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

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This Court has already scheduled oral argument in this matter, and Defendants agree that oral argument is warranted. As the three-judge Panel correctly held, the district court's opinion misapplied settled Circuit precedent requiring the denial of class certification in cases involving individualized issues of reliance, knowledge, and causation.

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INTRODUCTION

Class actions are the exception under our legal system. Ordinarily, litigants have the opportunity to examine each other about the merits of a claim. The defendants in a class action, however, are not afforded an opportunity to question each individual plaintiff.[1]

Accordingly, a court should not certify a class action unless the defendant need not question each plaintiff to properly defend itself. For example, some causes of action do not depend upon the plaintiff's subjective state of mind (*e.g.*, a civil rights challenge to a government policy). Alternatively, a cause of action might require proof of the plaintiff's state of mind (*e.g.*, plaintiff's reliance on a fraudulent statement)—but counsel might be able to present evidence, common to all plaintiffs, that somehow demonstrates *every* plaintiff's state of mind, without the need to question each individual plaintiff (*e.g.*, evidence

[1] *See*, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550, 2561 (2011) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' . . . [A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("'Due process requires that there be an opportunity to present every available defense.'").

that no rational person would want the good or service offered by the defendant, had they been told the truth about the good or service).

This case does not fall into either of these categories. First, to prevail in this RICO fraud action, the plaintiff must prove not only that the defendant made a false representation, but also that each plaintiff relied on the false statement. If a plaintiff did not actually rely on the false statement—for example, if he or she was unaware of the false statement, or chose to participate for reasons unrelated to the false statement, or otherwise knew the statement was false—then that plaintiff may not recover.

Determining whether a plaintiff relied on an alleged false statement will usually require a plaintiff-by-plaintiff inquiry. Not surprisingly, then, RICO fraud cases are ordinarily unsuited for class certification—as both this Court, and district courts in this Circuit, have repeatedly observed.

There is a narrow exception to this rule, to be sure. If class action counsel can somehow demonstrate that a defendant is fraudulently selling a good or service that *nobody would want, no matter the circumstances*, that case could in certain circumstances be certified as a

RICO fraud class action. After all, if no rational person would knowingly do business with the defendant, then class members must not have known the truth—and therefore must have relied on the false representation that the good or service was desirable, when in fact it was universally undesirable. *See*, *e.g.*, *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1081, 1090 (10th Cir. 2014) (certifying class where "no rational economic actor" would knowingly do business with defendant because "the behavior of plaintiffs and the members of the class *cannot be explained in any way other than reliance* upon the defendant's conduct") (emphasis added).

Here, however, Plaintiffs *did not even try* to present evidence to satisfy the exception. Instead, Plaintiffs challenged the rule itself: They argued below that this case does not require evidence of reliance—a meritless argument that the district court summarily rejected (and that even Plaintiffs have apparently abandoned on appeal).

So Plaintiffs failed to present any evidence that they could prove reliance on a class-wide basis—that is, that Defendants are offering an opportunity that nobody would want. Rather, they argued precisely the opposite—that they were not required to prove reliance *at all*.

Plaintiffs' evidentiary failure is fatal, because class actions are the exception, not the rule—and it is Plaintiffs' burden to prove why their case should be tried as a class action. *See*, *e.g.*, *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins.*, 319 F.3d 205, 218 (5th Cir. 2003).

Just as important, if Plaintiffs had bothered to confront the evidence, they would have found that many people want to do business with Defendants—regardless of counsel's accusations about illegal pyramid schemes. And they want it for many different reasons:

- For example, some people who joined Stream were interested in becoming independent associates (IAs) for reasons beyond making money. Some wanted the sales training and motivational courses offered by Defendants. Others desired the social benefits from joining Defendants' business community.

- Some people were interested in making money, but from the central element of the business that is indisputably legal—namely, the opportunity to sell energy. This includes, among others, the only named plaintiff left in this case, Eugene Robison. It includes people who made money from selling energy alone; people who earned additional income by selling multiple products to the same base of customers; and people who did not make money at all, because for whatever reason, they ultimately chose not to work their business (for example, Plaintiff Robison abandoned his efforts after just nine days).

- Other people were interested in making money, not only by selling energy, but also by recruiting other sales associates and building a personal sales force—the part of the business that counsel alleges is actually an illegal pyramid scheme. This

includes law-abiding citizens who were aware of Plaintiffs' allegations, but decided to participate anyway—not by relying on any alleged representation of legality, but based on their *own* examination and desire to participate in the program.

- Finally, there are still other people in this world who are perfectly willing to engage in legally controversial activities, if they can make money.

None of these people is entitled to recover, because they did not rely on any representation—explicit or implicit—of the legitimacy of Stream's multi-level marketing program. So Defendants should be able to determine whether each class member fits into one of these (or other) categories of meritless claims (as Robison himself does).

For their part, Plaintiffs claim that none of this evidence is relevant. They claim that the class should be certified, based on a "common sense inference" that no rational person would ever want to join an illegal pyramid scheme.

But putting aside the fact that Stream Energy is emphatically not a pyramid scheme—but rather, one of the leading energy companies in Texas—there are at least two fatal flaws with Plaintiffs' argument. First of all, Plaintiffs' "common sense inference" does not in any way answer any of the first three categories of persons described above—it only contests the fourth category of persons. Second, that theory—that

no rational person would engage in illegal activity—flies in the face of common sense, not to mention the entire purpose of our legal system. The issue is not whether rational people *should* engage in illegal activity, but whether rational people *would* do so—and should therefore be barred from recovering in a RICO suit. Our legal system exists, because such people exist. Indeed, it is the central premise of Plaintiffs' suit that there are people who are willing to participate in an illegal pyramid scheme.

The truth is that rational people are willing to engage in any number of business practices, for one simple reason: to make money. And it is undisputed that many who joined believed they could make money doing so—and that thousands did.

Moreover, certification of this class would not only upend decades of settled class action precedents, but also violate at least three additional fundamental legal principles: It would usurp the power of Congress to alter statutory liability rules; it would deprive Defendants of their right, under the Due Process Clause, to meaningfully present all available defenses; and it would violate the Rules Enabling Act, by using procedural rules to alter substantive rights.

So this Court cannot affirm, as a matter of established doctrine and precedent. The only way to justify certification is to resort to policy arguments—namely, that class certification is the *only* way to protect people from actual illegal pyramid schemes.

But that is not true—and it is for Congress, not the courts, to decide in any event. Various government agencies have the power to stop pyramid schemes and compensate victims—and have done so often. In addition, private plaintiffs can bring both individualized and class actions against pyramid schemes—for example, by demonstrating that there is no conceivable way that a new member could earn any revenue from the alleged pyramid scheme. And in all events, if certain fraud cases are too hard or too costly to bring without a class action, it is up to Congress to alter the liability rules to make it easier to sue—as it has done in various contexts—and not for courts to ignore causation under RICO and predominance under Rule 23.

Accordingly, this Court should reverse and remand this case for proceedings on an individualized basis, as the panel majority envisions.

JURISDICTIONAL STATEMENT

Defendants' original brief before the three-judge Panel remains accurate. This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

ISSUE PRESENTED

Did the district court err by certifying this RICO fraud class action even though it presents individualized issues of reliance, knowledge, and causation?

STATEMENT OF THE CASE

I. Stream Energy Is A Leading Retail Energy Company In Texas That Uses Multilevel Marketing To Reach Its Customers.

Founded in Dallas, Texas in 2005, Stream Energy is one of the largest and most reputable retail energy companies in Texas. D.E. 129, Ex. 1 at ¶¶ 7-10 (Snyder affidavit).[2] Stream Energy generates billions of dollars in gas and electricity sales to more than a million customers in Texas and the six other states in which it operates. *Id.* It has been approved for operation in every state where it has applied for a retail energy license, and operates under the oversight of regulators in Texas,

[2] Documents filed under seal are cited by their Docket Entry (D.E.) number.

Georgia, Pennsylvania, Maryland, New Jersey, New York, and the District of Columbia. *Id*. In fact, Stream Energy's reputation is so well established that the Texas Public Utility Commission chose Stream Energy to serve as one of the state's Providers of Last Resort.

Stream Energy sells gas and electricity in deregulated energy markets through direct selling or multi-level marketing. The company chose this method of marketing for one simple reason: The best way to teach customers the simplicity of switching their energy service under deregulation is through someone they already know.

Individuals join Stream Energy's direct selling organization by paying a fee of $329 to become an independent associate (IA), and thereafter enroll residential and commercial customers for electric and natural gas service. IAs receive commissions based on monthly energy sales to their customers. In addition, IAs can recruit their own force of downline IAs, and earn additional compensation for sales made by their recruited IAs. *See* D.E. 129, Ex. 4 at ¶¶ 6-15 (Smith affidavit).

Multi-level marketing is a well-established distribution channel, used by name-brand companies such as Mary Kay, Tupperware, Amway, Avon, and others. *See* D.E. 129, Ex. 2 at ¶¶ 6-14 (Defendants'

Expert Report). The direct-selling industry has flourished because the business model benefits both the company and its participants. *See id*. When participants sell the company's products, they earn a steady income, and the company increases its customer base.

Stream Energy, like those name-brand companies, is a legitimate multi-level marketing enterprise that offers IAs a very real prospect of making money. Stream Energy sells a real product that is used by everyone: energy. Indeed, over 97 percent of its revenue is derived from energy sales. And over the last ten years, Stream Energy has sold billions of dollars of energy to over one million non-IA customers. D.E. 129, Ex. 1 at ¶¶ 10-11. Although it is one of the largest energy retailers in Texas, Stream Energy has just 5 percent market penetration—leaving plenty of room for future growth.

As with other, legitimate multi-level marketing companies, Stream Energy IAs are eligible to receive compensation only if they sell energy to customers. D.E. 129, Ex. 2 at ¶ 89 ("Recruitment without sales earns an IA a zero commission."). IAs receive monthly energy income (MEI) only *after* one of their customers pays for energy. *Id*. And IAs are not required to purchase their energy from Stream Energy.

Perhaps most importantly, IAs can—and do—make money selling energy for Stream Energy. And they can do so without recruiting a single other sales associate—as Plaintiffs' own expert admitted. *See* Class Certification Tr., D.E. 154 at 70:9-12 (Plaintiffs' expert) ("[Q.] [I]t's true that an independent associate, an IA, can make money without recruiting a single person. Correct? A. Yes.").[3]

Indeed, according to Plaintiffs' own data, 14 percent of IAs have earned a profit—*i.e.*, 29,155 IAs who joined Stream Energy during this class period have made money.[4] D.E. 121, App. III, Ex. 1(a) (sched. 1) (Plaintiffs' Expert Report). That percentage doubles to over 29 percent,

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[3] *See also id*. at 44:6-14 (Defendants' counsel) ("Your Honor, if you yourself decided that you wanted to sign up as an IA today -- And let's say your strategy is very simple. You're going to ask around the Southern District of Texas. You're going to get all of your fellow colleagues, your fellow district and magistrate judges, to get all of your judges in the Southern District to sign up as our energy customers. You will make a profit today. You would earn back all of your money in the very first year.").

[4] This success rate is likely understated because 10 percent of IAs who lost money did not bother to sign up even a single energy account. More tellingly, these IAs—including Plaintiff Robison—did not even bother to sign up as a customer *themselves*. For example, if Robison had made the minimal effort of signing himself up, along with just *one other customer*, he would have recouped his sign-up fee—and this suit would lack a class representative. Indeed, that explains why Plaintiff Torres is no longer a class representative: He made money. D.E. 129, Ex. 4 at ¶ 25 ("Torres earned more money from Ignite than he paid in fees to Ignite."). And Plaintiff Robison abandoned his sales efforts after a mere nine days. D.E. 129, Ex. 6 at 73:15-17 (Robison deposition).

or 59,672 IAs, if website costs—which IAs are *not* required to pay—are excluded. Moreover, of the 29,155 IAs who joined and made a profit during the class period, 33 percent (or 9,426 IAs) have made more than $1,000—more than tripling their initial $329 investment. And over 600 IAs have made more than $50,000—and more than 250 have made over $100,000.

And it is not just early-joining IAs who made money. Consistent with Stream Energy's market penetration of only 5 percent, IAs who joined in each of the years covered by the class period—2005 through 2011—had a very real prospect of earning a profit. On average, 14 percent of new joiners each year profited—from a high of 16.2 percent in 2005 to a low of 11.7 percent in 2009. In the last two years of the class period, new joiners profited at a rate of roughly 15 percent.

All of that is to say that it is undisputed that tens of thousands of IAs have profited by selling hundreds of millions of dollars of power for Stream Energy—while helping Stream Energy to become the fourth largest energy provider in Texas.

In addition, there are many non-monetary reasons why people become IAs. As the three-judge Panel correctly noted, "[t]he evidence

here" reflected "many reasons" why IAs participate in Stream Energy. *Torres v. S.G.E. Mgmt., LLC*, 805 F.3d 145, 157 (5th Cir. 2015). IAs could have joined "as 'a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things.'" *Id*. (quoting *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004)). *See also* D.E. 129, Ex. 2 at ¶ 13(e) (some people are "attracted to the [multi-level marketing] business opportunity more for its recognition and community-building aspects than for its income-generating possibilities"); D.E. 121, App. I, Ex. D at 128:11-14 (Tacker deposition) ("[Q.] [Y]ou teach associates how to – – how to market themselves, is one of the things you do? A. Yes.").

II. Plaintiffs Sued Alleging That Stream Energy Operated An Illegal Pyramid Scheme, And Then Sought Class Certification On The Theory That Individualized Evidence Of Reliance Is No Longer Required In RICO Fraud Cases.

On June 30, 2009, Plaintiffs filed a civil RICO fraud action, alleging the IA program is, in fact, an illegal pyramid scheme. Defendants include not only Stream Energy and its corporate partners, subsidiaries, and employees, but also several private individuals and entities that are IAs.

Plaintiffs sought to certify this case as a class action on behalf of all current and former IAs who lost money. In support of certification, Plaintiffs argued that reliance is no longer required in RICO fraud cases, under *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). Plaintiffs contended that *Bridge* was the "key case" that "opens the door fairly wide for certifying the RICO class action, because you no longer have to go look at every plaintiff, whether every plaintiff relied on a misrepresentation or not, for a RICO violation." D.E. 154 at 18:5-9 (Plaintiffs' counsel).

The district court properly rejected this argument. As the district court noted, *Bridge* confirms that "plaintiffs must establish proximate cause," ROA.2263, and Plaintiffs' sole theory of causation in this case is that they relied on the alleged misrepresentations. ROA.2264. *See Bridge*, 553 U.S. at 658-59 ("the complete absence of reliance may prevent the plaintiff from establishing proximate cause"). Accordingly, Plaintiffs were required to prove reliance.

The district court nevertheless granted certification on a different theory—namely, that Plaintiffs could establish reliance on a common rather than individualized basis. The court theorized that no rational

person would become an IA but for some misrepresentation and, therefore, that reliance could be established through common evidence for every class member.

But the record shows precisely the opposite—a rational person could choose to become an IA. As the district court acknowledged, "especially entrepreneurial class members [could have] read the allegedly fraudulent claims about how easy it was to make money, maintained a healthy degree of skepticism regarding those claims, but became IAs nonetheless because they believed they (though not necessarily everyone else) would make a significant amount of money." ROA.2265 ("Here, . . . individualized reliance issues as to the plaintiffs' knowledge, motivations and expectations bear heavily on the proximate cause analysis, rendering 23(b)(3) certification unavailable."). And, as explained above, nearly 30,000 IAs who joined during the class period did, in fact, earn a profit.

The district court also invoked the "fraud-on-the-market theory," a judicially created doctrine that excuses plaintiffs in securities fraud cases from proving causation and reliance if the plaintiffs prove the existence of certain predicate facts (such as an efficient market for the

security at issue). ROA.2266. Based on that doctrine, which applies only in securities fraud cases, the court held that certification was justified because Plaintiffs had alleged that Stream Energy was an illegal pyramid scheme. *Id*.

In the end, the district court certified a RICO fraud class that contains over 150,000 members, with Plaintiffs seeking trebled damages of over $150 million. ROA.2270. This Court granted Stream Energy's motion for leave and docketed this appeal on March 5, 2014. ROA.2485.

III. The Three-Judge Panel Correctly Held That This Class Cannot Be Certified.

On February 3, 2015, a three-judge Panel of this Court heard oral argument. Following argument, the Court requested supplemental briefs, which the parties submitted on February 9. On October 16, 2015, the Panel issued its decision declaring certification inappropriate and vacating the district court's order to the contrary. 805 F.3d 145.

The Panel rightly noted that this appeal concerns a narrow question: whether "class certification was appropriate specifically under Rule 23(b)(3)"—*i.e.*, the "exclusive[]" path to certification in this

case. *Id*. at 150 & n.3. Specifically, the Panel noted that the core of the dispute lies in Rule 23(b)(3)'s "predominance requirement." *Id*.

Examining predominance, the Panel rightly began with the elements of RICO fraud, which "require[] 'a showing that the fraud was the "but for" cause and "proximate" cause of the injury.'" *Id*. at 151 (quoting *Sandwich Chef*, 319 F.3d at 218). The Panel then noted that the Supreme Court's decision in *Bridge* was not relevant to the appeal because "Plaintiffs concede that proximate cause in their case depends on reliance." *Id*. And, as the Panel correctly observed, "a class action cannot be certified if proof of reliance will depend on individualized evidence." *Id*.

Plaintiffs attempted to satisfy the reliance requirement by invoking "a 'common sense' inference of reliance, which exists from the nature of pyramid schemes." *Id*. at 152-53 ("[T]he common proof that the Plaintiffs offer in this case is evidence that Ignite is actually a pyramid scheme; and this evidence, they claim, is sufficient to establish causation as well.").

That tactical approach doomed certification. First, the evidence of implied misrepresentations offered by Plaintiffs "suggest[ed] that the

Plaintiffs will have to prove RICO causation by relying on individualized, and not common, proof of reliance." *Id*. at 154. Nor does Plaintiffs' evidence "support a sufficient inference of reliance." *Id*. at 157. As the Panel ably summed up: Individuals might become IAs "for any number of reasons, most notably because Ignite provides an opportunity to make money." *Id*. As a result, "the class cannot be certified under our precedents or the precedents cited by the Plaintiffs because individualized issues of reliance and knowledge will be relevant to each Plaintiff's case." *Id*.

Judge Wiener dissented. He expressed concern that the majority's opinion would "vaccinate illegal pyramid schemes against *all* civil litigation, immunizing them not just from class actions but ultimately from all judicial challenges." *Id*. at 159 (Wiener, J., dissenting). And he argued that this class should be certified for reasons exemplified by the Tenth Circuit's decision in *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014).[5]

[5] Neither the majority nor the dissent mentioned Plaintiffs' "fraud-on-the-market" theory of certification, which Plaintiffs abandoned on appeal.

Plaintiffs petitioned for rehearing *en banc*, which this Court granted on March 12, 2016.

SUMMARY OF THE ARGUMENT

Bedrock principles of class action law foreclose certification in this case. As this Circuit has held for decades, "[f]raud actions that require proof of individual reliance cannot be certified as Fed. R. Civ. P. 23(b)(3) class actions because individual, rather than common, issues will predominate." *Sandwich Chef*, 319 F.3d at 211.

This class cannot be certified under those precedents. The underlying cause of action in this putative class action turns on individualized, subjective questions of reliance that cannot be inferred on a class-wide basis. Accordingly, under longstanding doctrine, Plaintiffs' claims must proceed on an individual basis, dependent on the facts surrounding each plaintiff's reliance (or lack thereof) on Defendants' statements. *See id.* at 220-21.

There is a narrow doctrinal exception under these precedents, articulated most clearly by the Tenth Circuit in *CGC Holding*. That exception provides that, when no rational economic actor would engage in the activity at issue, then individualized reliance issues fall away,

and certification may be appropriate. 773 F.3d at 1090. This situation arises when it is mathematically impossible for a victim to ever recover his initial financial outlay—*i.e.*, an investment guaranteed to be worthless. *See*, *e.g.*, *Peterson v. H&R Block Tax Servs., Inc.*, 174 F.R.D. 78 (N.D. Ill. 1997).

Plaintiffs cannot avail themselves of that exception. To begin with, they have put on no evidence—despite their clear burden to do so—that no rational actor would have joined Stream Energy, absent fraud. Second, had Plaintiffs confronted the evidence, they would have inevitably uncovered that many people want what Stream Energy offers—and for many different reasons. Those include various economic reasons, which have nothing to do with Plaintiffs' accusation that Defendants operate an unlawful pyramid scheme—as well as non-economic reasons related to social involvement, community membership, and personal growth.

As a result, certification of this class would not only conflict with decades of settled class action precedents but also usurp Congress's power to alter statutory liability rules, deprive Defendants of their

rights under the Due Process Clause to meaningfully contest all of the elements of a RICO fraud action, and violate the Rules Enabling Act.

The only way to justify the judgment below is to resort to policy- and fairness-based arguments—namely, that certification is the only way to protect people from pyramid schemes. But this argument is wrong—and, in any event, it is for Congress, not the courts. If Congress has established a cause of action that plaintiffs find too difficult to prove, only Congress can amend the elements of that cause of action—as it has on various occasions. Congress—not the courts—has the power to balance interests in enhancing legal protections for worthy plaintiffs against concerns about rewarding undeserving plaintiffs (for example, people who intended to engage in illegal activity) and pressuring innocent defendants into *in terrorem* settlements.

The Court should reverse outright, hold that this class cannot be certified, and remand for individualized proceedings. Alternatively, and at the very most, the Court should vacate and remand to give Plaintiffs a second chance to present any evidence that might justify class certification.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 23 sets forth several requirements for class certification. Among other things, a plaintiff must "show that the common issues predominate" over individualized issues, and that "class treatment is the superior way of resolving the dispute." *Sandwich Chef*, 319 F.3d at 218. "The party seeking certification bears the burden of proof." *Id.*

This Court generally "review[s] the district court's class certification decision for abuse of discretion." But "'[a] district court by definition abuses its discretion when it makes an error of law.'" *Id.* So "[w]hen a district court certifies a case as a class action, despite the fact that the predominance requirement cannot be met, it errs as a matter of law." *Id.* at 219 ("If the court erred in these [predominance] holdings, its class certification decision was necessarily an abuse of discretion and must be reversed."); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) ("the district court erred as a matter of law in certifying this class because the predominance requirement could not be met").

ARGUMENT

I. Bedrock Principles Of Class Action Law Confirm This Class Cannot Be Certified.

This case begins (and should end) with the following decades-old, black-letter principle of class action law: "Fraud actions that require proof of individual reliance cannot be certified as Fed. R. Civ. P. 23(b)(3) class actions because individual, rather than common, issues will predominate." *Sandwich Chef*, 319 F.3d at 211. That basic principle governs here, and forecloses class certification in this case.

A. For Four Decades, This Circuit Has Refused To Certify Fraud Class Actions—With Good Reason.

1. This case turns on whether Plaintiffs can satisfy the Rule 23(b)(3) requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." This predominance requirement must be assessed through the lens of the substantive claim at issue—RICO fraud. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) ("[A] court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.").

RICO makes it unlawful to conduct or participate in an enterprise's affairs "through a pattern of racketeering activity." 18 U.S.C. § 1962(c). To show a "pattern of racketeering activity," a plaintiff generally must identify a "predicate act[]"—such as mail or wire fraud. *Bridge*, 553 U.S. at 647 (citing 18 U.S.C. § 1961(1)(B)). RICO establishes a private civil right of action for anyone "injured in his business or property *by reason of* a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c) (emphasis added).

In *Bridge*, the Supreme Court concluded that the "by reason of" language requires a plaintiff to show both proximate and but-for causation. 553 U.S. at 654 (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)). To be sure, it does not require the plaintiff to show "first-party reliance." *Id*. at 641-42. But the Court nevertheless cautioned that "none of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations." *Id*. at 658.

Thus, although reliance is not statutorily required in *every* RICO case, it is required in *this* RICO case—for the simple reason that Plaintiffs themselves admit that the only way they might possibly

satisfy the proximate causation requirement is by demonstrating reliance. 805 F.3d at 151.

That sets up the nub of this case: Whether Plaintiffs can satisfy the Rule 23(b)(3) "predominance" requirement depends on whether they can demonstrate reliance through evidence that is common to all class members, rather than evidence that varies from plaintiff to plaintiff.

2. Decades of precedent establish that RICO fraud actions are typically unsuitable for class certification. This is because they ordinarily require proof of reliance on an individualized—rather than common—basis.

For example, in *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, an investor sought to pursue a putative class action against Merrill Lynch due to fraud, negligence, and certain failures to disclose under the Securities Exchange Act of 1934. 482 F.2d 880, 882 (5th Cir. 1973). Drawing from the Advisory Committee's Note to Rule 23, this Court found certification inappropriate: "If there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case may be unsuited for treatment as a class action." *Id.* at 882 (citing Fed. R. Civ. P. 23, *Advisory Committee's Note*, 39 F.R.D. 69, 98,

107 (1966) [hereinafter *Committee Note*]). That conclusion was bolstered by the Advisory Committee's view that, even when fraud is "perpetrated on numerous persons by the use of similar misrepresentations"—*i.e.*, even when multiple fraud claims share a "common core"—such a claim may nevertheless "be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." *Committee Note*, 39 F.R.D. at 103. That is why, as the *Simon* Court declared, "variations" across representations make reliance-based actions unsuited to class treatment. 482 F.2d at 882-83.

This Court reached the same conclusion in *Castano*, which involved a putative class of smokers who bought the defendant's cigarettes, as well as their families and estates. 84 F.3d at 737. The plaintiffs claimed the defendants "fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature." *Id*. At issue there—as in this case—was whether those fraud-based claims satisfied Rule 23(b)(3)'s predominance requirement. *Id*. at 739. This Court

answered no. Citing *Simon*, the Court declared that "a fraud class action cannot be certified when individual reliance will be an issue." *Id*. at 745. In its analysis of the predominance requirement, the Court explained that "the claims, defenses, relevant facts, and applicable substantive law" indicated that reliance would be individualized. *Id*. at 744.

A few years later, this Court decided in quick succession three cases that further cemented the rule that reliance-based actions cannot be certified for class treatment. First came *Summit Properties Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *overruled in part by St. Germain v. Howard*, 556 F.3d 261 (5th Cir. 2009). Faced with a civil RICO claim, this Court noted that problems related to reliance could destroy the causation required under RICO. *Id*. at 560 n.19 ("If the relevant decisionmakers knew the limitations of the product but would have bought it anyway because of its low price, for example, the fraud would not have been a 'but-for' cause of the plaintiffs' damages."). And it further cited a Third Circuit case dismissing a RICO class action due to problems with establishing reliance. *Id*. &

n.16 (citing *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996)).[6]

Bolin v. Sears, Roebuck & Co., reinforced that point. 231 F.3d 970 (5th Cir. 2000). This Court held that "individual findings of reliance necessary to establish RICO liability and damages preclude . . . [23](b)(3) certification." *Id.* at 978 & n.47 ("[I]ndividualized determinations of reliance would defeat the predomination requirement of Rule 23(b)(3)."). And a year later, in *Patterson*, this Court issued its most forceful statement yet that RICO fraud actions are not suitable to class treatment. It reiterated that "[c]laims for money damages in which individual reliance is an element are poor candidates for class treatment, at best. We have made that plain." 241 F.3d at 419.[7] And

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[6] To be sure, *Summit* held "a plaintiff's reliance on the predicate mail or wire fraud is necessary in order to establish proximate causation" for RICO purposes. 214 F.3d at 558. That holding was overruled by *Bridge*, as this Court has recognized. *St. Germain*, 556 F.3d at 263. But *Summit* and other pre-*Bridge* cases remain relevant for establishing that when reliance *is* a necessary component of a plaintiff's claim (for example, when the plaintiff concedes that it can only establish causation via reliance, as Plaintiffs do here), class certification is inappropriate.

[7] As with *Summit*, *Bridge* overruled *Bolin* and *Patterson* to the extent that they held that reliance is an element of a RICO action. But that is irrelevant where, as here, the plaintiff must prove reliance to demonstrate causation. *See supra* note 6.

whatever common issues might exist in such an action, they will not predominate. *Id.*[8]

3. Against that backdrop came *Sandwich Chef*. This Court synthesized each of the cases discussed above, and reached the inexorable conclusion that controls this case: "Fraud actions that require proof of individual reliance cannot be certified as Fed. R. Civ. P. 23(b)(3) class actions because individual, rather than common, issues will predominate." 319 F.3d at 211.

Sandwich Chef, as the three-judge Panel correctly noted, "bears a striking resemblance to this case." 805 F.3d at 155. The plaintiffs there alleged that a group of insurance companies charged excessive—and possibly illegal—premiums by sending false invoices to policyholders. *Sandwich Chef*, 319 F.3d at 211-21. The district court certified a class, but this Court reversed. *Id.* at 224. As the three-judge Panel summarized:

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[8] Other decisions from this period similarly concluded that individualized reliance issues preclude certification. *E.g.*, *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).

> We reasoned that the plaintiffs in *Sandwich Chef* could not prove proximate cause through common proof, because individualized issues of knowledge and reliance would overwhelm any common proof. Specifically, we pointed out that the plaintiffs and the defendants negotiated the insurance policies in individualized transactions; and evidence in the record suggested that the plaintiffs could have voluntarily assented to the illegal rate structures so that they could receive other benefits in return. Because the proof suggested that at least some of the plaintiffs could have knowingly participated in the fraud, we held that the defendants were entitled to undercut the plaintiffs' evidence of reliance.

805 F.3d at 155 (internal citations omitted).

In light of those principles, as well as the rules articulated in *Simon*, *Castano*, *Summit*, *Bolin*, and *Patterson*, the *Sandwich Chef* Court declared a "working presumption against class certification" because of the "pervasive issues of individual reliance that generally exist in RICO fraud actions." 319 F.3d at 219.

And that presumption—combined with this Court's declaration that "[f]raud actions that require proof of individual reliance cannot be certified," *id*. at 211—has become the foundational class action law of this Circuit. Since *Sandwich Chef*, numerous decisions of this Court

have refused to certify putative classes involving reliance.[9] In fact, no district court anywhere in this circuit had certified a RICO fraud class action for trial since *Bolin*—until the district court did so in this case.[10]

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[9] *See Unger v. Amedisys, Inc.*, 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 individualized causation issues under RICO); *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 F. App'x 296, 301 (5th Cir. 2004) (denying class certification in part because fraudulent concealment claims required individualized knowledge inquiries).

[10] *See, e.g.*, *Haley v. Merial, Ltd.*, 292 F.R.D. 339, 359 (N.D. Miss. 2013) ("individualized issues concerning causation" "predominate over any common issues"); *David v. Signal Int'l, LLC*, 2012 WL 10759668, at *29 (E.D. La. Jan. 4, 2012) ("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 *11 (N.D. Tex. Apr. 29, 2011) (theory that "homeowners' payment of their assessments shows that they relied on the truthfulness of the invoices" "does not obviate the need to show the individual class members' reliance"); *Warnock v. State Farm Mut. Auto Ins.*, 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. Grp.*, 208 F.R.D. 575, 584 (E.D. Tex. 2002) ("*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.) (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").

[Footnote continued on next page]

B. This Case Typifies A Putative Class That Cannot Be Certified.

Against that backdrop—in which courts have continuously refused to certify cases that turn on reliance—Plaintiffs filed this putative class action. But this action exemplifies why this Court has uniformly denied certification for reliance-based actions.

To recap, the sole theory of causation in this case is reliance. ROA.2264-2268; *see* ROA.1139 (Second Amended Complaint) ("The defendants used false and fraudulent pretenses to deceive persons of ordinary prudence . . . to the detriment of [Plaintiffs]."). And because that reliance can only be proven through individualized evidence, class certification is inappropriate. *Sandwich Chef*, 319 F.3d at 224.

The district court theorized that reliance could be established through common rather than individualized evidence, because no "rational" person would knowingly participate in Stream Energy's

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And we have found only one case where this Court has *ever* allowed certification of a RICO fraud class action for trial—and it is an unpublished ruling, decided prior to *Bolin*. *Brand v. Nat'l Bank of Commerce*, 213 F.3d 636 (5th Cir. 2000) (unpublished). But even that case recognized that "[i]f the class members could only recover by proving individual reliance, then class certification would be inappropriate." *Id*. at *2.

business opportunities. ROA.2266-2268. But that conclusion is squarely contradicted by the record of this case. A rational person could knowingly choose to participate as an IA for Stream Energy, for the simple reason that a rational person could believe he would earn a profit. Indeed, it is undisputed that thousands of IAs who joined during the class period did earn profits—including thousands that did so solely by selling energy, without recruiting a single IA to the program. *See* D.E. 154 at 97:3-25 (Plaintiffs' expert).

In fact, according to Plaintiffs' own data, 14 percent (or 29,155) of IAs who joined during the class period have made a profit. D.E. 121, App. III, Ex. 1(a) (sched. 1). The percentage doubles to over 29 percent (or 59,672 IAs) if one excludes website costs—which IAs are not required to pay and can cancel at any time. And some IAs made *substantial* profits: 9,426 IAs made over $1,000 (more than tripling their $329 fee), 618 IAs made over $50,000, and 268 IAs made over $100,000. *See id*.

The upshot is that, as even the district court recognized elsewhere in its opinion, joining Stream Energy fully aware of its operations and nature is quite rational. "[S]ome especially entrepreneurial class

members [could have] read the allegedly fraudulent claims about how easy it was to make money, maintained a healthy degree of skepticism regarding those claims, but became IAs nonetheless because they believed they (though not necessarily everyone else) would make a significant amount of money." ROA.2265.

In addition, many IAs joined Stream Energy for non-economic reasons. IAs have the opportunity to attend sales training and motivational courses, and to enjoy the social benefits of joining the Stream Energy business community. To many IAs, the experience is a hybrid of small-business ownership and enrollment in business school. As the three-judge Panel correctly observed, "individuals could have become IAs as 'a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things.'" 805 F.3d at 157 (quoting *Poulos*, 379 F.3d at 668).

For these reasons, it was eminently reasonable for someone to knowingly join Stream Energy, regardless of any alleged misrepresentation. And that is fatal to class certification. After all, Stream Energy is entitled to defend itself by asking each Plaintiff what she knew, what she relied on, and whether she would have taken

precisely the same action, had she known the truth. *E.g.*, *Thorn v. Jefferson-Pilot Life Ins.*, 445 F.3d 311, 320-21 (4th Cir. 2006) ("[I]n cases where the legal issue is similarly focused on the plaintiff's knowledge, such as the requirement that a plaintiff in a fraud claim reasonably rely on the defendant's representations, we have consistently held that individual hearings are required.").

* * *

This is a doctrinally simple case. This Court should faithfully apply longstanding bedrock principles of class action law and hold that this class cannot be certified. Any other result would mangle decades of precedent and render this Circuit's class action law unintelligible.

II. Plaintiffs Have Failed To Demonstrate That This Is The Exceptional Case Where No Rational Person Would Want What Defendants Offer.

Because class certification is barred under this Circuit's class-action precedents, Plaintiffs seek sanctuary in the law of other circuits. They claim that a separate line of cases decided elsewhere—best exemplified by the Tenth Circuit's decision in *CGC Holding*—compels certification of this class.

But Plaintiffs are mistaken. *CGC Holding* and related cases present nothing more than a narrow exception to the well-established principle that RICO fraud actions are ordinarily unsuitable for class treatment. Courts have recognized such an exception where the plaintiff can demonstrate that the defendant is offering an opportunity that *nobody would want*—and therefore, plaintiffs must not have known the truth, and instead must have relied on a false representation that the opportunity was desirable, when in fact it is universally undesirable.

That exception does not apply here. Not only did Plaintiffs fail to put on any evidence (as is their burden), but also the record below establishes precisely the opposite—namely, that many people would, and did, want what Defendants offered. As a result, Plaintiffs have no choice but to prove reliance with individualized, rather than common, evidence.

A. Actions That Depend On Reliance Can Be Certified Only In One Narrow Instance: When No Rational Actor Would Want What Defendants Offer.

Ordinarily, RICO fraud class actions that depend on a showing of reliance cannot be certified. Other circuits have developed a narrow exception to that rule: When "no rational economic actor" would do

business with the defendant, but for the fraud, then certification may be appropriate. *CGC Holding*, 773 F.3d at 1081.

To illustrate, Plaintiffs have cited *Peterson*, where a taxpayer filed a putative class action against H&R Block, claiming it "defrauded its customers by inducing them to pay for tax-related services that Block knew they could not receive." 174 F.R.D. at 80. In other words, the defendant duped the plaintiff into purchasing something literally worthless—a classic fraud. In that case, the district court reasoned, the plaintiffs could show that it was "*inconceivable* that the class members would rationally choose" to purchase the product if they knew the truth—and thus "[t]he *only* logical explanation for such behavior" was their reliance on the alleged misrepresentation. *Id*. at 85 (emphases added).

That same exception was recognized in *Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D. 590 (C.D. Cal. 2012). That case involved a RICO fraud claim stemming from plaintiffs' assertion that the defendant insurer was duping senior citizens into buying worthless annuities by misrepresenting the value of those annuities. *Id*. at 594. In certifying the class, the court noted that plaintiffs had cleared a

"high bar"—*i.e.*, "that *no* rational senior would have bought any of the Allianz deferred annuities if they had known the truth." *Id*. at 596 (emphasis added).

CGC Holding further confirmed the obvious: when "no rational economic actor" would participate in the opportunity at issue, absent fraud, then class-wide reliance on the fraud can be inferred. 773 F.3d at 1081. That case involved a fraudulent loan scheme, in which various lenders misrepresented their ability to make good on their ability to meet their financial obligations, causing borrowers to lose millions of dollars in up-front fees. *Id*. at 1080-81. The Tenth Circuit held that certification is proper in a fraud class action when "'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 1089-90 (emphasis added).

The Tenth Circuit explicitly acknowledged *Sandwich Chef*, further confirming that *CGC Holding* represents an exception to the rule *Sandwich Chef* lays out. The Tenth Circuit recounted *Sandwich Chef*'s facts and agreed that "[u]nder those circumstances"—and in light of the "myriad factors" affecting the decisions of each class member in

Sandwich Chef—"Rule 23(b)'s predominance requirement cannot be met." *Id*. at 1093. The court further noted that the *Sandwich Chef* plaintiffs received something of value—albeit a "slightly watered-down or less appealing version." *Id*. By contrast, the plaintiffs in *CGC Holding* "were *completely* deprived of *any* benefit from their transaction," because the defendant "did not intend to or have the ability to fund *any* of the loans." *Id*. (emphasis added).

Peterson, *Negrete*, and *CGC Holding* share a core common fact: In each case, the defendants ran some scheme that bilked plaintiffs out of funds in exchange for—nothing. In *Peterson*, the plaintiffs paid for tax services they were ineligible for. 174 F.R.D. at 80-81. In *Negrete*, the plaintiffs paid for worthless annuities. 287 F.R.D. at 596, 612-13. And in *CGC Holding*, plaintiffs paid for loans defendant refused to fund. 773 F.3d at 1093.[11]

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[11] The no-rational-person standard has played out in other cases as well, all of which confirm that the standard is simply a narrow exception to the general *Sandwich Chef* rule. *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004); *Nguyen v. FundAmerica, Inc.*, 1990 WL 165251, at *2 (N.D. Cal. Aug. 16, 1990).

Thus, cases like *Sandwich Chef* and *CGC Holding* stand in harmony. *Sandwich Chef* lays out the broad rule, repeatedly applied by this Circuit. And *CGC Holding* produces an obvious—but narrow—exception to the *Sandwich Chef* rule: When a defendant dupes a plaintiff out of money by promising something that nobody would want in exchange, reliance can be inferred on a class-wide basis. *Id.*

B. Plaintiffs Have Failed To Meet Their Evidentiary Burden To Take Advantage Of The No-Rational-Person Exception.

Plaintiffs claim their putative class fits within the *CGC Holding* exception to *Sandwich Chef*. But they are wrong, for at least two reasons. First, despite their clear burden, Plaintiffs have failed to put on any evidence to support their claim that no rational person would have become an IA, but for fraud. In fact, Plaintiffs did not even attempt to do so. Second, the only relevant evidence in the record establishes the opposite—namely, there are many reasons a rational person would choose to become an IA notwithstanding any representations regarding Stream Energy's legality.

1. *Despite their clear burden to do so, Plaintiffs have put forward no evidence showing that nobody would knowingly join Stream Energy.*

To begin with, it is the *plaintiff's* duty to present all evidence necessary at the class certification stage to prove that common issues predominate—not the defendant's duty to present evidence to prove that individual issues exist. *E.g.*, *Sandwich Chef*, 319 F.3d at 218 ("The party seeking certification bears the burden of proof . . . [and] must also show that the common issues predominate."); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (same). That is fatal to class certification, because Plaintiffs have not carried their burden—indeed, they have not even tried.

In the court below, Plaintiffs did not try to prove that rational people would not join the IA program. To the contrary, they argued that after *Bridge*, they were not required to prove reliance at all. ROA.2262.

At the class certification stage, Plaintiffs argued that *Bridge* "did away with first-party reliance in RICO cases." D.E. 154 at 18:7 (Plaintiffs' counsel). Thus, according to Plaintiffs, it was *unnecessary* to decide "whether every plaintiff relied on a misrepresentation or not." *Id*. at 18:11-12. "We need proof of a RICO enterprise, proof of predicate

acts, proof of a conspiracy for 1962(b). *We don't need proof of first-party reliance*." *Id*. at 20:21-23 (emphasis added).

At no point below did Plaintiffs argue that reliance could be proved on a class-wide basis or that no rational person would knowingly join a pyramid scheme. For example, Plaintiffs did not put on any evidence that the relevant market was "saturated"—*i.e.*, that no newcomer to the pyramid scheme had any realistic possibility of recouping his investment.

It was not until they reached this Court that Plaintiffs changed course. Instead, they now argue that reliance can be proven in this case on a class-wide basis. 805 F.3d at 151. But they never even argued that point below—let alone produced evidence to support that conclusion. That lack of evidence is fatal to certification. *E.g.*, *Sandwich Chef*, 319 F.3d at 218; *see also Comcast*, 133 S. Ct. at 1432.[12]

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[12] Judge Wiener, in dissent, suggested that Defendants bear the burden to show why reliance and knowledge must be proven on an individualized basis. 805 F.3d at 166-67 & nn.36-38 (Wiener, J., dissenting) (citing *Sandwich Chef*, *Foodservice*, and other cases). To be sure, in cases where a plaintiff has demonstrated that nobody would want the opportunity the defendant is offering, then class certification could be appropriate—absent contrary evidence. But the record here is precisely the opposite: Plaintiffs have failed to offer anything demonstrating why *no* rational person would want to participate in Stream

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2. *The Record Reflects Myriad Reasons a Fully Informed, Rational Investor Would Join Stream Energy.*

Had Plaintiffs bothered to engage in an evidentiary contest at the class certification stage, they would have found that there are many individuals who want what Defendants offer, for many different reasons—thereby foreclosing class certification.

1. Many IAs joined Stream Energy for reasons unrelated to financial gain—and thus could not have relied on any misrepresentations about the legality of making money through recruiting other IAs. Participating in Stream Energy is akin to being in a club that comes with special perks. IAs get to not only attend networking and educational events, but also fine-tune their entrepreneurial skills. They learn how to sell and how to run their own business—the type of experience that MBA students pay tens of thousands of dollars to enjoy. As the Panel noted, IAs could have joined "as 'a form of escape, a casual endeavor, a hobby, a risk-taking money

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Energy as an IA. In fact, the record shows that IAs who joined throughout the class period not only could, but did make money. *See infra* at 47-49.

venture, or scores of other things.'" 805 F.3d at 157 (quoting *Poulos*, 379 F.3d at 668).

Others joined Stream Energy not to recruit other IAs, but to sell energy to end users. This practice is indisputably legal. And for many IAs, it is a good source of supplemental income. This group includes IAs for whom Stream Energy is merely one of several different multi-level-marketing opportunities that comprise their business portfolio. And it includes still others who did not make money selling energy, either due to inadequate salesmanship skills or insufficient effort—for example, the only named plaintiff remaining in this case abandoned his efforts just *nine days* after enrolling as an IA. *See supra* at 11 & n.4.

Still other IAs joined Stream Energy to not only sell energy, but also recruit other sales associates—but only after they independently determined that Stream Energy's sales program is legal. These individuals did not rely on any representations regarding legality, because they reached their own conclusions, regardless of what they were told by Stream Energy. *See*, *e.g.*, *Roberts v. United New Mexico Bank at Roswell*, 14 F.3d 1076, 1081 (5th Cir. 1994) ("'[O]ne cannot recover for fraudulent representations . . . when he has *relied solely* on

his own investigation rather than on the representations of the other party.'"); *N.Y. Life Ins. v. Strudel*, 243 F.2d 90, 93-94 (5th Cir. 1957) ("[I]f [plaintiff] chooses to make an independent inquiry . . . then he cannot plead reliance even if his investigation is as a matter of fact cursory and did not reveal the true facts.").

And finally, some IAs were content to engage in Stream Energy's sales program, regardless of its legality, for the simple reason that they wanted to make money.

2. Plaintiffs assert a common-sense inference that no rational person would join an illegal pyramid scheme. But that fails for two reasons.

First, it does not account for three of the categories of individuals described above: those who joined for reasons unrelated to money, those who had no intention of recruiting other IAs, and those who determined independently that Stream Energy's program is legal.

Second, Plaintiffs' inference is simply wrong. Rational people routinely engage in legally dubious (or even illegal) activities to make money. Indeed, "[a] rational actor will undertake an activity when the benefits of doing so exceed the costs." *Ciraolo v. City of N.Y.*, 216 F.3d

236, 242-46 (2d Cir. 2000) (Calabresi, J., concurring). Rational actors often violate the law "and accept[] the known consequences of doing so." *Smith v. NTSB*, 981 F.2d 1326, 1328 (D.C. Cir. 1993).

This is not to say, of course, that rational people *should* commit crime—only that there are people who rationally choose to commit crimes in order to make money. *See*, *e.g.*, *CGC Holding*, 773 F.3d at 1081.

A host of scholars agree. As Nobel Laureate Economist Gary Becker recognized, a person engages in an activity "if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities." Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968). "Such persons become 'criminals,' therefore, not because their basic motivation differs from that of other persons, but because their benefits and costs differ." *Id.* That is why it is entirely rational for certain people in certain circumstances to commit crime, contrary to the Plaintiffs' flawed "common-sense" intuition.[13]

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[13] *See id.*; *see also* Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 303 (2008) ("[O]ffenders' choices to commit particular crimes are the products of rational calculation of the likely economic

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And make no mistake: Stream Energy IAs—even those who joined late in the class period—have made money at rates exceeding those of the typical small business owner. As set out earlier, 14 percent (or 29,155) of IAs who joined during the class period profited. D.E. 121, App. III, Ex. 1(a) (sched. 1). The percentage doubles to over 29 percent (or 59,672) IAs, if you exclude website costs—which IAs are not required to pay, and can cancel at any time.

And some IAs who joined during the class period have made quite large profits. Indeed, 9,426 IAs made over $1,000 in profit (tripling their $329 fee), over 600 made more than $50,000, and over 250 made more than $100,000. *Id.*

Those numbers hardly suggest that Stream Energy is a bad deal. Although it surely takes most IAs some time to realize a profit, and many never do, the same is true of any small business. According to a recent study by the Small Business Administration, nearly two-thirds of

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gains of particular crimes offset by the likely risks of punishment compared with likely net economic gains of available lawful employment."); Stephen G. Bene, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 921-22 (1991) (same).

all new businesses are doomed to failure. *See* SBA, Office of Advocacy, *Frequently Asked Questions* 3 (Sept. 2012), https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf. And the capital outlay required to start most small businesses dwarfs the $329 fee that would-be entrepreneurs pay to begin their Stream Energy business.

Nor does the opportunity to earn real money require people to join early (as is the case in an illegal pyramid scheme). IAs who joined in each and every year covered by the class period (from January 2005 through April 2011) enjoyed a very real prospect to make money:

Year	**New IAs**	**Excluding Optional Website Fees**		**Including Optional Website Fees**	
		# of IAs Who Profited	**% of IAs Who Profited**	**# of IAs Who Profited**	**% of IAs Who Profited**
2005	21,689	6,149	28.35%	3,515	16.21%
2006	36,434	10,586	29.06%	5,335	14.64%
2007	36,751	10,288	27.99%	4,835	13.16%
2008	39,986	11,274	28.19%	5,295	13.24%
2009	23,500	6,210	26.43%	2,759	11.74%
2010	29,764	8,767	29.46%	4,493	15.10%
2011	19,535	6,398	32.75%	2,923	14.96%
Total	**208,856**	**59,672**	**28.74%**	**29,155**	**14.04%**

See D.E. 121, App. III, Ex. 1(a) (sched. 1).

This chart confirms that class members had a reasonable prospect to make money throughout the class period—at least as good a prospect as many small businesses in their early days. It is no wonder, then, that Plaintiffs do not seek certification on the ground that class members could not have rightfully thought that they could make money. ROA.2265 ("[C]lass members . . . became IAs . . . because they believed they (though not necessarily everyone else) would make a significant amount of money, even if not as much as advertised").

3. Finally, it bears repeating that Plaintiffs have already conceded that Defendants have produced evidence documenting numerous issues of individualized reliance. *See* D.E. 134 at 11 (Plaintiffs' Reply in Support of Class Certification) (acknowledging "evidence listed by the Defendants is first-party reliance," but dismissing it as irrelevant under *Bridge*).[14] In light of that admission, Plaintiffs' failure to put on any evidence rebutting Defendants'

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[14] Plaintiffs tried to discount that evidence at the time by claiming that, under *Bridge*, they were not required to prove reliance. But of course, that was Plaintiffs' own decision. Now that Plaintiffs have abandoned their *Bridge* argument, the entire basis for class certification has collapsed.

evidence—and supporting their certification theory—is all the more glaring.[15]

III. Certification Would Usurp Congress's Power To Alter Substantive Law, Deprive Defendants Of Their Due Process Right To Present Every Available Statutory Defense, And Violate The Rules Enabling Act.

Certification would not only upend decades of settled precedent under Rule 23 but also violate at least three separate and fundamental legal principles. First, certification would usurp the power of Congress to alter substantive liability rules, by effectively repealing RICO's causation requirement. Second, by depriving Defendants of the opportunity to meaningfully contest causation, certification would deprive Defendants of their right to a fair trial under the Due Process Clause. Finally, both of these outcomes run afoul of the Rules Enabling

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[15] Plaintiffs also rely on a single line of dicta from the Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, which states that a "defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." 134 S. Ct. 2398, 2412 (2014). That sentence arose out of a discussion of *stare decisis*, and offers no support for certification here. Far from merely trying to "pick off" an "occasional" class member, Defendants have demonstrated that tens of thousands of IAs who joined during the class period made money—while other IAs joined for reasons other than making money. Not surprisingly, then, the dissent did not mention, let alone rely on, this single line from *Halliburton*.

Act—which provides that a court may not use a procedural rule, such as Rule 23, to alter substantive rights. *See* 28 U.S.C. § 2072(b).

1. First, certification would effectively strip a core element—causation—from RICO. The Supreme Court declared in *Bridge* that a RICO plaintiff must establish proximate cause. 553 U.S. at 654. Plaintiffs represent that they can satisfy that requirement by showing class-wide reliance. But they have plainly failed to do so, for the reasons set out above, *supra*, Part II. If the class is certified despite Plaintiffs' inability to establish class-wide causation, then certification will effectively repeal the proximate cause requirement out of RICO. *Id.*; 18 U.S.C. § 1964(c).

2. Certification would also violate Defendants' right to due process. As this Court well knows, the Constitution guarantees all civil defendants a fair trial. *See*, *e.g.*, *Davis v. Hollier*, 595 F. App'x 428, 429 (5th Cir. 2015) ("Litigants have a constitutional right to a fair trial in a civil case.").

Essential to a fair trial is the right to present a full defense. As the Supreme Court has explained, "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey*, 405 U.S.

at 66. And in a case that turns on subjective reliance, that means examining every potential plaintiff. *See Thorn*, 445 F.3d at 320-21 (knowledge and reliance "will generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it").

That means, in this case, that Defendants must have the right to examine all 150,000 putative class members on their reliance. But examining 150,000 trial witnesses in a single action would be unwieldy and inefficient—which is why obviously no district court would permit it. After all, Rule 23 requires a court to find, as a precursor to certification, "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). *See also Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632-33 (3d Cir. 1996) ("[A] class of this magnitude and complexity could not be tried. There are simply too many uncommon issues . . . the difficulties likely to be encountered . . . are insurmountable."), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Nor is it any solution to simply allow Defendants to examine only a subset of the class. As the California Supreme Court recently

declared, in a unanimous opinion, "[a]lthough courts enjoy great latitude in structuring trials," "any trial must allow for the litigation of affirmative defenses, even in a class action case where the defense touches upon individual issues." *Duran v. U.S. Bank N.A.*, 325 P.3d 916, 934 (Cal. 2014). The "class action procedural device may not be used to abridge a party's substantive rights," including its right to litigate individualized defenses, a "principle [that] derive[s] from both class action rules and principles of due process." *Id*. at 935.

In short, "[c]lass certification is appropriate only if [any] individual questions can be managed with an appropriate trial plan" that accommodates the defendant's rights. *Id*. at 930, 939; *see also Sanchez v. Wal Mart Stores, Inc.*, 2009 WL 1514435, at *4 (E.D. Cal. May 28, 2009) ("[A]ny attempt to try these claims on a classwide basis would deprive Defendants of their due process right to a fair trial, including the right to present 'every available defense.'").

In a case where individualized questions of subjective reliance adhere to each putative class member, no such trial plan exists. And that is why certifying this class will lead to a Catch-22. If a class is certified, Defendants must be permitted to examine each class member,

which will make class treatment *inferior* and, therefore, will require decertification. This Court previously has instructed district courts to "consider how a trial on the merits would be conducted if a class were certified." *Sandwich Chef*, 319 F.3d at 218. That consideration leaves no doubt that certification is improper.

3. Finally, by altering the substantive rules of liability established by Congress under RICO and depriving Defendants of their rights under the Due Process Clause, certification also runs afoul of the Rules Enabling Act.

As both the Supreme Court and this Court recognize, the Rules Enabling Act forbids courts from using procedural rules, such as Rule 23, to infringe upon substantive rights. *See* 28 U.S.C. § 2072(b) ("general rules of practice and procedure" "shall not abridge, enlarge or modify any substantive right"). When a procedural rule clashes with a substantive right, the substantive right must trump. *Id.*; *see also Wal-Mart*, 131 S. Ct. at 2561.

As a result, both the Supreme Court and this Court have ruled that class certification is inappropriate when doing so would infringe upon or otherwise prejudice the defendants' right to a fair trial. After

all, "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem Prods.*, 521 U.S. at 613; *In re Deepwater Horizon*, 732 F.3d 326, 341 (5th Cir. 2013) ("'It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members.'").

That is why it is improper to certify a class if doing so would "deprive[] defendants of a fair trial." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 334, 344-45 (4th Cir. 1998) ("The practical effect of the district court's certification ruling" "so infected the proceedings" that it "was felt at every stage of trial"). Indeed, when "representations or warnings," "knowledge," and "the factors relevant (or not relevant) to that class member's decision to purchase" a product are in play, "[d]efendants would be denied their right to due process if a class action were permitted to proceed." *Sanchez*, 2009 WL 1514435, at *4.

This Court has been especially vigilant about enforcing the Rules Enabling Act in the class-action context. The Court recently described

the Rules Enabling Act as "the ever-antecedent and overarching limitation on class-action litigation." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). It "demands a narrow construction of Rule 23." *Id.* The Rules Enabling Act and the precepts it embodies "define the first—and often the last—arena of analysis, imposing foundational limitations" on class certification. *Id.* at 475. And that requires the rejection of the view of "'the modern class action as a free-standing device, designed to do justice and police corporate evildoers.'" *Id.* at 481 (Jones, C.J., concurring).

This case cries out for that same vigilance. This Court should reverse an order that violates both substantive rights and, in the process, the Rules Enabling Act.

IV. The Original Panel's Outcome Is Not "Unfair," And Even If It Were, Only Congress Can Provide The Solution.

Established doctrine forecloses class certification in this case. The only way to affirm the judgment below, then, is to resort to policy- and fairness-based arguments—namely, that class actions are the only way to protect people from illegal pyramid schemes. But the argument is invalid—and it is an argument for Congress, and not the courts.

A. The Solution To Policy Concerns Is To Lobby Congress—Not To Do Violence To Rule 23.

If a statutory cause of action is too easy or difficult to prove, it is up to Congress, not federal courts, to alter the liability rules accordingly. As the Supreme Court unanimously admonished in *Bridge*—which Plaintiffs formerly heralded as the "key case" that should decide this dispute, *supra* at 14—courts "are not at liberty to rewrite RICO to reflect their . . . views of good policy." 553 U.S. at 660.

Similarly, the Supreme Court has emphasized the "overriding importance" of the principle that courts are "bound to enforce" procedural rules, such as Rule 23, "as now composed"—and without regard to policy preferences. *Amchem Prods.*, 521 U.S. at 620. After all, the "text of a rule . . . limits judicial inventiveness," and courts "are not free to amend a rule outside the process Congress ordered." *Id*. Doing so would violate the Rules Enabling Act. And the Supreme Court has explicitly confirmed that whether or not an outcome is "fair" is not a proper consideration under Rule 23. *Id*. at 622 ("Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper.").

Moreover, the Supreme Court has specifically admonished courts not to grant class certification on the ground that a potentially meritorious claim "'might otherwise slip through the legal system.'" *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013). Courts "are not free to devise an ideal system for adjudicating" claims that otherwise might go unadjudicated. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring). Such a situation "cries out for a legislative solution"—not judicial activism. *Id*.

So if a plaintiff's burden to prove a litigant's state of mind is too hard to satisfy, only Congress can amend the relevant statutory cause of action accordingly. *See*, *e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525-26 (2013) (Civil Rights Act of 1991 "rejected" *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and imposed liability on an employer who considers *any* improper motivating factor in an employment decision—even if it is not the but-for cause of the employer's decision); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act § 933(b), Pub. L. No. 111-203, 124 Stat. 1376, 1883-84 (2010) (explicitly modifying the mental state element for private actions against credit rating agencies), codified at 15 U.S.C. § 78u-

4(b)(2)(B); Dodd-Frank § 929O, 124 Stat. at 1862 (amending statute "by inserting 'or recklessly' after 'knowingly'"), codified at 15 U.S.C. § 78t(e).

In short, if Plaintiffs find individualized actions unappealing, or alternative mechanisms unsatisfying, only Congress has the authority to provide a solution. *See Bridge*, 553 U.S. at 660 (when courts encounter a perceived flaw in RICO, "the 'correction must lie with Congress'").

B. Congress Has Already Enacted Other Mechanisms For Combating Illegal Pyramid Schemes That Do Not Require Violence To Rule 23.

Moreover, it is far from clear that Congressional action is necessary in this context. To be sure, the dissent claims that denying class certification in this case "will vaccinate illegal pyramid schemes against *all* civil litigation, immunizing them not just from class actions but ultimately from all judicial challenges." 805 F.3d at 159 (Wiener, J., dissenting) (emphasis added). But that is simply not true. Congress has provided a variety of important tools to combat illegal pyramid schemes—and if they are insufficient in any way, it is up to Congress to create more.

1. For example, various government enforcement agencies have the power to stop illegal pyramid schemes, and obtain compensation for

the victims. This includes both the Federal Trade Commission[16] and the Securities and Exchange Commission.[17] It also includes actions brought by state attorneys general.[18]

Moreover, these tools include not only public civil enforcement, but criminal prosecution as well. *See*, *e.g.*, *Dockstader v. State*, 233 S.W.3d 98, 101 (Tex. App.—Houston [14th Dist.] 2007) (affirming

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[16] *See*, *e.g.*, *FTC v. BurnLounge, Inc.*, 753 F.3d 878 (9th Cir. 2014); FTC, Press Release, *FTC Settlement Bans Pyramid Scheme Operators from Multi-Level Marketing* (May 13, 2014) ("The settlement also requires the operators to surrender assets totaling at least $7.75 million, which will be returned to consumers."), https://www.ftc.gov/news-events/press-releases/2014/05/ftc-settlement-bans-pyramid-scheme-operators-multi-level; FTC, Press Release, *Skybiz Pyramid Settlement to Provide $20 Million for Consumers* (Apr. 1, 2003) ("Distribution of $20 million dollars in consumer redress will begin in the near future for victims of SkyBiz, an alleged massive international pyramid operation based in Tulsa, Oklahoma. The money for consumer redress is part of a settlement between the pyramid's promoters and the Federal Trade Commission."), https://www.ftc.gov/news-events/press-releases/2003/04/skybiz-pyramid-settlement-provide-20-million-consumers; FTC, Press Release, *Bigsmart Pyramid Promoters Settle FTC Charges* (Aug. 9, 2001) ("Bigsmart.Com L.L.C. principals, Mark and Harry Tahiliani, agreed to provide up to $5 million in consumer redress."), https://www.ftc.gov/news-events/press-releases/2001/08/bigsmart-pyramid-promoters-settle-ftc-charges.

[17] *See also* Andrews Ceresney, Director, SEC Division of Enforcement, *UIC-SEC Joint Symposium to Raise Public Awareness: Combating Pyramid Schemes and Affinity Frauds Opening Remarks* (Mar. 2, 2016), https://www.sec.gov/news/speech/ceresney-remarks-joint-symposium-raise-public-awareness-03022016.html.

[18] For example, in 2007, Texas Attorney General Greg Abbott brought down an illegal pyramid scheme, recovering over $7 million for its victims. *See Attorney General Abbott Shuts Down Pyramid Scheme That Marketed Bogus Fuel Pill* (Jan. 23, 2007), https://texasattorneygeneral.gov/oagnews/release.php?id=1906.

conviction and two-year sentence for "promoting a pyramid promotional scheme").

Notably, Congress has made clear that government agencies need not prove reliance or causation to prevail in these cases. *See*, *e.g.*, *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012) ("'Justifiable reliance,' however, is not an element of an SEC enforcement action."); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993) ("It is well established . . . that proof of individual reliance by each purchasing customer is not needed."). Plaintiffs may think it is unfair to force private plaintiffs to prove causation, when government need not do so—but that is a decision for Congress to make.

2. These government agencies provide powerful protections for consumers against unlawful pyramid schemes—and indeed, Congress might have easily stopped there. After all, in other contexts, Congress has chosen to remedy a social ill by empowering *only* public officials—and not private plaintiffs—to take action. And the reason is no mystery: Unlike private plaintiffs, public actors bring enforcement actions in the public interest, not for private financial gain. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988)

("'We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.'") (alteration in original); *see also Stoneridge Inv. Partners, LLC v. Sci.-Atl., Inc.*, 552 U.S. 148, 158 (2008) ("[Congress] directed prosecution of aiders and abettors *by the SEC*," not by private plaintiffs) (emphasis added); S. REP. NO. 104-98, at 19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 698 ("The Committee believes that amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to [the] goal of reducing meritless securities litigation.").

But in fact, Congress additionally allows private plaintiffs to file suits against illegal pyramid schemes—including individual lawsuits as well as class actions—so long as they establish causation and reliance.

Plaintiffs' complaint, at bottom, is that the causation and reliance element simply makes it too difficult to certify most fraud cases as a class action—and that, without the class action device, these lawsuits are essentially worthless. But as other circuits have noted, it is a false dichotomy to suggest that the absence of class action lawsuits will

result in "impunity for the non-compliant." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 281-82 (4th Cir. 2010) (Wilkinson, J., concurring specially). Consumers often have enough incentive to bring actions on their own, and winning favorable judgments in those actions may bring about victories for other plaintiffs on the basis of offensive collateral estoppel. *Id.* So it is not the case that "the denial of class certification with its possibilities of annihilative consequences would allow companies who violate the statute to emerge laughing and unscathed." *Id.* *See also Rahman v. Chertoff*, 530 F.3d 622, 627-28 (7th Cir. 2008) (Easterbrook, J.) (discussing how plaintiffs can obtain relief "without certifying a class").

Moreover, class certification can be appropriate against certain pyramid schemes—namely, those in which (per the *CGC Holding* exception to *Sandwich Chef*) there is no chance of recouping the initial buy-in. Future putative RICO civil fraud classes may be certified when the plaintiffs can meet their evidentiary burden of demonstrating that no rational person would join the enterprise because there is no realistic prospect of deriving any benefit. *CGC Holding*, 773 F.3d at 1081. They could accomplish this by demonstrating saturation—*i.e.*, that the

market is so dried up that no new member to the pyramid scheme could possibly hope to earn any revenue. *E.g.*, *United States v. Grasso*, 173 F. Supp. 2d 353, 360 (E.D. Pa. 2001) ("saturation" occurs when "those at the bottom of the pyramid will be unable to recoup their investment by finding new buyers").

C. Amending Current Law To Permit Class Certification In Cases Such As This May Reward Undeserving Plaintiffs And Punish Innocent Defendants.

Altering the law to allow class certification in cases such as this would present serious policy concerns that are, in any event, for Congress to balance.

For example, Congress may be reluctant to establish a new rule of law that would perversely incentivize bad-faith actors to join *real* pyramid schemes. Yet that is exactly what the district court's certification order endorses: a "win-win" for bad actors. That is, if a person joins something he believes is a pyramid scheme, one of two possibilities will result. One, he makes money from the pyramid scheme, at the expense of the scheme's victims. Two, he fails to make money—in which case, he simply hires a plaintiffs' lawyer and files a RICO fraud class action, knowing (according to the district court's

incorrect opinion below) that he need simply allege an illegal pyramid scheme to unlock RICO's treble damages, without regard to his own knowing culpability. All things equal, this Court has consistently declined to reach results that would incentivize bad behavior or create perverse incentives. *See*, *e.g.*, *United States v. Anzueto-Barrios*, 607 F. App'x 434, 436 (5th Cir. 2015) (reaching "commonsense holding" that "avoids creating perverse incentives"); *United States v. Mathes*, 151 F.3d 251, 254 (5th Cir. 1998) (construing statute to avoid creating a "perverse incentive" that would "surely flout Congress's purpose for enacting the statute").[19]

And that is to say nothing of the harm that innocent defendants will suffer if strong-armed into *in terrorem* settlements. But that is all too often the inevitable side effect of class certification. *See*, *e.g.*, *AT&T*

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[19] The class certified in this case presents an even more problematic third possibility: One could join something he believes is a pyramid scheme, profit, and still be eligible to recover as a member of the class. Because the "district court did not explicitly limit the class to consist only of those IAs who lost money by participating in Ignite," 805 F.3d at 148 n.2, many of the named defendants are included in the class. This seemingly perverse result obtains because the "district court defined the class more broadly than the Plaintiffs' proposed definition." *Id*. *Compare* D.E. 121 at 1 (Class Certification Motion) (defining class as those "who became Ignite Independent Associates who have not recovered the money they paid to Ignite"), *with* ROA.2270 ("The class will consist of all IAs who joined Ignite on or after January 1, 2005, through April 2, 2011.").

Mobility LLC v. Concepcion, 563 U.S. 333, 350-51 (2011). The concern is especially pressing where—as the Panel dissent rightly acknowledged—"'[n]o clear line separates illegal pyramid schemes from legitimate multilevel marketing programs.'" 805 F.3d at 164 (Wiener, J., dissenting) (alteration in original). As the dissent noted, courts have not made clear what distinguishes *legal* multi-level marketing from unlawful pyramid schemes—thereby creating a significant risk that class certification in cases such as this will pressure *innocent* defendants into *in terrorem* settlements. *See id.*; *see also AT&T Mobility*, 563 U.S. at 350-51.[20]

V. This Court Should Reverse And Remand For Individual Trials—Or, At Most, Vacate And Remand For Plaintiffs To Present Evidence To Support Class Certification.

For the reasons set out above, this Court should reverse the district court's certification order and remand for individualized proceedings—as the original three-judge Panel appeared to contemplate.

[20] Indeed, this case is a perfect example: The dissent's own analysis seems only to confirm that Stream Energy does not operate a pyramid scheme. 805 F.3d at 164 (Wiener, J., dissenting) (policies that "'deter inventory loading and encourage retail sales'" indicate lawful business); *id.* at 165 & n.30 (noting that Stream Energy encourages and requires retail sales); D.E. 129, Ex. 2 at ¶ 34 ("[T]here cannot be inventory loading by IAs in the Stream Energy distribution channel.").

Alternatively, if the Court is disinclined to resolve the matter of certification in this case outright, there is an intermediate option. The Court could simply instruct the district court that RICO fraud actions that turn on issues of reliance are ordinarily unsuitable for class certification—and that *CGC Holding* establishes a narrow exception to that rule, where the alleged victims are "completely deprived of any benefit from their transaction," because there was no realistic opportunity to recoup any value. 773 F.3d at 1092-93 (citing *Sandwich Chef*, 319 F.3d at 219, 221).

The Court could then remand the case to allow Plaintiffs a second chance to present evidence that no rational actor would knowingly do business with Defendants. *See*, *e.g.*, *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 313, 318-19 (5th Cir. 2007) (vacating certification order and remanding for district court to "reconsider its class certification pursuant to the standards discussed herein"); *EEOC v. Miss. State Tax Comm'n*, 873 F.2d 97, 100 (5th Cir. 1989) (en banc) (vacating order and remanding for district court to reconsider and, if appropriate "elect to take further evidence").

CONCLUSION

The Court should reverse the class certification order and remand for individualized proceedings. Alternatively, the Court should vacate the class certification order and remand to give Plaintiffs another opportunity to present evidence to justify class certification.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in New Century Schoolbook, 14-point. The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,867 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

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