APPEAL NO. 13-1879
CROSS APEAL NO. 13-1931

In the
UNITED STATES COURT OF APPEALS
for the
EIGHTH CIRCUIT

Choice Escrow and Land Title, LLC,
Plaintiff – Appellant/Cross-Appellee,

v.

BancorpSouth Bank,
Defendant – Appellee/Cross-Appellant.

On Appeal from the United States District Court for the Western District of Missouri,
Case No. 6:10-CV-03531-JTM,
The Honorable John T. Maughmer, Magistrate Judge.

APPELLANT'S PRINCIPAL BRIEF

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SUMMARY OF THE CASE– REQUEST FOR ORAL ARGUMENT

This appeal presents an issue of first impression in the Eighth Circuit. At issue is the unique and largely uncharted analysis and application of Article 4A of the Uniform Commercial Code ("Article 4A") regarding bank wire transfers. Few courts in the country have considered such issues, with only one such case having been considered by a sister court of this Court. The threat of cyber theft from U.S. corporate bank accounts through fraudulent wire transfers is growing exponentially. Future lawsuits regarding these issues are likely.

Although initiated by an unknown third party, BancorpSouth Bank ("BancorpSouth") accepted an internet-based wire transfer request for $440,000 out of the trust account of Choice Escrow and Land Title, LLC ("Choice"). The factual record and legal arguments in this appeal are voluminous, detailed and nuanced. In its Order spawning this appeal, the district court demonstrated that it lacked a grasp of the issues and facts through misstatements of the record and failures to consider and apply vital aspects of Article 4A and pleading rules.

Choice believes oral argument will appreciably aid this Court in considering the issues presented in this appeal, in avoiding the pitfalls suffered by the district court, and in considering likely future appeals by other cyber-fraud victims. Due to the novelty and complexity of the issues involved, Choice requests 30 minutes of oral argument for each side.

APPELLANT'S CORPORATE DISCLOSURE STATEMENT

Choice is a Missouri limited liability company which does not have a parent company, and no publicly held corporation owns 10% or more of Choice.

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JURISDICTIONAL STATEMENT

Choice is a Missouri limited liability company. BancorpSouth is a Mississippi banking corporation. Choice filed its Complaint in Missouri state court alleging BancorpSouth failed to comply with §4A-202 of the Uniform Commercial Code[1] and seeking $440,000. Based on diversity jurisdiction, BancorpSouth removed the cause to the Western District of Missouri under 28 U.S.C. §1332. Following the district court's *Order* [ADD. 1-16][2] of March 18, 2013, disposing of all parties' claims through summary judgment, Choice filed a timely Notice of Appeal on April 16, 2013 [J.A. 212][3]. The Eighth Circuit's jurisdiction derives from appeal of that final judgment, under 28 U.S.C. §1291.

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[1] Under §4A-507, Mississippi law applies: all citations to Article 4A herein are in reference to Miss. Code Ann. §75-4A-xxx .

[2] [ADD.] denotes citation to Appellant's Addendum.

[3] [J.A.] denotes citation to the Joint Appendix.

STATEMENT OF THE ISSUES

I. OBJECTIVE GOOD FAITH – §4A-202(b)(ii)

1. The district court erred in granting BancorpSouth's summary judgment motion and denying Choice's First summary judgment motion by failing to find that BancorpSouth failed to establish the "reasonable commercial standards of fair dealing" (i.e. objective good faith standards) through its expert, Peter Makohon.

a. Experi-Metal, Inc. v. Comerica Bank, 2011 W.L. 2433383 (E.D. Mich. 2011) (unpublished opinion) [ADD. 26-37].

b. Maine Family Fed. Credit Union v. Sun Life Ass. Co. of Canada, 727 A.2nd 335 (Me. 1999).

a. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

c. Fed. R. Evidence 701 and 702.

d. Miss. Code Ann. §75-4A-202(b)(ii).

e. Miss. Code Ann. §75-4A-105(a)(6).

2. The district court erred in granting BancorpSouth's summary judgment motion and denying Choice's First summary judgment motion by erroneously finding that the parties (and the parties' experts) agreed that the FFIEC's 2005 Guidance was the "reasonable commercial standards of fair dealing" for accepting the subject wire transfer, since no fact in the record establishes any such agreement or expert opinion.

a. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

b. Fed. R. Civ. P. 56.

c. Miss. Code Ann. §75-4A-202(b)(ii).

II. CHOICE'S LIMITING INSTRUCTION – §4A-202(b)(ii)

3. The district court erred in granting BancorpSouth's summary judgment motion and denying Choice's Second summary judgment motion by failing to find that BancorpSouth conclusively and judicially admitted in its Answer that Choice's email of November 11, 2009, was an "instruction" to limit wire transfers to foreign banks.

a. In re Crawford, 274 B.R. 798 (B.A.P. 8th Cir. 2002).

b. MO Hous. Dev. Com'n v. Brice, 919 F.2d 1306 (8th Cir. 1990).

c. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

d. Miss. Code Ann. §75-4A-202(b)(ii).

4. The district court erred in granting BancorpSouth's summary judgment motion and denying Choice's Second summary judgment motion by failing to find that BancorpSouth failed to plead, as a defense to its failure to comply with Choice's instruction, that Choice's instruction to limit wire transfers to foreign banks allegedly violates the "Memo" executed by Choice.

a. Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91 (5th Cir. 1976).

b. Hertz Commercial Leasing v. Morrison, 567 So.2d 832 (Miss. 1990).

c. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

d. Miss. Code Ann. §75-4A-202(b)(ii).

5. The district court erred in granting BancorpSouth's summary judgment motion and denying Choice's Second summary judgment motion by improperly weighing the evidence and determining a question of fact regarding whether Choice's email to limit wire transfers to foreign banks was an instruction.

a. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

b. Hunt v. Cromartie, 526 U.S. 541 (1999).

c. Fed. R. Civ. P. 56.

d. Miss. Code Ann. §75-4A-202(b)(ii).

III. COMMERCIAL REASONABLENESS – §4A-202(b)(i)

6. The district court erred in granting BancorpSouth's summary judgment motion by failing to find BancorpSouth's security procedures were commercially unreasonable since they did not perform transactional analysis (i.e. review of the payment order), as is required by Article 4A.

a. Miss. Code Ann. §75-4A-202(b)(ii).

b. Miss. Code Ann. §75-4A-201.

c. Miss. Code Ann. §75-4A-202(c).

7. The district court erred in granting BancorpSouth's summary judgment motion by determining that a particular security procedure that was not utilized (Dual Control) would have, in retrospect, prevented a particular wire transfer, since such analysis is not permitted under Article 4A.

a. Patco Const. Co. v. People's United Bank, 684 F.3d 197 (1st Cir. 2012)

b. Miss. Code Ann. §75-4A-202(b)(ii).

c. Miss. Code Ann. §75-4A-201.

d. Miss. Code Ann. §75-4A-202(c).

8. The district court erred in granting BancorpSouth's summary judgment motion by failing to analyze the commercial reasonableness of Dual Control pursuant to §4A-202(c), and instead, improperly weighing the evidence and making its determination solely on its belief that Dual Control was "suitable" for Choice.

a. Miss. Code Ann. §75-4A-202(b)(ii).

b. Miss. Code Ann. §75-4A-202(c).

STATEMENT OF THE CASE

This is a statutory action under Article 4A of the Uniform Commercial Code ("Article 4A") regarding Funds Transfers (wire transfers) by commercial/business customers. Choice's Addendum contains the pertinent sections of both Article 4A and the official Comments by the drafters of Article 4A. [ADD. 17-25.]

Article 4A

The catalyst for drafting Article 4A was that judicial authority with regard to funds transfers was sparse, undeveloped and disparate. [ADD. 17.] Judges' attempts to define the rights and obligations of disputing funds transfer parties with general principles of common law or equity were unsatisfactory. [Id.]

Therefore, the drafters made a deliberate decision to "write on a clean slate", treating funds transfers as a unique method of payment entirely different from the methods addressed by other articles of the UCC. [Id.] Rather than relying on such broadly-stated general principles of law or equity, precise and detailed rules were created to assign responsibility, define behavioral norms, allocate risks and establish limits on liability. [Id.]

Funds transfers involve three competing interests: the banks that provide funds transfer services; the organizations that use those services; and the general public. [ADD. 17.] All three interests were thoroughly considered in the drafting process of Article 4A. [Id.] The rules that emerged represent a careful and delicate balancing of those interests and are intended to be "*the exclusive means of determining the rights, duties and liabilities of the affected parties*". [Id.] Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in Article 4A. [Id.]

Wire Transfers and "Security Procedures"

The wire transfer process begins with a customer's "payment order", which is a customer's instruction to its bank to pay a fixed amount of money to a specified beneficiary. [J.A. 741.] A "wire transfer" consists of the actions the bank performs when a customer's payment order is reviewed, processed and accepted, resulting in the money being electronically sent to the beneficiary's bank. [J.A. 743.]

A bank and a customer may agree that the bank will verify the customer's payment orders pursuant to a "security procedure", which is defined in §4A-201, and clarified in the Comment §4A-201, as follows:

> "*a procedure established by agreement of a customer and a receiving bank for the purpose of (i) verifying that a payment order or communication amending or cancelling a payment order is that of the customer, or (ii) detecting error in the transmission or the content of the payment order or communication.*" [ADD. 18.]
>
> "*The definition of security procedure limits the term to a procedure 'established by agreement of a customer and a receiving bank.' The term does not apply to procedures that the receiving bank may follow unilaterally in processing payment orders.*" [Id.]

The drafter's decision to exclude procedures unilaterally implemented by the bank from the definition of "security procedure" protects *both the customer and the bank*.[4]

[4] A bank was protected under this rule in Skyline Int. Dev. v. Citibank, 706 N.E.2d 942 (Ill. 1998). The court ruled that the bank's additional internal procedures used to process wire transfers were not part of the agreed security procedure, and thus, the bank's failure to follow those unilaterally implemented procedures in accepting a funds transfer from the customer was *not* a violation of the security procedure under Article 4A. Skyline, at 945.

Unauthorized Wire Transfers – §4A-202

Whether the bank or the customer bears the loss from an unauthorized, fraudulent wire transfer is governed by §4A-202. [ADD. 19.] The general rule, pursuant to §4A-204, is that the bank bears the loss from an unauthorized wire transfer. [ADD. 2.] When a bank and a customer have agreed to use a security procedure, the bank can only shift the loss to the customer by meeting its burden of proof on all three of the elements required under §4A-202: (1) proving the security procedure's "commercial reasonableness"; (2) proving it accepted the payment order in "good faith"; and (3) proving it accepted the payment order in compliance with the customer's instructions that limit the bank's ability to accept payment orders. [ADD. 19.]

1 of 3: Proving Commercial Reasonableness

First, the bank must establish that the "agreed" security procedure was a commercially reasonable method of providing security against unauthorized payment orders. [Id.] Determining commercial reasonableness is a question of law for the Court. [Id.] The concept of what is commercially reasonable in any given case is flexible. [ADD. 23, Comment 4.] The court must consider the particular customer and

particular bank involved, not a uniform standard for all banks and customers. [ADD. 24, Comment 4.] The Court must utilize the following five factors:

(i) The wishes of the customer expressed to the bank;

(ii) The circumstances of the customer known to the bank, including the size, type and frequency of payment orders normally issued by the customer to the bank;

(iii) Alternative security procedures offered to the customer; and

(iv) Security procedures in general use by similarly situated customers and banks. [ADD. 19.]

The fifth factor is the type of receiving bank; with the expectation that a larger bank should provide more state-of–the-art security measures than a smaller bank. [ADD. 23-24, Comment 4.]

2 of 3: Proving Objective Good Faith

Second, the bank must prove it accepted the subject payment order in "good faith". [ADD. 19.] The definition of good faith, §4A-105(a)(6), consists of two prongs: a subjective prong ("honesty in fact") and an objective prong ("observance of the reasonable commercial/industry

standards of fair dealing"). Maine Family Fed. v. Sun Life Assur., 727 F.2d 335, 340-344 (Me. 1999).

The subjective prong (not at issue in this case) is generally referred to as the "pure heart and empty head" standard. Maine Family. at 340. The objective prong requires that the bank's conduct comport with the banking industry's standards of fair dealing for accepting internet-based payment orders. Id. at 342-343. It is the bank's obligation, not the customer's, to establish the applicable standards of fair dealing in accepting internet-based payment orders. Experi-Metal, Inc. v. Comerica Bank, 2011 W.L. 2433383, *12-13 (E.D. Mich. 2011) ("Experi-Metal 2") (unpublished opinion) [ADD. 26-37].

3 of 3: Proving Compliance with the Customer's Limiting Instruction

Third, the bank must prove it accepted the payment order in compliance with any instruction of the customer. [ADD. 19.] A customer may want to protect itself by imposing limitations on the bank's ability to accept certain payment orders. [ADD. 23, Comment 3.][5] Such limitations may be covered by an instruction unilaterally imposed by the customer, separate from the security procedure agreement. [Id.] The bank ***must***

[5] The Comment for §4A-202 was combined with the Comment for §4A-203. [ADD. 20.]

comply with the customer's limitations if the conditions of subsection (b) are met. [Id.] The bank is relieved of its obligation to follow a customer's instruction only if the instruction "violates" a prior written agreement. [ADD. 19.]

Conclusion

The bank has the burden of proof (i.e. the burden of producing evidence and the risk of non-persuasion) on all three elements. [ADD. 23, Comment 3.] The three elements at issue here (objective good faith, the customer's limiting instruction and commercial reasonableness) are of *equal* importance, and the bank's failure to prove any one of these elements is fatal.[6] [ADD. 19.]

[6] NOTE: Should the court or jury find the loss should be shifted to the customer under §4A-202, the customer can shift the loss back to the bank under §4A-203. However, Choice makes no claim under §4A-203, relying on the fact that BancorpSouth has failed in its burdens under §4A-202. Thus, §4A-203 is irrelevant to this case.

Case Disposition

Choice alleged in its Second Amended Complaint [J.A. 19-67] that, under §4A-202, BancorpSouth must repay the funds stolen from Choice's account through the unauthorized wire transfer described herein. In its Counterclaim, BancorpSouth sought attorney fees through four separate counts. [J.A. 84-95.] Choice moved to dismiss said counterclaim. [J.A. 126-130.] The district court granted Choice's motion [J.A. 160-163], leaving only Choice's Second Amended Complaint at issue.

After discovery closed, both parties filed summary judgment motions. Choice filed two summary judgment motions: the first regarding BancorpSouth's failure to prove it accepted the subject payment order in "objective" good faith [J.A. 216-218]; and the second regarding BancorpSouth's failure to comply with Choice's limiting instruction to not accept wire transfers to foreign banks [J.A. 370-372].

BancorpSouth moved for summary judgment on Choice's entire Complaint, and alternatively for partial summary judgments on each of its burdens of proof under §4A-202. [J.A. 439-440.] The district court disposed of all claims when it entered its *Order* [ADD. 1-16.] granting BancorpSouth's motion and denying Choice's motions.

STATEMENT OF THE FACTS

Basic Facts

In 2009, Choice became a customer of BancorpSouth, establishing two deposit accounts: a business operating account for Choice's business funds; and a trust/escrow disbursement account for its clients' funds, from which Choice was able to wire transfer funds to beneficiaries for its clients' real estate-related payoffs. [J.A. 190 (#17).] Between May 2009 and March 2010, Choice made hundreds of wire transfers out of its trust account through BancorpSouth's internet banking application ("InView"), all of which were authorized by Choice. [J.A. 451 (#25).]

Prophetically, in November 2009, Choice sent an email to BancorpSouth expressing its "wish" and "instruction" that BancorpSouth limit transfers to foreign banks. [J.A. 29 (#61); & 75 (#61); 222 (#13); & 284 (#1).] Attached to that email was a bulletin from Choice's underwriter warning of the threat of foreign cyber-criminals looting escrow company trust accounts and advising that all wiring capabilities to foreign banks be disabled. [J.A. 719.]

On March 17, 2010, despite receiving Choice's said wish and instruction just four months prior, BancorpSouth accepted an internet-based payment order to a foreign bank in the Republic of Cyprus, which

was initiated by an unknown third party (hereinafter, "The Wire Transfer"). [J.A. 188 (#3, 4, 5).] The $440,000 Wire Transfer was for “invoice: equipment”, even though Choice had never previously sent a wire transfer for “invoice” or “equipment” from its trust account. [J.A. 188, 189 (#3, 9, 10).] Although BancorpSouth made efforts to recover the funds of the fraudulent transfer, it was unsuccessful and has refused to refund Choice for accepting the unauthorized Wire Transfer. [J.A. 189, (#15, 16).]

The Parties

Choice is a land title and real estate escrow business located in Springfield, Missouri. [J.A. 188 (#1).] BancorpSouth is a Mississippi banking corporation, headquartered in Tupelo, Mississippi, and doing business for over 135 years through more than 200 locations in eight states. [J.A. 188 (#2); & 848 (#14-17).] In March of 2010, BancorpSouth had been offering internet wire transfer services for over 10 years and had over $13 billion in total assets, ranking it within the top 2% of all banks in the U.S. [J.A. 191 (#23, 24).]

Choice's Wire Transfer History

Prior to March 17, 2010, ALL wire transfers from Choice's trust account were for real estate-related purposes. [J.A. 849 (#18).] Prior to March 17, 2010, NONE of the wire transfers from Choice's trust account were for "invoice" or "equipment". [J.A. 849 (#18).] Prior to March 17, 2010, NONE of the wire transfers from Choice's trust account were to a foreign beneficiary or foreign bank. [J.A. 849 (#18).]

In addition to input-fields for dollar amount, beneficiary name and beneficiary bank name, BancorpSouth's internet banking application (InView) included an Originator's Bank Information field ("OBI"). [J.A. 459 (#65).] The OBI was left blank in 87% of the previous wire transfers from Choice's account prior to March 17, 2010. [J.A. 459 (#65).] It was anomalous that the Wire Transfer included any information in the OBI, since it was utilized only 13% of the time. [J.A. 459 (#65).] The Wire Transfer was so atypical, that the terms "invoice" and "equipment" had NEVER appeared in the OBI in any of Choice's previous wire transfers. [J.A. 849 (#18).]

I. Objective Good Faith

The district court's Scheduling and Trial Order provides that after each party's expert submitted an expert report, the testimony of each such expert was limited to the opinions provided in that report. [J.A. 182, V(C)(3).] Peter Makohon was the designated expert witness for BancorpSouth. [J.A. 224 (#20); & 284 (#1).] Mr. Makohon testified that *ALL* of his opinions are contained in his report. [J.A. 224 (#22); & 284 (#1).]

In his report [J.A. 244-278], Mr. Makohon thoroughly expresses his opinions regarding the commercial reasonableness of BancorpSouth's security procedure. However, NONE of the following terms appear in his report: "commercial standards of fair dealing", "industry standards of good faith", "objective prong", or "reasonable person standard". [Id.] His report is divided into eleven headings, none of which contain the term "good faith". [Id.] The statutory language for commercial reasonableness is cited in his report [J.A. 250-251], but the statute for good faith is conspicuously omitted. [Id.]

II. Choice's Limiting Instruction

BancorpSouth unequivocally admitted in its Answer that on November 11, 2009, Choice expressed in an email its "wish" and "instruction" that BancorpSouth limit transfers to foreign banks. [J.A. 29 (#61); & 75 (#61).] Clearly, BancorpSouth did not comply with Choice's wish and instruction, since on March 17, 2010, just four months after receiving the email, BancorpSouth accepted and sent the Wire Transfer to a foreign bank. [J.A. 220 (#4, 5, 6); & 284 (#1).]

Although BancorpSouth did not plead such a defense in its Answer [J.A. 68-111], it later claimed that it was not required to follow Choice's instruction under the last sentence of §4A-202(b), asserting that the instruction "violates" the Memo executed by Choice [J.A. 397, 714]. However, Choice asserted that its instruction does not "violate" the Memo since (i) a statement that InView*cannot* do something (i.e. control where a wire is sent) is not the same as an agreement that BancorpSouth *will not* block foreign wires, and (ii) the Memo only relates to InView's limited functioning capabilities, but fails to account for the ability of BancorpSouth's personnel to block foreign wires during the manual review process, which is performed on every internet-based wire transfer BancorpSouth receives. [J.A. 425-427.]

III. Commercial Reasonableness

(a) The Parties' Agreements

The parties agreed the authenticity of payment orders issued to BancorpSouth in the name of Choice would be verified pursuant to a security procedure. [J.A. 844 (#1).] No *verbal* agreements between BancorpSouth and Choice exist regarding wire transfers or payment orders. [J.A. 992 (# 4).] Choice and BancorpSouth did enter into the following *written* agreements:

a) InView Implementation Form

b) Business Services Agreement.

c) Funds Transfer Agreement.

d) Memo: Dual Control Waiver.

e) InView Wire Transfer User Security Form.

f) Sweep Account Overnight Repurchase Agreement.

g) Deposit Account Terms and Conditions.

[J.A. 190 (# 17).]

The above agreements: (1) are all on forms prepared by BancorpSouth, (2) all contain type-written information specific to Choice that was placed there by BancorpSouth, and (3) have boilerplate language that was not adjusted to be individualized for Choice or any other BancorpSouth customer. [J.A. 194 (#46).]

(b) Single Control v. Dual Control

BancorpSouth offered only two security procedure options to Choice: Single Control and Dual Control. [J.A. 714, 715.] Dual Control is defined as requiring two users; one user to create the wire transfer request, and another user to approve the same wire transfer request. [J.A. 715.] Single Control requires one user to both create and approve a wire transfer request. [Id.] Other than an additional User ID and Password to approve/release a wire transfer, there are no differences between Dual Control and Single Control. [J.A. 1097 (#27).] Choice informed BancorpSouth that Dual Control was not suitable for Choice, and thus, it utilized Single Control. [J.A. 717.]

(c) The Security Procedure Established by Agreement of the Parties

As required by §4A-201, the security procedure *established by agreement* of Choice and BancorpSouth is contained in the Funds Transfer

Agreement, which is "*the complete and exclusive statement of the agreement*" between Choice and BancorpSouth regarding funds transfers and which "*supersedes*" all other agreements regarding funds transfers. [J.A. 96.] The Funds Transfer Agreement only mentions the use of a security code (i.e. a Password), without reference to "PassMark", a "device ID" or any other security-related features. [J.A. 96.]

As BancorpSouth admitted in response to Request for Admissions, NONE of the written agreements between BancorpSouth and Choice contain the term "PassMark". [J.A. 1050-1051 (#26(b)).] The record lacks evidence that a person *with Choice's authority* agreed to the use of PassMark for accepting wire transfer requests from Choice. [J.A. 992 (#2).] In addition, *no written or verbal agreement* exists between the parties which contains the terms, or describes the use of, any of the following:

a. PassMark or RSA;

b. device ID, device identifier, device fingerprint, or cookie;

c. IP Address verification or GEO Location verification

d. Manual or human review of payment orders, PayPlus, wire transfer specialist or OFAC black list.

(collectively referred to as "**The Unilateral Procedures**".)

[J.A. 993-994 (#6, 7).]

Although The Unilateral Procedures were never a part of any verbal or written agreement and were performed invisibly to and without the knowledge of Choice, BancorpSouth claimed they were part of the "agreed" security procedure through "course of performance". [J.A. 1022, 1025 (pp. 66:7-20, 105:8–106:25.] A course of performance agreement cannot exist with regard to The Unilateral Procedures and Single Control, since the record lacks evidence that Choice knew those features were being used or approved of their use. [J.A. 799-1052.] Furthermore, since BancorpSouth and Choice never "performed" under Dual Control, it is impossible to have a "course of performance" agreement coupling The Unilateral Procedures with Dual Control. [J.A. 448 (#14).]

(d) The Security Features Unilaterally Implemented by BancorpSouth Without Choice's Agreement or Knowledge

BancorpSouth's designated Corporate Representative stated that its internet-based wire transfer system, as "implemented" in March 2010, consisted of three main components: (1) PassMark, (2) InView, and (3) a manual review of the payment order. [J.A. 1006 (pp. 10:16-11:6).]

PassMark acted like the gatekeeper, checking the customer's identity before permitting entrance to InView. [J.A. 1011 (pp. 49:19-23).] InView acted like the teller, assisting the customer in performing various banking functions. [J.A. 1011 (pp. 49:24-50:7).] The manual review occurred after the customer submitted a wire transfer request (payment order) to BancorpSouth through InView, where a BancorpSouth employee verified the form of the request and a computer program checked the customer's available funds and the OFAC black-listed countries. [J.A. 522-523 (#8, 9, 10); & 1006 (pp. 10:16-11:6).]

The features of PassMark (i.e. verification of the device identifier/cookie on the customer's computer and verification of the customer's IP Address) occurred within the computer, ***invisibly*** to Choice. [J.A. 1022, 1025 (pp. 66:7-20, 105:8–106:25.] As BancorpSouth admitted in its summary judgment reply, *it NEVER offered PassMark or its features to Choice*, with either Single Control or Dual Control. [J.A. 1088-1090 (#6-10), & 1094 (#8-12).] Nor does any written or verbal agreement mention or address the "manual review" process. [J.A. 61-65, 66, 67, 96-101, 102-106, 107-11, 992 (# 4).].]

Consequently, BancorpSouth *unilaterally* used PassMark, the manual review and the remaining Unilateral Procedures in March of 2010, without

Choice's knowledge, acceptance or consent [J.A. 992-994 (#2-13)]. Thus, PassMark and the manual review were not a part of the "security procedure", is a security must be "established by agreement". [ADD. 18.][7]

(e) The FFIEC 2005 Guidance

The Federal Financial Institutions Examination Council ("FFIEC") is an inter-agency body established to, inter alia, prescribe and publish various principles and standards it recommends banks and financial institutions follow. [J.A. 22 (#23).] In 2005, the FFIEC issued its "Authentication in an Internet Banking Environment" (herein, the "2005 Guidance"). [J.A. 23 (#27).] The 2005 Guidance is aimed at security measures to reliably *authenticate the identity of bank customers* accessing internet-based financial services. [J.A. 39-52.] Therefore, the 2005 Guidance is a starting point for banks to review when attempting to implement "commercially reasonable" security procedures. [J.A. 39-52 & ADD. 24, Comment 4.][8] However, the 2005 Guidance was never aimed at

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[7] [ADD. 18]: "The definition of security procedure limits the term to a procedure 'established by agreement of a customer and a receiving bank'. The term **does not apply** to procedures that the receiving bank may follow unilaterally in processing payment orders." (emphasis added.)

[8] [ADD. 24.]: "On the other hand, a **security procedure** that fails to meet the prevailing standards of good banking practice applicable to the particular bank should not be held to be **commercially reasonable**." (emphasis added.)

addressing the applicable banking industry standards of fair dealing for a bank's good faith acceptance of a payment order. [J.A. 39-52.] The terms "good faith", "fair dealing" and "commercial reasonableness" never appear in the 2005 Guidance. [J.A. 39-52.]

(f) "Deemed" Commercially Reasonable & Suitability

Under §4A-202(b) and §4A-202(c), a security procedure can be determined commercially reasonable by the Court finding that either:

(i) the agreed security procedure (i.e. procedure "A") is found to be commercially reasonable using the factors in §4A-202(c); or

(ii) another security procedure (i.e. procedure "B") that was offered to and refused by the customer is commercially reasonable using the factors in §4A-202(c) and is suitable for the customer; thus, resulting in the agreed security procedure (procedure "A") being "deemed" commercially reasonable. [ADD. 19.]

In this case, the security procedure that was agreed to by the parties was Single Control. [J.A. 96, 107, 714, 715.] The security procedure that was offered to, and refused by, Choice was Dual Control. [J.A. 714, 715.] Thus, under a "deemed" commercially reasonable argument, Dual Control must itself be commercially reasonable using the §4A-202(c) factors. In

addition, the Comment to §4A-202 indicates that Dual Control must also be "suitable" for Choice, as well commercially reasonable. [ADD. 24, Comment 4.][9]

In its summary judgment motion, BancorpSouth exclusively sought a determination that Single Control should be "deemed commercially reasonable" because Choice refused Dual Control. [J.A. 479.] However, BancorpSouth's "deemed commercially reasonable" argument focuses solely on the issue of suitability, without addressing any of the four factors mentioned in §4A-202(c). [J.A. 439-507.]

Following BancorpSouth's lead, the district court's Order only discussed Dual Control's suitability for Choice, and made no mention or analysis of (i) the wishes of Choice, (ii) the circumstances of Choice known to BancorpSouth, including its previous wire transfer history, (iii) the alternative security procedures offered, and (iv) security procedures utilized by similarly situated banks and customers. [ADD. 4-11.]

[9] [Add. 24.]: "Sometimes an informed customer refuses a security procedure that is commercially reasonable *and suitable* for that customer"

(g) Transactional / Payment Order Analysis is Required

Sections 4A-201 & 202(c) require a bank's security procedure to perform transactional analysis (i.e. reviewing the contents of its customer's payment orders). [ADD. 18, 19; & J.A. 955-956 (Maryman Observation 12).] Choice's expert is supported in this conclusion by the fact that one of the four factors listed in §4A-202(c) is "the circumstances of the customer known to the bank, including *the size, type and frequency of payment orders normally issued* by the customer to the bank". [ADD. 19.]

As BancorpSouth's own expert admitted, BancorpSouth's security procedures were NOT performing transactional analysis in March of 2010. [J.A. 1091 (#13).] Without performing transactional/payment order analysis, it was impossible for BancorpSouth to consider the size, type or frequency of Choice's previous wire transfers. [ADD. 19.]

SUMMARY OF APPELLANT'S ARGUMENT

In order for BancorpSouth to shift its liability for the $440,000 loss suffered from the Wire Transfer to Choice, BancorpSouth must prove all three elements under §4A-202: (i) objective good faith; (ii) compliance with Choice's limiting instruction; and (iii) the security procedure's commercially reasonableness. By way of analogy, this creates a three-legged stool, for which BancorpSouth must successfully construct each leg. Failure to adequately support any one of the three legs, causes the stool to fall (i.e. BancorpSouth fails to carry its burden).

Although Choice prevails if the Court finds any one or more of the elements is not established, Choice contends that BancorpSouth has failed all three. The granting and denying of the summary judgments at issue are reviewed by this Court de novo. Choice presents its Statement of the Issues, above, in the form of how the district court erred, in order to aid this Court in avoiding those errors made by the district court.

I. OBJECTIVE GOOD FAITH – §4A-202(b)(ii)

1. BancorpSouth's failure to establish the reasonable commercial standards of fair dealing through its expert.

Choice's First Motion for Summary Judgment asserted that BancorpSouth failed to establish an essential element of its case (i.e. the objective prong of good faith). [J.A. 216-218.] As a result, summary judgment against BancorpSouth is mandated under Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986).

The district court's Scheduling and Trial Order limits an expert's testimony to the opinions expressed in the expert's report. [J.A. 182.] Under §4A-202(b)(ii), BancorpSouth has the burden of proof on whether it accepted the payment order for the Wire Transfer in "objective good faith" (i.e. the reasonable industry standards of fair dealing). [ADD. 19.]

BancorpSouth's expert never established or opined on the reasonable banking industry standards of fair dealing applicable in his report. Consequently, BancorpSouth is precluded from presenting evidence on objective good faith and summary judgment should be entered in favor of Choice.

2. The record lacks support for the conclusion that the parties and the experts agreed that the 2005 Guidance was the applicable objective good faith standard.

In discussing the objective prong of good faith, the district court stated *"The parties and their respective experts are in agreement that the... FFIEC 2005 Guidance provides the applicable standard*". [ADD. 12-13.] Choice is astonished by this unsubstantiated conclusion. Nothing in the record supports the conclusion that Choice or its expert "agreed" the 2005 Guidance is the objective standard of good faith in this case.

All evidence in the record is to the contrary. Choice filed its First Motion for Summary Judgment claiming that BancorpSouth's expert failed to establish the objective standard of good faith. Since Choice was clearly of the belief that BancorpSouth did not establish the applicable standard at all, how is it possible Choice agreed that the 2005 Guidance was the standard? The answer: it is not possible.

The district court's Order [ADD. 1-16] lacks support for the conclusion that BancorpSouth established the objective prong of good faith, since the above-described non-existent agreement is the sole ground cited for such a finding, without the district court reviewing whether BancorpSouth's expert ever opined on the objective prong of good faith.

II. CHOICE'S LIMITING INSTRUCTION – §4A-202(b)(ii)

3. BancorpSouth judicially admitted Choice's email was an instruction.

It is well-established that statements made in a party's pleadings are binding on that party, and are considered conclusive judicial admissions. In re Crawford, 274 B.R. 798 (B.A.P. 8th Cir. 2002). Judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means. Id.

In its Second Amended Complaint, Choice alleged: "*Choice by email on or about November 11, 2009, from Jim Payne to Ashley Kester, expressed to BancorpSouth its wish, requirement and/or instruction that BancorpSouth limit transfers to foreign banks.*" [J.A. 29 (#61).] BancorpSouth's response to that allegation was one word: "Admit." [J.A. 75 (#61).]

BancorpSouth has tried to circumvent its binding judicial admission by claiming that subsequent to said pleading admission, contrary evidence was elicited from Choice member Jim Payne, who stated in his deposition that said email was merely an inquiry. [J.A. 395.] Precedent in this Circuit dictates that such subsequent, contrary evidence does not relieve

BancorpSouth of its judicial admission. MO Housing Dev. Com'n v. Brice, 919 F.2d 1306, 1315 (8th Cir. 1990).

The district court ignored this clear precedent on judicial admissions, and instead improperly weighed the evidence concerning the email instruction, stating:

> "*In addition, the Court does not find that Mr. Payne's e-mail in November of 2009 asking whether (BancorpSouth) could limit transfers to foreign banks was an instruction by Choice restricting (BancorpSouth's) ability to accept payment order.*" [ADD. 14.]

Such a holding fails to comport with the case law on both judicial admissions and improperly weighing evidence in summary judgment proceedings, and cannot stand.

4. BancorpSouth failed to plead the "Memo" as a defense to Choice's instruction.

Whether a statute is an affirmative defense within Rule 8(c) is determined by looking to the substantive law of the state (i.e. Mississippi). Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91, 95 (5th Cir. 1976). In Mississippi, if the defendant bears the burden of production and the risk of non-persuasion, the matter is an affirmative defense and Rule 8(c) saddles the defendant with the burden to plead the defense. Hertz Commercial Leasing v. Morrison, 567 So.2d 832, 834 (Miss. 1990). Failure to plead the defense creates a waiver if not timely and adequately pled. Id.

BancorpSouth claimed in its Suggestions in Opposition to Choice's Second Motion for Summary Judgment [J.A. 395-397] that, under the last sentence of §4A-202(b), it was relieved of complying with Choice's limiting instruction because the instruction violates the Memo executed by Choice [J.A. 66]. However, BancorpSouth never pled such a defense. [J.A. 68-95.]

Choice was ambushed by this defense in summary judgment proceedings, after discovery could not be conducted on such an untimely claim. To say Choice was "surprised" that the Memo is supposedly a defense to Choice's instruction is an understatement.

5. *Weighing the evidence to determine whether Choice's email was an instruction is improper in summary judgment.*

Should this Court not hold BancorpSouth to its judicial admission, the question of whether or not Choice's email is an instruction is a fact for the jury to determine at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Even if it was a bench question, it is improper for the court to weigh such conflicting evidence in summary judgment proceedings. Id.

The district court ignored these summary judgment principles and concluded that the email was not an instruction. [ADD. 14.] This Court should reverse the district court's Order concluding the email was not an instruction, and should remand the issue for trial.

III. COMMERCIAL REASONABLENESS – §4A-202(b)(i)

6. BancorpSouth's security procedure is not commercially reasonable since it did not perform transactional analysis.

Section 4A-202 requires a bank's security procedure to review the customer's payment orders. [J.A. 955-956 (Observation 12, last bullet).] This fact is supported by the definitions of security procedure and commercial reasonableness. [ADD. 18 & 19.] In each definition, specific reference is made to the fact that *payment orders*, not merely a customer's login credentials, must be verified, reviewed and considered. Therefore, if a procedure does not review the payment order (i.e. transactional analysis), it is not a commercially reasonable security procedure.

Since BancorpSouth [J.A. 501, 1091] and its own expert [J.A. 1021, 1091] both admit that BancorpSouth's security procedures did not perform transactional analysis, summary judgment against BancorpSouth on the commercial unreasonableness of its security procedure is mandated under Celotex, 477 U.S. at 322-323.

7. Considering whether Dual Control would have, in hindsight, prevented the Wire Transfer is improper under Article 4A.

In its summary judgment motion, BancorpSouth made the assertion that Choice's expert stated that, in retrospect, had Choice utilized Dual Control instead of Single Control, the Wire Transfer on March 17, 2010 would not have happened. [J.A. 463-464 (#90, 91.] The district Court used that statement to justify its decision to enter summary judgment in favor of BancorpSouth, stating: "The result (i.e. judgment against Choice) is not wholly unjust." [ADD. 15.]

The problem with this conclusion is that it is not supported by the plain language of Article 4A. Nowhere in Article 4A is the Court directed to consider guess-work as to whether a security procedure that was refused by the customer would have, in hindsight, prevented a particular unauthorized transfer. This red-herring by BancorpSouth should be disregarded, as it is irrelevant to determining commercial reasonableness under §4A-202(c).

8. *Determining suitability is (a) not the same as determining "commercial reasonableness" under §4A-202(c), and (b) improper in summary judgment.*

The district court stated in its Order that commercial reasonableness is determined by utilizing the four factors in §4A-202(c). [ADD. 4.] This is, of course, true. However, confusingly, the district court discussed NONE of those factors when it analyzed commercial reasonableness in this case. [ADD. 1-16.] Rather, the district court focused solely on whether Dual Control was "suitable" for Choice. [ADD. 9-11.] This occurred because BancorpSouth's argument for Dual Control's commercial reasonableness was improperly based solely on suitability, rather than the factors in §4A-202(c). [J.A. 453-455.]

Choice agrees that whether Dual Control was suitable for Choice must be considered pursuant to the Comment to §4A-202:

> "*In all cases, however, a receiving bank cannot get the benefit of subsection (b) unless it has made available to the customer a security procedure that is commercially reasonable and suitable for use by that customer.*"
> [ADD. 24, Comment 4 (emphasis added).]

However, suitability is only determined *AFTER* Dual Control is reviewed for commercial reasonableness under §4A-202(c). Patco Const. Co. v. People's United Bank, 684 F.3d 197, 209 (1st Cir. 2012). The suitability

analysis does *not* replace the four factors in §4A-202(c), as BancorpSouth would like the Court to believe.

Furthermore, the district court improperly entered the province of the factfinder (the jury) in determining suitability. The only issue in Choice's §4A-202 claim that is a question of law for the Court to determine is commercial reasonableness. [ADD. 19.] Whether or not Dual Control was "suitable" for Choice's use is, at best, a disputed fact which the jury must weigh, not the Court, and which must be decided at trial, not in summary judgment. Anderson, 477 U.S. at 249.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's granting of summary judgment in favor of BancorpSouth, affirming only if the record, viewed in the light most favorable to non-movant Choice, demonstrates there is no genuine dispute of material fact and movant BancorpSouth is entitled to judgment as a matter of law. Austell v. Sprenger, 690 F.3d 929 (8th Cir. 2012). This Court reviews *de novo* the district court's interpretation of Mississippi state law, giving no deference to its interpretation. Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 379 (8th Cir. 1995).

Ordinarily this Court lacks jurisdiction to reverse the denial of Choice's two summary judgment motions. First National Bank v. Lincoln Life Ins. Co., 824 F.2d 277, 281 (3rd Cir. 1987). However, since this Court obtained jurisdiction reviewing BancorpSouth's granted summary judgment motion, the Court has broad discretion as to "*reverse any judgment, decree, or order of a court lawfully brought before [it] for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order.*" Id. and 28 U.S.C. 2106.

Consequently, all eight issues presented by Choice are reviewed de novo, giving no deference to the district court's determinations or analysis.

APPELLANT'S ARGUMENT

Introduction

Pursuant to the standard of review, the summary judgment motions and argument therewith, the record before the Court, and the argument presented herein, Choice requests the Court reverse and vacate the district court's Order [ADD. 1-16] and enter proper judgment in favor of Choice, under Celotex, First National and 28 U.S.C. 2106.

Alternatively, Choice believes that, at a minimum, the Court will find that a number of genuine disputes exist with regard to material facts relevant to BancorpSouth's Motion for Summary Judgment [J.A. 439-798], which must be resolved by a jury. In addition, in at least two instances, the district court improperly weighed the evidence in summary judgment proceedings on matters that were the province of the factfinder-jury (regarding the objective standard of good faith, and the limiting instruction).

Consequently, although reversal of the district court's Order is more likely, Choice alternatively requests the Court remand the case to the district court for trial on the disputed fact issues regarding good faith, Choice's limiting instruction and Dual Control's suitability.

I. OBJECTIVE GOOD FAITH – §4A-202(b)(ii)

1. BancorpSouth's failure to establish the reasonable commercial standards of fair dealing through its expert.

Introduction

It is established above that BancorpSouth bears the burden of proving the applicable banking industry standards, which are reasonable and intended to result in fair dealing. §4A-202(b); and Maine Family, 727 A.2nd at 342-344. The district court's Scheduling and Trial Order establishes that the testimony of a party's expert is limited to the opinions provided in his expert report. [J.A. 182.]

Summary judgment should be entered in favor of Choice, under Celotex, if this Court agrees with Choice that (a) expert testimony is required to establish the objective prong of good faith, (b) BancorpSouth's expert, Peter Makohon, failed to provide any opinions in his report establishing the objective banking industry standards of good faith, and (c) his failure to do so prohibits him from testifying regarding said standards pursuant to the district court's Scheduling and Trial Order [J.A. 182].

An Expert Must Establish the Banking Industry's Standards of Fair Dealing

Federal Rules of Evidence 701 and 702 govern testimony by lay and expert witnesses. Rule 702 establishes that testifying about the banking industry (i.e. establishing the reasonable banking industry standards of fair dealing) must be accomplished by an expert.

> "The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to *all "specialized" knowledge*... Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, *but also the large group sometimes called "skilled" witnesses, such as* ***bankers*** or landowners testifying to land values."
>
> Rule 702, Committee Notes, 2000 Amendment (emphasis added).

Furthermore, the Eastern District of Michigan is the only federal court to analyze the objective prong of good faith in a §4A-202 claim. It exclusively reviewed testimony by the parties' expert witnesses on objective good faith, without reference to lay testimony. Experi-Metal 2, at 12-13 [ADD. 35-37]. The court found the testimony of the customer's expert on objective good faith to be unpersuasive, and found the bank's expert was "not qualified to provide an expert opinion with respect to the reasonable

commercial standards of fair dealing." Id. The court held that the dispositive issue was the bank's failure to meet its burden to establish the industry standards of fair dealing through its expert. Id. at 13. If the court thought it could consider lay testimony on the banking industry standard, it would be irrelevant that the bank's expert was unqualified to provide exert testimony.

Consequently, BancorpSouth was required to establish the applicable banking industry standards through its expert, Peter Makohon. As Choice establishes below, Mr. Makohon failed to provide any opinions on "good faith" or the "reasonable commercial/industry standards of fair dealing" in his report. Like in Experi-Metal 2 [ADD. 26-37], Mr. Makohon's failure to do so is dispositive in this case.

BancorpSouth's Expert Only Addressed Commercial Reasonableness, Not Good Faith

Mr. Makohon's report [J.A. 244-278] is attached to Choice's First Motion for Summary Judgment ("First Motion"). Herein, Choice demonstrates that his report is without opinion or analysis of the objective prong of good faith. Presumably, BancorpSouth will attempt to provide argument that Mr. Makohon's report does contain such opinions. Nevertheless, Choice submits that the Court can perform the task of

determining whether such opinions are provided in the plain language of his report by its own review of his report, *without* consideration of Choice's or BancorpSouth's argument, since argument of counsel cannot provide what the report itself obviously lacks.

The question for the Court is: Did Mr. Makohon only opine on commercial reasonableness and fail to opine on the "reasonable commercial (industry) standards of fair dealing" (the objective prong of good faith)? If the answer is yes, Choice's First Motion should be granted, and BancorpSouth's summary judgment motion should be denied.

In reviewing Mr. Makohon's report, a key fact that must be remembered is that §4A-202(b) is divided into two subparts: (i) which regards the commercial reasonableness of the security procedure; and (ii) which regards both good faith and the customer's limiting instruction. [ADD. 19.] Therefore, it is clear that the determination regarding commercial reasonableness is separate and different from the determination regarding accepting the payment order in good faith. Experi-Metal, Inc. v. Comerica Bank, 2010 WL 2720914, *6-7 (E.D. Mich. 2010) ("*Experi-Metal 1*") (unpublished opinion) [J.A. 791-798].

This fact is crucial because BancorpSouth improperly attempted to conflate, and blur the differences between, the standard for commercial

reasonableness and the standard for good faith by claiming that the FFIEC's 2005 Guidance is the standard for determining both commercial reasonableness and objective good faith. [J.A. 1100-1101.] That assertion is without merit, since a separate and different analysis is required for each. Experi-Metal 1, at *6-7 [J.A. 796-797].

As regards his report, in over 30 pages of opinion, Mr. Makohon NEVER cited the law regarding good faith (i.e. §4A-202(b)(ii) or §4A-105(a)(6)). [J.A. 244-278.] He NEVER uses the following terms: "commercial standards of fair dealing", "industry standards of good faith", "objective prong", or "reasonable person standard". [Id.] His report is divided into eleven headings, none of which contain any of those terms. [Id.] Reviewing the headings used by Mr. Makohon is important because each heading accurately describes the opinions he provided thereunder:

- Heading 5 is titled "*BancorpSouth's Security Procedures were Commercially Reasonable*". Under that heading he opined that BancorpSouth's security procedures were commercially reasonable because they complied with the 2005 Guidance, exactly as the heading indicated.
- Heading 9 is titled "*Choices' expert report contained many inaccuracies*". Under this heading he provided subheadings,

which detailed certain aspects of the report of Choice's expert, Brad Maryman, with which he disagreed. Once again, the heading was descriptive and accurate of the opinions provided thereunder.

- Similarly, ALL eleven headings correctly inform the reader of the opinions that follow each heading. [Id.]

If Mr. Makohon actually intended to opine on the objective prong of good faith, why did he not provide such opinions in a clear and thorough manner, as he did concerning his opinions on commercial reasonableness? Why are none of the above terms in the body of his report or in the headings?[10]

The answer to both questions: he never intended to provide, and did not provide, the reasonable banking industry standards. BancorpSouth, through attorney argument alone, is attempting to cover this fatal error by transforming his opinions on commercial reasonableness into opinions on good faith. However, attorney argument does not make it so.

[10] Out of desperation, BancorpSouth attempts to admonish Choice for its argument regarding Mr. Makohon's headings. [J.A. 1105.] However, Choice is not claiming that headings were "required" by some order or rule of procedure. Rather, Choice demonstrates that Mr. Makohon has no opinion on good faith *anywhere* in his report, and the headings he used are indicative of this fact.

BancorpSouth's Changing Stance on the Objective Prong of Good Faith

On January 10, 2013, BancorpSouth filed its summary judgment motion, and with it supporting suggestions. [J.A. 14.] It sought summary judgment on, inter alia, its burden to prove it accepted the Wire Transfer payment order in good faith. [J.A. 472.] Therein, BancorpSouth made NO claim that its expert opined that the 2005 Guidance was the objective prong of good faith, and BancorpSouth never cited its expert's report in its good faith argument. [J.A. 441-507.] Furthermore, NONE of its 115 fact statements concerns the objective prong of good faith, although Rule 56 required BancorpSouth as the summary judgment movant with the burden of proof, to show there was no dispute as to "any material fact". [J.A. 444-471.] Undoubtedly, establishing the banking industry standard for fair dealing is material in this case, and its absence from BancorpSouth's fact statements renders summary judgment in its favor *impossible*. Rule 56.

However, on February 4, 2013, BancorpSouth filed its suggestions in opposition to Choice's First Motion, and its stance on good faith dramatically changed. [J.A. 15.] Therein, BancorpSouth claimed, for the first time in this case, that the objective prong is merely a "reasonable person standard", which does not require expert testimony. [J.A. 294-295.] BancorpSouth then asserted that even though it thought an expert was

unnecessary to provide a "reasonable person standard", its expert amazingly did opine in his report that the 2005 Guidance was the applicable banking industry standard for good faith. [J.A. 303-306.] BancorpSouth expanded upon this absurd claim by asserting that its expert also stated the good faith standards in his deposition. [J.A. 306-308.] This would be another bona fide miracle, since Mr. Makohon was not asked a single question about good faith in his deposition, as BancorpSouth pointed out. [J.A. 306 (FN4).]

More likely, the reason BancorpSouth's stance on good faith drastically changed between January 10 and February 4 was that it realized it failed to meet its burden of proof and it was attempting to avoid the adverse consequences (i.e. summary judgment against it). This is demonstrated by the fact that, originally, BancorpSouth cited the correct law regarding objective good faith; the holding in Maine Family. [J.A. 492.] Maine Family states the test for the objective prong of good faith, to wit:

> "*First, whether the conduct... comported with* ***industry or "commercial" standards*** *applicable to the transaction and, second, whether those standards were reasonable standards intended to result in fair dealing*".
> Maine Family, 727 F.2d at 340-344 (emphasis added).

Although BancorpSouth cited the above "test", it went on to address subjective good faith, but NEVER set forth the objective banking industry standards applicable to this transaction in its statement of facts or its argument. [J.A. 444-471, 492-494.] Conspicuously absent from its suggestions regarding good faith are: a claim that the 2005 Guidance is the objective good faith standard; claim that the objective prong is merely a "reasonable person standard", as it later claimed in its response to BancorpSouth's First Motion; and any citation Peter Makohon's report or deposition. [Id.]

To the contrary, similar to Comerica Bank in Experi-Metal 2, the only argument BancorpSouth provided in its original suggestions regards certain *subjective* facts, claiming it did not actually know the Wire Transfer was fraudulent. See Experi-Metal 2, at *12-14 [ADD. 35-37]. However, *subjective* good faith (a pure heart, empty head) does not satisfy the *objective* prong. Maine Family, 727 F.2d at 340-344. Only after BancorpSouth received Choice's First Motion, regarding BancorpSouth's failure to establish the objective prong of good faith, did it realize its mistake and begin attempting to cover it up.

Objective Good Faith is NOT a Reasonable Person Standard

As was stated above, BancorpSouth's second stance on objective good faith was that it is a simple reasonable person standard. BancorpSouth stated as follows:

> "*the objective prong of the good faith analysis is not something which requires a complex or technical analysis of any given industry's standards*", but rather it is "*simply a reasonable person standard*" based on "*how a reasonable person (not necessarily in the industry) would act*". [J.A. 294-295.]

This claim is without merit. In support, BancorpSouth cited six cases[11]. However, NONE of those cases actually hold that the objective prong of good faith is a mere reasonable person standard, as BancorpSouth erroneously claimed they do. [Id.] In fact, one of the cases, Talcott[12], actually supports Choice's claim that the standard must be applicable to the particular industry involved (i.e. in that case the check-cashing industry, in this case the banking industry). Talcott, at 165-168.

Therefore, objective good faith is not a reasonable person standard, but rather is the banking industry standard for accepting payment orders, which BancorpSouth has failed to establish through its expert.

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[11] [J.A. 341-344.]: The six case citations and Choice's demonstration that they are inapplicable to the objective prong of good faith.

[12] Any Kind Checks Cashed, Inc. v. Talcott, 830 So.2d 160 (Fla.App. 2002).

Experi-Metal 2

Experi-Metal 2 is the only case in the country which has analyzed Article 4A's objective prong of good faith. [ADD. 26-37.] BancorpSouth claimed the Experi-Metal 2 opinion is inapposite since it is factually different than this case. [J.A. 297-299.] That argument is without merit.

First, it is well-known that precedent is not based on whether identical facts exist[13]. Thus, it is irrelevant to this Court's analysis that Experi-Metal's facts are different than the facts of this case.

Second, Experi-Metal 2 was *not* decided on its specific and admittedly egregious facts, as BancorpSouth claimed. [J.A. 504.] In reality, the Michigan court found that the expert for Comerica Bank was not qualified to give an expert opinion on the reasonable banking industry standards, and thus, absent the applicable standards, the court was unable to determine whether such standards were observed by the bank. Experi-Metal 2, at *12-13 [ADD. 36]. The court found this failure by the bank was the dispositive issue, since Comerica Bank (like BancorpSouth) had the burden to prove the objective industry standards of good faith. Id.

[13] "All cases are factually distinguishable at some level. Lawyers learned in law school that the true "white horse" case that is "on all fours" with the facts of a given live dispute rarely, if ever, exists. Were the test of applicability of a given precedent that it must meet the "white horse/on all fours" standard, every new case would have to be decided without the benefit of any precedent."
In re Bading, 378 B.R. 143, 151 (Bankr. Ct. W.D. Tex. 2007)

Conclusion

A number of questions arise, which illustrate that BancorpSouth has failed to establish the objective prong of good faith.

- Why, when it had the burden to do so, did BancorpSouth not set forth a single fact statement in its summary judgment motion regarding the objective standards of good faith?
- If BancorpSouth actually believed that a mere reasonable person standard applied, why did it cite the "industry standard" test stated in Maine Family and not cite support for a reasonable person standard in its original suggestions, like it did when it responded to Choice's First Motion?
- If BancorpSouth believed that Mr. Makohon opined that the 2005 Guidance satisfied the objective prong of good faith, why did it never cite to his report, or to the 2005 Guidance, in its original suggestions filed on January 10, 2013?
- If BancorpSouth believed that an expert was not needed to provide the standards for objective good faith, why would its expert have provided such an opinion, since it alleged it was unnecessary?

- If Mr. Makohon intended to provide an opinion on the objective prong of good faith, why did he expressly cite the definition of commercial reasonableness, but not cite the definition of good faith anywhere in his report?
- If Mr. Makohon intended to provide an opinion about the objective prong of good faith, why did he never use the term "reasonable commercial standards of fair dealing" in his report, or provide a heading titled "BancorpSouth accepted the payment order in good faith"?

Once the Court has read Mr. Makohon's report, Choice believes it will determine that Mr. Makohon set forth no opinion regarding the objective standards of good faith for this case. Upon that determination alone, the Court should reverse the district court's Order and grant Choice's First Motion.[14]

[14] Even if this Court finds Mr. Makohon did provide an opinion on the objective standards of good faith, summary judgment is still inappropriate. The jury must determine whether or not it believes the 2005 Guidance is the applicable standard. Should this be the Court's finding, the district court's Order must be vacated and the case remanded for trial.

2. *The record lacks support for the conclusion that the parties and the experts agreed that the 2005 Guidance was the applicable objective good faith standard.*

The district court erroneously found the objective prong of good faith had been satisfied because "*The parties and their respective experts are in agreement that the…2005 Guidance…provides the applicable standards.*" [ADD. 12-13.] The appropriate word to describe Choice's reaction to this finding is: flabbergasted.

Not only is there no support in the record for such an alleged agreement by the parties and experts, it is also patently nonsensical. If Choice agreed that the 2005 Guidance was the standard, why would Choice file its First Motion for Summary Judgment based on the claim that no objective good faith standard has been established by BancorpSouth? Obviously, BancorpSouth's statement, which the district court relied on, is a gross misrepresentation of Choice's position regarding the 2005 Guidance. Below, Choice demonstrates its position, as it is actually stated in the record.

On pages 72-83 of Choice's suggestions in opposition to BancorpSouth's summary judgment motion, Choice addressed BancorpSouth's "*Commercially Reasonable*" claims. [J.A. 870-881.] In discussing that Article 4A set up commercial reasonableness as a "flexible"

standard for the particular customer and bank involved, Choice observed that the UCC drafters also created a benchmark which all *security procedures* must meet at a minimum, regardless of the "particular bank/particular customer" standard:

> "*On the other hand, a security procedure that fails to meet the prevailing standards of good banking practice applicable to the particular bank should not be held to be commercially reasonable.*"
> [J.A. 874-875 & ADD. 24, Comment 4.]

With regard to the above Comment to §4A-202 about a security procedure's commercial reasonableness (not the bank's good faith acceptance obligations), Choice stated: "*This is where the FFIEC 2005 Guidance comes into play*" and "*The 2005 Guidance is recognized by both experts as that applicable standard.*" [J.A. 875.] Choice addressed BancorpSouth's good faith argument in its suggestions in opposition on pages 59-63 (as Choice's headings accurately and descriptively indicated), not pages 72-83 regarding commercial reasonableness. [J.A. 857-861.]

BancorpSouth apparently forgets, or wishes it were not true, that good faith and commercial reasonableness each require different analysis. Experi-Metal 1, at *6-7 [J.A. 796-797]. The obvious fact that Choice was exclusively discussing commercial reasonableness did not stop

BancorpSouth from misrepresenting Choice's statements to the district court, stating: "*Here the parties agree on the standard for showing objective good faith*". [J.A. 1105.] Unfortunately, the district court did not pick up on BancorpSouth's blatant misrepresentation of Choice's statements on the 2005 Guidance. [ADD. 12-13.]

Choice is aware this court will review this issue de novo, but believes it is duty-bound to apprise the Court of this previous misrepresentation by BancorpSouth, should BancorpSouth elect to do so again in this Appeal. BancorpSouth will be unable to cite to any part of the record to support its meritless claims that Choice and its expert, Brad Maryman, agree or believe that the FFIEC 2005 Guidance satisfies the "reasonable industry standard of fair dealing" applicable in this case. BancorpSouth's need to misrepresent Choice's position on objective good faith is telling of the weakness of its argument.

II. CHOICE'S LIMITING INSTRUCTION – §4A-202(b)(ii)

3. BancorpSouth judicially admitted Choice's email was an instruction.

Introduction

A basic question before the Court under this Issue 3, is whether a party is bound by the unqualified admissions in its Answer. BancorpSouth admitted in its Answer that a certain email from Choice was an instruction to BancorpSouth to limit wire transfers to foreign banks from Choice's trust account. [J.A. 29 (#61), 75 (#61).] Since BancorpSouth accepted the Wire Transfer to a foreign bank, it clearly failed to comply with Choice's instruction.

As a result, BancorpSouth has failed to prove an essential element of its case under §4A-202(b)(ii), and Choice's Second Motion for Summary Judgment ("Second Motion") [J.A. 370-372] should be granted, and BancorpSouth's summary judgment motion should be denied. Celotex, 477 U.S. at 322-323.

Judicial Admissions

It is well-established that statements made in a party's pleadings are binding on that party, and are conclusive judicial admissions. Crawford, 274 B.R. at 804-805. Judicial admissions eliminate the need for evidence on the subject matter of the admission. Ferguson v. Neighborhood Housing Servs., 780 F.2d 549, 550-551 (6th Cir. 1986). Judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told to a court by the most formal and considered means. Crawford, at 805.

In Davis v. A.G. Edwards and Sons, Inc., 823 F.2d 105 (5th Cir. 1987), the Fifth Circuit found that although plaintiff submitted an affidavit which created a factual dispute with facts he admitted in his pleadings, plaintiff was bound by the pleading admissions and no factual issue could be evoked. Id. at 108-109. In citing the Davis opinion favorably, this Court held that admissions in the pleadings are binding on the parties and may support summary judgment against the party making such admissions. Brice, 919 F.2d at 1315. The same result should follow in this case.

BancorpSouth's Judicial Admission

In its Answer [J.A. 75 (#61)], BancorpSouth admitted the following allegation in Choice's Second Amended Complaint:

> "61. *Choice by email on or about November 11, 2009, from Jim Payne to Ashley Kester, expressed to BancorpSouth its wish, requirement and/or instruction that BancorpSouth limit transfers to foreign banks*".
> [J.A. 29 (#61) (emphasis added.]

Therefore, the fact that Choice imposed a limiting instruction on BancorpSouth's ability to accept payment orders to foreign banks in the name of Choice is no longer at issue in this case. That has not stopped BancorpSouth from inventing a few untenable arguments that it should not be held to its admission.

First, BancorpSouth claimed that because Jim Payne called Choice's email an "inquiry" in his deposition, that BancorpSouth is released from its judicial admission that the email is an "instruction". [J.A. 395.] However, it is abundantly clear that an admission in a party's pleadings cannot be controverted by subsequent, conflicting testimony. See Crawford, 274 B.R. at 804-805, Davis, 823 F.2d at 108-109 and Brice, 919 F.2d at 1315, supra.

Second, in its reply suggestions to its own summary judgment motion, BancorpSouth claimed that its "attorney statements" are not

judicial admissions. [J.A. 1116.] This claim is without merit. A party's *pleadings* are not attorney statements, and the cases cited by BancorpSouth are inapplicable, as none of them relate to admissions in pleadings. MacDonald v. General Motors Corp., 110 F.3d 337, 339-340 (6th Cir. 1997)(*regarding opening statements at trial*); Oscanyan v. Arms Co., 103 U.S. 261 (1880)(*regarding opening statements at trial*); Livingston v. Wacker, 2008 WL 185796, *5 (E.D. Mo. 2008)(*regarding suggestions for a motion to dismiss on counsel's legal theory and opinions on police dept. regulations)*; Huggins v. Federal Express Corp., 2008 WL 441727, *2-4 (E.D. Mo. 2008)(which *actually distinguishes between statements in memoranda and in pleadings (footnote 1), and regards a motion to dismiss memorandum*). [J.A. 1116-1117.]

Third, BancorpSouth claimed that even if Choice's email was an instruction, it did not have to comply with the instruction pursuant to the last sentence of §4A-202: "*The bank is not required to follow an instruction that violates a written agreement with the customer*". It claimed Choice's instruction "violates" the Memo executed by Choice [J.A. 66]. However, not only did BancorpSouth fail to plead this defense (addressed below in Issue 4), but the instruction does not "violate" the Memo, since they do not have contradicting language.

In order for Choice's instruction to contradict the Memo, the Memo would have to state something to the effect of: "BancorpSouth will not limit wires based on destination." No such statement exists in the Memo. Rather, BancorpSouth relies on the following language of the Memo (Exhibit 13):

> "[b]y signing below we understand that although InView can restrict the account from which wires are sent and the amount related to said wire, InView CANNOT restrict to where the wire is sent." [J.A. 66 (underline emphasis added).]

Such language is nothing more than a statement of InView's functional limitations; not a statement that BancorpSouth will honor all wire transfer requests from Choice. Acknowledging that InView "cannot" (is unable) to control a wire's destination is not the same as the parties agreeing that transfers to foreign banks "shall not" be limited by BancorpSouth.

Furthermore, the Memo only relates to InView. As was established above, BancorpSouth's implemented (*but not agreed upon*) system was a three-part process involving PassMark, InView and the manual review. [J.A. 1006.] The Memo does not state that *BancorpSouth* "cannot" not restrict the destination of a wire during the manual review. That is because BancorpSouth personnel had the ability to block foreign or domestic wires during the manual review. [J.A. 438 (73:23-74:20).]

4. BancorpSouth failed to plead the "Memo" as a defense to Choice's instruction.

Defenses, Avoidances and Affirmative Defenses

Above, Choice demonstrated that its instruction to limit foreign wires does not violate the Memo. Additionally, BancorpSouth's alleged defense to the instruction has been waived, since BancorpSouth failed to plead that it. Jacobs Mfg. Co. v. Sam Brown Co., 19 F.3d 159, 1266 (8th Cir. 1994).

BancorpSouth was required to state in short and plain terms its *defenses to each claim* asserted against it by Choice. Fed. R. Civ. P. 8(b) (emphasis added). In addition, BancorpSouth was required to affirmatively state *any* avoidances or affirmative defenses to Choice's claims. Fed. R. Civ. P. 8(c) (emphasis added). Whether a statute is an affirmative defense within Rule 8(c) is determined by looking to the substantive law of the state. Funding Systems, 530 F.2d at 95. In Mississippi, if the defendant bears the burden of production and the risk of non-persuasion, the matter is an affirmative defense and Rule 8(c) saddles the defendant with the burden to plead the defense. Hertz, 567 So.2d at 834. Failure to plead the defense creates a waiver if not timely and adequately pled. Id.

BancorpSouth Failed to Plead the Memo as a Defense, Avoidance or Affirmative Defense to Choice's Instruction

One "claim" by Choice was that its email in November 2009 was an instruction to limit wires to foreign banks. [J.A. 29 (#61.] BancorpSouth's response: "Admit". [J.A. 75 (#61).] Although it had provided defenses, avoidances and affirmative defenses to other claims by Choice [for example, J.A. 70 (#11), 71 (#27), 76 (#70) and 78-83], BancorpSouth chose not to provide any defenses or avoidances to Choice's allegations in paragraph 61 of Choice's Second Amended Complaint.

The first time BancorpSouth claimed that the Memo was a defense to Choice's instruction was in its response to Choice's Second Motion. [J.A. 395-397] In its own summary judgment motion, where it had the burden to establish all material facts, BancorpSouth did not establish in any of its 115 fact statements that the Memo relieved it of its duty to comply with Choice's instruction. [J.A. 444-471.] Nonetheless, an affirmative defense may not be raised for the first time in a post-answer motion without first amending the answer. Harris v. Secretary, US Dep't of Vet. Aff., 126 F.3d 339, 344-345 (D.C. Cir. 1997). BancorpSouth never amended, or moved to amend, its answer to paragraph 61 of Choice's Second Amended Complaint. [J.A. 1-8.]

To say Choice was *surprised* to learn of this claim by BancorpSouth for the first time on February 4, 2013, is an understatement. Since discovery had closed when the summary judgments were filed, Choice had no opportunity to investigate or rebut such a claim, and is prejudiced by its untimely, improper submission for the first time in summary judgment proceedings. Without BancorpSouth pleading this defense, avoidance or affirmative defense, the Court cannot enter judgment in favor of BancorpSouth based thereon. Armstrong Cork Co. v. Lyons, 366 F.2d 206, 208 (8th Cir. 1966).

Consequently, BancorpSouth has no defense to its failure to comply with Choice's instruction to limit foreign wires, and Choice's Second Motion should be granted.

5. *Weighing the evidence to determine whether Choice's email was an instruction is improper in summary judgment.*

The district court's entire analysis, or lack thereof, of Choice's email instruction to limit foreign wires is contained in one sentence. [ADD. 14.] Not only did the district court ignore established law regarding the binding effect of admissions in pleadings, it also improperly weighed the evidence regarding the instruction, which is expressly prohibited in summary judgment. Anderson, 477 U.S. at 249.

By stating it "finds" that the email was not an instruction [ADD. 14], the district court entered into the province of the factfinder (the jury), and misapplied the rules of summary judgment by injecting its belief of one party's evidence over another party's opposing evidence. Anderson, 477 U.S. at 249 and Rule 56.

Absent a finding by this Court that BancorpSouth is bound by its clear judicial admission, at best, fact questions remain for the jury as to whether the email is an instruction, and whether the instruction violates the Memo. Both issues should be remanded for trial, not determined in summary judgment.

III. COMMERCIAL REASONABLENESS – §4A-202(b)(i)

6. BancorpSouth's security procedure is not commercially reasonable since it did not perform transactional analysis.

Under this Issue, only one fact is material: Both BancorpSouth and its expert admit that BancorpSouth's security procedures did not perform transactional analysis. [J.A. 501, 1021, 1091.] As Choice demonstrates, Article 4A requires transactional analysis, and thus, BancorpSouth has not offered a "security procedure", nor has it offered a commercially reasonable security procedure.

To qualify as a security procedure under Article 4A, the bank's system *must* either verify the payment order, or detect errors in the payment order. [ADD. 18.] To be a "commercially reasonable" security procedure, the bank's system *must* consider, inter alia, "*the size, type and frequency of payment orders normally issued by the customer to the bank*". [Id.] This process of reviewing the payment order is commonly referred to as transactional analysis. [J.A. 955-956 (Observation 12, last bullet).]

By failing to include transactional/payment order analysis, BancorpSouth has not offered a "security procedure" to Choice under §4A-201, and it has certainly not offered a commercially reasonable security

procedure, since it ignores the mandate that it consider past "normally issued" payment orders of Choice. [ADD. 18.]

Consequently, the Court should deny BancorpSouth's summary judgment motion and should enter judgment in favor of Choice, pursuant to First National, 824 F.2d at 281 and 28 U.S.C. 2106.

7. Considering whether Dual Control would have, in hindsight, prevented the Wire Transfer is improper under Article 4A.

In its summary judgment motion, BancorpSouth made the assertion that Choice's expert stated that had Choice utilized Dual Control, the Wire Transfer on March 17, 2010 would not have happened. [J.A. 463-464 (#90, 91.] The district Court used that statement to justify its decision to enter summary judgment in favor of BancorpSouth, stating: "The result (i.e. entering summary judgment against Choice) is not wholly unjust." [ADD. 15.]

Besides being purely speculative, consideration of such argument is not supported by the language of Article 4A. Commercial reasonableness is determined solely by reference to §4A-202(c). Article 4A *NEVER* directs the Court to consider whether a particular security procedure that was refused (i.e. Dual Control) would have, in hindsight, prevented a particular unauthorized transfer (i.e. the Wire Transfer). This argument by BancorpSouth is a specious red-herring, which this Court should disregard when determining commercial reasonableness.

8. Determining suitability is (a) not the same as determining "commercial reasonableness" under §4A-202(c), and (b) improper in summary judgment.

Introduction

Another way BancorpSouth misled the district court regards its "deemed commercially reasonable" argument. BancorpSouth convinced the district court that by determining that Dual Control was "suitable" for Choice to use, it was inherently a commercially reasonable security procedure. However, commercial reasonableness and suitability are not interchangeable terms. Each is determined independent of the other. Patco, 684 F.3d at 209.

In order to find that Single Control is "deemed commercially reasonable", the Court must first determine that Dual Control was commercially reasonable under §4A-202(c). [ADD. 19.] Second, the Comment to §4A-202(c) requires that the fact-finder (jury) determine that Dual Control was suitable for Choice. [ADD. 24, Comment 4.] No Article 4A language, Article 4A Comment or other authority cited by BancorpSouth indicates that "suitability" is a question of law for the court or that suitability replaces the factors in §4A-202(c).

Commercially Reasonableness: a §4A-202(c) Analysis

BancorpSouth asserted that the Court should disregard ("look beyond") the plain language of Article 4A regarding commercial reasonableness, and instead should determine commercial reasonableness based upon the 2005 Guidance. [J.A. 476-477, 495-497.] Such assertion is meritless and without any supporting citation.

Article 4A does not state that commercial reasonableness is determined by compliance with a uniform standard or guidance (i.e. the 2005 Guidance). Rather the opposite is provided; it is a flexible standard, based upon the particular customer and bank. [ADD. 23-24, Comments 3 and 4.] Nonetheless, as is demonstrated below, BancorpSouth's claim fails under its own argument regarding the 2005 Guidance.

The 2005 Guidance recommends that a bank should implement "multifactor authentication", consisting of a combination of three factors:

(1) something the user **knows** (a password);

(2) something the user **has** (an ATM card); and

(3) something the user **is** (a fingerprint). [J.A. 39-52.]

BancorpSouth claimed that it achieved multifactor authentication through a password in InView (something the user knows) and a cookie/device identifier in PassMark (something the user has). [J.A. 477-478.]

However, BancorpSouth's "deemed" commercially reasonable argument fails because BancorpSouth *admits* it never *offered* PassMark, or its "something the user has" features, along with Dual Control. [J.A. 1088-1090 (#6-10), 994 (#12).] By not offering the multifactor aspects of PassMark coupled with Dual Control, BancorpSouth, by its own argument, did not offer a deemed commercially reasonable security procedure. [J.A. 476-477, 496.]

Deemed Commercially Reasonable & Suitability

A bank's security procedure (for example, Procedure A) can be commercially reasonable by the court finding that either:

(i) Procedure A is commercially reasonable under the factors in §4A-202(c); or

(ii) The bank offered, and the customer refused, Procedure B which the Court finds is commercially reasonable under the factors in §4A-202(c); thus, resulting in Procedure A being "deemed" commercially reasonable. [ADD. 19.]

However, the Comment to §4A-202 clarifies that under the deemed commercially reasonable analysis, the procedure that was offered and refused must also be "suitable" for the customer, as well as commercially

reasonable. [ADD. 24 (emphasis added).] Since the Comment states the procedure must be both "commercially reasonable and suitable", they are independent determinations. Patco, 684 F.3d at 209.

The district court correctly stated in its Order that commercial reasonableness is determined by utilizing §4A-202(c). [ADD. 4.] Despite this accurate recital of the law, the district court focused solely on whether Dual Control was "suitable" for Choice, analyzing only whether Choice employees Brooke Black and Cara Thulin were in the office at the same time. [ADD. 9-11.] The district court did so because BancorpSouth's argument for Dual Control's "commercial reasonableness" is based solely on suitability, rather than the factors in §4A-202(c). [J.A. 453-455.] However, suitability should only be determined AFTER Dual Control is reviewed for commercial reasonableness under §4A-202(c). [ADD. 19 & 24, Comment 4.] The suitability analysis does not replace the four factors in §4A-202(c), as BancorpSouth would like the Court to believe. Patco, at 209.

Therefore, conspicuously absent from the district court's Order is any analysis of those factors: (i) the wishes of Choice, (ii) the circumstances of Choice known to BancorpSouth regarding its previous wire transfer history, (iii) the alternative security procedures offered, and (iv) security procedures

utilized by similarly situated banks and customers. [ADD. 1-16.] A review of those factors demonstrates that BancorpSouth's security procedure is clearly not commercially reasonable.

(1) Customer's Wishes: the only "wish" in the record is the one judicially admitted by BancorpSouth: that BancorpSouth limit wires to foreign banks from Choice's account. [J.A. 29 (#61); & 75 (#61); 222 (#13); & 284 (#1).]

(2) Customer's Circumstances: the relevant circumstances of Choice known to BancorpSouth were: (i) the Wire Transfer was for "invoice:equipment" although this account was a trust account from which only real estate-related payoffs were performed, not equipment purchases [J.A. 188-194 (#1, 9, 10)]; (ii) the OBI field was filled-in for the Wire Transfer, although in previous wire transfers it was only completed 13% of the time, and NEVER did a previous OBI state "invoice" or "equipment" [J.A. 189 (#9, 10), 459 (#65).]; (iii) in regard to the size, type and frequency of past wire transfers from Choice, BancorpSouth's system failed to properly review this information inasmuch as it failed to perform the required transactional analysis [J.A. 501, 1021, 1091].

(3) Alternative Security Procedures Offered: The only security procedures to consider are Single Control and Dual Control, which are identical, except that Dual Control has an extra User ID and Password. [J.A. 714, 715, 1097 (#27).]

(4) Security Procedures by Similar Banks and Customers: None provided by BancorpSouth in the record.

It is possible BancorpSouth may attempt to argue that its expert, Peter Makohon, opined on this issue in §5.8 of his report [J.A. 262]. Such a claim would be without merit. In that section, Mr. Makohon lists only a few banks and vaguely references that they "have or do use RSA PassMark for multi-factor authentication solutions".

However, Mr. Makohon clarified in his deposition that (i) all he did was a simple internet search and he has no personal knowledge of those banks, (ii) he has no idea what version of PassMark or any other security features those banks utilized, and (iii) he did his internet search in 2012 and, thus, does not know what security procedures they utilized in March 2010. [J.A. 366.]

(5) Type of Receiving Bank: The Comment to §4A-202 states that commercial reasonableness must also account for the type of receiving bank; i.e. it is reasonable to "require" larger banks to have "state-of-the-art security procedures". [ADD. 23-24, Comment 4.]

In March of 2010, BancorpSouth was over 135 years old, with more than 200 locations in eight states, had been offering internet wire transfer services for over 10 years and had over $13 billion in total assets, *ranking it within the top 2% of all U.S. banks*. [J.A. 188 (#2), 191 (#23, 24), 848 (#14-17).] Clearly, this large bank should have been offering near state-of-the-art security procedures, with transactional analysis, and it was not.

Lastly, the district court improperly entered the province of the factfinder (the jury) in determining suitability. The only issue in a §4A-202 claim that is a "question of law" for the Court to determine is "commercial reasonableness". [ADD. 19.] Whether Dual Control was suitable for Choice is a disputed fact which the jury must weigh and consider, not the Court in summary judgment. Anderson, 477 U.S. at 249.

Security Procedure CANNOT be "one-size-fits-all"

Commercial reasonableness is a "flexible" standard, in which the Court determines "whether the procedure is reasonable for the particular customer and the particular bank" and "subsection (c) states factors to be considered by the judge in making the determination of commercial reasonableness". [ADD. 23-24, Comment 4.] Adopting a "one-size-fits-all" approach to customers, without allowing for, or offering adjustment of, the security procedure pursuant to each customer's particular circumstances, violates Article 4A's instruction to take the customer's circumstances into account. Patco, 684 F.3d at 212.

In March of 2010, BancorpSouth utilized an improper one-size-fits-all approach to security procedures. The security procedures available were Single Control and Dual Control. [J.A. 714, 715, 1097 (#27).] BancorpSouth's designated corporate representative confirmed that BancorpSouth does not adjust its security options for a particular customer's circumstances. [J.A. 1003, depo. 118:16-119:1.] BancorpSouth stipulated that all of the written form agreements it prepares for its customers regarding funds transfers are not typically changed or varied for an individual customer. [J.A. 194.] Thus, since BancorpSouth made no effort to adjust its security procedures based on its customer's wishes and

circumstances, its security procedures are one-size-fits-all, which the First Circuit has stated is unreasonable. Patco, supra.

BancorpSouth will undoubtedly point out that the specific facts involved in Patco were not identical to the facts of this case. Choice agrees that the facts in Patco are egregious and differ from the facts of this case. Yet, this is simply another specious argument by BancorpSouth. Precedent is not identity of indistinguishable facts, but rather is identity of principle. Bading, 378 B.R. 151 (FN 13).

The unifying principle that makes Patco applicable to this case is its consideration of Article 4A. The First Circuit aptly stated that Article 4A requires a bank to adjust its security procedures based upon the specific wishes and circumstances of its customers. Patco, 684 F.3d at 212. Failure to do so results in commercial unreasonableness. Id. It is this principle upon which Choice relies when citing Patco.

CONCLUSION

Although BancorpSouth desperately requests the Court disregard the plain language of Article 4A, and instead utilize the 2005 Guidance [J.A. 496.], no authority permits such to occur. Article 4A is the controlling law of Mississippi with regard to wire transfers.

Under Mississippi's §4A-202, BancorpSouth has failed in its burden to successfully construct the required three-legged stool of proof under §4A-2020(b). As a result, judgment should be entered in favor of Choice, for any one or more of the following reasons:

1. Objective Good Faith – Despite its confusing and shifting stance on the standards for objective good faith, the bottom line is that BancorpSouth's expert, Peter Makohon, failed to opine on the banking industry's objective standards for accepting payment orders in his report, as the district court's Scheduling Order required [J.A. 182].

Without establishing such a standard, the Court is unable to determine whether BancorpSouth complied with same. Experi-Metal 2, at *12-13 [ADD. 35-36]. Furthermore, the record lacks any agreement that the 2005 Guidance is the objective standard in this case. Thus, BancorpSouth failed its burden of proof on objective good faith in §4A-202(b)(ii).

2. Limiting Instruction – A party is bound by the admissions in its pleadings, regardless of the presence of subsequent conflicting evidence. See Crawford, 274 B.R. at 804-805, Davis, 823 F.2d at 108-109 and Brice, 919 F.2d at 1315. By accepting the Wire Transfer to a bank in the Republic of Cyprus, BancorpSouth failed to comply with Choice's instruction to limit wires to foreign banks, which BancorpSouth judicially admitted Choice provided to it, just four months prior to the Wire Transfer.

That failure, combined with the facts that BancorpSouth did not plead the Memo and that the instruction does not violate the Memo, results in BancorpSouth failing to meet its burden of proof under §4A-202(b)(ii).

3. Commercially Unreasonable – Since both transactional analysis and adjusting the security procedure according the customers wishes and circumstances (i.e. not "one-size-fits-all") are required, the failure of BancorpSouth's security procedures to satisfy either requirement is fatal to BancorpSouth's burden of proof under §4A-202(b)(i) and 202(c). In addition, the Court must analyze commercial reasonableness based on §4A-202(c), not based on the 2005 Guidance or Dual Control's suitability.

Pursuant to the foregoing, and Celotex, First National, and 28 U.S.C. 2106, Choice requests the Court reverse the district court's Order [ADD. 1-16], and enter an Order and/or Judgment as follows:

1. Denying BancorpSouth's Motion for Summary Judgment [J.A. 439-440], in all respects; and
2. Granting Choice's First Motion for Summary Judgment [J.A. 216-218] on objective good faith; and/or
3. Granting Choice's Second Motion for Summary Judgment [J.A. 216-218] on Choice's limiting instruction; and/or
4. Declaring that BancorpSouth's security procedures are not commercially reasonable since they fail to provide transactional or payment order analysis, and entering proper judgment in favor of Choice; and
5. Judgment in favor of Choice for $440,000, plus interest and costs.

Alternatively, Choice requests the Court reverse the district court's Order [ADD. 1-16] and remand for trial on the issues of whether the 2005 Guidance is the objective standard of good faith, whether Choice's email was an instruction, and whether Dual Control was suitable for Choice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant certifies that:

(a) Pursuant to Microsoft Word's word count tool, this brief contains 13,937 words [*excluding the portions of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii)*] in compliance with the type-volume requirements of F.R.A.P. 32(a)(7)(B)(i).

(b) This brief, and Appellant's Addendum, have been scanned for viruses and are virus-free.

__/s/_Jeff McCurry_____
Jeff McCurry
Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned counsel for Appellant certifies that:

(a) On June 14, 2013, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

(b) All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

__/s/_Jeff McCurry_____

Jeff McCurry
Counsel for Appellant

APPELLANT'S ADDENDUM