No. 14-90006

In the United States Court of Appeals for the Fifth Circuit

JUAN RAMON TORRES; EUGENE ROBISON

Plaintiffs-Respondents,

V.

SGE MANAGEMENT, LLC; ET AL.,

Defendants-Petitioners.

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

PLAINTIFFS' RESPONSE TO PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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This is a fact-bound case about an illegal pyramid scheme masquerading as the marketing arm of an electricity resale company. The district court's carefully limited class-certification order rests on a single, narrow theory that Petitioners all but ignore: that Petitioners' victims were injured in common not by particular fraudulent misrepresentations but rather by the uniform fact that Petitioners were operating an unlawful scheme and holding it out as a legitimate business. The district court's order tracks analogous Fifth Circuit precedent, mirrors similar holdings around the country, and comports with Supreme Court case law.

Moreover, that order does not present the broad legal questions Petitioners raise in their attempt to secure this Court's intervention. The district court *accepted* Petitioners' principal argument. It has yet to address the premise of their second theory, which is pending in their motion for summary judgment. Petitioners' motion also surprisingly fails either to address the governing legal standard or to disclose that the cases on which it relies most heavily have been "overruled," *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009). Even the facts it claims are "undisputed" are anything but. Accordingly, this is not the case for which Rule 23(f) is designed—it is not a suitable vehicle to intervene in the middle of a case to resolve a dispositive legal question that will determine class certification. To the contrary, all that can be confidently predicted is that granting the motion will force this Court to wade into disputed facts in an awkward procedural posture, only then to find that Petitioners' legal theories are not properly presented. Those facts will ultimately show that Petitioners enriched themselves by placing themselves and their associates atop an illegal pyramid scheme that directly caused a class-wide harm to those who found themselves near the bottom. The district court's order certifying a class to pursue that narrow theory in no way merits immediate review.

STANDARD OF REVIEW

Racing to the merits, Petitioners fail to state or address their arguments to the standard that governs their Rule 23(f) motion. The motion may only be granted where "(1) a 'certification decision turns on a novel or unsettled question of law' or (2) 'an order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action.'" *Regents of Univ. of Cal. v. Credit Suisse*, 482 F.3d 372, 379 (5th Cir. 2007) (quoting advisory committee note). "Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law." F.R.C.P. 23(f) (advisory committee note).

This Court reviews "class certification decisions for abuse of discretion in recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation." *Regents*, 482 F.3d at 380. It "may not conduct an independent inquiry into the legal or factual merit of this case as though [it] were reviewing a motion under Federal Rule of Civil Procedure 12(b)(6) or 56." *Id.*

COUNTER-STATEMENT OF FACTS

"You'll rapidly understand that there are Peters here to rob for the purpose of paying Paul."

Petitioners omit most of the voluminous, relevant factual record and mislabel other facts as "undisputed" in a hopeless effort to suggest that they are part of a legitimate "multi-level marketing" strategy akin to Mary Kay or Avon rather than a pyramid scheme. Mot. 4-5. That is just one obvious illustration of how Petitioners' motion would improperly require this Court to assume the facts in their favor at a preliminary stage. But in any event, even a cursory review of the record shows that Petitioners' version of events lacks any merit.

Stream Energy (and its marketing arm, Ignite) were conceived in late 2004 in Texas with the plan to sell electricity in a new, deregulated market. The principals had no previous energy experience; they planned to sell electricity through a multi-level system that would pay its own way: the salespeople would pay the company for the right to find other salespeople to pay the company to sell electricity, and so on down the line [Dkt. 121 at 3-5].[1] The fee to join this ever-expanding sales force was $329 up front and several hundred dollars a year for website access; conversely, the commission for signing up an energy customer was a much, much smaller 50 cents a month [*Id.* at at 6-8, 12]. Thus, most of the

[1] For ease of reading, record citations refer to the briefing below. These motions in turn direct the reader to the large number of supporting documents filed therewith.

moneymaking opportunity lay in signing up new salespeople (called Independent Associates or "IAs"), who could sign up yet more new salespeople, and so on, with the lion's share of the commissions from these multiplying individuals flowing up to the IAs at the higher levels. Those located "upline" from new recruits could also get "leadership bonuses" from $75 to $125 per head as a direct reward for recruitment so long as a minimal sale was also made [Id. at 7-10].

This design grossly rewarded recruitment of new IAs and early entry into the system over actual sales, and so—like any geometrically expanding pyramid scheme—created an inevitable class of winners at the top and losers at the bottom. All told, over <u>86%</u> of people who signed up lost money in fees, collectively paying over <u>$80,000,000</u> for the mere opportunity to sell the recruitment scheme on to others, while that money flowed in the millions and tens of millions to upstream insiders and professional networking recruiters who had a privileged starting spot at the top [*Id.* at 26-29, 33-36]. In short, the evidence clearly shows that rewards in this system overwhelmingly corresponded to one's place in the pyramid, not the share of energy sales one personally secured.[2]

Petitioners (at 4, 16) paint these IA fees as incidental to its legitimate energy-selling business, but they are not. Stream only *resells* energy, so the image

[2] Detailed schedules showing the exact amounts funneled to insiders and the number of "downline" recruits were before the district court [*Id.* at App. III]. Ultimately, Petitioners paid over $200 million in bonuses tied to recruiting compared to about $49 million in (arguably) customer-based commissions [*Id.* at 36].

it casts of its "billions" in sales is an optical illusion: the money quickly disappears on the other side of resale transactions as payments to the actual power generators [*Id.* at 11-12]. Because the margin on these sales is small or negative, IA fees represent an essential aspect of Stream's balance sheet. Petitioners statement (at 16) that the "vast majority of Stream Energy's revenues were generated through sales of energy" thus creates a distinct, gross misimpression. The amount Stream collected in sign-up and website fees from its IAs exceeded its return on *all* of their sales for all eight years of its existence combined, and the company would not have made any money without those fees [*Id.* at 34]. Petitioners' failure even to acknowledge the actual economics so this Court understands the case into which it is being invited is a prelude to what would follow if their motion is granted.

The conduct of the insiders at the top of the marketing scheme perfectly illustrates how this supposedly legitimate business actually operated. Even before Stream was approved to sell power, those insiders—many of them veterans of an earlier, defunct "multi-level marketing" scheme—had structured themselves into a multi-level capstone at the top of the pyramid positioned to reap enormous returns from sales and sign-ups by the later-joining IAs at lower tiers [*Id.* at 26-29 & nn. 50-51]. Those top layers consisted of the insiders themselves, their (separate) personal corporations, and even their family members, all of whom engaged in little to no sales activity but were still richly compensated for their position atop the scheme [*Id.* at 34, App. III, Chart of Relationships]. Petitioners suggest (at 16) that "[c]ompensation of IAs is … entirely *dependent* on sales." The reality is that one insider in this so-called energy company ended up credited with over 200,000 people in his "downline" and made <u>$16,000,000</u> in "commissions" and recruitment bonuses; another, a company executive, had over 282,000 people in his downline and (together with his mother and children) pocketed over $5.5 million [*Id.* at 14, 28, 34]. Those who made the most from the scheme were exclusively those whose tier was set before sales even began; not one of them was credited with directly selling to more than 20 customers; the ratio of their returns from their "downlines" relative to direct sales of energy was literally thousands to one [*Id.* at 36].

Petitioners also omit critical details in claiming (at 15) that their scheme required energy sales rather than downstream recruitment for IAs to make money. In fact, Petitioners' compensation plan was carefully constructed to reward the kind of mere duplication of the previous tier that is hallmark of a pyramidal scheme. Petitioners thus fail to advise this Court that although IAs nominally did need four sales "points" to qualify for compensation, in fact they could get one point for signing themselves up, two points for subscribing to (and paying a monthly fee for) the website, and one more for recruiting another IA who would themselves sign up for an energy account—with a small cash bonus for achieving this "quick start." [*Id.* at 7]. The new IA then faced the exact same incentive structure. And, in fact—as Petitioners knew—the average IA was responsible for just two accounts, one of which was usually his own. The compensation plan thus overwhelmingly encouraged IAs to recruit more IAs—in one of the Petitioner's own evocative words, to "duplicate, duplicate, duplicate!!!"—rather than actually find new customers for Stream's repackaged energy product [*Id.* at 22].

Petitioners likewise misrepresent two more critical facts intended to show that this case presents a recurring question of law regarding reliance on distinct representations, when in fact the district court's order turned on the lawfulness of the scheme as a whole. First, Petitioners claim (at 11) that it is "undisputed" that "thousands" of IAs made profits solely through sales. In reality, this is not remotely an "undisputed fact." To the contrary, it comes from a snippet of testimony, about less than 1% of the IA workforce, from Petitioners' own expert, whose opinions the district court eventually struck in significant part [Dkt.168].[3] The plaintiffs dispute Petitioners' claim, and the evidence will prove it mistaken.

Second, Petitioners attempt (at 11) to absolve themselves by pointing to a fact that is common to all pyramid schemes—namely, that some participants could and did make money. If pyramid schemes were only unlawful if nearly *everyone* lost, they would all be legal. Even a classic chain letter scheme allows some

[3] Moreover, to the extent that Petitioners' own best version of the facts is that *less than 1%* of IAs were able to make money through energy sales, it only better proves that Ignite and its IAs were principally in the business of selling a recruitment opportunity, not energy.

participants to escape without a loss if they end up far enough away from the bottom when the pyramid collapses. The problem arises only when the class of participants becomes too big, the market becomes saturated, and participants who need new recruits can no longer find available people to slot in below them. *See United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 481-482 (6th Cir. 1999) (explaining that the risk of saturation, and resulting losses to those at the bottom, is the critical danger inherent in a pyramid scheme). That is what happened here: After the expected, initial geometric growth, the Texas market where the scheme began became saturated and the overwhelming majority (86%) of IAs were left holding the bag for those above them who made either some return or an enormous fortune according to their tier [Dkt. 121 at 36-38].

Indeed, among the thousands of pages of discovery and scores of depositions before the district court at the time of class certification was a set of remarkably candid statements from various Petitioners demonstrating that they knew exactly what was going on within Ignite and Stream. Petitioners described their moneymaking model as "a cycle of duplication," [*id.* at 7, n.2] with "geometric growth to infinity," [*id.* at 20], where "success has not come from asking our associates to go out and gather lots of customer[s] personally," but rather from "building your associate team and creat[ing] leverage." [*Id.* at 18]. Petitioners were also aware that real, outside sales were lacking—the scheme was mostly functioning by having IAs sell energy to themselves—and one even opined that they "need[ed] to start NOT giving out our IA #s as the ratio does not look very good vs. customers." [*Id.* at 29]. Moreover, Petitioners fully anticipated the inevitable saturation problem that comes from a pyramidal recruitment system, [*id.* at 37-38] and then saw it as it unfolded in the market, with new IAs "having a hard time getting" recruits [*id.* at 29] because "the area is very saturated with Ignite," making it "impossible for someone to come into Ignite right now and make significant money." [*Id.* at 37-38]. Petitioners' CEO captured matters precisely in a letter to a friend who asked about his business: "You'll rapidly understand that there are Peters here to rob for the purpose of paying Paul." [*Id.* at 15].

All this vividly demonstrates that this case is not as Petitioners describe. The district court's class certification order turned not on divergent representations to a large class. Rather, the facts demonstrating a facially illegal pyramid scheme included Petitioners' own self-descriptions, huge returns to insiders with miniscule outside sales activity, and a widely distributed loss at the bottom corresponding to market saturation. That scheme affected the class in common. To the extent that any of the facts above are in dispute, it only demonstrates that the essential factual question at the heart of the case is unripe for this Court to consider as a matter of first review—indeed, there are cross-motions for summary judgment pending in the district court on the question whether Petitioners operated a pyramid scheme, and that court will be in a position to actually consider the complete record. Thus, and contrary to Petitioners' baseless suggestion (at 17), there is no question that this case involves more-than-sufficient evidence, applicable to the whole class, that defendants operate a facially illegal pyramid scheme. The Court will have to decide the propriety of class certification on *that* basis if it agrees to intervene now.

ARGUMENT

Petitioners' motion should be denied because the district court *agreed* with Petitioners' principal argument against class certification, and Petitioners otherwise rely on cases that have been expressly overruled. The narrow certification theory that the court actually adopted is consistent with analogous Fifth Circuit precedent and similar cases from around the country. Petitioners ultimately concede (at 7) that the district court accepted only a narrow ground for certification, that this ground was at least "theoretically" sound, *id.* at 10, and that the only question is whether this case fits that theory on its facts, *id.* at 11. It is unclear why interlocutory review would be appropriate to consider such a question, especially given the facts above.

I. The District Court Did Not Make The Broad Holding Petitioners Attack, And Its Narrow Certification Decision Is Entirely Faithful To Precedent

Petitioners' main argument (at 8-10) is that Fifth Circuit precedent deems class certification inappropriate in a fraud case that depends on the plaintiffs' reliance on particular misrepresentations because such reliance is typically an individualized matter. The problem with this argument is that the district court *agreed* with it. Ruling for *Petitioners* on this point, the district court expressly held that the plaintiffs' reliance on misstatements or omissions in Petitioners' marketing statements and materials did not support class certification. Op. 13-14 ("[P]laintiffs' position is that because every class member saw at least one of the many documents that contained fraudulent misstatements, classwide reliance can be shown. The Court disagrees. … [I]ndividualized reliance issues as to plaintiffs' knowledge, motivations and expectations … render[] 23(b)(3) certification unavailable under that theory."). This case simply does not present the main issue that Petitioners' motion purports to raise.

Ultimately recognizing (at 7) that the district court's decision was actually predicated on "a narrower legal theory," Petitioners pivot to a still broader counter-argument. They argue (at 7-9) that the essence of this case is that it is a "RICO fraud class action" and that this Court has never approved a certification order in such a case because "'a finding of RICO fraud liability requires a showing of reliance by *each plaintiff*.'" *Id.* at 9 (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000). Petitioners somehow fail to mention, however, that this very proposition has been expressly "overruled" by the Supreme Court and this Court has so held in the clearest possible terms. *See St. Germain*, 556 F.3d

261, 263 (5th Cir. 2009) ("The Supreme Court recently held that no reliance requirement exists for civil causes of action under RICO for victims of mail fraud. Thus, to the extent that our prior cases are in conflict with *Bridge*, they are overruled."). In other words, "a finding of RICO fraud liability [does *not*] requir[e] a showing of reliance by each plaintiff." *Contra Bolin*, 231 F.3d at 978. Petitioners' motion relies on the opposite of the law.

In fact, Justice Thomas's decision for the unanimous court in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), is fatal to Petitioners' argument and demonstrates the soundness of the district court's narrow theory. *Bridge* held that "[u]sing the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if *no one relied* on any misrepresentation. And one can conduct the affairs of a qualifying enterprise through a pattern of such acts without *anyone* relying on a fraudulent misrepresentation." *Id.* at 648-649 (emphasis added). After *Bridge*, it is thus impossible to maintain that the plaintiffs' reliance is a necessary element of a RICO fraud claim. On the contrary, *Bridge* makes very clear that the essential elements are (1) a scheme to defraud and (2) a showing that plaintiffs were injured "by reason of" that scheme (*i.e.*, "proximate cause"). *Id.* Reliance on fraudulent statements may be one way to demonstrate proximate cause, but the ultimate inquiry asks only if the fraudulent scheme caused the harm to the plaintiffs, whether they individually relied on any misrepresentation or not.

The district court's narrow theory for certification in this case follows directly from that holding. "Unquestionably, an illegal pyramid scheme constitutes a scheme to defraud," *Gold Unlimited*, 177 F.3d at 484, and plaintiffs who find themselves in "the vast majority of participants [who] are sure to lose money" in a pyramid scheme are plainly injured "by reason of" that scheme. Op. 15. Given the district court's unchallenged conclusion "that the legality of the Ignite program was a bedrock assumption of every class member," the court properly concluded that "a showing that the program was actually a facially illegal pyramid scheme would provide the necessary proximate cause" with respect to the class as a whole. *Id.* Or in the words of *Bridge*, "'[i]t is a foreseeable and natural consequence of the defendants' [pyramid] scheme' that the vast majority of unwitting IAs would lose money." *Id.* at 15 n.13 (quoting *Bridge*, 553 U.S. at 658; alteration by district court). Moreover, both these elements—the existence of a fraudulent pyramid scheme and the inevitable injury to those on the bottom—will necessarily be common questions for all members of the class.

Not only does the district court's narrow certification theory follow cleanly from *Bridge*, it is consistent with the best available precedents on cases involving pyramid schemes. Two analogous pyramid-scheme cases in this Circuit proceeded as class actions, *see Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980); *Bell v. Health-Mar, Inc.*, 549 F.2d 342 (5th Cir. 1977), as have similar cases in other circuits. *E.g.*, *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 779 (9th Cir. 1996). And as the district court made clear, its class certification order is not remotely novel, Op. 15-16 (citing *Negrete v. Allianz Life Insurance Co.*, 287 F.R.D. 590, 611-612 (C.D. Cal. 2012); *Peterson v. H & R Block Tax Services, Inc.*, 174 F.R.D. 78, 84-85 (N.D. Ill. 1997)), and relies only on a commonsense understanding of how individuals respond to an illegal pyramid scheme that holds itself out as a legitimate enterprise—indeed, that is the *whole point of the scheme*.

II. Petitioners' Argument That "Actual Proof" Of A Pyramid Scheme Was Required For Class Certification Is Not Properly Presented And Baseless

Petitioners also encourage the Court to grant interlocutory review on a second theory: that the district court erred by relying on an allegation of a pyramid scheme when it was required to find "actual proof." This argument cannot be resolved through this motion because it is being presented for the first time on appeal—it appears *nowhere* in Petitioners' objections to class certification below, and it would be particularly unfair to consider it now. Even if it were preserved, however, it is wrong. The existence of a pyramid scheme is the common *question* that makes the case appropriate for class certification: The answer may be yes or no, and every plaintiff's pyramid-scheme theory will either win or lose on the merits respectively. And once again, the Petitioners' motion fails even to cite, let alone discuss, the most relevant Supreme Court precedent.

To begin, the argument Petitioners advance is not properly before this Court. Petitioners did not ask the district court to deny class certification on the ground that it must first decide whether they were running an illegal pyramid scheme before deciding the issue of class certification. Indeed, despite directly addressing the "pyramid claims" at length in their opposition to class certification, *see* Dkt. 129 at 37-40, Petitioners did not even hint at this objection there. This Circuit steadfastly holds that "arguments not raised before the district court are waived and cannot be raised for the first time on appeal." *Martco Ltd. P'ship v. Wellons, Inc.*, 588 F.3d 864, 877 (5th Cir. 2009). It should adhere to that rule here, especially where Petitioners seek the extraordinary right of a permissive, interlocutory appeal.

Allowing Petitioners to raise this issue for the first time on appeal in this case would be especially inappropriate. Petitioners filed a *separate* motion for summary judgment on this precise factual question simultaneously with their objections to class certification [Dkt. 127]. If Petitioners actually wanted the district court to decide that motion first—or as part of the certification dispute—they could easily have asked. Moreover, discovery has closed and the record contains voluminous evidence going to the existence of a pyramid scheme. The court could have weighed this evidence and answered the question Petitioners now raise. Given the facts before the district court and the market and litigation stakes, Petitioners might have had many reasons not to force an answer on whether, in the considered view of a federal judge, Petitioners were ultimately running a scheme to defraud. But it is manifestly sandbagging to fault the district court now for failing to do something they did not ask it to do when they easily could have done so.

The novelty of this theory on appeal also leads to it being more than a little undercooked. Petitioners do not propose a standard of proof. (Judgment as a matter of law? Preponderance of the evidence?) They do not explain the necessary procedures. (Should *Daubert* motions and evidentiary disputes be settled first? What about discovery issues?) And they do not account at all for the burden imposed on the district court by requiring a full-blown mini-trial on the core merits question at a preliminary stage (nor explain how the existence of "proof" could be ascertained without one).

The novelty of this unpreserved and undeveloped theory apparently arises from Petitioners' view that, because the district court loosely analogized this case to the fraud-on-the-market theory in securities-fraud class actions, they can require compliance with every doctrinal detail of those cases—particularly the requirement that class plaintiffs "prove" the existence of an efficient market at the certification stage. *See* Motion at 12-13 (citing *Erica P. John Fund v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011)). This is an odd reading of the district court's opinion, which does not cite any securities-fraud cases and refers to the fraud-on-the-market theory only as another context in which class-wide harms may be demonstrated based on a "common sense inference" about the plaintiffs' rational behavior. Op. 15. It is quite clear that neither plaintiffs' pyramid-scheme theory nor the district court's class-certification order actually depends on the doctrinal particulars of securities-fraud litigation.

In fact, at Petitioners' doctrinal level (as opposed to the district court's), the analogy to a fraud-on-the-market case is plainly inapt. As Petitioners acknowledge (at 13), the reason plaintiffs must prove an efficient market in a fraud-on-the-market case is to avoid the need to show individualized reliance on a particular misrepresentation; the theory is that, in an efficient market, the stock price on which everyone relies incorporates that information. *Basic Inc. v. Levinson*, 485 U.S. 224, 243-245 (1988). That is not this case: The plaintiffs do not contend that the pyramid scheme was an efficient mechanism for the distribution of some particular misstatement or omission on which every plaintiff thereby relied. Indeed, after *Bridge*, it is clear that RICO fraud cases are unlike securities-fraud cases because the plaintiffs need not show their own reliance on a particular misrepresentation. But in any event, the theory on which the district court allowed certification here is much more simple: *i.e.*, that the pyramid scheme was a scheme to defraud under RICO, and that it caused a common harm to plaintiffs by holding itself out as a legitimate business when, in fact, it created a class of inevitable losers at the bottom. There is no dispute that Stream held itself out as a lawful business—it still does—and so there is no requirement to prove that it is in fact an unlawful pyramid scheme at the class certification stage in order to conclude that all members of the class received this same key information about it.

The efficient market issue to which Petitioners refer is also an unusual kind of question wholly unlike the pyramid-scheme issue here because it is logically antecedent to the existence of any class-wide questions. If the market is not efficient in a fraud-on-the-market case, the plaintiffs could not have all relied on the stock price in the same way, and they do not hang together as a class. By contrast, the existence of a pyramid-scheme is not antecedent to any class-wide questions in this case; it *is the class-wide question*: If the plaintiffs cannot prove that petitioners were operating a pyramid scheme, the whole class loses on its pyramid-scheme theory together on the merits.

Indeed, even if this issue were preserved and fully developed for appeal, and even if doctrinal analogies to securities-fraud cases were on point, Petitioners' theory would run headlong into the Supreme Court's recent holding in *Amgen v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013)—another case Petitioners mystifyingly fail to mention. *Amgen* held that a putative class in a fraud-on-the-market case need *not* prove that there was a material misstatement at the class certification stage because that question is indisputably common to the class. *Id.* at 1195-1196. The Court relied on the fact that the entire class's fraud theory as to a given representation would fail on the merits if the plaintiffs ultimately failed to prove that it was a material misstatement. Accordingly, individual questions could never predominate on that theory. *Id.* at 1196. So too here: This *entire class* will lose its pyramid-scheme theory on the merits if there is ultimately a failure of proof on the existence of a pyramid scheme. That makes the existence of a pyramid scheme a common question, which is all *Amgen* requires.

To be sure, the Supreme Court has said that a district court may sometimes need to inquire into the merits and the nature of the evidence that will be offered in order to satisfy itself that the case is amenable to proof on a class-wide basis. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). But as the Court most recently explained, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 133 S. Ct. at 1194-1195. The district court performed just the inquiry that these cases require (and permit), which is why it examined the misrepresentations and omissions that plaintiffs cited and held that evidence insufficient on its own to certify the class. But Petitioners' theory that the district court was required to do much, much more and fully decide whether they were running a pyramid scheme at the certification stage is incompatible with the Supreme Court's definitive statements in *Amgen*. Surprisingly, Petitioners do not even try to show otherwise.

* * * * *

In the end, Petitioners hope to place this case in an unbroken line of RICO fraud cases in which this Court has denied class certification. It is regrettable that they do not disclose that the line has been broken by intervening precedent, nor discuss the relevant Supreme Court cases, but that is not the biggest problem with this strategy. Behind Petitioners' stylized account of the facts and wishful account of the law lies a case that is fundamentally different from the prior RICO fraud cases mentioned because it is not predicated on a theory of individualized reliance on particular misstatements in the style of common-law fraud. Instead, as *Bridge* expressly permits, this case is predicated on an overarching, fraudulent pyramid scheme whose illegal nature and direct effects on those at the bottom are plainly common questions appropriate for class-wide resolution. The district court's certification decision in this case reflects that reality and yet was carefully circumscribed to avoid straying beyond this narrow theory, as even Petitioners must ultimately acknowledge. It does not merit interlocutory review.

CONCLUSION

For the foregoing reasons, Petitioners' Rule 23(f) motion should be denied.

DATED: February 6, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 5(c), 32(c), and 27(d).

/s/Brent T. Caldwell
Brent T. Caldwell

CERTIFICATE OF SERVICE

I hereby certify that all parties in this case will be served through the Court's ECF system, according to Local Rule 25.2.5. In addition, all parties will be sent a copy of this document by electronic mail at the time of filing.

/s/Brent T. Caldwell
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