State Court of Fulton County
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LeNora Ponzo, Clerk
Civil Division

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

ELLEN RAMBO BICKERSTAFF, as executor of the Estate of JEFF BICKERSTAFF, JR., on behalf of himself and all persons similarly situated,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO. 10-EV-010485-D
SUNTRUST BANK,	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Before the Court is Plaintiff's Motion for Class Certification ("Motion"). This Motion has been the subject of extensive briefing by both parties and the Court has heard oral argument from counsel.

Having considered the Motion, Defendant SunTrust Bank's ("SunTrust") response in opposition thereto, the arguments of counsel, all other pleadings and matters of record, and for other good cause shown, the Court finds as follows:

BACKGROUND

I. Plaintiff's SunTrust Account

On February 2, 2009, Plaintiff Jeff Bickerstaff, Jr.[1] opened a personal checking account with SunTrust. (Triplett Aff. ¶ 4). As a condition to opening the account, Plaintiff, like all SunTrust customers, was bound by SunTrust's Rules and Regulations

[1] Jeff Bickerstaff, Jr. died during the pendency of this case. Ellen Rambo Bickerstaff is the Executor of his Estate and has been substituted as the named plaintiff.

for Deposit Accounts ("Rules and Regulations"). (Triplett Dep. at 14-15). The Rules and Regulations covered 40 pages and were drafted by SunTrust. (Triplett Aff. ¶¶ 5-6, Exh. B; Triplett Dep. at 14-15).

When Plaintiff opened his account, the Rules and Regulations included a mandatory arbitration provision pursuant to which Plaintiff and SunTrust were required, with the exception of certain Excluded Claims or Proceedings, to submit any disputes or claims "concerning, arising out of or relating to the Account" to binding arbitration. ("Arbitration Agreement") (Triplett Aff. Exh. B at 22). The Arbitration Agreement includes a class action waiver that provides that:

> Notwithstanding any other provision to the contrary, if either you or we elect to arbitrate a Claim, neither you nor we will have the right: (a) to participate in a class action in court or in arbitration, either as a class representative, class member or class opponent; or (b) to join or consolidate Claims with claims of any other persons. No arbitrator shall have authority to conduct any arbitration in violation of this provision.
>
> The parties to these [R]ules and [R]egulations acknowledge that the waiver of class actions is material and essential to the arbitration of any disputes between the parties and is nonseverable from this agreement to arbitrate a Claim. If the waiver of class actions is limited, voided or found unenforceable, then the parties' agreement to arbitrate (except for this sentence) shall be null and void with respect to such proceeding, subject to the right to appeal the limitation or invalidation of the waiver of class actions. The parties acknowledge and agree that under no circumstances will a class action be arbitrated.

(*Id.* at 23).

The Rules and Regulations also included a class action and jury trial waiver:

> **JURY TRIAL WAIVER**. FOR ANY MATTERS NOT SUBMITTED TO ARBITRATION, DEPOSITOR AND BANK HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVE THE RIGHT TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HERE OR

> ARISING OUT OF THESE RULES AND REGULATIONS, RELATING TO THE ACCOUNT, OR ANY OTHER DISPUTE OR CONTROVERSY BETWEEN YOU AND US. FURTHER DEPOSITOR AND BANK HEREBY AGREE THAT ANY LITIGATION WILL PROCEED ON AN INDIVIDUAL BASIS AND WILL NOT PROCEED AS PART OF A CLASS ACTION.

(*Id.* at 24) ("Litigation Class Action Waiver").

After Plaintiff filed his complaint, SunTrust changed the Rules and Regulations, allowing its customers the ability to opt out of arbitration. (Triplett Aff. at ¶ 6, Exh. D at 23; Triplett Dep. at 17-18). Customers had the right to opt out of arbitration by the later of October 1, 2010 or within 45 days of opening their accounts. The revised opt-out provision read as follows:

> **Right to Reject Arbitration Agreement.** You may reject this arbitration agreement provision and therefore not be subject to being required to resolve any dispute, controversy or claim by arbitration. To reject this arbitration agreement provision, you must send [SunTrust] written notice of your decision so that we receive it at the address listed below by the later of October 1, 2010 or within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations along with your name, address, Account name, Account number and your signature and must be mailed to the SunTrust Bank Legal Department, Attn: Arbitration Rejection, P.O. Box 2848, Mail Code 2034, Orlando, FL 32802-2848. This is the sole and only method by which you can reject this arbitration agreement provision. Rejection of this arbitration agreement provision will not affect any remaining terms of these rules and regulations and will not result in any adverse consequence to you or your Account. You agree that our business records will be final and conclusive with respect to whether you rejected this arbitration agreement provision in a timely and proper fashion. **This arbitration agreement provision will apply to you and us and to your Account unless you reject it by providing proper and timely notice as stated herein.**

(Triplett Aff. Exh. D at 23).

PROCEDURAL HISTORY

On July 12, 2010, Plaintiff filed his Complaint in this case alleging that, pursuant to SunTrust's automated overdraft program for bank cards, between February 2, 2009 and April 4, 2010, he was on more than one occasion charged with overdraft fees. (Compl. at ¶ 89). Plaintiff contends that these overdraft fees amount to interest charges that exceed Georgia's civil and criminal usury limits. (*Id.* at ¶¶ 14, 85-100). Plaintiff asserts claims for: (1) violation of Georgia's civil usury laws, O.C.G.A. § 7-4-2; (2) violation of Georgia's criminal usury laws, O.C.G.A. § 7-4-18; (3) conversion; and (4) money had and received. (First Am. Compl. at ¶¶ 16, 87-119).[2]

SunTrust filed a Motion to Compel Arbitration and Stay Action, which was denied by the Court on March 16, 2012. In denying SunTrust's Motion, the Court rejected Plaintiff's contention that the Arbitration Agreement was unconscionable, but found that, by filing this lawsuit, Plaintiff had effectively exercised his contractual right to opt out of arbitration. Although the Court of Appeals initially granted a discretionary appeal of that order, it ultimately dismissed the appeal.

On April 8, 2013, Bickerstaff filed a motion to certify a class of all Georgia citizens with a SunTrust deposit agreement who, from a date four years prior to the date Bickerstaff filed his complaint, had at least one overdraft of $500 or less resulting from an ATM or debit card transaction and paid an overdraft fee on that transaction. The Court denied the class certification in a February 19, 2014 order, finding that the class lacked

[2] Plaintiff filed a First Amended Complaint on August 9, 2010.

numerosity because Bickerstaff could not reject arbitration on behalf of the proposed class members.

Bickerstaff appealed the order denying class certification and SunTrust cross-appealed the order denying its motion to compel Bickerstaff to arbitrate his claim. The Court of Appeals affirmed both orders. *Bickerstaff v. SunTrust Bank*, 332 Ga. App. 121, 770 S.E.2d 903 (2015). The Georgia Supreme Court reversed the denial of the class certification, holding that "the filing of Bickerstaff's complaint tolled the required time period for giving notice to SunTrust for all putative class members until a certification decision is made and the notified class members elect whether to opt out or remain in the class." *Bickerstaff v. SunTrust Bank*, 299 Ga. 459, 459-62, 788 S.E.2d 787, 789-91 (2016). SunTrust sought certiorari to the Supreme Court of the United States, which was denied on December 5, 2016. On January 5, 2017, the Court of Appeals adopted the judgment of the Supreme Court of Georgia and remanded the case to the trial court for further proceedings.

Class certification is again before the Court. Plaintiff seeks certification, pursuant to O.C.G.A. § 9-11-23(b)(3), of a class of Georgia citizens who paid overdraft charges on debit or ATM overdrafts to SunTrust of $500.00 or less.[3] The Georgia Supreme Court

[3] Plaintiff's Motion requests that the Court certify a class of "[e]very Georgia citizen who had or has one or more accounts with SunTrust Bank and who, from July 12, 2006, to the date the Court certifies the class, (i) had at least one overdraft of $500.00 or less resulting from an ATM or debit card transaction (the "Transaction"); (ii) paid any Overdraft Fees as a result of the Transaction; and (iii) did not receive a refund a refund of those Fees. (Pl. Br. In Support of Mot. for Class Certification at 6). SunTrust argues that the class, if certified, should be limited. These arguments, which are based upon the merits of the claims, are not addressed in this Order.

held that Plaintiff's "opt out" of arbitration was effective not just for himself but for all the other members of the proposed class: "Any member of the certified class who remains and does not opt out of the class will be deemed to have brought suit at the same time Bickerstaff's complaint was filed, which was within the deadline for rejecting arbitration for existing depositors, the class Bickerstaff seeks to represent." *Bickerstaff,* 299 Ga. at 469, 788 S.E.2d at 795. The Court must now address whether the purported class meets the requirements of O.C.G.A. § 9-11-23(a) and (b), and if it does, whether the Litigation Class Action Waiver is unconscionable under Georgia law and therefore unenforceable.

ANALYSIS

I. Class Action Certification is Appropriate

"Under OCGA § 9-11-23, a class action is authorized if the members of the class share a common right and common questions of law or fact predominate over individual questions of law or fact." *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 375, 634 S.E.2d 123 (2006) (citation omitted). "The nature of the right to be enforced may be in common, though the facts as to each member of the alleged class may be different." *Id.* In order to certify a class, the Court must determine that the proposed class meets the following requirements:

> (1) numerosity — that the class is so numerous as to make it impracticable to bring all members before the court; (2) commonality — that there are questions of law and fact common to the class members which predominate over any individual questions; (3) typicality — that the claim of the named plaintiff is typical of the claims of the class members; (4) adequacy of representation — that the named plaintiff will adequately represent the interest of the class; and

> (5) superiority — that a class action is superior to other methods of fairly and efficiently adjudicating the controversy.

Id. at 375-76, 634 S.E.2d 123; O.C.G.A. § 9-11-23(a),(b)(3). "In determining the propriety of a class action, the first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the requirements of O.C.G.A. § 9-11-23 have been met." *Fortis Ins. Co. v. Kahn*, 299 Ga. App. 319, 324, 683 S.E.2d 4, 9 (2009). For the reasons set forth below, the Court concludes that the class certification is proper.

a. Numerosity

The numerosity requirement is satisfied. SunTrust stipulated that over 1,000 of its customers in Georgia have been assessed an overdraft fee during the stipulated putative class period, July 12, 2006 – July 12, 2010. (Stipulation attached as Exh. 1 to Pl.'s Reply in Support of Mot. for Class Certification at ¶ 3) ("Stipulation"). Plaintiff's counsel estimates the number could be in the tens of thousands.

As the Supreme Court held, the filing of the complaint tolled the time period to reject arbitration for the putative class:

> The filing of Bickerstaff's complaint tolled the required time period for giving notice to SunTrust for all putative class members until a certification decision is made and the notified class members elect whether to opt out or remain in the class. *See American Pipe*, supra, 414 U. S. at 551. This preserves the numerosity issue for a determination of whether the total number of putative class members whose contractual conditions have been tolled meets the numerosity requirement of OCGA § 9-11-23 (a) (1). To hold otherwise — that the filing of the class action complaint tolls the required time period for giving notice of a claim or filing suit only for the named plaintiff — would defeat numerosity in many cases in which any sort of notice requirement exists. The concept of numerosity applies to the number of *putative* class members, and does not require that the actual number of class members be determined before a class is certified. That Bickerstaff's rejection of the arbitration agreement by the

> act of filing his complaint does not bind others until the class is certified does not defeat numerosity.

Bickerstaff, 299 Ga. at 469, 788 S.E.2d at 795.

b. Commonality

Common questions affect the putative class. "Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Brenntag Mid S., Inc. v. Smart*, 308 Ga. App. 899, 904, 710 S.E.2d 569, 575 (2011). To establish the requisite commonality, the Plaintiff must show the existence of common questions of law and fact. "[T]he commonality requirement does not require that all questions of law and fact be common to every member of the class. Rather, the rule requires only that resolution of the common questions affect all or a substantial number of the class members." *Id.* The claims raised by the Plaintiff arise under a common set of contract terms that applies to all putative members of the class. "[C]laims arising from interpretation of form agreements are considered to be 'classic' cases for treatment as a class action." *Resource Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 729, 698 S.E.2d 19, 29 (2010).

One of the primary issues raised by the Plaintiff is whether the overdraft fee charged by SunTrust meets the definition of interest for purposes of Georgia's usury laws. Liability will be determined based upon identical standard form contracts between SunTrust and its customers. (Triplett Dep. at 13-15). SunTrust has admitted that it imposes the same policies on each of its customers and stipulated that its overdraft process and procedures do not differ materially from customer to customer. (Stipulation

at ¶ 4). It further stipulated that it maintains all of the records for class members in computerized, searchable form. (*Id.* at ¶¶ 1-2).

The common issue of whether the overdraft fee violates Georgia's usury laws predominates over any questions, or calculations of damages, that affect only individual class members. If these overdraft fees charged do in fact constitute interest, then a similar calculation can be made for each class member to determine whether or not the interest charged violates Georgia law. For usury determinations, interest is calculated by using three inputs: the amount of the loan, the amount of the interest charge and the term of the loan. *E.g. Norris v. Sigler Daisy Corp.,* 260 Ga. 271, 391 S.E.2d 242 (1990). Whether or not usury exists is determined at the time of the execution of the contract. *E.g. Knight v. First Federal Sav. & Loan Ass'n*, 151 Ga. App. 447, 450, 260 S.E.2d 511 (1979). If the rates are usurious, then individual damage calculations will have to be made, but the damages calculation is a "formulaic administrative matter to determine both who is owed a refund and how much each [class member] is owed. [T]he fact that there may be differences in the damages for members of the class does not prevent certification because, when common issues predominate, individualized damage calculations do not defeat class certification." *Resource Life,* 304 Ga. App. at 731-32, 698 S.E.2d at 21 (internal citations omitted). Because common issues predominate over any individual issues, the commonality requirement is met.

c. Typicality

Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in

relation to the class.

> The typicality requirement under OCGA § 9-11-23 (a) is satisfied upon a showing that the defendant committed the same unlawful acts in the same method against an entire class. Thus, typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large. A sufficient nexus is established if the claims or defenses of the class and the class representative[s] arise from the same event or pattern or practice and are based on the same legal theory.

Brenntag, 308 Ga. App. at 904, 710 S.E.2d at 575 (internal citations and punctuation omitted). As set forth in more detail above, the named representative's claims are based upon the same contractual agreement that applied to each prospective class member. Thus, a sufficient nexus exists between the named plaintiff's claims and that of the class at large and the typicality requirement is satisfied.

d. Adequacy of Representation

"The important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class." *Brenntag*, 308 Ga. App. at 905, 710 S.E.2d at 576. The adequacy requirement is met. Plaintiff's counsel is competent and experienced; SunTrust does not challenge this.

Although SunTrust challenges the adequacy of the class representative, who was substituted as Plaintiff when she was named executor of the estate, the class representative is adequate. It is anticipated that the claims in this case can be determined from a review of the contract and the financial records. Importantly, the named Plaintiff does not have antagonistic interests to the rest of the class. Even if there were, there is nothing to suggest that the named Plaintiff will not vigorously pursue the claims on

behalf of the class. *See, e.g. J.M.I.C. Life Ins. Co.,* 280 Ga. App. at 373, 634 S.E.2d at 123.

Although SunTrust argues that named representative's duties to Mr. Bickerstaff's estate conflict with her duties to the class, there is no evidence to support that claim. No estate assets are being used to pursue this lawsuit and there are no remaining debts of the estate.

e. Superiority

The Court is well aware of the high costs that an individual would have to incur to seek a potential recovery without class certification, and the reality that very few, if any, potential class members will challenge the fees at issue in this case. The United States Supreme Court has recognized that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997). SunTrust has essentially conceded this point when it stipulated that the individual claims related to Overdraft Fees were not sufficiently large "for it to be feasible for such claims to be brought individually." (Stipulation at ¶ 5). Therefore, a class action is superior to individual lawsuits to adjudicate the claims raised.

Thus, for the aforementioned reasons, the Court finds that class certification is justified and appropriate under Georgia law. The Court must now turn to the issue of the waiver of class action contained within the contract.

II. The Litigation Class Action Waiver is Unconscionable

Having found that a class action is appropriate, the Court must determine whether the class action waiver, independent of an arbitration agreement, is enforceable. The Litigation Class Action Waiver is found on page 24 of the Rules and Regulations:

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

There are two aspects to the unconscionability analysis – procedural and substantive. "Procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves. A non-inclusive list of some factors courts have considered in determining whether a contract is procedurally unconscionable includes the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." *Nec Techs. v. Nelson*, 267 Ga. 390, 392, 478 S.E.2d 769, 772 (1996). As to the substantive element of unconscionability, courts have focused on matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns. *Id.*

a. Procedural Unconscionability

The Litigation Class Action Waiver is procedurally unconscionable. Like exculpatory clauses, this provision waives substantive rights. As a waiver, it must be "'explicit, prominent, clear and unambiguous.'" *Dept. of Transp. v. Arapaho Const.*, 180 Ga. App. 341, 343, 349 S.E.2d 196 (1986). The Litigation Class Action Waiver is a single sentence of a 40 page Rules and Regulations form document that was prepared by SunTrust and applies to all its customers. It has no separate paragraph heading regarding the class action waiver, and is contained within a paragraph entitled "Jury Trial Waiver." Its typeface is the same as the surrounding language. Lacking any indicia of prominence, the waiver is unenforceable. *See Parkside Ctr. v. Chicagoland Vending*, 250 Ga. App. 607, 611-12, 552 S.E.2d 557, 562 (2001) (refusing to enforce exculpatory clause because it was not prominent in the contract).

Furthermore, this sentence is contained within a paragraph that is invalid. A contractual pre-litigation jury trial waiver is unenforceable. *Bank South, N.A. v. Howard*, 264 Ga. 339, 340, 444 S.E.2d 799 (1994). Although this does not necessarily invalidate every other sentence contained within that paragraph, it lends further support to a finding of procedural unconscionability because the class action waiver is hidden within a paragraph, which based upon its title, contains unenforceable substantive waivers.

b. **Substantive Unconscionability**

The Litigation Class Action Waiver is substantively unconscionable because, without a class action, the individual monetary claims are so small that the Waiver effectively precludes customers from enforcing their substantive rights. The Eleventh

Circuit addressed a similar issue when it held that a litigation class action waiver was unconscionable as applied to customers with small dollar value claims:

> Without the benefit of a class action mechanism, the subscribers would effectively be precluded from suing Comcast . . . The cost of vindicating an individual subscriber's claim, when compared to his or her potential recovery, is too great. . . . This will allow Comcast to engage in unchecked market behavior that may be unlawful. Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims.

Dale v. Comcast, 498 F.3d 1216, 1219 (11th Cir 2007) (applying Georgia law); *see also Gordon v. Branch Banking and Trust Co.*, 666 F.Supp.2d 1347, 1352 (N.D. Ga. 2009), *vacated,* 453 Fed. Appx. 949 (11th Cir 2012) (holding a class action ban substantively unconscionable under Georgia law because small dollar value of plaintiff's claims challenging overdraft fees was too great to justify individual actions); *In re Checking Account Overdraft Litig.*, 734 F.Supp.2d 1279, 1292 (S.D. Fla. 2010), *vacated,* 425 Fed. Appx. 826, 827 (11th Cir. 2011) (holding SunTrust's class action waiver substantively unconscionable under Georgia law because low dollar value of potential individual recovery will keep plaintiffs from pursuing individual claims).[4] The effort and cost of investigating and initiating a claim against SunTrust would be greater than most proposed class members' individual potential recovery.

Additionally, Georgia statutes demonstrate that in the context of usury claims, a litigation class action wavier is inconsistent with legislative intent. Georgia law prohibits

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[4] The Court recognizes the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) affects these decisions that held class action waives in arbitration clauses to be unenforceable. Nonetheless, the reasoning is persuasive when reviewing a class action waiver outside the context of an arbitration agreement.

enforcement of contracts that discharge usurious interest rates: "No contrivance or arrangement between the parties to any such unlawful transaction or their privies, except an actual and full payment of the amount forfeited as provided in subsection (a) of this Code section, shall have the effect of discharging such forfeiture." O.C.G.A. § 7-4-10(c). In this case, the Litigation Class Action Waiver would have the effect of discharging the forfeiture of the interest charged by SunTrust (if it is found to be usurious) because it would be unfeasible for individual depositors to bring individual lawsuits.

CONCLUSION

For the foregoing reasons, the court finds that the proposed class meets the prerequisites required under Georgia law and that the Litigation Class Action Waiver is unenforceable. The parties disagree about the scope of the class; the arguments raised by SunTrust are more appropriately addressed at a later time, rather than at the time of class certification. Thus, it is hereby **ORDERED** that the following class is certified:

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

This 6th day of October, 2017.

/s/ Susan E. Edlein
Susan E. Edlein
Judge, State Court of Fulton County