No. 25-80

IN THE

Supreme Court of the United States

STUDCO BUILDING SYSTEMS US, LLC,

Petitioner,

v.

1ST ADVANTAGE FEDERAL CREDIT UNION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court should grant review under Supreme Court Rule 10(a) because the Fourth Circuit both: (1) entered a decision in conflict with the Eleventh Circuit (and several district courts) on an important matter, Pet. 17-21, and (2) "far departed from the accepted and usual course of judicial proceedings" by considering waived arguments, failing to remand to the district court, and making its own factual findings, Pet. 21-27.

1st Advantage concedes that this Court's interpretation of UCC § 4A-207 is a matter of national importance. By its own measure, the decisions of the Eleventh Circuit (and several district courts) – which conflict with the Fourth Circuit's decision below – will "threaten grave harm to the national financial system," Opp. i, and will "quickly bring the economy to a screeching halt," Opp. 6. Although 1st Advantage attempts to downplay the Eleventh Circuit's conflicting decisions, it concedes that those decisions conflict with the Fourth Circuit. *See* Argument § I, *infra*.

1st Advantage's Opposition also highlights how far the Fourth Circuit "departed from the accepted and usual course of judicial proceedings," S. Ct. R. 10(a), in direct contravention of this Court's well-established precedent.

First, 1st Advantage concedes that this Court's precedent requires appellate courts to remand when it finds that a district court applied the wrong legal standard. Pet. 21-23; *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982). The district court below held

that UCC § 4A-207's actual knowledge standard allowed it to impute 1st Advantage with *actual knowledge* under UCC § 1-202(f)'s due diligence standard. The Fourth Circuit expressly acknowledged that the district court applied an actual knowledge standard, but held that the district court applied that standard incorrectly:

> "It was . . . error for the district court to construe 'actual knowledge' to mean knowledge that could have been obtained with 'due diligence.'"

App. 20(a). This falls squarely within *Pullman-Standard*.

1st Advantage's argument that the district court considered the Fourth Circuit's actual knowledge formula is flatly incorrect. Opp. 4. The district court never considered the facts under the Fourth Circuit's actual knowledge formula because it was applying a different legal test for actual knowledge. App. 68a-70a; 74a-77a. The Fourth Circuit's refusal to remand to allow the district court to apply the correct standard was a "far depart[ure] from the accepted and usual course of judicial proceedings." S. Ct. R. 10(a). *See* Argument § II, *infra*.

Second, 1st Advantage concedes that arguments not raised in the district court are ordinarily waived under this Court's precedent. Pet. 23-25; *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008). 1st Advantage concedes that it never raised privity: (a) as an affirmative defense, (b) in its Rule 12 motion to dismiss, (c) in its motion for summary judgment, (d) during trial, or (e) in its opening appellate brief. It

points to no instance where it mentioned "privity" or UCC § 4A-402 (the provision that purportedly imposes the privity rule).

And, if 1st Advantage actually believed that the district court had failed to consider an articulated privity argument, it would have raised that argument in its opening appellate brief in the Fourth Circuit. It was glaringly absent from its opening appellate brief because 1st Advantage never raised privity before the district court.

1st Advantage provides no reason to depart from the "ordinary rule" that it waived any argument that it failed to make in the district court. The Fourth Circuit's consideration of 1st Advantage's waived privity argument was "a far depart[ure] from the accepted and usual course of judicial proceedings." S. Ct. R. 10(a). *See* Argument § III, *infra*.

Last, how or why Studco's stolen funds arrived in the fraudulent account at 1st Advantage are entirely irrelevant to the § 4A-207 claim. Opp. 1-3. The only thing that matters is what 1st Advantage "knew" when it allowed its customer to steal Studco's money. The Fourth Circuit's "findings" about the emails that defrauded Studco (made with judicial hindsight) were both improper and unsupported by the factual record.

This Court should grant Studco's petition and grant summary reversal.

ARGUMENT

I. 1st Advantage concedes that a circuit split exists and that this Court's interpretation of UCC § 4A-207 is a matter of national importance.

1st Advantage's concedes that the Eleventh Circuit's decisions in *Julio J. Valdes, M.D., P.A. v. Customers Bank*, Inc., 830 F. App'x 598 (11th Cir. 2020) and *Peter E. Shapiro, P.A. v. Wells Fargo Bank N.A.*, 795 F. App'x 741 (11th Cir. 2019) conflict with the Fourth Circuit's decision below. Opp. 8-11. District courts regularly rely on these decisions despite 1st Advantage's attempt to characterize them as "non-precedential" and "dicta." Opp. 8-9. *See* § I(A), *infra*.

1st Advantage also demonstrates that this is an issue of national importance. By its own measure, *Julio J. Valdes, M.D., P.A.* and *Peter E. Shapiro, P.A.* "threaten grave harm to the national financial system." Opp. i. Resolving the conflict regarding UCC § 4A-207's "knowledge" and "privity" requirements is essential to maintaining consistency under UCC Article 4A's uniform scheme and the integrity of the national financial system. *See* § I(B), *infra*.

A. 1st Advantage concedes the circuit split.

1st Advantage concedes that the Eleventh Circuit's decisions in *Julio J. Valdes, M.D., P.A.* and *Peter E. Shapiro, P.A.* both applied UCC § 1-202(f)'s "due diligence" standard for determining when a bank has "actual" knowledge. Opp. 8-11; *see Julio J. Valdes,*

M.D., P.A., 830 Fed. Appx. at 600–01; *Peter E. Shapiro, P.A.*, 795 Fed. Appx. at 746-47.

1st Advantage argues that a conflict does not exist because the Eleventh Circuit published these decisions under 11th Cir. Rule 36-2. Opp. 8-9. But as 1st Advantage acknowledges, Rule 36-2 expressly allows these decisions to be "cited as persuasive authority." District Courts regularly cite to these cases. Studco located twenty-eight cases that cite either *Julio J. Valdes, M.D., P.A.* or *Peter E. Shapiro, P.A. See e.g., Kelley & Grant, P.A. v. JPmorgan Chase Bank, N.A.*, No. 23-CV-80749, 2023 WL 11899127, at *3 (S.D. Fla. Oct. 10, 2023) ("just like in [*Peter E. Shapiro, P.A.*], there may be no reasonable dispute that the Defendant did not deviate from the reasonable routines it has in place for identifying a mismatched beneficiary and account number on a wire transfer").

1st Advantage does not cite a single case (and Studco did not find any) in which a district court declined to follow *Julio J. Valdes, M.D., P.A.* or *Peter E. Shapiro, P.A.* solely because the case was published under 11th Cir. Rule 36-2. *See* Opp. 8-11. Thus, as a practical matter, publication under Rule 36-2 has not constrained district courts' reliance on those cases.

And *Julio J. Valdes, M.D., P.A.* and *Peter E. Shapiro, P.A.* both hold that UCC § 4A-207 allows courts to impute an organization with actual knowledge under UCC § 1-202(f)'s organizational knowledge standard. *See Julio J. Valdes, M.D., P.A.*, 830 Fed. Appx. at 600–01 (affirming district court's dismissal of Florida UCC § 4A-207 claim because plaintiff failed to allege "facts to establish that

Customers Bank failed to exercise due diligence" (citing Florida's UCC § 1-202(f)) (emphasis added)); *Peter E. Shapiro, P.A.*, 795 Fed. Appx. at 746-47 ("the proper resolution of this [§ 4A-207 claim] depends on (1) whether an individual person had actual knowledge . . . , or (2) even if no individual person had actual knowledge of the name mismatch, whether [the beneficiary bank]'s failure to communicate information from its automated audit trail regarding a potential name mismatch to an individual person means it failed to exercise due diligence and thus should be deemed to have knowledge of the mismatch") (applying Florida law) (emphasis added).

Also, the Eleventh Circuit's articulation of UCC § 4A-207's "actual knowledge" standard was not dicta. The Eleventh Circuit directly applied its standard in both cases and held that the plaintiffs had failed to meet it. *Julio J. Valdes, M.D., P.A.*, 830 Fed. Appx. at 600 ("Valdes also alleged no facts to establish that Customers Bank failed to exercise due diligence"); *Peter E. Shapiro, P.A.*, 795 Fed. Appx. at 745 (plaintiff failed to create a "genuine issue of material fact as to Wells Fargo's failure to exercise due diligence in processing the Shapiro wire"). In both cases, the Eleventh Circuit held that the plaintiff could not plead a lack of due diligence solely by alleging that the bank should have manually reviewed automated payments for discrepancies, because the statute expressly allows banks to rely on "automated payment system[s]" that "ignore a potential name mismatch." *Peter E. Shapiro, P.A.*, 795 Fed. Appx. at 748; *Julio J. Valdes, M.D., P.A.*, 830 Fed. Appx. at 601.

But as Studco's petition demonstrates, Studco did not rely solely on 1st Advantage's failure to manually review automated payments to establish its lack of due diligence. Pet. 10-15. Rather, Studco demonstrated at trial that 1st Advantage had ample information to identify the Studco's incoming transfer as misdirected though: (a) at least twelve highly suspicious in person interactions, (b) at least thirty-three reviews of the fraudulent account (including as part of an "ongoing investigation" by the director of compliance), and (c) alerts generated by two separate computer systems. Pet. 12. 1st Advantage obtained this knowledge before, during, and after it made Studco's misdirected transfers available to the fraudsters. And for each subsequent misdirected transfer, 1st Advantage had all of its accumulated knowledge from its prior interactions with the fraudster and the fraudulent account.

This evidence satisfies the "actual knowledge" standard articulated in *Julio J. Valdes, M.D., P.A.* and *Peter E. Shapiro, P.A.* Consistent with those decisions, the district court held that there was ample evidence to establish that 1st Advantage would have had knowledge of the misdescription if it had exercised due diligence in communicating this information to the appropriate bank personnel under UCC § 1-202(f)'s due diligence standard.[1]

A circuit split exists between the Eleventh and Fourth Circuit.

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[1] These facts are also sufficient circumstantial evidence to support an inference of actual knowledge under the Fourth Circuit's standard. *See* Pet. 21-13.

B. 1st Advantage's arguments demonstrate the national importance of this Court's interpretation of UCC § 4A-207.

1st Advantage highlights the national importance of this issue. "The Clearing House clears and settles more than $2 trillion in payments every business day." Opp. 6. By 1st Advantage's own measure, the Eleventh Circuit's conflicting decisions "threaten grave harm to the national financial system." Opp. i.

Although 1st Advantage attempts to characterize this as an issue of "state law," it does not dispute that every U.S. jurisdiction has codified UCC Article 4A and courts regularly hold that UCC provisions should be "interpreted consistently with [identical UCC provisions in] other jurisdictions." *Land O'Lakes Purina Feed LLC v. Jaeger*, 976 F. Supp. 2d 1073, 1076 (S.D. Iowa 2013).

As stated in Studco's petition, the magnitude of electronic funds and the exponential rise of internet fraud underscores the urgent need for clarity and consistency in the law governing such transactions. Pet. 27-29.

II. 1st Advantage concedes that this Court's precedent requires appellate courts to remand when a district court applies the wrong standard.

1st Advantage cites to the portion of the Fourth Circuit's decision in which the Fourth Circuit's acknowledged that the district court applied an actual knowledge standard but held that the district court erred by "construe[ing] 'actual knowledge' to mean knowledge that could have been obtained with 'due diligence.'" App. 19a-20a.

1st Advantage's sole argument is that the district court's absence of findings under the Fourth Circuit's standard demonstrates a lack of supporting facts. Opp. 4. But as the Fourth Circuit acknowledged, the district court applied a different legal standard for actual knowledge, and made factual findings only as necessary under that standard. As explained in Studco's petition and acknowledged by Judge Wynn, the trial record contains evidence from which "a factfinder could infer that [1st Advantage's investigation] led to a 1st Advantage employee obtaining actual knowledge of a misdescription." App. 26a; Pet. 21-23.

Even if this Court agrees with the actual knowledge standard articulated by the Fourth Circuit, this Court should still find that the Fourth Circuit "far departed from the accepted and usual course of judicial proceedings," S. Ct. R. 10(a), by refusing to "remand for further proceedings to permit the trial court to make the missing findings[.]" *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982)

(citing *DeMarco v. United States*, 415 U.S. 449, 450, n.1 (1974))

III. 1st Advantage concedes that under this Court's precedent it waived arguments not made in the district court.

1st Advantage does not point to a single instance in which it succinctly made a privity argument in the district court (and it concedes the argument was not in its opening appellate brief). Opp. 12-15.

Despite its claim that it "repeatedly" raised privity in the district court, Opp. 13, 1st Advantage does not point to a single mention of "privity" or UCC § 4A-402 in any motion, pleading, or the trial transcript. Rather, 1st Advantage desperately clings to a single paragraph in its post-trial proposed findings of fact and law ('proposed findings") in which it copy-and-pasted UCC § 4A-207(d)'s statutory language and made a vague conclusory argument that Studco cannot "recover from 1st Advantage." Opp. 14.

But this vague argument that Studco "cannot recover" stands in stark contrast to every other defense 1st Advantage asserted in its proposed findings. 1st Advantage succinctly raised those defenses with supporting legal argument. *See* Joint Appendix, *Studco Bldg. Sys. US, LLC v. 1st Advantage Fed. Credit Union*, No. 23-1148 (4th Cir. Oct. 10, 2023), ECF No. 20, at JA487-512 (1st Advantage's Proposed Findings).

Because 1st Advantage did not raise privity in its proposed findings, the district court's trial memorandum opinion and order does not

acknowledge a privity argument. App. 38(a). This, again, is in stark contrast with 1st Advantage's *articulated* defenses. The district court discussed and rejected those arguments. *See* App. 80a-81a (addressing and rejecting contributory negligence argument). And of course, if the district court had failed to consider one of 1st Advantage's legal arguments, it would have raised that argument in its opening appellate brief. 1st Advantage's opening appellate brief did not raise privity because it never made a privity argument to the district court.

1st Advantage concedes that this Court has established time and time again that an "appellate court [should] not give consideration to issues not raised [in the district court]." *Pet. 23-26 (citing Hormel v. Helvering*, 312 U.S. 552, 556 (1941). *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); (following *Hormel*); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (following *Singleton*)). The Fourth Circuit has "far departed from the accepted and usual course of judicial proceedings," S. Ct. R. 10(a), by failing to follow this Court's precedent.

CONCLUSION

The Court should grant the petition. Petitioner requests summary reversal.

Respectfully submitted.

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