

IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
DIVISION _____

CHOICE ESCROW AND LAND TITLE, LLC,)
)
Plaintiff,)

v.)

Case No. _____

BANCORPSOUTH BANK,)
)
Serve: Rodney Nichols, Agent,)
)
Carnahan, Evans, Cantwell & Brown, P.C.,)
)
2805 S. Ingram Mill Road,)
)
Springfield, MO, 65804,)
)
Defendant.)

PETITION

COMES NOW Plaintiff, Choice Escrow and Land Title, LLC ("Choice"), and for its cause of action against Defendant, BancorpSouth Bank ("BancorpSouth"), states as follows:

Fraudulent, Unauthorized Wire Transfer By BancorpSouth

1. On March 17, 2010, BancorpSouth made an unauthorized transfer of \$440,000.00 (Four Hundred Forty Thousand Dollars) out of Choice's trust account with BancorpSouth (the "Wire Transfer") after receiving a fraudulent, internet-based wire transfer instruction/request.

2. The Wire Transfer was sent from BancorpSouth, as originator bank, to Bank of New York, as intermediary bank, for further transfer internationally to Popular Bank Public Co. Ltd. in the Republic of Cypress, as beneficiary bank for the beneficiary, Brolaw Services, LTD.

3. Choice has never heard of, done business with, or held money in escrow for Brolaw Services, LTD.

4. The Wire Transfer was not initiated, approved, authorized, or ratified by Choice, its members, managers, agents, representatives, officers, or employees.

5. The Wire Transfer was initiated by a third party ("Hacker") with no affiliation with Choice or authority, actual or apparent, to act on behalf of Choice.

6. The Hacker stole and used Choice's BancorpSouth "User ID" and "Password" (i.e. single-factor authentication) to initiate the Wire Transfer.

7. The amount transferred (\$440,000) was a substantial overdraft of over \$90,000 more than Choice had in its trust account on that day, which BancorpSouth honored and/or processed despite the fact that Choice has never overdrafted that account before and that Choice and BancorpSouth had an agreement (InView Wire Transfer User Security Form, Exhibit 11 below) which provided that the account's balance would determine whether or not a wire transfer would be processed.

8. The Hacker's transfer instruction/request indicated that the money was for "Invoice: equipment", which BancorpSouth should have flagged as fraudulent, unauthorized or suspicious since it knew that Choice's account was a "Trust Account" or "Escrow Disbursement Account", which was only used for real estate related payoffs, and not for purchasing equipment or paying off bills.

9. Prior to the fraudulent, unauthorized Wire Transfer, money from Choice's Trust or Escrow Disbursement Account with BancorpSouth had never been wired or transferred, and Choice has never authorized a wire or funds transfer, to an international bank or beneficiary.

10. In the afternoon of the date of the fraudulent, unauthorized Wire Transfer (March 17, 2010), Choice notified BancorpSouth that it was unable to access BancorpSouth's website, which should have been a "red flag" which alerted BancorpSouth that suspicious, unauthorized

and/or fraudulent activity was occurring, since BancorpSouth's website was in fact accessible not "down".

11. BancorpSouth did not, and will not, retrieve or refund any of the fraudulent, unauthorized Wire Transfer that was transferred or debited from Choice's trust account.

Parties

12. Plaintiff Choice is a Missouri limited liability company in good standing and authorized to do business in Missouri, and having a principal place of business in Springfield, Greene County, Missouri.

13. Defendant BancorpSouth is a bank regulated by the Federal Deposit Insurance Corporation ("FDIC"), authorized to do business in Missouri, and doing business in Springfield, Greene County, Missouri.

Internet Banking Authentication

14. The Federal Financial Institutions Examination Council ("FFIEC") is a formal interagency body empowered to prescribe uniform principles and standards for the federal examination of financial institutions (i.e. BancorpSouth), and was established in 1979, pursuant to Title X of the Financial Institutions Regulatory and Interest Rate Control Act of 1978.

15. The regulatory agencies which comprise the membership of the FFIEC are (1) the Board of Governors of the Federal Reserve System, (2) the National Credit Union Administration, (3) the Office of the Comptroller of the Currency, (4) the Office of Thrift Supervision, and (5) the FDIC, which regulates BancorpSouth.

16. In 2005, the FFIEC issued guidance, entitled "Authentication in an Internet Banking Environment" ("2005 Guidance"), for the financial institutions it governs (i.e.

BancorpSouth) to follow with regard to risk management controls necessary to authenticate the identity of customers accessing internet-based financial services.

17. The 2005 Guidance (a copy of which is attached hereto and incorporated herein by reference as EXHIBIT 1) states, in part, as follows:

- a. "Financial institutions engaging in any form of Internet banking should have effective and reliable methods to authenticate customers."
- b. "Account fraud and identity theft are frequently the result of single-factor (e.g. ID/password) authentication exploitation."
- c. "The (FFIEC) agencies consider single-factor authentication, as the only control mechanism, to be inadequate for high-risk transactions involving access to customer information or the movement of funds to other parties."
- d. "Authentication methods that depend on more than one factor are more difficult to compromise than single-factor methods. Accordingly, properly designed and implemented multifactor authentication methods are more reliable and stronger fraud deterrents."

18. Authentication is typically dependent on customers providing (a) valid identification data, such as a driver's license or user ID, and (b) one or more authentication credentials (factors) to prove their identity, such as a password, ATM card, or fingerprint.

19. The 2005 Guidance recognizes three (3) basic types of "factors":

- a. Something the user KNOWS (e.g., password, PIN);
- b. Something the user HAS (e.g., ATM card, USB token device);
- c. Something the user IS (e.g., fingerprint, voice recognition).

20. Multifactor authentication comprises the use of two or more of the three above-mentioned factors, while single-factor authentication is the use of only one of the factors.

21. In 2006, the FFIEC issued a Frequently Asked Questions ("2006 FAQ") memorandum to assist its financial institutions (i.e. BancorpSouth) in understanding the 2005 Guidance and its scope.

22. The 2006 FAQ (attached hereto and incorporated herein by reference as EXHIBIT 2) states, in part, as follows:

a Q. "Are there banking applications where single-factor authentication as the only control mechanism would be adequate?"

A. "Single-factor authentication alone would be adequate for electronic banking applications that do not process high-risk transactions, e.g., systems that do not allow funds to be transferred to other parties and that do not permit access to customer information."

b. Q. "Would two-factor authentication include using two of the same type of factor (e.g., two different passwords) if they are used at different points in the applications?"

A. "By definition true multifactor authentication requires the use of solutions from two or more of the three categories of factors. Using multiple solutions from the same category at different points in the process may be part of a layered security or other compensating control approach, but it would not constitute multifactor authentication."

c. Q. "Is a user logon ID considered one of the factors in multifactor authentication?"

A. "No, because user logon IDs are not secret."

23. From its 2005 Guidance and 2006 FAQ, it is clear that the FFIEC considers the use of two separate user IDs and passwords to be merely a layered, single-factor authentication rather than a multifactor authentication, which is, thus, inadequate for high-risk transactions involving the movement of funds to other parties (i.e. wire or funds transfers).

24. The 2006 FAQ clarified that the 2005 Guidance requires FFIEC regulated financial institutions (i.e. BancorpSouth) to monitor, evaluate, and adjust their information security programs in light of changes in technology, the sensitivity of customer information, and internal and external threats to information.

25. In April of 2007, the FDIC issued a Financial Institution Letter ("FIL-32-2007") entitled "Supervisory Policy on Identity Theft", which stated that its financial institutions (i.e. BancorpSouth) have an affirmative and continuing obligation to protect the privacy of customers' non-public personal information and that despite general strong controls and practices by financial institutions, methods for stealing personal data and committing fraud with that data are continuously evolving.

26. FIL-32-2007 (attached hereto and incorporated herein by reference as EXHIBIT 3) is a policy statement that "emphasizes the FDIC's well-defined expectations that institutions under its supervision (i.e. BancorpSouth) detect, prevent and mitigate the effects of identity theft in order to protect consumers and help ensure safe and sound operations."

27. FIL-32-2007 specifically points out, in part, the following:

- a. "In guidance that became effective January 1, 2007 (the 2005 Guidance), the federal banking agencies made it clear that they expect

institutions (i.e. BancorpSouth) to use stronger and more reliable methods to authenticate the identity of customers using electronic banking systems."

b. "The FDIC has issued a number of other supervisory guidance documents articulating its position and expectations concerning identity theft." Those documents are specified in Footnote 8 of FIL-32-2007.

28. In August of 2009, the FDIC sent a Special Alert ("SA-147-2009") to all CEOs of the financial institutions it regulates (i.e. BancorpSouth) regarding the increased number of fraudulent electronic funds transfers resulting from compromised user login credentials.

29. SA-147-2009 (attached hereto and incorporated herein by reference as EXHIBIT 4) specifically directed its financial institutions (i.e. BancorpSouth) to the 2005 Guidance and the 2006 FAQ as references for information on appropriate authentication and high-risk transactions.

BancorpSouth's Internet Authentication Methods

30. BancorpSouth provided Choice with only two options for authentication when using "InView", BancorpSouth's internet-based wire transfer (or funds transfer or payment order) system.

31. The most secure option BancorpSouth offered Choice for internet-based authentication was "Dual Control", which requires the customer to have one user ID and password to "approve" a wire transfer and another user ID and password to "release" the same wire transfer.

32. The other option, if the customer (Choice) waived or did not choose Dual Control, required one user ID and password to both approve and release a wire transfer ("Single Control").

33. According to the 2005 Guidance and 2006 FAQ, Single Control is a single-factor authentication method, requiring only "something the user KNOWS" (i.e. a password).

34. According to the 2005 Guidance and 2006 FAQ, Dual Control is a layered single-factor authentication method, requiring only "something the user KNOWS" (i.e. two passwords).

35. The only control mechanisms BancorpSouth offered its wire or funds transfer customers (i.e. Choice) were two options which were both single-factor authentication, despite the FFIEC's 2005 Guidance and 2006 FAQ which clearly stated that single-factor authentication as the only control mechanism is inadequate for high-risk transactions involving the movement of funds to other parties.

36. The only control mechanism BancorpSouth offered Choice for its high-risk transactions (i.e. wire transfers, funds transfers, payment orders) was "something the user KNOWS", without an option that included "something the user HAS" or "something the user IS".

Count I

Violation of §§400.4A--202, 400.4A--203, and 400.4A--204, RSMo.

COMES NOW Plaintiff Choice and for Count I of its cause of action against Defendant BancorpSouth states as follows:

37. Plaintiff incorporates by reference and re-alleges herein paragraphs 1 through 36, inclusive, as if the same were more fully set forth herein.

38. As described herein, on March 17, 2010, Defendant BancorpSouth transferred \$440,000.00 out of Choice's trust account after it received a wire transfer instruction/request which was fraudulent and not authorized by Choice. The wire transfer was initiated by a Hacker who stole and used Choice's Single Control user ID and password.

39. The Wire Transfer was not effective as a payment order of Choice, pursuant to §§400.4A--202, 400.4A--203, and 400.4A--204, RSMo., in that Choice did not authorize the payment order and the security procedures and/or authentication methods used by BancorpSouth (both Single Control and Dual Control) were not commercially reasonable methods for providing security against unauthorized payment orders (or wire transfers or funds transfers) for the following reasons:

- a. The Wire Transfer was specifically the type of high-risk transaction about which the 2005 Guidance and 2006 FAQ warned BancorpSouth, that single-factor authentication would be inadequate as the only security procedure;
- b. BancorpSouth's Single Control only required one password to be entered, which is a single-factor authentication, which is not a commercially reasonable security procedure, as stated by the FFIEC and FDIC;

c. BancorpSouth's Dual Control only required two passwords to be entered, which is merely a layered, single-factor authentication, which is not a commercially reasonable security procedure, as stated by the FFIEC and FDIC;

d. BancorpSouth should have, and could have, offered a commercially reasonable multifactor authentication method, since it had ample time (more than four years, October 2005 to March 2010) and knowledge of the need and requirement to provide its customers with secure authentication methods, as evidenced from the numerous documents it received, and/or knew about or should have known about, from the FFIEC and FDIC, which includes, but is not limited to, the following:

- (i) The 2005 Guidance;
- (ii) The 2006 FAQ;
- (iii) The 2007 FIL-32-2007;
- (iv) The documents listed in Footnote 8 of FIL-32-2007;
- (v) The 2009 SA-147-2009;

e. Both Single Control and Dual Control fail to meet the prevailing standards of good banking practice as determined by the FFIEC and FDIC;

f. Both Single Control and Dual Control require only "something the user KNOWS", rather than including another type of authentication factor, such as "something the user HAS", "something user IS";

g. Choice expressed its wish and requirement that its account's current ledger balance will govern whether or not BancorpSouth could process a wire transfer, regardless of the fact that Choice did not indicate or determine a daily wire transfer limit, as evidenced by its InView Wire Transfer User Security Form (Exhibit 11 below);

h. Choice expressed its wish and requirement that its account with BancorpSouth be a "Trust Account" and "Escrow Disbursement Account" which is used solely to transfer funds for home loans or for payoffs related to commercial or residential real estate transactions, and is not to be used to payoff invoices for purchased equipment, as evidenced by its Trust Account/Escrow Disbursement Account and Account Terms and Conditions Agreement (Exhibit 9 below);

i. BancorpSouth knew Choice's wishes and requirements described herein, and knew Choice's circumstances, including that its account balance was approximately \$90,000.00 less than \$440,000.00 at the time of the Wire Transfer (See Exhibit 12 below), knew the type of payment orders normally issued by Choice were for payoffs related to commercial or residential real estate transactions and not for payment of invoices for purchased equipment, and knew that Choice never (i.e. with no frequency) issued and authorized payment orders to international beneficiaries for unspecified equipment purchases;

j. BancorpSouth did not offer a multifactor authentication method or security procedure for Choice to use for InView, BancorpSouth's internet-

based wire or funds transfer system, and both Single Control and Dual Control were single-factor authentications, which was not reasonable for the transactions specific to Choice and BancorpSouth;

k. The prevailing standards of good banking practice applicable to BancorpSouth, as described herein, require the use of multifactor authentication methods or security procedures, which BancorpSouth did not comply with, and, on information and belief, authentication methods or security procedures in use by customers and receiving banks similarly situated generally consist of multifactor methods and procedures.

40. The Wire Transfer was not effective as a payment order of Choice, pursuant to §§400.4A--202, 400.4A--203, or 400.4A--204, RSMo., since BancorpSouth accepted, processed or honored the Wire Transfer instruction/request according to Single Control, which was not commercially reasonable, in that:

a. BancorpSouth accepted, processed or honored the Wire Transfer despite the fact that it knew of Choice's wishes and requirements that its account be a "Trust Account" and "Escrow Disbursement Account" which is used solely to transfer funds for home loans or for payoffs related to commercial or residential real estate transactions, and not be used to payoff invoices for purchased equipment, and that its account's current ledger balance will govern whether or not BancorpSouth could process a wire transfer, regardless of the fact that Choice did not indicate or determine a daily wire transfer limit;

b. BancorpSouth entered into an agreement with Choice (Exhibit 12, below) which provided that BancorpSouth would not process a wire transfer for an amount greater than Choice had in its account balance, yet BancorpSouth accepted, processed or honored the Wire Transfer for an amount approximately \$90,000.00 greater than Choice had in its account on March 17, 2010;

c. BancorpSouth accepted, processed or honored the Wire Transfer despite the fact that it knew Choice's circumstances, including, but not limited to, knowing that it was an escrow company, that its account was a "Trust Account" and "Escrow Disbursement Account" used solely to transfer funds for home loans or for payoffs related to commercial or residential real estate transactions, and that Choice never (i.e. with no frequency) issued and authorized payment orders to international beneficiaries for unspecified equipment purchases;

d. BancorpSouth offered only two authentication methods or security procedures (i.e. Single Control and Dual Control), neither of which employed multifactor authentication, which was not reasonable for the transactions specific to Choice and BancorpSouth;

e. BancorpSouth knew, or should have known from the documents described herein, that the prevailing standards of good banking practice, applicable to a bank of BancorpSouth's caliber and sophistication, require the use of multifactor authentication methods or security procedures, which BancorpSouth did not comply with, and, on information and belief,

authentication methods or security procedures in use by customers and receiving banks similarly situated generally consist of multifactor methods and procedures;

f. BancorpSouth only offered Choice two choices (Single Control and Dual Control) for InView, its wire transfer system, and Dual Control is not a commercially reasonable authentication method or security procedure, as described herein, and thus, BancorpSouth did not offer Choice a commercially reasonable authentication method or security procedure which Choice refused in favor of Single Control;

g. Choice did not expressly agree in writing to be assume the risk and be bound by any payment order (wire transfer), whether or not authorized, issued in its name and accepted by BancorpSouth in compliance with Single Control.

41. The Wire Transfer was not effective as a payment order of Choice, pursuant to §§400.4A--202, 400.4A--203, or 400.4A--204, RSMo., since BancorpSouth did not accept the Wire Transfer (i.e. payment order or funds transfer) in good faith as required by the above-mentioned Sections of the Missouri Uniform Commercial Code, in that Choice's account with BancorpSouth is a Trust Account or Escrow Disbursement Account used solely to transfer funds for home loans or payoffs related to commercial or residential real estate transactions, yet the Facsimile Transmission Receipt for the Wire Transfer indicates funds were transferred for a purpose other than for escrow disbursement (i.e. "Invoice: equipment").

42. The Facsimile Transmission Receipt (attached hereto and incorporated herein by reference as EXHIBIT 5) for the Wire Transfer indicates the money transferred out of Choice's

Trust Account or Escrow Disbursement Account was for "Invoice: equipment", which BancorpSouth knew or should have known was suspicious, unauthorized and/or fraudulent, since Choice is an escrow company and its account is a trust account solely to transfer funds for home loans or payoffs related to commercial or residential real estate transactions and is not a general business account from which invoices or bills can be paid, or from which unspecified equipment can be purchased.

43. The Wire Transfer was not effective as a payment order of Choice, as described herein, and Single Control is not commercially reasonable, and is not deemed commercially reasonable, pursuant to §§400.4A--202, 400.4A--203, or 400.4A--204, RSMo., since Choice did not expressly agree in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by BancorpSouth in compliance with Single Control, in that no agreement between Choice and BancorpSouth indicates that Choice expressly agreed to be bound by a payment order accepted through the use of Single Control.

44. Since, pursuant to §400.4A--202, RSMo., BancorpSouth did not offer or make available to Choice a commercially reasonable authentication method or security procedure, as described herein, §400-4A--202(b), RSMo., does not apply and under §400-4A--202(a), RSMo., BancorpSouth acted at its own peril in accepting the unauthorized Wire Transfer request/instruction (i.e. a payment order).

45. The authentication methods or security procedures offered to Choice by BancorpSouth (i.e. Single Control and Dual Control) were not commercially reasonable, pursuant to §400.4A--202, RSMo., in that Choice, as the particular customer, required secure funds transfers (i.e. payment orders) to transfer funds for home loans or for payoffs related to commercial or residential real estate transactions out of its Trust Account or Escrow

Disbursement Account, and BancorpSouth, as the particular bank, provided only two authentication methods or security procedures, both of which fail to meet prevailing standards of good banking practices, as described herein and as demonstrated by the fact that BancorpSouth is a large, competent and sophisticated bank, which has been operating for over 100 years.

46. The following described documents are agreements entered into by Choice and BancorpSouth in Springfield, Greene County, Missouri (collectively referred to as the "Agreement Documents"), and none of the Agreement Documents indicate that Choice expressly agreed in writing to be bound by any payment order accepted by BancorpSouth using Single Control:

- a. Funds Transfer Agreement (attached hereto for purpose of identification only as EXHIBIT 6);
- b. Business Services Agreement (attached hereto for purpose of identification only as EXHIBIT 7);
- c. InView Automated Information Reporting Service Implementation Form/Addendum to Business Services Agreement (attached hereto for purpose of identification only as EXHIBIT 8);
- d. Trust Account/Escrow Disbursement Account and Account Terms and Conditions Agreement (attached hereto for purpose of identification only as EXHIBIT 9);
- e. Waiver Consent--InView Wire Module Dual Control (attached hereto for purpose of identification only as EXHIBIT 10);
- f. InView Wire Transfer User Security Form (attached hereto for purpose of identification only as EXHIBIT 11).

47. In the InView Wire Transfer User Security Form (Exhibit 11), Choice elected to not indicate a dollar amount for the "Company Daily Wire Transfer Limit".

48. However, the InView Wire Transfer User Security Form (Exhibit 11) also explicitly establishes that "(r)egardless of user limits for higher amounts, an account's current ledger balance will govern whether or not a wire transfer can be processed."

49. On March 17, 2010, Choice's account balance was \$349,352.20 (Three Hundred Forty-Nine Thousand Three Hundred Fifty-Two and 20/100 Dollars). See the March 17, 2010 "Balance Statement For Trust Account--Account No. 0618003800" attached hereto and incorporated herein by reference as EXHIBIT 12.

50. Thus, when BancorpSouth honored, processed or accepted the fraudulent, unauthorized Wire Transfer instruction/request on March 17, 2010, and transferred \$440,000.00 out of Choice's Trust Account or Escrow Disbursement Account, it exceeded the current amount of funds Choice had in its account (\$349,352.20) and failed to, in good faith, give effect to the InView Wire Transfer User Security Form (Exhibit 11).

51. BancorpSouth is liable to Choice for the full amount of the fraudulent, unauthorized Wire Transfer that occurred on March 17, 2010 (\$440,000.00) since (a) BancorpSouth's authentication methods or security procedures lack commercial reasonableness, (b) BancorpSouth did not act in good faith in accepting the Wire Transfer, and (c) Choice and BancorpSouth did not expressly agree in writing that Choice would be bound by any wire transfer, authorized or not, issued in its name and accepted by BancorpSouth in compliance with Single Control.

52. As a result of the fraudulent, unauthorized Wire Transfer of March 17, 2010, Choice's account with BancorpSouth was improperly charged or debited by BancorpSouth, and

Choice has been damaged in the amount of \$440,000.00, plus interest from the date of transfer (March 17, 2010) until the date of refund.

53. BancorpSouth accepted the Wire Transfer (a payment order) issued in the name of Choice as sender, which was fraudulent, not authorized and not effective as the order of Choice under §400.4A-202, RSMo., and which was not enforceable against Choice under §400.4A-203, RSMo., and BancorpSouth has not refunded any of the payment of the Wire Transfer (\$440,000.00) and, therefore, pursuant to §400.4A-204, RSMo., BancorpSouth is required to refund said amount, plus interest from the date the bank received the payment instruction/request (March 17, 2010) until the date of refund.

54. As a result of BancorpSouth's acceptance of the fraudulent, unauthorized Wire Transfer, Choice was required to retain attorneys in order to attempt to retrieve, or obtain refund of, the funds that were transferred out of its account by the fraudulent, unauthorized Wire Transfer, due to BancorpSouth's inadequate and commercially unreasonable authentication method or security procedure (Single Control) for its internet-based wire transfer (or funds transfer or payment order) system, and Choice is thus entitled to its reasonable attorney's fees pursuant to the Court's equitable power to balance the benefits, since this is an unusual type of case or is unusually complicated litigation, in that it involves Article 4A of the Missouri Uniform Commercial Code, which, in Missouri, is rarely litigated, has little or no guiding or persuasive case law, and is an unusually complicated and technical area of the law.

WHEREFORE, Plaintiff Choice prays and requests the Court enter judgment in its favor and against Defendant BancorpSouth in the amount of \$440,000.00; for prejudgment interest at the highest lawful interest rate, pursuant to §400.4A-204, RSMo., from March 17, 2010 until the date of refund; for post-judgment interest at the highest lawful interest rate, pursuant to

§408.040, RSMo.; for the costs of this action and its reasonable attorney's fees incurred herein, pursuant to the Court's equitable power to balance the benefits; and for such other and further relief as to the Court seems just and proper in the premises.

Count II

Violation of 15 U.S.C. 6801 – 6809

COMES NOW Plaintiff Choice and for Count II of its cause of action against Defendant BancorpSouth states as follows:

55. Plaintiff incorporates by reference and realleges herein paragraphs 1 through 54, inclusive, as if the same were more fully set forth herein.

56. In part, the Gramm-Leach-Bliley Act, at 15 U.S.C. 6801-6809, establishes that it is the policy of Congress that each financial institution (i.e. BancorpSouth) has an affirmative and continuing obligation to respect the privacy of its customers (i.e. Choice) and to protect the security and confidentiality of those customers' (Choice's) nonpublic personal information.

57. Choice's Single Control User ID and Password for BancorpSouth's wire or funds transfer system, InView, was nonpublic personal information which BancorpSouth did not adequately protect and secure as confidential, in that "Nonpublic Personal Information" means, as defined in 15 U.S.C. 6809(4), personally identifiable financial information:

- a. provided by a consumer to a financial institution;
- b. resulting from any transaction with the consumer or any service performed for the consumer;
- c. otherwise obtained by the financial institution.

58. In furtherance of the above-described policy, each agency or authority regulated by the Gramm-Leach-Bliley Act (i.e. the FDIC) established, pursuant to 15 U.S.C. 6801(b),

appropriate standards for the financial institutions subject to their jurisdiction (i.e. BancorpSouth) relating to the administrative, technical, and physical safeguards:

- a. to ensure the security and confidentiality of customer (i.e. Choice's) records and information;
- b. to protect against any anticipated threats or hazards to the security or integrity of such records; and
- c. to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.

59. Further, pursuant to 15 U.S.C. 6805 and the FFIEC's 2005 Guidance (see Footnote 3), as a financial institution regulated by the FFIEC and FDIC, BancorpSouth was required to implement an effective authentication system for its customers using Internet banking in order to comply with requirements to safeguard customer information.

60. BancorpSouth, thus, failed to comply with the safeguard provisions of 15 U.S.C. 6801 through 6809, in that:

- a. BancorpSouth did not ensure the security and confidentiality of Choice's records and information;
- b. BancorpSouth did not protect against the anticipated threats or hazards to the security or integrity of Choice's records, since Single Control and Dual Control are single-factor authentication methods which are known to be inadequate as an authentication method or security procedure; and

c. BancorpSouth did not protect against unauthorized or fraudulent access to or use of Choice's records or information (including, but not limited to its User ID and Password) which resulted in substantial harm and inconvenience to Choice, in that \$440,000.00 was transferred or debited from its Trust Account or Escrow Disbursement Account with BancorpSouth, as a result of the fraudulent, unauthorized Wire Transfer.

61. Due to BancorpSouth's failure to comply with certain provisions of the Gramm-Leach-Bliley Act, 15 U.S.C. 6801-6809, by not adequately safeguarding Choice's nonpublic personal information, BancorpSouth is liable to Choice for its violation in the full amount of the fraudulent, unauthorized Wire Transfer (\$440,000.00).

62. As a result of BancorpSouth failing to safeguard Choice's nonpublic personal information as required by the Gramm-Leach-Bliley Act, 15 U.S.C. 6801-6809, Choice was required to retain attorneys in order to attempt to retrieve, or obtain refund of, the funds that were transferred out of its account by the fraudulent, unauthorized Wire Transfer, due to BancorpSouth's inadequate and commercially unreasonable authentication methods or security procedures (Single Control and Dual Control) for its internet-based wire transfer (or funds transfer or payment order) system, which allowed Choice's nonpublic personal information (User ID and Password) to be stolen and used by a Hacker, and Choice is thus entitled to its reasonable attorney's fees pursuant to the Court's equitable power to balance the benefits, since this is an unusual type of case or is unusually complicated litigation, in that it involves, in part, the Gramm-Leach-Bliley Act, which, in Missouri, is rarely litigated, has little or no guiding or persuasive case law and is an unusually complicated and technical area of the law.

WHEREFORE, Plaintiff Choice prays and requests the Court enter judgment in its favor and against Defendant BancorpSouth in the amount of \$440,000.00; for post-judgment interest at the highest lawful interest rate, pursuant to §408.040, RSMo.; for the costs of this action and its reasonable attorney's fees incurred herein, pursuant to the Court's equitable power to balance the benefits; and for such other and further relief as to the Court seems just and proper in the premises.

CHANEY & McCURRY

By _____

Bruce McCurry #22494

By _____

Jeff McCurry #61960

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