No. 13-8086

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REYNALDO REYES,
on behalf of himself and all others similarly situated,

Petitioner,

v.

ZIONS FIRST NATIONAL BANK, NETDEPOSIT, LLC,
MP TECHNOLOGIES d/b/a MODERN PAYMENTS,

Respondents.

Petition for Review of Decision by the United States District Court
for the Eastern District of Pennsylvania
Case No. 10-00345
The Honorable Juan R. Sanchez

AMICUS BRIEF BY UNITED STATES SENATORS EDWARD J. MARKEY AND ROBERT CASEY AND UNITED STATES REPRESENTATIVE ALLYSON SCHWARTZ IN SUPPORT OF GRANTING RULE 23(F) PETITION

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IDENTITY AND INTEREST OF AMICUS CURIAE

The experience and particularized interest of Senators Markey and Casey and Representative Schwartz in the subject matter of this action have been set forth in the foregoing motion and exhibits thereto, which, to avoid repetition, are incorporated by reference. These interests include, *inter alia*:

- Senator Markey serves on the Senate Committee on Commerce, Science and Transportation, which oversees the Federal Trade Commission, has held numerous hearings that have addressed telemarketing fraud in the past four years.[1] Senator Markey was instrumental in convincing the Comptroller of the Currency to distribute restitution to victims of a telemarketing scheme in a manner that provided full redress to all victims. *See* Docket No. 351-2 in *United States v. Payment Processing Center, LLC*, Civil No. 06-0725 (E.D.Pa., May 29, 2008));
- Senator Casey has sponsored numerous pieces of legislation to protect the elderly from financial abuse. Recently, Senator Casey introduced S. 1185, the Senior Investor Protections Enhancement Act of 2013. This bill would

[1] See Hearing on "Aggressive Sales Tactics on the Internet and Their Impact on American Consumers," Senate Committee on Commerce, Science and Transportation (November 17, 2009); Hearing on "The Economy and Fraud: Protecting Consumers During Downward Economic Times," Senate Committee on Commerce, Science and Transportation (July 14, 2009); Hearing on "Financial Services and Products: The Role of the FTC in Protecting Consumers, Parts I and II" (February 4, 2010 and March 17, 2010). These are available at: *www.commerce.senate.gov/public/index.cfm?p+Hearings&ContentType*

strengthen the federal government's ability to prosecute criminals targeting senior citizens with financial scams;

- Representative Schwartz sits on House Committees and sub-committees that exercise jurisdiction over numerous programs affecting the elderly. The underlying lawsuit arose in her Congressional District, and given the demographics of that District it is logical to believe that numerous victims reside in her District.

REQUIRED STATEMENT UNDER F.R.APP.P. 29(C)(5)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus curiae or his counsel—contributed money that was intended to fund preparing or submitting the brief.

REASONS FOR GRANTING THE RULE 23(f) PETITION

Amici Markey, Casey and Schwartz respectfully support and adopt the *amici* filings already of record as to why the Rule 23(f) petition should be granted, and in particular the amicus filing of the Public Interest Law Center of Philadelphia (PILCOP) and Community Legal Services (CLS). In view of those briefs, this brief is limited to emphasizing a few critical points.

First, the case involves issues of national importance, issues that Congress has watched carefully over the past several years and the banking community has watched as well. Not only does this case relate to the protection of the elderly and

the vulnerable, but also to the integrity of the national banking system. While it is estimated that frauds like those in the present case cost victims billions of dollars annually, the present case itself involves over $30 million taken from victims who are primarily elderly and poor.

Second, there is no indication that the district court gave any consideration at all to the expert evidence on telemarketing fraud that was presented to it, let alone engaged in the "rigorous analysis" required by *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir.2009). Under settled law "a district court exercising proper discretion in deciding whether to certify a class will resolve factual disputes by a preponderance of the evidence and make findings that each Rule 23 requirement is met or is not met, having considered *all relevant evidence* and arguments presented by the parties." *Id.* at 320. *See id.* at 325 ("The district court must resolve [conflicts] after considering all relevant evidence.") The court's opinion does not address any of the expert declarations. More specifically, the court's reasoning does not consider any of the very substantial expert evidence that was presented as to the nature of the fraud, Zion's participation in it, and its class-wide nature.

The Federal Reserve Bank and the U.S. Department of Justice have publicly expressed positions that when a bank has customers with a return transaction rate of 10%, that is *prima facie* evidence of fraudulent conduct. (A return transaction rate measures the proportion of cases in which a bank has processed a transaction

to credit the account of the bank's customer and debit the account of another bank's customer, and the transaction has been rejected and returned by the second bank). For example, the Federal Reserve Bank stated to one bank:

> [A] return rate of 10% (which is on its face significantly in excess of industry norms) would likely be regarded by bank supervisory agencies and/or law enforcement agencies as prima facie evidence that your bank knew or should have known that your [third-party payment processors and/or merchants] had engaged in fraudulent activity.

See United States v. First Bank of Delaware, Civil No. 12-6500 (E.D.Pa.), DOJ complaint at ¶64.

This 10% benchmark for *prima facie* fraud was presented to the district court in this case by two of plaintiff's experts. Professor Robert Meyer stated:

> The Federal Reserve Bank has written that return rates above ten percent represent a level that regulators and law enforcement authorities would view as prima facie evidence of fraud.

See Declaration of Professor Meyer, Ex. 2 to the PILCOP/CLS amicus brief, at ¶11. It was also presented by the expert declaration of Ms. Barbara Blake: "The Federal Reserve has stated that a return rate above ten percent would be considered prima facie evidence that a bank knew that its third-party processor or its third-party processor's customer was engaged in fraud." (Blake declaration, PILCOP/CLS Ex. 3, ¶19).

The expert evidence presented to the district court showed that Zions' bank return transaction rates for the telemarketers (which Zions itself labeled as "high risk") vastly exceeded this 10% benchmark. Professor Boss showed the monthly range of return rates for the telemarketers was:

NHS:	**42% to 56%** in 2007 and **55% to 60%** in 2008;
Low Pay:	**40% to 90%** in 2007 and **56% to 83%** in 2008;
Group One:	**47% to 68%** in 2007 and **16% to 163%** in 2008[2];
Platinum Benefit:	**26% to 57%** in 2007 and **20% to 57%** in 2008;
Market Power:	**77% to 96%** in 2007 and **77% to 96%** in 2008;
Paydayloan:	**54 to 61%** in 2007;

Boss' declaration, PILCOP/CLS Ex. 1, at ¶¶80-81 (rounded to nearest whole number). Professor Meyer declared: "The return rates at issue are among the very highest I have ever seen, ranging from 30% to almost 90%." (Meyer declaration, ¶11(a). And Ms. Blake summarized the overall average two year rates of return of these telemarketers as follows:

- NHS 64.79%
- Low Pay 68.83%
- Group One 51.67%
- Market Power Marketing Solutions 86.73%

[2] A rate can exceed 100% for a given month because of a delay in the processing of returns. For example: 1000 transactions go out in month 1 and 200 come back for a 20% return that month. In month 2, only 500 transactions go out, but in that same month 600 returns from the prior month come in (on top of the Month 2 returns). In that scenario, the month 2 returns would be over 100%.

- Payday Loan Resource Center 73.46%
- Platinum Benefits Group 30.83%
- RX Smart 54.21%

(Blake declaration, ¶¶23, 35, 43, 50, 60, 71, 79).

The defendants' expert did not controvert this. Rather, defendants presented Ms. Milner as an expert on the ACH ("automated clearing house") system of electronic banking, and the NACHA (formerly, the National Automated Clearing House Association) rules. Ms. Milner opined simply that she was "unaware of any NACHA Operating Rule, Guideline, or other rule…holding that high return rates…are conclusive evidence of fraud…rather high return rates may be indicative of fraud." (Milner Declaration, ¶17, quoted in docket no. 167 in district court, pp. 21-22). She did not even address the Federal Reserve standard.

Hence, plaintiff's expert declarations were unrebutted that a 10% return rate is *prima facie* evidence of fraud, according to the Federal Reserve Bank and DOJ, and that Zions' return rates exceeded this threshold by a staggering margin. Yet the district court did not analyze this evidence, did not compare these return rates to the Federal Reserve benchmark for *prima facie* fraud, nor consider in its Opinion Professor Boss and Professor Meyer's declarations stating that this proof was common to all class members as to Zion's complicity in the scheme. Boss declaration at ¶¶77, 107; Meyer declaration at ¶31. And as the PILCOP/CLS brief

points out, the district court adopted an incorrect legal standard that plaintiff had to provide "absolute proof of fraud" (Opinion p. 14), while ignoring that *prima facie* proof of fraud clearly existed.

Prima facie evidence means "such as will suffice until contradicted and overcome by other evidence." *Black's Law Dictionary* (West, 4th Ed. 1968). Here, Ms. Milner's declaration certainly did not "contradict or overcome" the evidence furnished by Professors Boss, Meyer and Ms. Blake. And the *prima facie* case was strengthened even further by:

- Evidence that the FTC had shut down four of the telemarketers; that a fifth (RX Smart) was shut down as a result of a criminal action; and that the sixth (Platinum Benefits/Georgione) was found to be a fraud in an action brought by five state Attorneys General;
- Actual evidence of the telemarketers' fraudulent schemes, and Zions' knowledge of it, which were discussed extensively in the three expert declarations of Professors Boss and Meyer and Ms. Blake. Their declarations were based on an extensive documentary evidentiary record that was never referenced by the district court.

To rebut *prima facie* evidence, there must be sufficient evidence that the entities are something other than fraudulent to justify Zions' continued processing of the transactions (both the debits from consumers' accounts and the thousands upon thousands of returned transactions). Here, the only evidence submitted that

the "merchants" were anything other than frauds was the self-serving testimony of a single telemarketer. By contrast, there was very substantial expert evidence that confirmed what the extreme return rates indicated: that the whole purpose of these entities was to obtain account information so that consumers' accounts could be raided.

Class actions play a critical role in compensating victims of telemarketing fraud. The only way these vulnerable victims' injuries can realistically be redressed is through class action. In the face of such compelling evidence of class-wide fraud, the district court's failure to follow this Court's well established standard for evaluating expert opinion in determining whether to certify this class serves to victimize them yet again. The petition for Rule 23(f) review should be granted.

Dated: October 21, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 21, 2013, the foregoing document was served on all parties or their counsel of record via hand delivery and/or electronic mail.

/s/ Robert J. LaRocca