No. 14-20128

In the United States Court of Appeals for the Fifth Circuit

JUAN RAMON TORRES; EUGENE ROBISON,

Plaintiffs-Appellees,

v.

SGE MANAGEMENT, LLC; STREAM GAS & ELECTRIC, LTD.; STREAM SPE. GP, LLC; STREAM SPE, LTD; IGNITE HOLDINGS, LTD; ET AL.,

Defendants-Appellants.

On Petition for Review from the United States District Court for the Southern District of Texas, Houston Division, Case No. 4:09-CV-02056

RESPONSE TO THE PETITION FOR REHEARING EN BANC

Michael K. Hurst
John F. Guild
GRUBER HURST JOHANSEN HAIL SHANK LLP
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202
Telephone: (214) 855-6800
Facsimile: (214) 855-6808

James C. Ho
Robert C. Walters
Prerak Shah
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2934

Vanessa J. Rush
STREAM ENERGY
1950 Stemmons Freeway, Suite 3000
Dallas, TX 75207
Telephone: (214) 800-4464
Facsimile: (214) 560-1354

COUNSEL FOR APPELLANTS

TABLE OF CONTENTS

Table of Authorities iii

Introduction 1

Argument 4

I. There Is No Circuit Split. 5

II. Plaintiffs' Policy Arguments Are Both Wrong And Irrelevant. 9

III. Stream Energy Is Not An Illegal Pyramid Scheme. 13

Conclusion 15

Certificate of Service 17

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Express Co. v. Italian Colors Rest.,
133 S. Ct. 2304 (2013).....10

AT&T Mobility v. Concepcion,
563 U.S. 333, 350 (2011).....12

Bolin v. Sears, Roebuck & Co.,
231 F.3d 970 (5th Cir. 2000) 2

Bridgewater v. Double Diamond-Del., Inc.,
2011 WL 1671021 (N.D. Tex. Apr. 29, 2011) 2

Castano v. Am.Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 1, 12

CGC Holding Co. v. Broad & Cassel,
773 F.3d 1076 (10th Cir. 2014) 5, 9

Corley v. Orangefield Indep. Sch. Dist.,
152 F. App'x 350 (5th Cir. 2005) 1

David v. Signal Int'l, LLC,
2012 WL 10759668 (E.D. La. Jan. 4, 2012) 2

FTC v. Skybiz.com,
2001 U.S. Dist. LEXIS 26175 (N.D. Okla. Aug. 31, 2001).....14

Haley v. Merial, Ltd.,
292 F.R.D. 339 (N.D. Miss. 2013) 2

In re Amway Corp.,
93 F.T.C. 618 (1979) 15

In re Koscot Interplanetary, Inc.,
86 F.T.C. 1106 (1975) 14

In re U.S. Foodservice Inc. Pricing Litig.,
729 F.3d 108 (2d Cir. 2010) 7

Klay v. Humana,
382 F.3d 1241 (11th Cir. 2004) 7

TABLE OF AUTHORITIES *(continued)*

Page(s)

Ladd v. Equicredit Corp. of Am.,
2001 WL 1033618 (E.D. La. Sept. 7, 2001).....2

McManus v. Fleetwood Enters.,
320 F.3d 545 (5th Cir. 2003) 1

Patterson v. Mobil Oil Corp.,
241 F.3d 417 (5th Cir. 2001) 2

Perrone v. Gen. Motors Acceptance Corp.,
232 F.3d 433 (5th Cir. 2000) 1

Piggly Wiggly Clarksville v. Interstate Brands Corp.,
100 F. App'x 296 (5th Cir. 2004).....1

Reyes v. Netdeposit, LLC,
802 F.3d 469 (3d Cir. 2015) 8

Richard v. Hoechst Celanese Chem. Group, Inc.,
208 F.R.D. 575 (E.D. Tex. 2002) 2

Rikos v. Procter & Gamble,
799 F.3d 497 (6th Cir. 2015) 8

Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.,
319 F.3d 205 (5th Cir. 2003) 2

Stull v. YTB Int'l, Inc.,
2011 U.S. Dist. LEXIS 109376 (S.D. Ill. Sept. 26, 2011).....14

Unger v. Amedisys,
401 F.3d 316 (5th Cir. 2005) 1

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011).....10

Warnock v. State Farm Mut. Auto Ins. Co.,
2011 WL 1113475 (S.D. Miss. Mar. 24, 2011).....2

Treatises

RESTATEMENT (SECOND) OF TORTS § 548 (1977).....12

INTRODUCTION

This is a doctrinally simple case. Plaintiffs are suing Defendants for RICO fraud. An essential element of RICO fraud is causation—and, in this case, Plaintiffs are trying to prove causation through first-party reliance on a misrepresentation. In other words, Plaintiffs allege that every single class member—over 150,000 people—each individually relied on a misrepresentation by Stream Energy that caused them harm.

In the typical RICO fraud case, first-party reliance is an individualized issue, not a common issue, because it concerns each plaintiff's subjective state of mind. After all, the usual way to determine what a plaintiff knew or what he relied on is to actually ask that plaintiff what he knew and what he relied on. Thus, those cases are almost always denied class certification. *See*, *e.g.*, *Castano v. Am.Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.").[1] Indeed, not a single district court anywhere in this circuit had certified a RICO fraud class action for trial since this Court's

[1] *See also Unger v. Amedisys*, 401 F.3d 316, 321 (5th Cir. 2005) ("If the circumstances surrounding each plaintiff's alleged reliance on fraudulent representations differ, then reliance is an issue that will have to be proven by each plaintiff, and the proposed class fails Rule 23(b)(3)'s predominance requirement."); *Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App'x 350, 355 (5th Cir. 2005) (denying certification because of individual issues relating to causation under RICO); *Piggly Wiggly Clarksville v. Interstate Brands Corp.*, 100 F. App'x 296, 301 (5th Cir. 2004) (class certification denied in part because fraudulent concealment claims required individualized determinations as to each class member's knowledge); *McManus v. Fleetwood Enters.*, 320 F.3d 545, 550 (5th Cir. 2003) (decertifying class because "[r]eliance will vary from plaintiff to plaintiff"); *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 440 (5th Cir. 2000) (claims requiring reliance could not be certified).

seminal opinions in *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000), *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. 2001), and *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003)—until the district court in this case did so.[2]

To be sure, there are rare circumstances where reliance can be a common issue for the entire class. In those unusual cases, all the class members receive a common misrepresentation, they respond by taking precisely the same action, and that common response can support a classwide inference of reliance—because

[2] *See, e.g.*, *Haley v. Merial, Ltd.*, 292 F.R.D. 339, 359 (N.D. Miss. 2013) (denying certification for RICO fraud action because "individualized issues concerning causation . . . predominate over any common issues"); *David v. Signal Int'l, LLC*, 2012 WL 10759668, at *30 (E.D. La. Jan. 4, 2012) (denying class certification in RICO fraud action, noting that "the fact that Plaintiffs can identify one narrow aspect of fraud and prove that someone relied upon it, does not strip the question of RICO causation in this case of its individual nature"); *Bridgewater v. Double Diamond-Del., Inc.*, 2011 WL 1671021, at *12 (N.D. Tex. Apr. 29, 2011) (denying class certification in RICO action alleging fraudulent fee assessment, rejecting argument that "homeowners' payment of their assessments shows that they relied on the truthfulness of the invoices setting forth the assessments," because "such theory does not obviate the need to show the individual class members' reliance"); *Warnock v. State Farm Mut. Auto Ins. Co.*, 2011 WL 1113475, at *4, *6 (S.D. Miss. Mar. 24, 2011) ("The Fifth Circuit has consistently declined to certify RICO class actions predicated on mail and wire fraud because individual issues of causation (which generally take the form of reliance in a RICO fraud claim) predominate over common issues. . . . [T]o try a class action in this case would require individualized proof of reliance which dooms class certification under longstanding Fifth Circuit precedent."); *Richard v. Hoechst Celanese Chem. Group, Inc.*, 208 F.R.D. 575, 584 (E.D. Tex. 2002) (denying class certification in RICO fraud action, noting that "*Patterson* and *Bolin* demonstrate the difficulty, if not the impossibility, of certifying a class for settlement purposes in the instant case"); *Ladd v. Equicredit Corp. of Am.*, 2001 WL 1033618, at *5 (E.D. La. Sept. 7, 2001) (Clement, C.J.) (denying certification in RICO action against mortgage lender accused of fraudulently charging fees for services never rendered, rejecting invitation to "presume that each putative class member was injured by [defendant's] alleged fraud," because "each plaintiff must establish a causal connection between the fraud and the injury").

reliance on the misrepresentation is the only possible explanation for the class members' decision.

In this case, the common misrepresentation alleged by Plaintiffs is that Stream Energy lied by claiming to be a legitimate business, when it was in fact an illegal pyramid scheme. Thus, to certify this class, Plaintiffs must prove that the *only* explanation for the decisions by 150,000 people to become Stream Energy Independent Associates is reliance on the belief that it is not an illegal pyramid scheme. But if class members could have decided to become IAs regardless of that alleged misrepresentation, then reliance on the alleged misrepresentation is *not* the only possible explanation for their decisions to become IAs—and the classwide inference of reliance fails, rendering certification inappropriate.

That is precisely the case here. It was utterly rational for someone to become an IA, regardless of whether they thought Stream Energy was an illegal pyramid scheme, for one simple reason: becoming an IA provided them with an opportunity to profit. Indeed, it is unrebutted that *tens of thousands* of IAs who joined Stream Energy *during the class period* actually made a profit. This is fatal to class certification. Because rational people would join Stream Energy, regardless of the alleged misrepresentation in this case, common evidence cannot prove reliance for the entire class.

Thus, the panel correctly applied the law and decertified the class.

ARGUMENT

Plaintiffs believe *en banc* rehearing is warranted for two reasons, neither of which has merit. First, they claim there is a circuit split. But this is wrong. The majority faithfully applied the same test every other circuit has applied.

Second, Plaintiffs claim that policy considerations warrant certification of the class. Specifically, they argue that if the opinion stands, pyramid schemes will go unchecked. But that is both incorrect and irrelevant. It is incorrect not only because Stream Energy is plainly not an illegal pyramid scheme, but also because the ruling in this case will not prevent *actual* pyramid schemes from suffering legal consequences. Class actions could still be maintained by plaintiffs who truly could not profit from joining a pyramid scheme, and enforcement by government agencies will still prevent illegal pyramid schemes from going unpunished.

Indeed, not only would there be no harm to decertifying this class, there would be grave harm to countless legitimate businesses if the class is certified. If plaintiffs will now be allowed to certify a class action simply by alleging that a company is an illegal pyramid scheme, no multilevel marketing company—including Amway, Mary Kay, Tupperware, Avon, and many more stalwarts of American business—will be safe. That is why a broad coalition of amici—including the U.S. Chamber of Commerce—joined Stream Energy in seeking to reverse the district court's certification of this class.

I. There Is No Circuit Split.

Plaintiffs first claim that *en banc* rehearing is necessary because there is a split between the circuits on the question of certifying fraud class actions. But this is incorrect. There is no circuit split involving any issue in this case; the panel correctly applied the same test that every other court has applied.

Consider, for example, *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014), the case that Plaintiffs themselves highlight as their best case for a split. But even a cursory reading of *CGC* reveals that there is no split at all. Both *CGC* and the panel majority faithfully applied the exact same test.

The *CGC* court held that class certification should be denied unless "'the behavior of plaintiffs and the members of the *class cannot be explained in any way other than reliance* upon the defendant's conduct.'" *Id.* at 1090 (citation omitted, emphasis added). Put simply, the court said that the plaintiffs must show that "no rational economic actor" would knowingly choose to participate, absent fraud. *Id.* at 1081. And that is precisely the test applied by the majority here.

To be sure, the results in the two cases are different. But that is because the facts in the two cases are very different. In *CGC*, the plaintiffs paid for loans that the defendants could not provide. Understandably, the court concluded that "no rational economic actor would enter into a loan commitment agreement with a party they knew could not or would not fund the loans." *Id.* There was literally no

chance of receiving the loan that the customers paid for. The *CGC* court reasonably concluded that it would be irrational to pay money when one is guaranteed to receive nothing in return—so the court correctly concluded that it could be inferred that all class members relied on the misrepresentation that they would receive something in return for the money they were paying.

Here, by contrast, as the majority held, a rational actor could knowingly become an IA *regardless* of whether the person suspected Stream Energy was an illegal pyramid scheme, for any number of reasons, most significantly because it provides a real opportunity to make a profit. Indeed, *tens of thousands* of people who became IAs *during the same period as this class* made a profit. It is eminently rational for individuals to agree to join a program where they thought they could make money, regardless of whether the program was a pyramid scheme. Indeed, the district court itself recognized elsewhere in its opinion that an "especially entrepreneurial class member [could] read the allegedly fraudulent claims about how easy it was to make money, maintain[] a healthy degree of skepticism regarding those claims, but bec[ome] IAs nonetheless because they believed they (though not necessarily everyone else) would make a significant amount of money." ROA.2265.

Therefore, a court cannot simply assume that the only reason someone would become an IA is reliance on an alleged misrepresentation that Stream

Energy is not an illegal pyramid scheme. Thus, *CGC* and this case are wholly consistent. And the same is true for the other cases cited by Plaintiffs.

In *Klay v. Humana*, 382 F.3d 1241 (11th Cir. 2004), the Eleventh Circuit also applied the same test as the majority here: "while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue)." 382 F.3d at 1259. The class was certified under that test, because the court correctly concluded that "guarantees concerning physician pay—the very consideration upon which those agreements are based—go to the heart of these agreements, and that doctors based their assent upon them." In other words, the court concluded that no rational person would enter into a contract to do work for a specific amount of money if they knew that specific amount of money was not forthcoming.

Similarly, in *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2010), the court said that "[c]ertification is inappropriate where 'reliance is too individualized to admit of common proof'"—and certified the class because of "the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed." 729 F.3d at 119-20. Basically, absent any other information, the court correctly concluded that people who pay the amount listed on an invoice are relying on that amount being accurate.

It should be no surprise, then, that the panel majority in this case explicitly acknowledged and distinguished each of these cases:

> [T]he Plaintiffs' cases also fail to support class certification on the basis of an inference of reliance . . . *Klay*, *Foodservice*, and *CGC* all involved fraudulent schemes in which the plaintiff victims had no hope of recovering their investments. The courts could not point to any evidence that might provide an alternative explanation for the plaintiffs' conduct other than that they relied on a misrepresentation that they might profit. By contrast, an investor could reasonably choose to knowingly invest in a pyramid scheme in the hope that they would make money.

Op. 22-23. The panel here applied the same law as other circuits, but distinguished this case on the facts, based on the presence of other reasonable explanations for the plaintiffs' conduct—primarily, the opportunity to make a profit. *See also* Op. 20 ("[T]he class cannot be certified under . . . the precedents cited by the Plaintiffs because individualized issues of reliance and knowledge will be relevant to each Plaintiff's case.").[3]

In sum, there is plainly no circuit split. Every case cited by Plaintiffs agrees with the panel opinion: A class can only be certified if "'the behavior of plaintiffs

[3] Plaintiffs also cite, but do not discuss, *Reyes v. Netdeposit, LLC*, 802 F.3d 469 (3d Cir. 2015), and *Rikos v. Procter & Gamble*, 799 F.3d 497 (6th Cir. 2015). Neither helps Plaintiffs. *Rikos* concerned misrepresentations regarding a medication that was supposed to promote digestive health, but actually did no such thing. 799 F.3d at 502. The court correctly concluded that no rational person would buy a medication whose sole stated benefit is digestive health if the medication didn't actually promote digestive health. *Id*. at 506. *Reyes* concerned telemarketers who claimed that individuals were eligible for a government grant, when in fact there was no government grant—the defendants were lying to obtain bank account information to make unauthorized debits from those accounts. 802 F.3d 474-75. Again, the court correctly concluded that no rational person would give someone their private bank account information (not to mention the ultimate payments withdrawn from that account) in exchange for a government grant if they weren't going to actually receive a grant.

and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct.'" *CGC*, 773 F.3d at 1090 (citation omitted). Here, that is simply not the case: rational people would join Stream Energy because it gave them an opportunity to make money, as tens of thousands of individuals during this class period actually did.[4]

II. Plaintiffs' Policy Arguments Are Both Wrong And Irrelevant.

There is no circuit split. So it is not surprising that Plaintiffs focus as much on claimed policy considerations as they do the law. In their telling, the class must be certified because the alternative would be too terrible a policy consequence. Specifically, Plaintiffs assert that if this class is not certified, then illegal pyramid schemes will run amok without any legal consequence.

Putting aside for moment the fact that policy concerns are irrelevant to the issue of class certification, this argument is simply incorrect. The ruling in this case does not foreclose class actions against alleged pyramid schemes. If a plaintiff can prove that they could *not* have made money by joining a particular company and there was no other plausible basis for joining, then reliance on that

[4] Plaintiffs also briefly point to a couple of cases where class actions were certified when the underlying allegation was that the defendant operated an illegal pyramid scheme. Pet. 1-2. But Plaintiffs ignore the fact that *none* of those cases even mentioned (let alone examined) an argument that reliance was individualized—presumably because the defendants in those cases never raised the issue. Plaintiffs cannot point to a single case where a defendant accused of being an illegal pyramid scheme raised the issue of individualized reliance in order to defeat class certification and a court nonetheless certified the class—because no such case exists. *See also* Reply Br. 13-15 (rebutting every case cited by Plaintiffs).

company not being an illegal pyramid scheme could be inferred and a class could be certified. That is simply not the case here.

Moreover, even if Plaintiffs were correct that the opinion forecloses most private class actions against pyramid schemes, that would be irrelevant. Trial by class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). That is why limits on class actions are enforced even when it means that individual claims will not be litigated. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (Rule 23 "imposes stringent requirements for certification that in practice exclude most claims").

Additionally, lawsuits by the class action bar are hardly the only remedy for illegal pyramid schemes. The FTC and SEC have been very aggressive about pursuing illegal pyramid schemes that are harming consumers, as have state and local agencies. *See, e.g.*, Pet. 9 n.2. Stream Energy, it should be noted, has operated for over ten years with no negative action from any authorities.

Indeed, to the extent there are any policy considerations relevant to this case, it is Plaintiffs' theory that is most troubling. According to Plaintiffs, any plaintiff who alleges a company is an illegal pyramid scheme is automatically entitled to try the case as a class. But that cannot be right. Allowing certification—in this case, and in the countless other cases that will inevitably follow—would violate bedrock

principles of both fraud law and class action law.

First, countless undeserving plaintiffs would now be able to prevail in a RICO fraud suit. That includes, for example, class members who knew full well what they were getting involved in. Indeed, consider this very case: While Stream Energy is not a pyramid scheme, the panel opinion points out several news articles questioning its legality—in much the same manner that other legal multi-level marketing companies are routinely accused of being pyramid schemes. It is not known who might have read such articles and, therefore, which of the Plaintiffs were put on notice of the pyramid scheme allegation but decided to join anyway. If Plaintiffs can certify a class without the need for posing individualized questions to each class member to establish what each person knew or read or relied on, there will inevitably be members of the proposed plaintiff class who should either not be class members or who—were the pyramid scheme allegation actually true—should be defendants because of their knowing participation in the scheme.[5]

These absurd scenarios are precisely why knowledge has always been fatal to fraud claims—and why this class cannot be certified. The Plaintiffs' theory of certification violates bedrock fraud law: "The maker of a fraudulent

[5] In fact, certification here could very well lead to the perverse effect of actually encouraging people to knowingly invest in illegal pyramid schemes. After all, if knowledge of the truth no longer prevents recovery in RICO fraud suits, it becomes a win-win scenario: either you profit from the scheme itself, or you lose your investment but file a RICO fraud suit (and due to trebled damages, you double your investment).

misrepresentation is not liable to one who does not rely upon its truth but upon the expectation that the maker will be held liable in damages for its falsity." RESTATEMENT (SECOND) OF TORTS § 548 (1977).

Second, the district court's certification ruling also violates a first principle of class action law—the need to guard against abusive certifications. The order below paints a bullseye on the back of every multi-level marketing company. If the mere allegation of a pyramid scheme is enough to certify a class, then plaintiffs will be able to extract lucrative settlements from scores of innocent companies.

That is precisely what courts have sought to prevent: innocent businesses with legitimate defenses nevertheless coerced into settling, simply because of the certification of a class. As the Supreme Court has explained, litigation on a class basis "greatly increases risks to defendants" such that they will be forced into "in terrorem" settlements where, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility v. Concepcion*, 563 U.S. 333, 350 (2011). As this Court has likewise observed, certification imposes "insurmountable pressure on defendants to settle. . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted).

Tellingly, Plaintiffs do not even bother to deny that, under their theory, a class could be certified in any case involving a multi-level marketing program. After all, there is no way to distinguish the certification theory in this case from any other case involving a multi-level marking program, whether Avon, Mary Kay, Tupperware, or thousands of other legitimate multi-level marketing companies operating worldwide, benefiting millions of people.

III. Stream Energy Is Not An Illegal Pyramid Scheme.

Stream Energy looks forward to proving on remand (in an individualized rather than class setting) that it is not an illegal pyramid scheme, but rather a perfectly legitimate and lawful multi-level marketing company—a business strategy employed by some of the biggest names in American business. Of course, none of that is relevant to this appeal. The question presented by the certification order is this: *Assuming* proof of an illegal pyramid scheme, would that automatically prove reliance, knowledge, and causation for every member of a 150,000 person putative class as well? As detailed by the panel opinion and the briefing in this case, the answer is plainly "no."

But make no mistake: The undisputed facts in this case also conclusively demonstrate that Stream Energy, one of the largest and most reputable energy companies in Texas, does not operate an illegal pyramid scheme.

An illegal pyramid scheme exists when participants are compensated for

recruiting other participants, unrelated to the sale of an actual product. *See, e.g., In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975)).

That is not true of Stream Energy. To the contrary, sales are an essential aspect of the IA program: The only way an IA can receive *any* compensation is through an actual sale of energy—no matter how many other IAs he recruits. *See* Doc. No. 129, Ex. 2 ¶ 89 ("Recruitment without sales earns an IA a zero commission."), Ex. 4 ¶¶ 6-15. Conversely, a new IA can join today and make a profit *solely* through sales—without recruiting a single new IA. And in fact, thousands of people have made money through the IA program, solely through sales of energy, and without recruiting a single new IA. Doc. No. 154 at 97:3-25.

Nor does this case involve any of the other factors that some courts have identified as common traits of pyramid schemes. For example, pyramid schemes generate revenue primarily through sign-up fees paid by their independent sales associates—rather than sales of products or services to customers. *See, e.g., Stull v. YTB Int'l, Inc.*, 2011 U.S. Dist. LEXIS 109376, at *6 (S.D. Ill. Sept. 26, 2011) (75% of revenue came from fees, rather than sales). Here, only 3% of Stream Energy's $5.5 billion in revenue in its first eight years of operation was generated through IA fees. Doc. No. 129, Ex. 1 ¶¶ 10-11.

Another common trait of pyramid schemes is the absence of a legitimate product. *See, e.g., FTC v. Skybiz.com*, 2001 U.S. Dist. LEXIS 26175, at *18 (N.D.

Okla. Aug. 31, 2001). That is not the case here. Stream Energy is one of the largest retail energy providers in Texas, selling gas and electricity—indisputably "real" products. Indeed, it has *billions* of dollars in energy sales, to over a million customers, the vast majority of which have absolutely no involvement in the IA program. *See* Doc. No. 129, Ex. 1 ¶ 10; Doc. No. 129, Ex. 2 ¶ 34-44.

Stream Energy is no different from the thousands of legitimate multilevel marketing programs in the world today, including a number of classic name-brands of American business, such as Mary Kay, Tupperware, Amway, and Avon. Like many of these companies, Stream Energy now also finds itself falsely accused of being a pyramid scheme. *See, e.g.*, *In re Amway Corp.*, 93 F.T.C. 618 (1979). Those claims were baseless—and so are the claims here.

CONCLUSION

In sum, a rational person could have chosen to become an IA, regardless of any alleged misrepresentation, because they could rationally think that they could make a profit from doing so (as tens of thousands of IAs in fact did). As a result, Stream Energy is entitled to defend itself by asking each and every Plaintiff what they knew, what they relied on, and whether they would have taken precisely the same action, even in the absence of the alleged misrepresentation. Accordingly, the panel was correct to reverse the district court and decertify the class.

The Court should deny the petition for rehearing *en banc*.

DATED: December 21, 2015

Respectfully submitted,

/s/ *James C. Ho*
James C. Ho
Robert C. Walters
Prerak Shah
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912
Tel.: (214) 698-3264
Fax: (214) 571-2917
jho@gibsondunn.com
rwalters@gibsondunn.com
pshah@gibsondunn.com

Michael K. Hurst
John Franklin Guild
GRUBER HURST JOHANSEN HAIL SHANK LLP
1445 Ross Avenue, Suite 2500
Dallas, TX 75202
Tel.: (214) 855-6800
Fax: (214) 855-6808
mhurst@ghjhlaw.com
jguild@ghjhlaw.com

Vanessa J. Rush
STREAM ENERGY
1950 Stemmons Freeway, Suite 3000
Dallas, TX 75207
Tel.: (214) 800-4464
Fax: (214) 560-1354
vanessa.rush@streamenergy.net

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that, on December 21, 2015, a true and correct copy of the foregoing Response to the Petition for Rehearing En Banc was served via the Court's CM/ECF system on all counsel of record for all parties.

/s/ *James C. Ho*
James C. Ho
Counsel of Record