is a violation of the usury statutes:

> Rather, proof that SunTrust's overdraft fees violated the civil usury statute, O.C.G.A. § 7-4-2, or criminal usury statute, O.C.G.A. § 7-4-18, would establish that the overdraft fees the Class Members paid are their property (for purposes of conversion) and justly belong to the Class Members (for purposes of money had and received).

Opp. to Mot. for Summ. J. p. 115; see First Am. Compl, ¶¶ 16, 105, 113, 114. The common law claims are based solely on the allegations that the overdraft fees are actually usurious

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[15] A party may state a claim for conversion in **at least** two ways:

> (1) A conversion results when, without authority, a party exercises the right of ownership over, assumes dominion over, or appropriates personal property belonging to another party, in hostility of that other party's rights. (2) To establish a conversion claim, a plaintiff must demonstrate that (1) he or she owns title to or has the right to possess the personal property at issue; (2) the defendant actually possesses the property; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return it.

Rubenstein v. Palatchi, 359 Ga. App. 139, 142, 857 S.E.2d 81 (2021) (citation omitted).

[16] "The common law action for money had and received is founded upon the equitable principle that no one ought to unjustly enrich himself at the expense of another. This action is maintainable in all cases where one has received money under such circumstances that in equity and good conscience he ought not to retain it." Edible IP, LLC v. Google, LLC, 313 Ga. 305, 317-18, 869 S.E.2d 481 (2022) (citation and punctuation omitted).

interest charges. In order to recover under these common law claims, the jury must find that the overdraft fees charged by SunTrust violated Georgia's usury laws. If there is no finding of usury, then there can be no recovery.

The issue here is not whether a plaintiff can assert common law claims in addition to usury, but whether, based upon the law and the facts in this case, the statute of limitations for usury applies when the sole basis of recovery for the common law claims is a finding of usury. The Court is well-aware of a plaintiff's ability to pursue alternative theories of recovery. The Class's position goes beyond alternative theories; instead a finding of usury is a condition precedent to any recovery. Bickerstaff III recognized as much: "Bickerstaff's claims for money had and received and conversion seek to recover all payments under SunTrust's overdraft program deemed to be usurious, and it is well established that the voluntary payment doctrine does not apply to the recovery of usury." 349 Ga. App. at 804, 824 S.E.2d at 725 (emphasis supplied). Accepting the Class's argument would permit a work-around for the usury statute of limitations and render it meaningless.

O.C.G.A. § 9-3-99, which tolls causes of action for torts arising out of crimes, does not apply. Usury is not a tort. W. Sky Fin., LLC. v. State of Ga., 300 Ga. 340, 361, 793 S.E.2d 357, 374-75 (2016) (analyzing statute of limitations with regard to payday lending action). "[A] limitation for charges imposed for use of money did not exist at common law and that usury is a creature of legislation. Certainly, the remedies that may be pursued with respect to a loan that includes an illegal interest rate are defined by statute…" Id.; see O.C.G.A. §7-4-10(a).

The legislature established a one-year statute of limitations for usury. The Class cannot avoid this limitation by alleging common law claims that are based solely on alleged usurious

interest. Finding otherwise would render the usury statute of limitations meaningless. Therefore, summary judgment is **GRANTED** as to the Class's claims that accrued before July 12, 2009.

CONCLUSIONS

IT IS HEREBY ORDERED as follows:

1. SunTrust's Motion to Dismiss for Insufficiency of Service is **DENIED**;
2. Motion to Compel Arbitration is **GRANTED IN PART AND DENIED IN PART.** The Motion to Compel Arbitration is **GRANTED** as to account holders who closed their accounts prior to June 1, 2010.
3. Motion to Modify Class Definition is **GRANTED IN PART and DENIED IN PART.** To provide clarity the Class Definition hereby specifies what is required of citizenship:

> Every **person who was a Georgia citizen on the date Plaintiff filed this Complaint, and has thereafter continuously remained through October 6, 2017, a citizen of Georgia** who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006 to October 6, 2017 (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund of those fees.

4. Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**: Motion for Summary Judgment is granted as to claims that accrued before July 12, 2009.

V. REQUESTS FOR LEAVE TO FILE UNDER SEAL

The parties requested orders allowing unredacted copies of various documents to be filed with the Clerk's office under seal:

1. Unredacted copies of the Class's Summary Judgment-Related Response Materials;

2. Unredacted version of the Class's Reply In Support of Plaintiff's Motion to Exclude, In Part, Testimony and Opinions of Defense Experts Bob Birmingham III, Victor Stango, and Bernard Woolfley;
3. Unredacted copies of certain errata sheets filed by Defendant; and
4. Unredacted version of the Class's February 1, 2024 Notice of Filing Additional Discovery and exhibits;

The Court reviewed the documents and determined that portions of the aforementioned documents contain confidential information. Accordingly,

IT IS HEREBY ORDERED that unredacted copies of the following be filed with the Clerk's office under seal:

1. The Class's Opposition to SunTrust's Motion for Summary Judgment;
2. The Class's Response to SunTrust Bank's Theories of Defense and Statement of Undisputed Material Facts;
3. The Class's Opposition to SunTrust's Motion to Exclude Expert Opinions and Testimonies;
4. The 100 exhibits publicly filed redacted with The Class's Appendix in Support of Their Opposition to SunTrust Bank's Motion and Brief in Support of Summary Judgment and Response to Statement of Undisputed Material Facts
5. The 20 exhibits publicly filed redacted with The Class's Appendix in Support of their Opposition to SunTrust's Motion to Exclude Expert Opinions and Testimonies:
6. The 25 exhibits publicly filed redacted with the [Class's] Notice of Filing Additional Discovery;

1. The Class's Reply In Support of Plaintiff's Motion to Exclude, In Part, Testimony and Opinions of Defense Experts Bob Birmingham III, Victor Stango, and Bernard Woolfley;
2. Defendant's Exhibit 7 – Errata Sheet for the Deposition of Charles D. Cowan;
3. Defendant's Exhibit 8 – Errata Sheet for the 30(b)(6) Deposition of Jennifer Key;
4. Defendant's Exhibit 9 – Errata Sheet for the Deposition of Alexandra Maher;
5. Defendant's Exhibit 10 – Errata Sheet for the Deposition of Whitney Stewart;
6. Defendant's Exhibit 11 – Errata Sheet for the Deposition of Bernard F. Woolfley;
7. Classs' Exhibit 26 (filed Nov. 28, 2023) – Errata Sheet for Deposition of Victor Stango;
8. Class's Exhibit 27 (filed Nov. 30, 2023) – Errata Sheet for Deposition of Bob Birminghma III;
9. Class's Exhibit 28 (filed Nov. 30, 2023) – Errata Sheet for Deposition of Joel Howle;
10. Class's Exhibit 29 (filed Nov. 30, 2023) – Exhibits from Deposition of Joel Howle; and
11. Class's Exhibit 30 (filed Dec. 7, 2023) – Errata Sheet for Deposition of Laurie Pennington.

VI. SCHEDULING ORDER

The jury trial in this case remains specially-set to begin **April 29, 2024**. Having considered the Joint Motion to Amend Scheduling Order, and finding that such amendment would aid in the efficient and orderly trial of this matter beginning April 29, 2024, the Joint Motion to Amend Scheduling Order is **GRANTED** and the Scheduling Order entered September 22, 2022 is **HEREBY MODIFIED** as follows:

1. The deadline for (a) the parties to exchange preliminary trial "will call" and "may call" witness lists (except witnesses solely for purposes of impeachment) and (b) SunTrust to file any motion to bifurcate is **March 8, 2024**.

2. The deadline for the parties to exchange (a) additional trial witness lists in response to the opposing party's list, (b) preliminary trial exhibit lists, and (c) deposition designations for witnesses to be called at trial on deposition testimony is **March 22, 2024**.

3. The deadline for the parties to file (a) the Consolidated Pre-Trial Order (CPTO) (including final exhibit lists), (b) motions in limine, and (c) the Class's response to any motion to bifurcate shall be E-Filed and a copy in Word version of the CPTO and Motions in Limine emailed to the Court's Staff Attorney, Lisa Liang, at lisa.liang@fultoncountyga.gov, no later than **12:00 PM** on **April 3, 2024**.

    a. **CPTO**: The following procedures are to be followed in the preparation and filing of the CPTO and supersede any provisions to the contrary provided by the parties:

        i. **The parties shall use the Court's Consolidated Pre-Trial Order**, available in Word version by emailing the Court's Judicial Assistant, Kimberley Davis, at kimberley.davis@fultoncountyga.gov. The Court's CPTO contains significant additions and modifications to Paragraphs 3, 5, 11, 14, 18, and 19.

        ii. Counsel shall consolidate the proposed pre-trial order. **Failure of a party to submit its portion of the proposed pre-trial order may result in sanctions.** Unif. Sup. Ct. R. 7.1.

    b. **Motions in Limine**: Except for unforeseen evidentiary issues, all motions in limine are to be filed contemporaneously with, or as a part of, the proposed CPTO. Parties shall not file motions in limine that are "so vague and overly

broad as to render it virtually meaningless as a vehicle to decide an issue before it [is] raised in context at trial." Williams v. Harvey, 311 Ga. 349, 452-53, 858 S.E.2d 479 (2021). Nor shall parties file motions in limine that request that the Court and opposing parties file established rules of evidence. Motions in limine shall point out with specificity the objectionable evidence and show why the evidence is not admissible at trial.

The Court will hear oral argument, if necessary, during the Pre-Trial Conference. Parties must confer before the Pre-Trial Conference to narrow the motions in limine for argument and must file responses thereto and advise Ms. Liang by email no later than **12:00 P.M. on April 8, 2024** which motions are withdrawn or stipulated. Parties acknowledge that counsel are directed to notify the Court – on the record – at the time of any alleged violation, of the contention that the Court's ruling on a motion in limine has been violated during trial.

4. **Deposition Designations and Objections**: Counsel shall make a good faith effort to resolve any objections in depositions to be presented at trial. All unresolved objections – including objections and responses to rebuttal deposition designations – together with the deposition transcript, argument, and citations, shall be eFiled, with a copy to Ms. Liang via email. The deadline for the parties to file (a) responses to motions in limine, and (b) objections, responses and rebuttal designations to deposition designations is **12:00 PM on April 8, 2024**.
5. The deadline for the parties to file (a) requested preliminary jury instructions; (b) authenticity objections to trial exhibits; and (c) SunTrust's reply brief in support of its motion to bifurcate is **April 3, 2024.**

6. The deadline for the parties to file objections to requested preliminary jury instructions is **April 8, 2024**.

7. The pre-trial conference (including hearings on motions referenced above) is specially set for **April 10, 2024 at 9:30 a.m.** at the Fulton County Justice Center Tower, 185 Central Ave, SW, **Courtroom 2A,** Atlanta, Georgia, for the purpose of a Pre-Trial Conference. Parties shall provide their own court reporter. The Zoom link for exhibits only: https://zoom.us/j/92857792871 (Meeting ID: 928 5779 2871).

8. All other requested jury charges shall be submitted at the commencement of trial on **April 29, 2024** per U.S.C.R. 10.3. The Court will give the jury a written copy of the charge to have in the jury room. Barefoot v. Denson, 364 Ga. App. 64, 67, 873 S.E.2d 733 (2022).

SO ORDERED this 4th day of March, 2024.

Susan E. Edlein

Susan E. Edlein
Judge, State Court of Fulton County