

No. 14-1228

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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REYNALDO REYES,  
on behalf of himself and all others similarly situated,  
*Plaintiff – Appellant,*

v.

NETDEPOSIT, MP TECHNOLOGIES d/b/a Modern Payments,  
ZIONS FIRST NATIONAL BANK, *et al.*  
*Defendants – Appellees.*

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On Appeal from the United States District Court for the  
Eastern District of Pennsylvania, Hon. Juan R. Sánchez  
Case No. 10-345

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BRIEF AMICI CURIAE OF AARP, CONSUMER FEDERATION OF  
AMERICA, NATIONAL ASSOCIATION OF CONSUMER  
ADVOCATES, AND NATIONAL CONSUMER LAW CENTER  
IN SUPPORT OF PLAINTIFF - APPELLANT

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JULIE NEPVEU  
(DC Bar #458305)  
AARP FOUNDATION LITIGATION  
601 E Street, NW  
Washington, DC 20049  
Tel.: (202) 434-2060  
Fax: (202) 434-6424  
jnepveu@aarp.org  
Counsel for Amici Curiae

## **CORPORATE DISCLOSURE STATEMENT OF AARP**

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, Experience Corps, d/b/a. AARP Experience and AARP Financial.

AARP has no parent corporation, nor has it issued shares or securities.

## **CORPORATE DISCLOSURE STATEMENT OF CONSUMER FEDERATION OF AMERICA**

Consumer Federation of America (“CFA”) is a non-profit association that operates as a tax-exempt organization under the provisions of § 501(c)(3) of the Internal Revenue Code. CFA has a membership of over 275 nonprofit consumer organizations. CFA has no parent corporation, nor has it issued shares or securities.

## **CORPORATE DISCLOSURE STATEMENT OF NATIONAL ASSOCIATION OF CONSUMER ADVOCATES**

The National Association of Consumer Advocates is a non-profit membership organization of law professors, public sector lawyers, private lawyers,

legal services lawyers, and other consumer advocates. It is organized under the laws of the State of Massachusetts and is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

**CORPORATE DISCLOSURE STATEMENT OF NATIONAL  
CONSUMER LAW CENTER**

The National Consumer Law Center (“NCLC”) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of § 501(c)(3) of the Internal Revenue Code. It has no parent corporations and no publicly held company owns 10% or more of its stock. NCLC is not a corporate party within the meaning of Federal Rules of Appellate Procedure 26.1 and 29(c).

April 21, 2014

Respectfully Submitted

/s/Julie Nepveu

Julie Nepveu

AARP Foundation Litigation

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## STATEMENT OF AMICI'S INTEREST<sup>1</sup>

On a daily basis, older and low income people are battered by waves of mass-marketing fraud that cause untold suffering and wreak havoc on their lives. As did the snake oil salesmen of the past, mass-marketing fraudsters peddle illusory promises of a better life to the most vulnerable members of society. The offers are designed to look just good enough to be real in order to lure and trick victims into revealing sensitive financial information. Fraudsters routinely use such schemes to gain access to victims' bank accounts, from which they steal billions of dollars each year. Amici AARP, National Association of Consumer Advocates, and National Consumer Law Center are national legal advocacy, assistance, and education organizations that seek to protect the interests of older and low income people who are routinely targeted and harmed by such fraud.

Amici have a strong interest in this case because they work daily to ensure that older and low income people are protected from such fraud. The erroneous standard applied by the district court to deny class certification threatens to undermine the effectiveness of antifraud regulation and enforcement efforts designed to protect older and low income people. As demonstrated by *Faloney v.*

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<sup>1</sup> Pursuant to F. R. A. P. 29(c)(5), Amici state that this brief was not authored in whole or in part by any party or its counsel, and that no person other than AARP, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief.

*Wachovia Bank*, No. 07-1455 (E.D. Pa. Jan. 22, 2009), private class action relief that holds a bank accountable for facilitating fraudulent transactions greatly enhances protection against fraud. Indeed, spurred by the outcome of *Wachovia*, most banks made significant efforts to enhance their oversight of third party payment processors in order to detect and protect against similar fraudulent ACH transactions. A report produced for the Office of the Comptroller of the Currency (“OCC”) explicitly recognized the important contribution of private class action enforcement in protecting against fraud:

Going forward every bank must now consider its potential responsibility and financial liability for financial losses that result from the bad behavior of its bank customers or customers’ customers, specifically, the fact pattern where that bad behavior takes the form of defrauding third party victims and using the bank’s services to obtain payment from those defrauded victims.

Ana R. Cavazos-Wright, *An Examination of Remotely Created Checks*, 8, Fed. Res. Bank of Atl. (May 2010), available at [http://www.frbatlanta.org/documents/rprf/rprf\\_resources/RPRF\\_wp\\_0510.pdf](http://www.frbatlanta.org/documents/rprf/rprf_resources/RPRF_wp_0510.pdf) (hereinafter “*An Examination of Remotely Created Checks*”).

Amici’s participation in this case will raise issues which might otherwise escape the Court’s attention and will assist this Court in understanding the insidious nature of mass-marketing fraud.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities

and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly concerned about fraudulent practices of mass-marketers that drain billions of dollars every year from the bank accounts of older people. AARP has conducted extensive research into fighting mass-marketing fraud and works to prevent it through education, advocacy, and policy development. Among other efforts, AARP has conducted or commissioned numerous surveys and studies of fraud targeting older people. AARP also launched the Fraud Watch Network, a new campaign to provide access to information about how to protect against fraud. *See Nancy LeaMond, Fraud Watch Network: Fight ID Theft and Scams*, AARP (Nov. 12, 2013), available at <http://blog.aarp.org/2013/11/12/fraud-watch-network-fight-id-theft-and-scams/>.

The National Association of Consumer Advocates (“NACA”) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus involves the protection and representation of consumers. NACA’s mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

Enforcement and compliance with consumer protection laws has been a continuing concern of NACA since its inception.

The National Consumer Law Center (“NCLC”) is a national research and advocacy organization focusing on justice in consumer financial transactions for low income and elderly consumers. Since its founding as a non-profit corporation in 1969 at Boston College School of Law, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. NCLC is recognized nationally as an expert in consumer protection issues, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years. NCLC is, among other roles and accomplishments, author of a widely praised twenty-volume series of treatises on consumer law.

### **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The district court fundamentally misapprehended the nature of mass-marketing fraud, leading to its erroneous denial of class certification. Contrary to the district court’s conclusion, common evidence applicable to the class is

available to show—by a preponderance of the evidence—that the mass-marketing operations in this case were complete shams.<sup>2</sup> This is an issue “of significant public interest, especially to the elderly” because mass-marketing is “a national scourge ... which victimizes extremely vulnerable people, and does so in an inherently and intrinsically evil way.” *Faloney v. Wachovia*, at 77 (Dkt. 120) (hearing transcript), JA 1201. The district court’s application of an erroneous standard for class certification consigns older and low income people to the mercy of wholly fraudulent operations that were shut down by enforcement agencies and other federal courts. *See* Pl. Br., at 15-18 (detailing adjudications of the frauds at issue in this case).<sup>3</sup>

The mass-marketing frauds at issue in this case follow the standard blueprint used to bilk of billions of dollars from millions of victims annually: employ any number of nefarious means to obtain bank account information in order to make repeated unauthorized transactions. *See* Deevy M, *et al.*, *Scams, Schemes and Swindles*, 6, Financial Fraud Research Center (2012), available at <http://fraudresearchcenter.org/wp-content/uploads/2012/11/Scams-Schemes-Swindles-FINAL-On-Website.pdf> (hereinafter “*Scams, Schemes and Swindles*”).

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<sup>2</sup> Plaintiff correctly challenges the erroneous standard applied by the district court requiring “absolute proof” of fraud. *Reyes v. Zions First Nat. Bank*, No. 10-345, 2013 WL 5332107 (E.D. Pa Sept. 23, 2013), JA 8; *see* Pl.-Ap. Op. Br. at 35.

<sup>3</sup> Plaintiff-Appellant’s Brief on Appeal is cited as Pl. Br., at \_\_\_.

Fraudsters often drain bank accounts completely and repeatedly, resulting in a cascade of overdraft charges, damage to the victim's credit rating, and even exclusion from the banking system. See Jessica Silver-Greenberg, *Banks Seen as Aid in Fraud against Older Consumers*, N.Y. Times, June 20, 2013, at A1, available at [http://www.nytimes.com/2013/06/11/business/fraud-against-seniors-often-is-routed-through-banks.html?\\_r=0](http://www.nytimes.com/2013/06/11/business/fraud-against-seniors-often-is-routed-through-banks.html?_r=0); Charles Duhigg, *Papers Show Wachovia Knew of Thefts*, N.Y. Times, Feb. 6, 2008, at C1, available at <http://www.nytimes.com/2008/02/06/business/06wachovia.html?pagewanted=all>; Charles Duhigg, *Bilking the Elderly with a Corporate Assist*, N.Y. Times, May 20, 2007, at A1, available at <http://www.nytimes.com/2007/05/20/business/20tele.html?pagewanted=all&gwh=9FF7E630CCDA52BA722A76D257E41D8D&gwt=régi>.

Despite rules and regulations developed decades ago by Congress and banking regulators to keep America's banking system safe from fraud, banks have continued to reap fee income by serving and facilitating frauds at the expense of the most vulnerable members of society. "[F]rom a fee perspective the bank . . . has a disincentive to deny or even limit ACH origination services, because the bank earns a fee from the originator on both the initial presentment of the (faulty) debit entry, as well as the return." Furst K & Nolle D, *ACH Payments: Changing Users and Changing Uses*, 13, Policy Analysis Paper #6, OCC (Oct. 2005),

available at <http://www.occ.gov/topics/bank-operations/bit/ach-policy-paper-6.pdf>.

*Wachovia* established and the OCC reaffirmed that bank accountability is a powerful counterbalance to the perverse financial incentives inherent in the ACH system. Until the *Wachovia* class action held a bank accountable for its facilitation of fraud and required the bank to provide consumers with full relief, banks could make reasonably safe bets that they would not be held accountable for flouting their obligation to monitor ACH transactions and other electronic payment types to detect and prevent fraud by third parties.

Private class action lawsuits against banks are essential to protect against mass-marketing fraud, because a banking relationship is necessary to give fraudsters access to the electronic payments systems. Class actions fill gaping jurisdictional voids that render efforts of regulators and enforcement agencies akin to playing a “whack-a-mole” game. Zions’ alleged facilitation of frauds demonstrates this point tragically: although the Federal Trade Commission has shut down hundreds of mass-marketing frauds—including two of the frauds served by Zions, NHS and Market Power Marketing—it lacks jurisdiction over banks that provide fraudulent access to victims’ accounts. *See* Pl. Br. at 16. After an order of a federal court terminated the banking relationships that NHS and Market Power Marketing had with Wachovia, the operators of those frauds simply began processing fraudulent transactions through Zions. *See* Blake Decl., at ¶¶ 28, 48, JA

1616 and 1620.<sup>4</sup> Similarly, Low Pay operated contemporaneously with Zions and T Bank until their access to ACH processing through T Bank was terminated. *See* Pl. Br. at 15-16; JA 2133.

Private class actions are essential to provide the robust enforcement needed to protect against fraudsters simply migrating their operations to other banks. The district court denial of class certification in this case threatens to undermine the enhanced protection that was spurred by holding a bank accountable through private class action relief in *Wachovia*.

This Court should reverse the district court denial of class certification. Putative class members—especially highly vulnerable older and low income people—have no other recourse. The erroneous class certification standard the district court applied has the practical effect of immunizing insidious practices—including those before the district court—that illegally siphon billions of dollars each year from the accounts of the most vulnerable members of society. The district court’s errors threaten to undermine the efforts of private attorneys general and government enforcement and regulatory agencies that seek to deter banks from enabling mass-marketing fraud.

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<sup>4</sup> Materials in the record on appeal are cited as “JA \_.”

## ARGUMENT

### **I. Older And Low Income Americans Are Frequently Harmed By Mass-Marketing Fraud Designed To Gain Access To Their Bank Accounts, As Perpetrated In This Case.**

Like water through cracks in a dam, fraud seeps through every jurisdictional and legal enforcement crack. Older and low income people are extremely vulnerable to and are frequent targets of mass-marketing fraud. Even people who spend significant personal resources to protect themselves are not immune, because criminals are masters at exploiting weaknesses in the system. See Robert N. Mayer, *Defending Your Financial Privacy: The Benefits and Limits of Self-Help*, AARP Public Policy Institute (2006), available at [http://assets.aarp.org/rgcenter/consume/2006\\_06\\_privacy.pdf](http://assets.aarp.org/rgcenter/consume/2006_06_privacy.pdf). A common characteristic of “mass-marketing fraud schemes” is to utilize “a variety of ‘itches’ (explanations of promised goods, services, or benefits).” *Scams, Schemes and Swindles*, at 8. As with the mass-marketing schemes perpetrated in this case, fraudulent pitches hurled at older and low income people every day involve “a misrepresentation or concealment of some fact material to a transaction of goods, services, or other benefit that is made with knowledge of its falsity, nonexistence, or misrepresentation and with the intent to deceive another and that is reasonably relied upon by the other who is injured thereby.” *Scams, Schemes and Swindles*, at 7.

**A. Older And Low Income People Are Extremely Vulnerable To Mass-Marketing Fraud.**

Numerous studies have concluded that fraud is a significant problem for older people: “Americans age 65 and older are more likely to be targeted by fraudsters and more likely to lose money once targeted. Upon being solicited for fraud, older respondents were 34% more likely to lose money than respondents in their forties.” Financial Industry Regulatory Authority, *Financial Fraud and Fraud Susceptibility in the United States*, 3, Research Report, FINRA Investor Education Foundation (Sept. 2013), available at [http://www.finra.org/web/groups/sai/@sai/documents/sai\\_original\\_content/p337731.pdf](http://www.finra.org/web/groups/sai/@sai/documents/sai_original_content/p337731.pdf) (hereinafter “FINRA *Fraud*”). People with lower incomes are also “more likely to be fraud victims.” *Scams, Schemes and Swindles*, at 20.

A variety of factors make older and low income people particularly vulnerable to fraud. First, older people are attractive targets because people age 50 and older control nearly 70% of the nation’s wealth. See MetLife, *The Essentials, Preventing Elder Abuse*, 8, MetLife Mature Market Institute (2013), available at <https://www.metlife.com/assets/cao/mmi/publications/essentials/mmi-preventing-elder-abuse-essentials.pdf>; Marson D & Sabatino C, *Financial Capacity in an Aging Society*, *Generations* (J. of the Am. Soc. on Aging), vol. 36, no. 2 (Summer 2012), available at <http://www.asaging.org/blog/financial-capacity-aging-society-0> (hereinafter “*Financial Capacity in an Aging Society*”); see also Shadel D, *Off the*

*Hook: Reducing Participation in Telemarketing Fraud*, A-18, AARP Foundation, (2003), available at [http://assets.aarp.org/rgcenter/consume/d17812\\_fraud.pdf](http://assets.aarp.org/rgcenter/consume/d17812_fraud.pdf) (hereinafter “*Off the Hook*”).

Despite controlling enormous wealth, older people are not always well equipped to protect their resources. “With age, adults experience substantial diminution in cognitive function that affects financial decision making. Evidence indicates that, after peaking in middle age, the ability to make effective financial decisions declines.”<sup>5</sup> Karp N & Wilson R, *Protecting Older Investors: The Challenge of Diminished Capacity*, 11, AARP Public Policy Institute (Nov. 2011), available at [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/cons\\_prot/2011/rr2011-04.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf) (hereinafter “*The Challenge of Diminished Capacity*”). Financial decision making capacity declines even more sharply in people who have mild cognitive impairment or Alzheimer’s. *Id.* The prevalence of Alzheimer’s or mild cognitive impairment “explodes” in people over age 60, and that rate doubles every five years thereafter: approximately one half of people

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<sup>5</sup> “Financial capacity is ‘the capacity to manage money and financial assets in ways that meet a person’s needs and which are consistent with his/her values and self-interest.’ It encompasses such core skills as identifying and counting money, understanding debt and loans, conducting cash transactions, paying bills, and maintaining judgment to act prudently and avoid financial exploitation.” Karp N & Wilson R, *Protecting Older Investors: The Challenge of Diminished Capacity*, 3, AARP Public Policy Institute (Nov. 2011), available at [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/cons\\_prot/2011/rr2011-04.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf) (citation omitted).

aged 80 – 89 suffer some cognitive impairment. Agarwal S, Driscoll J, Gabaix X, Laibson D, *The Age of Reason: Financial Decisions over the Life-Cycle and Implications for Regulation*, 2, Brookings Papers on Economic Activity (2009), available at <http://ssrn.com/abstract=973790>. “Financial capacity is one of the first abilities to decline as cognitive impairment encroaches, yet older people, their families, and others are frequently unaware that these deficits are developing.” *The Challenge of Diminished Capacity*, at 3. Being unaware of declining capacity makes older people increasingly vulnerable to a wide variety of deceptive financial practices. *See id.*; *Financial Capacity in an Aging Society*.

There is no single attribute that makes a person vulnerable to fraud, but other traits frequently held by older people that are believed to contribute to making them vulnerable to fraud include:

- Social isolation, boredom, loneliness;
- Enjoyment of the attention and perceived companionship of telemarketers;
- Socialization to be trusting, polite, truthful, and to expect the same from others;
- Respect for authority;
- Distrust of the government;
- Desire to keep financial activities hidden from family or government;
- Resentment of anyone questioning their behavior;
- Need not to appear foolish or stupid;
- Need for financial security.

*Off the Hook*, at A-21.

The traits of victims, while important, are not the only reason older and low income people are vulnerable to mass-marketing fraud. After all, “[e]ven the most

wary and sophisticated consumers may fall victim to fraudulent offers—in the mail, in the media, and on the Internet.” Federal Trade Commission, *Consumer fraud in the United States: An FTC Survey*, 1, Report by Anderson K, Washington, DC. (2004), available at <http://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-ftc-survey/040805confraudrpt.pdf>; see also *Scams, Schemes and Swindles*, at 6. The very nature of mass-marketing fraud makes it hard for individuals to detect or protect themselves against it:

By mimicking the persuasive strategies, communication streams, and payment mechanisms of legitimate commerce, skilled fraudsters give few indications that their offers are scams. Fraudsters’ methods anticipate informed, skeptical consumers by providing numerous markers of legitimacy, authenticity, and appeals to trust. The means by which fraudsters contact targets and obtain money mirror trends in everyday transactions, with the internet outpacing all other mechanisms.

*Id.*

**B. Mass-Marketing Scams Are Designed To Resemble Legitimate Transactions In Order To Trick People Into Revealing Their Bank Account Information And Deter Victim Reporting.**

“Successful fraud looks just good enough to be true.” *Scams, Schemes and Swindles*, at 6. The FBI warns that perpetrators “target new victims and initiate fraud schemes under the guise of legitimacy.” See U.S. Federal Bureau of Investigation, *Mass-Marketing Fraud: A Threat Assessment, International Mass-Marketing Fraud Working Group* (June 2010), available at <http://www.fbi.gov/stats-services/publications/mass-marketing-fraud-threat-assessment/mass-market>

ing-threat (hereinafter “FBI, *Mass-Marketing Fraud*”). Financial losses from fraud targeted at older people likely exceed hundreds of billions of dollars a year, but the actual volume is hard to measure. Many victims do not recognize or admit that such transactions are fraudulent. *See* FBI, *Mass Marketing Fraud*.

“[E]fforts to track fraud losses and determine victimization rates” is “substantially hinder[ed]” by the wide variety of private and governmental agencies to which “mass-marketing fraud victims who try to report their losses typically direct their complaints.” FBI, *Mass-Marketing Fraud*; *see* *Off the Hook*, at A-18; Shadel D & Pak K, *AARP Foundation National Fraud Victim Study*, AARP (May 2011), *available at* <http://www.aarp.org/money/scams-fraud/info-03-2011/fraud-victims-11.html>. Underreporting of fraud also occurs because people may not know where to report, may believe it will not make a difference (i.e., that they will not get their money back), or may be too embarrassed to report it. *See* FINRA, *Fraud*, at 3-5; *see also* FBI, *Mass-Marketing Fraud*.

“[T]hose who attempt to share the incident with friends or with the authorities may face stigmatization and ridicule.” Police units may not have the resources to respond, may share a belief in the complicity of the victim, or may simply fail to perceive the victim as a victim at all. This incurs its own sort of harm, as the victim is not only betrayed, but socially isolated.

*Scams, Schemes and Swindles*, at 12. Indeed, victims often do not complain or otherwise seek redress, and most known victims—especially older ones—deny having been defrauded. *Id.*, at A-18; *Scams, Schemes and Swindles*, at 19.

Moreover, “[e]lderly victims, in particular, often may be unable or unwilling to report fraud due to diminished mental faculties or fear of losing financial independence should their families discover the fraud.” FBI, *Mass-Marketing Fraud*; see also *Off the Hook*, at A-18. Some older people, especially those with cognitive impairment, but others as well, do not recognize that they have been defrauded: the most successful fraud is one that evades detection, enabling processing of unauthorized transactions to continue.

The district court erroneously concluded that the various means used to access accounts raised individual issues that cannot be adjudicated in a class action: this was error. Apparent—and irrelevant—differences should not distract from the fact that the pitch is specifically designed to entice a transfer of money, regardless of the details used to lure a victim. The FBI explains that:

Mass-marketing fraud—whether committed via the Internet, telemarketing “boiler rooms,” the mail, television or radio advertising, mass meetings, or even one-on-one talks over people’s kitchen tables—has two elements in common. First, the criminals who conduct any mass-marketing fraud scheme aim to defraud multiple individuals or businesses to maximize their criminal revenues. Second, the schemes invariably depend on persuading victims to transfer money or funds to the criminals based on promises of valuable goods, services, or benefits, then never delivering the promised goods, services, or benefits to the victims.

*Id.*

Generally the small “benefit” delivered, if any, is intended solely to dupe the victims into believing they actually authorized a transaction and to deter them from

seeking redress. Plaintiff's evidence detailed, for example, how victims were sold debit cards for \$150.00 and ongoing monthly fees, which they could have gotten from their own banks for free. Others were sold benefit cards, which had been intended to be given away for free, at similarly high prices. *See* Pl. Br. at 15-18. Selling a discount card that victims could have obtained for "free" is not a legitimate business regardless of any individual variation in the pitch or scheme.

**II. Evidence Common To The Entire Class Demonstrates That The Zions Defendants Facilitated Mass-Marketing Fraud By Processing ACH Debits For Businesses That Were Complete Shams.**

Defendants argue, and the district court agreed, that the possibility of some small measure of legitimacy based on the unsubstantiated testimony from the principal of one of the schemes at issue precludes class certification. This is preposterous. Unopposed evidence from Plaintiff's experts in this case concluded that the frauds at issue were complete frauds. Moreover, federal prosecutors and courts in other cases shut down each of the frauds as wholly fraudulent, based upon evidence common to all the victims. *See* Pl. Br. at 15-18.

As described by the FBI, the goal of mass-marketing fraud is not to sell anything of legitimate value, but to acquire the victim's bank account number under the guise of legitimacy, which is then trafficked through the system. As Plaintiff's expert explained, based upon the evidence before the district court, the fraudulent operations "made money by luring victims into revealing their bank

account numbers, then debiting their accounts on an ongoing basis for products or services of little or no value.” Meyer Decl., at ¶ 10, JA 1635.

**A. Plaintiff’s Unopposed Expert Opinions Detailed Overwhelming Evidence of Fraud.**

The district court disregarded overwhelming and unopposed expert testimony demonstrating that “none of the enterprises were legitimate business[es].” Meyer Decl., at ¶ 10, JA 1635. After fully reviewing the evidence in the case, including the astronomically high percentage of ACH transactions that were returned as unauthorized, Plaintiff’s expert opined that “[s]ince the overwhelming majority of banks in the United States have no unauthorized returns at all, anyone looking at the high over-all return rates (many over 50%) would know that legitimate businesses would not and could not go on with such high return rates for any reason.” Boss Decl., at ¶ 82, JA 590.

The district court also erred in denying class certification based on the various means by which fraudsters obtained victims’ account information. The district court should have credited the Plaintiff’s expert testimony explaining that the use of various illicit practices to make unauthorized ACH transactions confirms that these operations were complete shams. *See* Blake Decl., ¶ 20, JA 1615. To be sure, some practices were more naked than others, such as initiating ACH transactions that were supposedly authorized in writing using account information that mass-marketers purchased from other fraudsters, without even contacting the

victim. Nevertheless, each practice employed ended in the same result: unauthorized ACH transactions that bilked victims out of hundreds or thousands of dollars each. *See id.* For example, based on his thorough review of the evidence, Plaintiff's expert found

in many instances, victims' bank accounts were debited. . . consistent with the practice known as slamming. . . . [where] the bank account information of a victim [is obtained] either through a prior fraudulent scheme or by purchasing illicit lists of victims with their bank account information and debits the account without any interaction at all with the consumer.

Meyer Decl., at ¶ 10, JA 1635.

Another of Plaintiff's experts also confirmed that the evidence before the district court—particularly the staggeringly high return rates—indicate a pattern of slamming, initiated without any contact with the victims:

Across the board, the return rates at issue in this case are astounding. They are among the highest I have ever seen, even as compared with the many criminal enterprises that I have investigated in my professional capacity over the years. Many are so high that the most plausible explanation is slamming—charging accounts with no contact with the victim. Overall, the rates strongly indicate such complete fraud that the victims could not have known that they would be charged the amounts debited for the products they received.

Blake Decl., ¶ 20, JA 1615; *accord* Boss Decl., at ¶ 82, JA 590 (confirming that “these high rates of return are characteristic of businesses that do the ACH equivalent of ‘phishing’ where they purchase lists of bank account numbers to utilize in the hopes that some of them are ‘good.’”). Indeed, the FBI recognizes

that mass-marketing fraud often involves initiating unauthorized transactions using information purchased from “lead lists” without even contacting the victims.<sup>6</sup> FBI, *Mass-Marketing Fraud*; see Blake Decl. ¶ 20, JA 1615.

**B. Law Enforcement Agencies And Federal Courts Have Concluded That Each Of The Mass-Marketing Operations Allegedly Facilitated By Zions Were Wholly Fraudulent Based Upon Evidence Common To All The Victims.**

The district court denied class certification without discussing any of the prior enforcement actions that previously established the mass-marketing operations were complete shams. As fully detailed in Plaintiff-Appellant’s brief, five of the six frauds were shut down by federal enforcement agencies because they were found to be wholly fraudulent. *See* Pl. Br. at 15-18. The sixth was the subject of a restitution order in an action brought by a consortium of state Attorneys General. *See* Pl. Br. at 17. Moreover, redress was provided on a class-wide basis to every person whose accounts were debited—without any need for individual inquiry—in several prior actions against banks for processing fraudulent payments. *See* Pl. Br. at 15-18.

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<sup>6</sup> “Fraud perpetrators purchase customized ‘lead lists’—sometimes known as ‘sucker lists’ by fraudsters—that contain individuals’ names and contact information compiled according to myriad demographic criteria, from direct marketing companies and leads lists brokers, some of which perform minimal or no verification of the legitimacy of the groups or persons who order the lists.” FBI, *Mass-Marketing Fraud*.

The federal enforcement actions concluded that the frauds at issue were complete shams, as demonstrated through common evidence. For example, as Plaintiff explained, several of the frauds that were shut down, along with hundreds of others, processed payments through Wachovia. *See Faloney v. Wachovia Bank*, No. 07-1455 (E.D. Pa. Jan. 22, 2009). The conclusion that Wachovia was culpable in facilitating the frauds at issue stemmed from systemic failures to manage its risk and failing properly to monitor its third party relationships.

Wachovia admitted that it failed to identify, detect, and report the suspicious transactions in the third-party payment processor accounts, as required by the BSA [Bank Secrecy Act, 31 U.S.C 1051 *et seq.*], due to deficiencies in its anti-money laundering program. Specifically, Wachovia failed to conduct appropriate customer due diligence by delegating most of this responsibility to business units instead of compliance personnel. Wachovia also failed to monitor high return rates for remotely-created checks and report suspicious wire transfer activity from the processors' accounts.

U.S. Att'y's Office (S.D. Fla.), Press Release, *Wachovia Enters Into Deferred Prosecution Agreement* (Mar. 17, 2010), available at <http://www.justice.gov/dea/pubs/pressrel/pr031710.html>. A bank's risk management and third party oversight is evidence common to all class members.

Similarly, evidence common to all the victims showing failure to manage risk and monitor third party payment processors was also at the heart of T Bank's facilitation of fraud. *In the Matter of T Bank, N.A.*, #2010-068, AA-EC 09-103 (Ap. 15, 2010), available at <http://www.occ.gov/newsissuances/news-releases>

/2010/nr-occ-2010-45a.pdf; *see also* Office of the Comptroller of the Currency, Press Release, *OCC, T Bank Enter Agreement to Reimburse Consumers* (Ap. 19, 2010), *available at* <http://www.occ.gov/news-issuances/news-releases/2010/nr-occ-2010-45.html>. The OCC’s formal agreement with T Bank requires the bank to develop and adhere to strict “policies, procedures, and standards for payment processor relationships” before entering into a banking relationship with a payment processor. *Id.* Enforcement action against the First Bank of Delaware also established that it failed to protect against such mass-marketing fraud, a conclusion arrived at by federal prosecutors and the court based upon common evidence applicable to all the victims. *See United States v. First Bank of Delaware*, No. 12-6500 (E.D. Pa. Nov. 19, 2012) Significantly, the T Bank and First Delaware Bank enforcement actions involved several of the very same frauds at issue here, including Low Pay, and Market Power Marketing (operating under the names ZaaZoom Solutions and ZaZaPay). *See id.*; *In re T Bank, N.A.*, AAEC-09-103, at 4; JA 2134; Pl. Br. at 17.

Finally, the court erred in finding that individual differences between telemarketers were sufficient to defeat class certification, because the evidence established that each far exceeded the threshold establishing *prima facie* proof of fraud set by the Federal Reserve Board. *See* Pl. Br., at 24. “[A]n institution that is 10 percent above average should respond more or less the same as an institution

that is 25 percent above average.” *Armantier, et al., A Method for Improving the Benchmarks Used to Monitor ACH Returns*, 9, Fed. Res. Bank of Minn., (Mar. 2010), available at [http://www.Minneapolisfed.org/pubs/bankingpolicy/papers/fpwp\\_10-03\\_ach.pdf](http://www.Minneapolisfed.org/pubs/bankingpolicy/papers/fpwp_10-03_ach.pdf). Indeed, the predominance and commonality requirements for class certification were met in *Wachovia* where the bank was processing fraudulent transactions for approximately 100 mass-marketing frauds. The district court’s conclusion that a class action may not be certified where a bank knowingly facilitates multiple frauds is inconsistent with precedent set in *Wachovia* and should be reversed.

Thus, the district court’s conclusion that common evidence is not available to prove the frauds at issue is clearly belied by the opposite findings of numerous federal courts and law enforcement agencies that shut down the frauds operating in this case. Evidence that banks failed to meet their legal obligations to institute internal monitoring policies designed to prevent such fraud was deemed sufficient on the merits in those cases to hold the banks and payment processors accountable for facilitating such fraud. The district court’s denial of class certification should be reversed because it misapprehends the true nature of and evidence available to prove mass-marketing frauds and bank facilitation thereof.

Following settlement of *Wachovia*, the OCC warned banks that the case sent “an important message to banks about the need for stronger oversight programs for

the inherent risk associated with certain payment relationships[.]” such as with third parties that facilitate access to banks by fraudsters. *Ana R. Cavazos-Wright, An Examination of Remotely Created Checks, Fed. Res. Bank of Atl. (May 2010), available at [http://www.frbatlanta.org/documents/rprf/rprf\\_resources/RPRF\\_wp\\_0510.pdf](http://www.frbatlanta.org/documents/rprf/rprf_resources/RPRF_wp_0510.pdf)*. Regulators widely promoted the publicity about *Wachovia* in order to encourage banks to enhance their systemic risk management procedures to prevent facilitation of mass-marketing fraud. Most banks significantly enhanced their systemic risk management procedures to detect and prevent such fraud as a result of *Wachovia* being held financially accountable to consumers. *See* Cheyenne Hopkins, *Wachovia OCC Order Called Sign of ‘New Era’*, *American Banker*, Ap. 28, 2008, 1:00 am, [http://www.americanbanker.com/issues/173\\_82/-350894-1.html](http://www.americanbanker.com/issues/173_82/-350894-1.html). Zions must also be held accountable because it left the vault door of America’s banking system open by facilitating unauthorized ACH transactions for wholly fraudulent operators.

### **III. In Order To Protect Older And Low Income People, Banks Must Be Held Accountable Through Private Class Actions For Knowingly Processing Fraudulent Transactions**

Private class actions against banks are necessary to protect older and low income people from mass-marketing fraud. Bank accountability is essential because the originating bank

is in effect the “gateway” to the payment system. It is the only player in the ACH system in a position to assess the credibility and

trustworthiness of the Originator that is the source of the entry, and is the one in the best place to prevent fraud and minimize loss.

Boss Decl., ¶ 23, JA 564. The district court's failure to acknowledge the substantial evidence Plaintiff presented to show that Zions knowingly processed fraudulent transactions in this case leaves victims at the mercy of mass-marketing fraudsters. *See* Pl. Br., at 23-33 (discussing evidence of fraud).

Banks are legally required to establish and follow systemic and well-defined risk management policies and procedures to prevent the known risk of fraudsters using third party payment processors to make unauthorized ACH withdrawals from bank accounts. *See* Office of the Comptroller of the Currency, Bulletin 2006-39, ACH Activities (Sept. 1, 2006), *available at* <http://www.occ.gov/news-issuances/bulletins/2006/bulletin-2006-39.html> (providing that, “[b]anks that participate in the ACH network, as well as their service providers, should have in place systems and controls to mitigate the risks associated with ACH activities[,]” including “[a]n effective vendor management program, including a due diligence process for selecting third-party service providers, and an oversight process for monitoring them.”). The OCC guidance provides:

Banks that engage in ACH transactions with high-risk originators or that involve third-party senders face increased reputation, credit, transaction, and compliance risks. High-risk originators include companies engaged in potentially illegal activities or that have an unusually high volume of unauthorized returns. High-risk originators often initiate transactions through third-party senders because they have difficulty establishing a relationship directly with a bank.

*Id.*

Regulators have long recognized the inherent risk of fraud posed by third party relationships. *See e.g.*, Office of the Comptroller of the Currency, Bulletin 2001-47, *Third-Party Relationships: Risk Management Principles*, App. A (Nov. 1, 2001), *available at* <http://www.occ.gov/static/news-issuances/bulletins/rescinded/bulletin-2001-47.pdf> (consolidating into Bulletin 2001-47 a list of previously issued guidance on risk presented by third party processors) (replaced by Office of the Comptroller of the Currency, Bulletin 2013-29, *Risk Management Guidance* (Oct. 30, 2013), *available at* <http://www.occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html>). “Many of the merchants that use third-party processors do so because they could not pass the standard [K]now [Y]our [C]ustomer procedure if they approached [a] financial institution directly. Like cockroaches, these merchants cannot withstand the light of scrutiny.” George F. Thomas, *Not Your Father’s ACH*, ICBA Indep. Banker (July 2007), *available at* <http://www.radixconsulting.com/icbaarticle.pdf>).

*Wachovia* demonstrates clearly that private class actions to hold banks accountable for facilitating mass-marketing fraud protects victims that otherwise would not obtain relief and enhances enforcement by regulators. For example, Plaintiff’s intervention in *Wachovia* resulted in significantly improved relief over that initially proposed by the OCC. *Compare* Office of the Comptroller of the

Currency, Press Release, *OCC Directs Wachovia to Make Restitution to Consumers Harmed by the Bank's Relationships with Telemarketers and Payment Processors* (Ap. 25, 2008), available at <http://www.occ.gov/news-issuances/news-releases/2008/nr-occ-2008-48.html> (announcing Wachovia directed to establish claims process to reimburse consumers bilked by mass-marketers of approximately \$125 million) with Office of the Comptroller of the Currency, Press Release, *OCC, Wachovia Enter Revised Agreement to Reimburse Consumers Directly* (Dec. 11, 2008), available at <http://www.occ.gov/news-issuances/news-releases/2008/nr-occ-2008-143.html> (revising order to ensure all consumers whose accounts were debited by mass-marketing frauds are fully reimbursed). Following the conclusion of *Wachovia*, the OCC further enhanced the requirements on banks to prevent enhanced risk posed by third party payment processors based upon common evidence strongly indicative of fraud. See Office of the Comptroller of the Currency, Bulletin 2008-12, *Risk Management Guidance* (April 24, 2008), available at <http://www.occ.treas.gov/ftp/bulletin/2008-12.html>. The bulletin specifically addressed the need for enhanced risk management practices for the processing of payments for telemarketers and other merchants, which pose a unique risk not present in relationships with other commercial consumers and that require additional due diligence and close monitoring.

Private class actions also spur additional enforcement actions. The public disclosures relating to Zions in the district court prompted the United States Department of Justice to begin investigating Zion’s payment processing practices “connected to the Reyes [class action litigation].” Zions Bancorporation, *Securities and Exchange Commission Annual Report, Form 10-K*, 157 (Dec. 31, 2012), available at <http://www.snl.com/irweblinkx/file.aspx?IID=100501&FID=16165091&O=3&OSID=9> (noting investigation of subsidiary Zions Bank conducted by the U.S. Attorney for the Eastern District of PA).

#### **IV. The District Court Applied A Standard For Class Certification That Will Make It Virtually Impossible To Protect Vulnerable Older And Low Income People From Mass-Marketing Fraud.**

The Supreme Court has long recognized that class actions serve the pressing need to protect people who otherwise would have no means to obtain relief:

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government ... [resulting in] increasing reliance on the “private attorney general” for the vindication of legal rights [via class actions].

*Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 338-339 (1980). Indeed, “most of the plaintiffs would have no realistic day in court if a class action were not available.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

Lawmakers and courts embrace class actions to enforce important rights because they recognize that class actions are essential to provide meaningful

protection without burdening taxpayers with the expense of enforcement. “Economic reality dictates that [a plaintiff’s] suit proceed as a class action or not at all.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

Class actions also overcome significant barriers that older and low income people face in protecting themselves from fraud. For example, as discussed above, many mass-marketing fraud victims never report to any enforcement agency and often deny being a victim. Clearly, people who do not even report fraud are unlikely to seek a legal remedy in court to recover their individual damages. Older people — particularly—those who are ill or have cognitive or physical disabilities -- are even less likely to recognize or challenge a fraudulent transaction through their bank to pursue a legal remedy.

Even those few who are willing to report a fraud are unlikely to seek an individual legal remedy because the financial and emotional cost to do so quickly overwhelms any possible remedy. In some cases, fraud losses amount to several thousand dollars, which is a significant amount of money, especially to a typical older or low income person. Even so, it is highly unlikely that individuals will ever recover their damages in an individual action. It is futile to seek monetary relief from the actual fraudsters: even the United States is often unable to reach hidden assets derived from fraud. The only means for victims to obtain relief is through a sophisticated aggregate action brought by attorneys with the expertise

and resources to pursue a case against a national bank as the facilitator of multiple frauds. The cost to hold a national bank accountable for facilitating fraud requires considerable legal resources and skill, which far exceeds what any individual could hope to recover in damages. As Judge Posner aptly observed, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

The class certification standard applied by the district court to challenge a bank’s facilitation of mass-marketing fraud will make it virtually impossible to bring private class actions to protect older, low income, and other consumers. It will signal a green light for banks to ignore their obligation to protect against illegal practices of third parties that systemically erode the financial security of society’s most vulnerable people. As *Wachovia* demonstrated, only robust enforcement, which is critically enhanced by private class actions to hold banks accountable, will serve to prevent and remedy mass-marketing fraud.

As the Supreme Court implicitly recognized in *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. at 338-339, the value of a private class action challenging a bank’s facilitation of mass-marketing fraud is that it protects even those consumers who are least able to protect themselves and would never seek relief on their own behalf, even by informal means. As argued above, many consumers may not

complain when they have been defrauded, often believing erroneously that complaining will not provide them any relief. Older people in particular may fear that reporting fraud will result in them losing control over their finances and an end to their independence. Such reticence makes them particularly vulnerable to financial loss and repeat victimization. Others, such as older people with cognitive impairment, may simply not be able to recognize a fraudulent transaction or be too embarrassed to admit it. Even if they report a fraud directly to their bank, people often don't report that they are victims of fraud to government agencies, or even family members and friends. Bank accountability for facilitating fraud is essential because even those who have not responded to mass-marketing may be included on "sucker lists." Fraud victims need greater protection to prevent and remedy ACH fraud, making private class actions essential.

### CONCLUSION

Amici respectfully urge this Court to reverse the order denying class certification and to remand the case for further proceedings on the merits.

April 21, 2014

Counsel for Amici Curiae

Respectfully Submitted,

/s/Julie Nepveu

Julie Nepveu

AARP Foundation Litigation

601 E Street, NW

Washington, DC 20049

Tel. (202) 434-2060

Fax: (202) 434-6424

[jnepveu@aarp.org](mailto:jnepveu@aarp.org)

**CERTIFICATE OF IDENTICAL COMPLIANCE AND VIRUS CHECK**

I, Jacqueline Crawford, hereby certify that the foregoing brief amici curiae of AARP, Consumer Federation of America, National Association of Consumer Advocates, and National Consumer Law Center electronically filed in PDF with this Court is identical to the brief amici curiae served with this Court in paper format, has been virus checked with the program Symantec Anti-Virus Endpoint Protection, ed. 2011.

Dated: April 21, 2014

/s/Jacqueline Crawford  
Jacqueline Crawford

**CERTIFICATE OF BAR MEMBERSHIP**

I, Julie Nepveu, hereby certify that I am admitted to practice before the United States Court of Appeals for the Third Circuit and that I am currently a member in good standing.

Dated: April 21, 2014

/s/ Julie Nepveu  
Julie Nepveu

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6715 of words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements to Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman using Microsoft Word 2010 in font size 14.

Dated: April 21, 2014

/s/ Julie Nepveu  
Julie Nepveu

## CERTIFICATE OF SERVICE

I hereby certify that this 21st day of April, 2014, I served through the ECF system the Brief Amici Curiae of AARP, Consumer Federation of America, National Association of Consumer Advocates, and National Consumer Law Center In Support of Plaintiff-Appellant. Seven hard copies of this brief will be delivered to the Court's office within five days of electronically filing.

Howard I. Langer  
John J. Grogan  
Edward Diver  
Irv Ackelsberg  
Peter Leckman  
Langer, Grogan & Diver, PC  
*Attorneys for Petitioner-Plaintiff*

Grant S. Palmer  
Jason A. Snyderman  
Blank Rome LLP  
One Logan Square  
Attorneys for Defendants Zions First  
National Bank, NetDeposit, LLC, and MP  
*Attorneys for Defendants/Respondents  
Technologies d/b/a Modern Payments*

Dated: April 21, 2014

/s/Julie Nepveu  
Julie Nepveu