No. 14-20128

In the United States Court of Appeals for the Fifth Circuit

JUAN RAMON TORRES; EUGENE ROBISON,

Plaintiffs-Appellees,

v.

S.G.E. MANAGEMENT, L.L.C.; STREAM GAS & ELECTRIC, L.T.D.; STREAM S.P.E. G.P., L.L.C; STREAM S.P.E., L.T.D.; IGNITE HOLDINGS, L.T.D; ET AL,

Defendants-Appellants.

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

SUPPLEMENTAL BRIEF OF APPELLEES

Andrew Kochanowski
SOMMERS SCHWARTZ, P.C.
One Towne Square, Suite 1700
Southfield, MI 48076
Telephone: (248) 355-0300
Facsimile: (248) 936-2140

Matthew J.M. Prebeg
Brent T. Caldwell
PREBEG, FAUCETT & ABBOTT PLLC
8441 Gulf Freeway, Suite 307
Houston, TX 77017
Telephone: (832) 742-9260
Facsimile: (832) 742-9261

Jeffrey W. Burnett
JEFFREY W. BURNETT PLLC
12226 Walraven
Huffman, Texas 77336
Telephone: (281)324-1400

Thomas C. Goldstein
Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
Telephone: (202) 362-0636
Facsimile: (888) 574-2033

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 are known to 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.

Plaintiffs-Appellees	Counsel for Plaintiffs-Appellees
Juan Ramon Torres Eugene Robison	Thomas C. Goldstein Eric F. Citron GOLDSTEIN & RUSSELL, P.C. 5225 Wisconsin Avenue, NW Suite 404 Washington, DC 20015 Telephone: (202) 362-0636 Facsimile: (888) 574-2033 Matthew J.M. Prebeg Brent T. Caldwell PREBEG, FAUCETT & ABBOTT PLLC 8441 Gulf Freeway, Suite 307 Houston, TX 77017 Telephone: (832) 742-9260 Facsimile: (832) 742-9261 Jeffrey W. Burnett JEFFREY W. BURNETT PLLC 12226 Walraven Huffman, Texas 77336 Telephone: (281)324-1400 Facsimile: (713) 583-1221 Andrew Kochanowski SOMMERS SCHWARTZ, P.C. One Towne Square, Suite 1700 Southfield, MI 48076 Telephone: (248) 355-0300 Facsimile: (248) 936-2140

	Scott Monroe Clearman THE CLEARMAN LAW FIRM, PLLC The Belle Meade at River Oaks 2929 Westheimer Road Houston, Texas 77098 Telephone: (713) 522-1122
Defendants-Appellants	**Counsel for Defendants-Appellants**
SGE Management, LLC (whose parent company Defendants-Appellants represent to be PointHigh Partners, LP) Stream Gas & Electric, Ltd. (whose parent company Defendants-Appellants represent to be SGE Management, LLC) Stream SPE GP, LLC (whose parent company Defendants-Appellants represent to be Stream Gas & Electric, Ltd.) Stream SPE, Ltd. (whose parent company Defendants-Appellants represent to be Stream Gas & Electric, Ltd.) Ignite Holdings, Ltd (whose parent company Defendants-Appellants represent to be Stream Gas & Electric, Ltd.) SGE Energy Management, Ltd. SGE IP Holdco, LLC (whose parent company Defendants-Appellants represent to be Stream Gas & Electric, Ltd.)	Robert C. Walters James C. Ho Prerak Shah GIBSON, DUNN & CRUTCHER LLP 2100 McKinney Avenue, Suite 1100 Dallas, Texas 75201-6912 Telephone: (214) 698-3100 Facsimile: (214) 571-2934 Michael K. Hurst John F. Guild GRUBER HURST JOHANSEN HAIL SHANK LLP 1445 Ross Avenue, Suite 2500 Dallas, Texas 75202 Telephone: (214) 855-6800 Facsimile: (214) 855-6808 Vanessa J. Rush STREAM ENERGY 1950 Stemmons Freeway, Suite 3000 Dallas, TX 75207 Telephone: (214) 800-4464

SGE Georgia Holdco, LLC SGE Serviceco, LLC SGE Consultants, LLC Stream Georgia Gas SPE, LLC (whose parent company Defendants-Appellants represent to be Stream Gas & Electric, Ltd.) Stream Texas Serviceco, LLC SGE Ignite GP Holdco, LLC SGE Texas Holdco, LLC SGE North America Serviceco, LLC (whose parent company Defendants-Appellants represent to be Stream Gas & Electric, Ltd.) PointHigh Partners, LP PointHigh Management Company, LLC Chris Domhoff Rob Snyder Pierre Koshakji Douglas Witt Steve Flores Michael Tacker Darryl Smith Trey Dyer	

Donny Anderson Steve Fisher Randy Hedge Brian Lucia Logan Stout Presley Swagerty Mark Dean La Dohn Dean A.E. “Trey” Dyer III Sally Kay Dyer Dyer Energy, Inc. Diane Fisher Kingdom Brokerage, Inc. Fisher Energy, LLC Susan Fisher Mark Florez The Randy Hedge Companies, Inc. Murlle, LLC Robert L. Ledbetter Greg McCord Heather McCord	

Rose Energy Group, Inc. Timothy W. Rose Shannon Rose LHS, Inc. Haley Stout Property Line Management, LLC Property Line, LP Swagerty Management, LLC Swagerty Energy, Ltd. Swagerty Enterprises, LP Swagerty Enterprises, Inc. Swagerty, Inc. Swagerty Power, Ltd. Jeannie E. Swagerty Sachse, Inc. Terry Yancey Paul Thies	

Respectfully submitted,

/s/ Thomas C. Goldstein
Thomas C. Goldstein
Counsel of Record

STATEMENT REGARDING ORAL ARGUMENT

En banc oral argument has already been scheduled in this matter, and we believe it may assist the Court's consideration of the questions presented.

CITATIONS GLOSSARY

App. A – Appendix A to Present Brief

App. B – Appendix B to Present Brief

Br. – Defendants' Supplemental Brief

Dissent – Panel Dissent (cited to sequential slip opinion page)

D.E. X – Docket Entry (used for items sealed below)

D.E. X, App. X-Ex. X (used for items in sealed electronic appendix below; cited by docket entry, appendix volume, and exhibit number)

DPBr. – Defendants' Panel Brief

IA-Br. – Brief of *Amici* IAs

Op. – Panel Opinion

PPBr. – Plaintiffs' Panel Brief

ROA.XX – Record on Appeal

SRE – Plaintiffs' Supplemental Record Excerpts

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INTRODUCTION

To affirm, this Court need only recognize that a pyramid-scheme victim—someone who *actually did lose money* because they fell in the inevitable class of people who lose money in any pyramid scheme—can make out a RICO claim by proving that defendants set such an illegal scheme in motion. That proposition is uncontested, however: Under settled law, an illegal pyramid scheme is *per se* mail fraud, and will "inevitably harm" a class of participants who must lose some or all of their investment. *United States v. Gold Unlimited*, 177 F.3d 472, 484 (6th Cir. 1999); *Webster v. Omnitrition*, 79 F.3d 776 (9th Cir. 1996); *In re Koscot*, 86 F.T.C. 1106 (1975). RICO's elements, meanwhile, require only that a plaintiff show she lost money "by reason of" a fraudulent scheme. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 649 (2008). It is thus hard to imagine a class better suited for Rule 23: Every illegal pyramid scheme *victim* loses money in the same way "by reason of" the same *per se* fraud, and their identical claims fall at the "very core of the class action mechanism," where "small recoveries do not provide the incentive for any individual to … prosecut[e] his or her rights." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997).

Thus, while defendants spend considerable ink discussing individuals who managed to make money, that fact is—like much of their briefing—an irrelevant distraction that also turns out to be mostly false. The class here consists *entirely of*

those who lost money because they joined Stream, and so identifying a small minority of others who managed to make an (almost always tiny) sum proves nothing. Indeed, in every illegal pyramid scheme, some people recoup their investment. Yet defendants still have not identified a single private pyramid-scheme case that did not proceed as a class action. Instead, as they acknowledge (in one of many carefully buried footnotes, Br. 39 n.11), even cases that "played out" their own stilted version of the certification standard "have upheld the predominance of common issues, and … granted certification to comprehensive plaintiff classes in cases arising from similar multi-level pyramid schemes." *Nguyen v. FundAmerica*, 1990 WL 165251, *2 (N.D. Cal. Aug. 16, 1990) (collecting cases). Defendants can thus portray this as a "doctrinally simple case," Br. 35, only by omitting almost all the doctrine.

Over and over, defendants use ellipses to misquote key materials, cite cases for the opposite of their holdings, rely on misleading statistics, and—most of all—omit critical contrary caselaw. For example, while this case is *only* about illegal pyramid schemes, defendants' briefing eschews *any* substantive pyramid-scheme law, including RICO-based, pyramid-scheme class actions they previously cited themselves. Those cases, decided even before *Bridge* unanimously clarified that individual reliance is not a RICO element, easily confirm that certification was appropriate here. In fact, recent (again, uncited) Supreme Court class-action law

does make this case "doctrinally simple," but not in defendants' favor. *See Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

Ultimately, denying certification here rests on a view of predominance rejected by every other authority, including thrice recently by the Supreme Court. Given the unbroken history of class-action litigation regarding pyramid schemes, the further grounds for certification provided by *Bridge*, and the judiciary's uniform rejection of defendants' version of Rule 23, finding an *abuse of discretion* here would leave this Court in an extreme and lonely spot. Accordingly, while defendants spend pages attacking policy-argument strawmen (at 50-66), we need neither those imaginary arguments nor the very real policy concerns they poorly represent to prevail. Instead, certification can be affirmed here on multiple, limited grounds, rooted in nothing more than settled law and common sense.

QUESTION PRESENTED

Did the district court abuse its discretion in concluding that common questions will predominate on the class's pyramid-scheme theory?

STATEMENT

I. Factual Background

Defendant Stream and its marketing arm, Ignite, were conceived in 2004 to sell electricity in Texas's newly deregulated market. Yet while defendants (at 8) vaguely describe Stream as a "retail energy company" that "generates billions of

dollars in gas and electricity sales," to "more than a million customers," and is reputable enough to be a "provider of last resort," that story is not particularly forthright.

Stream is a *sales* company: It owns no plants or power lines, and now sells everything from cellphone plans to credit monitoring. *See* https://mystream.com. Its "energy" business is reselling services provided by actual utilities—charging retail for energy it pays those utilities to produce and transport. References to Stream's revenues are thus illusory; the profits from this business are such that, even years in, Stream was netting only $4 million on its "billions [in] sales." PPBr. 5; SRE17.

Stream's other boasts regarding its "reputation" (at 8-9) are likewise puffery. It is a "provider of last resort" only in the sense that Texas allows it (and *fourteen* other competitors) to charge certain non-customers inflated prices if their preferred reseller fails; it cannot, say, run generators in a brownout. *See Provider of Last Resort*, www.puc.texas.gov/consumer/electricity/polr.aspx; *2015-2016 POLRs*, http://goo.gl/WNVXko. Stream also does not have "more than a million customers"; it eventually plateaued at half that number, while steadily bleeding customers in its home base of Texas. SRE14, 17. Perhaps defendants meant to say Stream *had* a million customers *cumulatively*. But that means Stream has lost half its subscribers over time, reflecting that its "real product[s] that [are] used by

everyone" (Br. 10) are really only accounting entries for products almost always available from others for less. *See* Memorandum, *FTC v. Fortune Hi-Tech Mktg.*, https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130128fhtmmotiontro.pdf (Jan. 24, 2013) ("*FHTM* Memo") at 5, 9 (FTC prosecution of similar company, founded by defendants' former colleague, noting that scheme also dubiously sold affiliate "services consumers are already likely to purchase").

What Stream does provide is "multi-level marketing" or "MLM": a system where individuals pay the company to sell its products and recruit others to do the same, earning bonuses based on the growth and sales of their "downline." Op. 2-3. Indeed, building an MLM to sell newly deregulated services was the sole relevant experience of the defendants who built this "energy company." Many had similar roles at Excel Telecommunications, which collapsed in 2004 after employing a similar MLM structure to sell newly deregulated telephone services. Op. 3 n.1; PPBr. 6; ROA.1052-62, 2192-94 (describing relationship). Meanwhile, Excel peers like Paul Orberson who started other, similar MLMs went on to be prosecuted for pyramid scheming. *See* PPBr. 6; *FHTM* Memo at 42; D.E. 142-Ex. B, 107-121 (discussing similarities among Stream, Excel, and Fortune Hi-Tech).

Of course, some MLMs are legal even though their salespeople (which Stream calls "IAs") must pay to participate. The distinction between lawful programs (like Avon or Tupperware) and illegal frauds (like Fortune Hi-Tech)

turns on whether their compensation rules create adequate incentives for sales rather than recruiting. Op. 14. If not, MLMs create an "inherently deceptive" situation where everyone expects to profit by recruiting others, and nobody has an incentive to do the real, woefully undercompensated sales work. Participants don't see it, but the vast majority of IAs *inevitably* lose money in that situation because the scheme eventually runs out of people to recruit. *Infra* pp.28-30.

Notably, Stream's *amicus* "Direct Selling Association" is an MLM lobby group that has had several members prosecuted for pyramid-scheming. PPBr. 55. Indeed, Avon and Tupperware—two of the four companies Stream touts as peers (at 9)—recently withdrew from DSA because its standards fail to protect against pyramid schemes. *Id.*; Max Ehrenfreund, *Avon Splits with Trade Group, Citing Risk of Pyramid Schemes*, Wash. Post (Sept. 16, 2014), http://wpo.st/1vpY1.

In Stream, as in any such scheme, IAs paid for the right to sell the product and recruit more IAs, who paid in turn for the same "opportunity." Stream charged $329 to join this ever-expanding force, plus $25/month for a website from which to sign up others. Meanwhile, finding customers earned IAs only $0.50/month on accounts costing 300-400 times that much. PPBr. 7; SRE8; SRE14.

As this tiny direct commission indicates, Stream was not designed to sustain a viable channel of customer-seeking salespeople. Instead, it sought infectious growth by offering IAs the mirage of substantial earnings through recruitment.

The panel majority acknowledged as much, finding that, at Stream, an "IA's success *depends primarily on recruiting* a 'downline' of other IAs." Op. 3 (emphasis added). That is a concise statement of when an MLM becomes a *per se* fraudulent, illegal pyramid scheme. And indeed, there is a mountain of evidence here not only that Stream was such a scheme, but that defendants knew exactly the kind of trap they set up.

Given that even the panel majority already reached the decisive legal conclusion, and our panel brief contains much of this evidence, PPBr. 5-16, we hit only the highlights below. Suffice it to say that Stream fares horribly on every relevant metric courts and regulators use to identify illegal pyramid schemes.

1. To begin, Stream plainly "preaches" recruiting over sales. *Compare FHTM* Memo at 40. Its "Business Plan" actually says: "[*T*]*his is not about becoming an energy expert or salesperson*. You only need a few customers to be successful." SRE2 (emphasis added). Instead, it says, success comes from "teaching others *and duplicating*." *Id.* (emphasis added). Defendants here provide the best possible summary of why Stream is an illegal pyramid scheme: Any "energy company" sales program that "is not about becoming an energy salesperson" necessarily collapses; if everyone tries to succeed by "duplicating," a huge class is inevitably left with a loss when the recruits run out. *Infra* pp.28-30; PPBr. 13-16.

As even the panel found, Stream's "officers repeatedly underscored that the way to make money was by *recruiting other IAs,* not *recruiting customers*." Op. 15 (majority's emphasis). Contrary to the majority's suggestion, however, *id.* 15-16, this recruitment preaching does not make the scheme less fraudulent—only more so. As explained below, uniform law deems pyramid schemes "inherently deceptive" because, even if laypeople understand what the scheme requires for them to profit, they do not see that the structure as a whole must inevitably cause harm to themselves or others in the end. *Infra* pp.28-29; PPBr. 34. Accordingly, Stream's colorful promises of "geometric growth to infinity!" Op. 4, are part of what makes it a pyramid fraud, not a warning to IAs that a business held out as legitimate is anything but. *See FHTM* Memo at 12-13; Dissent 33-34.

2. Stream's compensation plan practiced what Stream preached. The fifty-cent direct commission was the only inducement for IAs to make real sales. In contrast, IAs who signed up yet more IAs earned multiplying commissions from an expanding pyramid of "downline" sales plus "leadership bonuses" reaching up to $275/recruit. PPBr. 7; SRE7-9. Notably, the plan provided far more money *on each sale* to an IA's "upline" than to the IA herself. SRE8. That problematic incentive structure was reinforced by the difficulty of actually selling the product: Stream was paying only a tiny fraction of the account's monthly cost for selling a

product with cheaper, fungible alternatives that was inherently limited to one per customer. *Compare FHTM* Memo at 10; *see* PPBr. 5.

Even "bonuses" that seemed sales-related did not functionally induce retail selling. For example, the "Quick Start 4" bonus was paid for accruing four sales "points" within 30 days. But Stream gave IAs one point for signing up themselves, two for buying the website, and one for recruiting an IA who also bought an account. PPBr. 8; SRE6. Most of this "sales" bonus was thus paid because IAs *bought* services from Stream, not because they *sold* Stream's services to outside customers. *Id.*; *compare FHTM* Memo at 2, 8, 10. This kind of compensation plan inevitably leads to a massive set of IAs coming out with a loss.

3. And that's exactly what happened. **Over 86%** of Stream IAs who enrolled during the class period lost money, collectively losing **over $87,000,000**. PPBr. 12. Several confirmed pyramid schemes have comparable figures. *E.g.*, *FHTM* Memo at 18; *FTC v. BurnLounge*, 753 F.3d 878, 883 (9th Cir. 2014); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 532 (S.D.N.Y. 2000). Moreover, while Stream emphasizes that earnings require "hard work, diligence, and leadership," App. B, these figures assume that *their* value is $0. Even counting only the 14% of IAs that made any money—that is, the *non*-class-members defendants endlessly trumpet—over 40% of them failed to make one week's

minimum wage in years spent hustling for Stream. Among all IAs, less than 5% beat Uber's average for two days' work.[1]

Worse, nearly all of those non-class-member IAs who made money did so by recruiting others, inadvertently ensuring those recruits (or yet more below them) would end up losing. Defendants and their *amici* appear to contest this point, Br. 11, IA-Br. 8-9, saying it was theoretically possible to earn money through sales alone and that a tiny fraction did. This argument is largely false, however, and entirely trivial.

Purporting to cite "Plaintiff's Expert," defendants argue (at 33) that "thousands" of IAs who joined during the class period earned a profit "solely by selling energy, without recruiting a single IA." The citation refers to *their expert*, however, D.E. 154, 97:3-25, who later admitted this testimony had no basis in her (since stricken) report. *Id.* 102:10-103:20. Of course, even granting defendants' self-serving story, it's devastating: The "s" in their "thousands" refers to *two* thousand IAs (<.01 of the total)—meaning only a statistically insignificant set could recoup their out-of-pocket fees by actually selling the product. *Id.* 97:3-25. And yet even that self-serving, devastating story appears false: We have identified only 267 IAs (<.001) whose direct commissions exceeded their costs.

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[1] The calculations in this section are derived from DPI0001 *et seq.*—data sets introduced below, D.E. 121-App. II, Ex.135, and synthesized in plaintiff's expert report, which defendants have likewise repurposed in their newly developed figures. Br. 47-48.

Citing nothing, defendants' *amici* identify two individuals claiming to make "a modest amount of money by selling energy." IA-Br. 8-9. Were these stories true, they would remain extreme outliers. But they too are likely false.

Consider the "story" of June Joseph. Counsel reports (at 9) that she earns "between $75 and $150 a month by selling Stream Energy"—suggesting an amazing customer roster of 150-300 homes. But June Joseph is in the record, and it tells a different "story." Ms. Joseph joined Stream in May 2010, and in the three years the record covers, she earned a grand total of $117.30. She also had at least $500 in *recruiting* bonuses. Her total from energy sales was thus *negative* $400 or worse. Moreover, Ms. Joseph recruited two others: Bryant Porter (he lost $266.65) and Truman Scranton (he lost $306.85). The math "may not register with lawyers" with a story to tell, but Stream does very real harm to very real people, whose no-doubt-solicited participation here demonstrates that they clearly don't understand the harm they wreak on themselves and those below them when they innocently perpetuate the scam.[2]

In any event, Ms. Joseph needs 300 customers to earn her best-case-scenario wage of $150/month, while Stream has taken fees from 300,000 IAs. For each to achieve the little Ms. Joseph claims, Stream needs 90 million customers—three

[2] A*mici*'s counsel refused our request for Juanita Marquez's information. We cannot reliably identify her, but the closest match, Juana Marquez (#A1621921) both had recruiting bonuses and *lost* $79.85.

utility accounts for every man, woman, and child in Texas. Thus, the only way a non-trivial set of people make a non-trivial sum is by "duplicating" the endless recruiting scheme.

4. Accordingly, all the "real money" went to recruiters—principally the defendants who rigged the game. Tens of millions flowed to a tiny group of insiders with privileged starting positions. Even before Stream could sell power, those insiders created a web of sales among themselves, building a multi-level capstone that would be positioned to reap enormous returns from the activities of later-joining IAs at lower tiers. PPBr. 12.

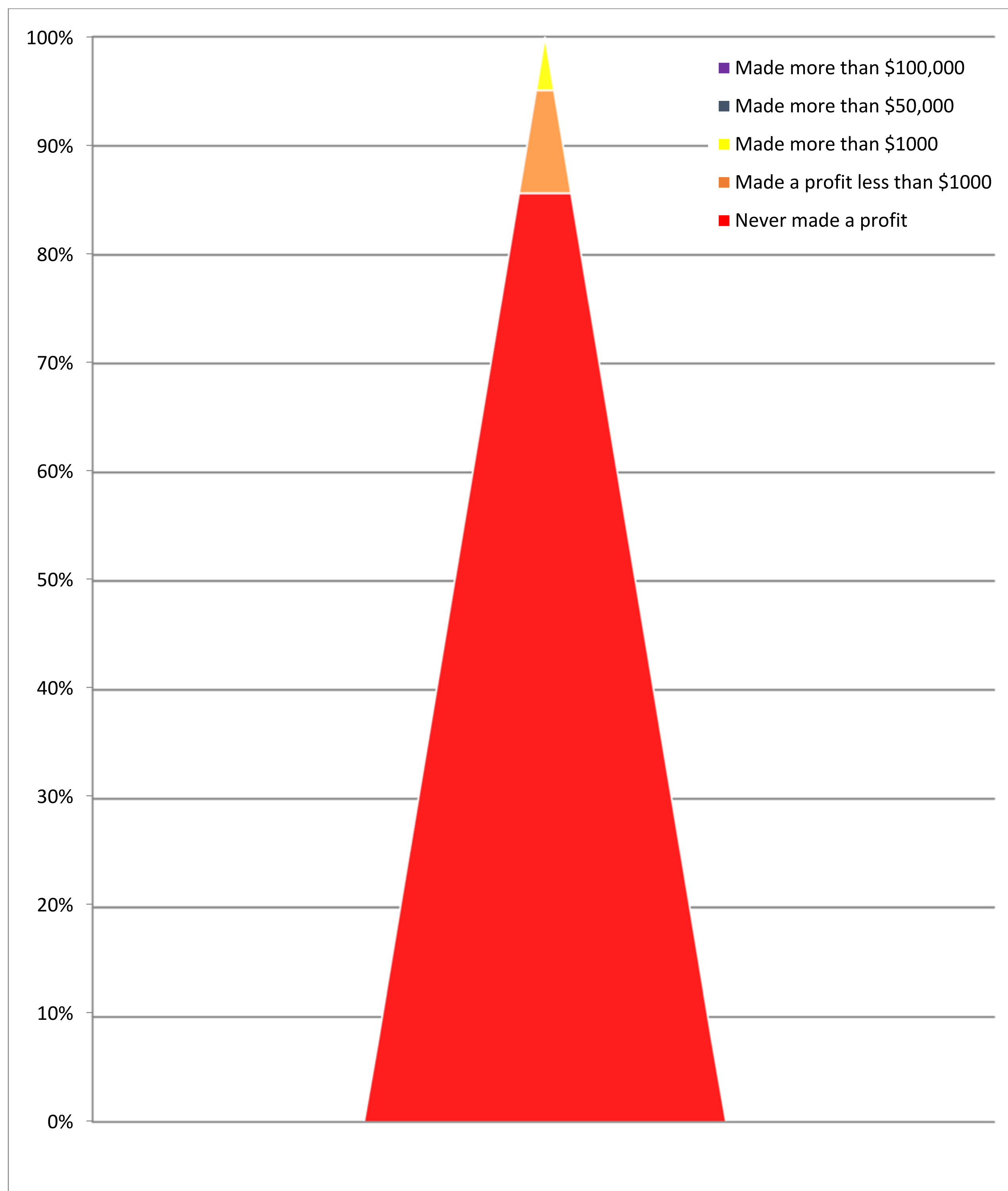
Within that capstone was only trivial sales activity, but huge profits. One defendant eventually had 200,000 people in his downline and made $16,500,000 in "commissions" and recruitment bonuses; another, a company executive, had 282,000 people in his downline and (together with his family) pocketed over $6 million. One even inserted his ailing mother in a lucrative upline such that—despite her *death* and consequent lack of sales—she ended up with over $500,000 in "commissions." These apex predators would have *lost* money counting only energy sales; their recruiting-to-sales ratio for their returns was literally thousands-to-one. PPBr. 13.

The aggregate numbers are likewise brutal. All told, Stream was paying out $42 million to IAs in years where its customer count implied only $3 million in

direct commissions (a 14-to-1 premium on recruiting). PPBr. 13-14. Even making maximally charitable assumptions, Stream's payout ratios still correspond to those of confirmed pyramid schemes. *See* PPBr. 13; *BurnLounge*, 753 F.3d at 884.

Shifting cagily among different statistics, defendants' nonetheless claim (at 47-48) that Stream offered all comers a "very real prospect" to "earn real money." We lack the space to demonstrate all the sleight of hand in that claim. But a scale representation of defendants' *own figures* shows exactly the concentrated payout structure one expects from an illegal pyramid scheme—where the "real money" is not really available to all:

Of course, that data leaves out everyone who *lost money*—*i.e.*, all the *actual class members*. Returning them to the picture is even more illustrative.



Defendants' (non-record) chart (at 48), purporting to show that joining at any time brought the same "very real prospect" to make "real money," is likewise deceptive, for two reasons. First, Stream expanded to new markets after 2008, and the largest expansion (Pennsylvania, in 2010) temporarily staunched the bleeding their chart otherwise shows from 2005-2009. Second, defendants conveniently omit *how much* "real money" was earned according to sign-up date. The two charts below simply expand the carefully cropped picture defendants chose for the Court, and might be more helpful. The latter is limited to Texas-addressed IAs (to partially control for the expansion), but both are devastating.

Year (IAs From All States)	New IAs	Including Website[3]		Average Profit For IAs Who Profited	Average Profit/Loss All IAs
		#Who Profited	% Who Profited		
2005	21,689	3,515	16.21%	$31,816	$4,812
2006	36,434	5,335	14.64%	$5,969	$533
2007	36,751	4,835	13.16%	$3,624	$138
2008	39,986	5,295	13.24%	$2,788	$36
2009	23,500	2,759	11.74%	$1,986	-$103
2010	29,764	4,493	15.10%	$2,698	$141
2011	49,271	7,107	14.42%	$1,176	-$88
2012	27,434	2,839	10.35%	$911	-$206
Total	264,829	36,178	13.66%		

[3] Excluding website costs is ridiculous. Not only did over 97% of IAs buy the website, D.E. 121-App. III, Ex.1(a), its "sales points" were necessary for many to qualify for payments. Accordingly, the numbers in defendants' non-website column, while irrelevant, are also plainly incorrect.

Year (Texas & Blank)	New IAs	Including Website		Average Profit For IAs Who Profited	Average Profit/Loss All IAs
		#Who Profited	%Who Profited		
2005	21,201	3,421	16.14%	$31,098	$4,674
2006	35,735	5,226	14.62%	$5,912	$524
2007	35,318	4,659	13.19%	$3,311	$102
2008	20,294	3,621	17.84%	$1,686	$7
2009	16,602	2,245	13.52%	$1,712	-$84
2010	18,943	2,346	12.38%	$1,264	-$105
2011	11,400	1,430	12.54%	$743	-$147
2012	5,699	481	8.44%	$642	-$249
Total	165,192	23,429	14.18%		

As is now apparent, the prospects of making "real money" were not "very real" after Year One. In both charts, the exact pattern expected from an illegal pyramid scheme rapidly emerges: Average returns to later-joining IAs almost immediately become trivial, and then increasingly negative. And even for 2005 sign-ups, if we excluded the tens of millions earned by *the defendants* who put themselves at the top, the meager average return of under $600/year would look even worse.

5. Accordingly, Stream—like all illegal pyramid schemes—never achieved a viable sales rate that could prevent massive IA losses. Generous assumptions show no more than two or three customers per IA, and by 2012, Stream had more new IAs paying to sell accounts each year than new customers buying them. PPBr. 15; SRE14; SRE17. Reality reflected the inexorable math: The market quickly

saturated; Stream ran out of new recruits and/or sales opportunities; and more than 86% of IAs were left holding the $87 million bag.

6. And here, finally, is the worst part. As detailed elsewhere, PPBr. 8-9, the record strongly reflects that defendants not only *knew* what they had done to most of their future IAs, but also worked hard to avoid revealing the illegitimacy of their model, which they knew would kill the golden goose.

For example, defendants realized they needed to suppress information about the number of IAs relative to customers, because it demonstrated an absence of adequate sales relative to recruitment. SRE31 (email titled "saturation" exhorting that "we need to start NOT giving out our IA #s as the ratio does not look very good vs. customers."). They also fully anticipated the inevitable saturation problem—believing Texas would be saturated with IAs *by 2006*. SRE30. They then did nothing as that saturation played out, as reflected in emails documenting that new IAs were "having a hard time getting" recruits, because "the area is very saturated with Ignite," making it "impossible for someone to come into Ignite right now and make significant money." SRE24. Indeed, they resisted calls to change their compensation structure because they "need[ed] to keep in mind our breakage profit [*i.e.*, profits from IAs who do not break even] that we currently depend on," D.E. 121, App. I-Ex. C, 294-95.

Defendants' 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."** SRE26.

Of course, this is the exact reality defendants carefully kept out of public earshot. Their annual income disclosure insists that those who "choose Ignite … are teaming up with an organization rooted in … integrity." App. B. But they knew the truth: Although they had in fact built the kind of endless recruiting scheme that would make them rich only by inevitably harming the huge class of victims now before the Court—and that harm, which they called "breakage profit," was in fact being visited on most of their IAs—it would all come crashing down if their scheme was actually revealed as the illegal pyramid scam it was.

II. Procedural Background

In 2009, plaintiffs filed a RICO suit alleging they were injured "by reason of" defendants' fraudulent scheme, 42 U.S.C. §1962, and seeking to represent a class of current and former Stream IAs *who lost money* by participating.[4]

Plaintiffs sought certification on two separate theories. The first was that defendants' common marketing materials were "replete with fraudulent misstatements" about how lucrative becoming an IA could be, and that—because everyone saw at least one—the plaintiffs could show that their injuries stemmed

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[4] As defendants concede (at 65 n.19), the granted certification motion limits the class to those who lost money, D.E. 121 at 1. Plaintiffs disavow any broader definition.

from a common set of frauds. ROA.2264. The second was based on the "common sense inference that IAs were duped into joining a pyramid scheme." ROA.2266. The latter would require plaintiffs to prove an illegal pyramid scheme at trial, but would not depend on Stream's representations about easy profits. Instead, the common pyramid-scheme showing would suffice because "it can rationally be assumed (at least without any contravening evidence) that the legality of the Ignite program was a bedrock assumption of every class member." *Id.* Put otherwise, *if* a jury found that Stream was an illegal pyramid scheme, it could also logically conclude that class members were harmed "by reason of" that *per se* fraudulent enterprise when they lost money by joining that deceptively illegal scheme.

The district court held a class-certification hearing with live testimony. Plaintiffs put forward their two theories and defendants opposed both, focusing on alleged individualized questions of "knowledge." D.E. 154, 51:7-10. Because discovery had closed and there was simultaneous summary-judgment briefing, a voluminous record of deposition testimony and documentary proof was before the court. But defendants nonetheless presented no evidence of *anyone*—class member or otherwise—who joined Stream, or would have, knowing it was an illegal pyramid scheme. Indeed, they didn't even ask plaintiff Robison if he would have done so, D.E. 159-Ex. C, nor did they mention the four hypothetical categories they now place before the Court. They *did* ask plaintiff Torres if he

thought Stream was a pyramid scheme when he joined, but they didn't even put that testimony in the record, because he of course said: "No." D.E. 127-Ex. 5 (omitting p.97).

The district court carefully distinguished the plaintiffs' two theories and held that only the pyramid-scheme claim was certifiable. It recognized that while the other claim would turn on which representations each IA heard, and their motivations for joining, the pyramid-scheme theory was different. "Although the litany of reasons any individual class member signed up to become an IA may vary, common sense compels the conclusion that every IA believed they were joining a lawful venture." ROA.2266. Accordingly, if plaintiffs could prove their allegation that Stream was *not* a lawful venture, "proximate cause … could be determined as to all the class members at once." ROA.2266; PPBr. 20.

Defendants sought an interlocutory appeal and emergency stay. That motion represented to this Court that distributing a class notice would cause "immediate and irreparable damage" because the pyramid-scheme "accusation" alone would "thwart Stream Energy from enlisting new IAs." App. A-3. Defendants even submitted a sworn affidavit asserting that the effect would be identical to an injunction against enrolling any further participants. App. A-10. Having thereby argued that *no one would join Stream* or buy its product if a class notice even accused it of being an illegal pyramid scheme, defendants' motion prevailed.

Thereafter, a divided panel vacated the class certification. The majority determined that, because the *plaintiffs*' evidence strongly indicated that defendants created an illegal pyramid scheme and openly preached recruiting, there would be individualized issues regarding whether some plaintiffs knew Stream was an illegal pyramid scheme. Op. 15-16. The majority further speculated that some rational person could—in theory—knowingly join an illegal pyramid scheme, and that this sufficed to reject certification. *Id.* 20-23.

Judge Wiener dissented. He noted that the majority opinion would "vaccinate illegal pyramid schemes against *all* civil litigation" and, more broadly, would "serve to instruct trial courts in this circuit to deny class certification on the merely theoretical possibility of a class member's knowledge of the fraud without requiring the defendant to adduce evidence of actual investor knowledge of illegality." Dissent 24. He faulted the majority for "us[ing] the very evidence on which the plaintiffs rely to establish that Ignite is an illegal pyramid scheme to reject a common inference of reliance," finding this inconsistent with the settled rule that illegal pyramid schemes are "inherently deceptive," *id.* 33-34, and the "long recognized" fact that "their very success depends on keeping their illegality secret." *Id.* He noted that, unlike in prior cases, the district court here had *found* that there was no evidence that *any* plaintiff knew about the fraud. *Id.* 36-37. And even ignoring all that, he explained, the majority still erred in concluding that

rational class members might have knowingly joined an *illegal* pyramid scheme held out as a legitimate business, which would require them "knowingly to become victims or knowingly to become fraudsters"—frequently "exploiting [their] family" in the process. *Id.* 38-39, 41.

This Court granted rehearing *en banc*.

SUMMARY OF ARGUMENT

Endeavoring to avoid repetition of our panel briefing and Judge Wiener's persuasive dissent,[5] this brief principally addresses three novelties in defendants' *en banc* arguments. We begin, however, by emphasizing a point defendants have still chosen not to contest—namely, that illegal pyramid schemes are "inherently deceptive" schemes to defraud, which the law prohibits because they "inevitably harm later investors." *Gold Unlimited*, 177 F.3d at 479.

Indeed, multiple courts have held that operating an illegal pyramid scheme is a *per se* predicate act of racketeering (*i.e.*, mail fraud), *id.* at 484, and that plaintiff classes establishing a pyramid-scheme claim also satisfy their burden on all elements of common-law fraud—including "justifiable reliance" and causation—at

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[5] We are particularly happy to rest on these materials (*e.g*. PPBr. 54-57; Dissent 24-25, 34-35, 41-42) in response to defendants' odd policy discussion (at 50-66). Relying on the question-begging (and false) premise that certification would somehow eliminate a RICO element or do "violence" to Rule 23, these arguments add nothing. But they *are* illuminating: At one point, defendants suggest that certification should be denied because it might incentivize hypothetical "bad-faith actors to join *real* pyramid schemes" by allowing them to fall back on a RICO claim. Br. 64-65. The bigger concern is, of course, allowing such imaginary boogeymen to destroy the only practicable redress that *over 200,000* real victims have against those who *actually set up* "real pyramid schemes."

least in the absence of contrary evidence. *See Omnitrition*, 79 F.3d at 788. Defendants omit these universally accepted holdings because they are largely indistinguishable from what the district court decided below: namely, that the plaintiffs could—"at least without any contravening evidence"—make a showing of causation through classwide proof that Stream was an illegal pyramid scheme. ROA.2266. Defendants' concession thus signals how and why the decision below is easily affirmed.

It also explains why—as defendants still concede—every private pyramid-scheme case proceeds as a class action. Defendants now even cite with (silent) approval to *Nguyen*, 1990 WL 165251, which explained that "federal courts have upheld the predominance of common issues, and … granted certification to comprehensive plaintiff classes in cases arising from similar multi-level pyramid schemes." *Id.* *2 (cited at Br. 39 n.11). Our panel briefing contains a bullet-point list of markedly similar pyramid-scheme cases, including from this Circuit, that proceeded as class actions. *See* PPBr. 29-31; *Piambino v. Bailey*, 610 F.2d 1306, 1308 (5th Cir. 1980); *Arata v. Nu Skin*, 5 F.3d 534 (9th Cir. 1993). No "doctrinally simple" argument can be so utterly contrary to every case on point. Instead, defendants' argument rests on three fundamental errors.

First, defendants plainly misstate the law governing the predominance inquiry generally, as well as its application to cases involving fraud. Multiple,

recent Supreme Court decisions categorically reject the perfect fit defendants would require, where it must be impossible to even imagine hypothetical class members with individualized issues. *See* Dissent 31-32. Instead, every case holds that common questions predominate where plaintiffs can establish a "logical inference" with respect to the statutory elements through common proof. The Supreme Court and Rules Committee accordingly recognize that many consumer fraud cases are tailor-made for class certification, and defendants only imply otherwise by misquoting or omitting the relevant materials. The settled rule is that a fraud case is certifiable where it is logical from the nature of the scheme and the common, circumstantial evidence that class members would have relied on the fraud—at least absent contrary evidence. That is the *exact* rule the court applied below, and that application was not remotely an abuse of discretion.

Second, even accepting defendants' nearly insurmountable version of the standard, certification would remain appropriate here because—as defendants themselves have argued—no one would join Stream if it were truthfully held out as an illegal pyramid scheme. Defendants and their *amici* hypothecate four sets of individuals with special reasons for joining (an argument not developed below), but both briefs avoid the only relevant question: Would these people have joined *if* Stream were truthfully held out as an illegal pyramid scheme? The answer to that question is plainly "no"—it leaps out from the record, defendants' own *amicus*

brief, and defendants own positions in this Court. Simply put, the jury could conclude that rational people do not willingly join *illegal* pyramid schemes, and thereby commit to (almost certainly) losing their own money or, at best, stealing from family and friends. Dissent 38-39.

Importantly, defendants' arguments here categorically reject even the reasoning of the panel majority. The majority reasoned that Stream's fraudulent structure was so blatant—and its preaching of recruiting so open—that some IAs might have known what they were getting into. Op. 15-16. This theory is at least intelligible: If Stream were an acknowledged pyramid scheme and sometimes even held out as such to potential recruits, there might well be individualized questions about what different IAs were told. But defendants expressly reject that theory (as they must) because they will not say Stream is an illegal pyramid scheme or that they represented anything of the sort to anyone. Where Stream claims it was not a pyramid scheme, it cannot logically raise a question at trial whether any plaintiff knew Stream was an illegal pyramid scheme. *See Sandwich Chef v. Reliance Nat'l Indem. Ins.*, 319 F.3d 205, 218 (5th Cir. 2003) (certification question looks to how trial would be conducted). That is especially so because of the settled substantive law that deems an illegal pyramid scheme "inherently deceptive" even if all the details of its structure are revealed.

Having eschewed the majority's position, defendants' view collapses into the entirely hypothetical idea that, somewhere out there, some class member was savvy enough to deduce that Stream was an illegal pyramid scheme, and criminal enough to be willing to join and attempt to defraud his family and friends, but too clueless to successfully exploit the criminal opportunity he uncovered. As Judge Wiener (and the Second Circuit) have explained, if that sort of speculation suffices, no class can ever be certified.

Finally, this case can be resolved on the separate ground that individual reliance is not even a RICO element, and so it is irrelevant whether class members themselves relied on the representation of Stream's legitimacy. *Bridge* confirmed that RICO requires only that a fraudulent scheme proximately cause the plaintiffs' losses. And in a decision subsequent to the panel's, this Court confirmed that, even where—as here—the "defendants contend that reliance is the only causal mechanism potentially at issue," the matter to be proven remains the "directness" of the relationship between the fraudulent scheme and the plaintiff's injury—*not* individual reliance. *See Allstate v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015). Understood as an issue only of proximate cause, the commonality of the question for trial here becomes obvious: Pyramid schemes are *per se* illegal precisely because they "inevitably" cause the losses these class members suffered. That makes this case readily resolvable: The jury can infer that defendants' scheme

caused the loss because of the natural inference of reliance on the scheme's purported legitimacy, or—under *Allstate*—because "[t]here is no plausible argument that [these IAs] were unforeseeable victims" of defendants' fraud. *Id.*

STANDARD OF REVIEW

"The class certification determination rests within the sound discretion of the trial court." *Unger v. Amedisys, Inc.*, 401 F.3d 316, 320 (5th Cir. 2005). This Court reviews "class certification decisions for abuse of discretion in recognition of the essentially factual basis of the certification inquiry." *Regents of Univ. of Cal. v. Credit Suisse*, 482 F.3d 372, 380 (5th Cir. 2007). 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.*

Here, the district court premised its analysis on a perfect understanding of the governing law, distinguishing among fraud theories that would and would not require individualized proof. *See Unger*, 401 F.3d at 320-21 (emphasizing this distinction). Defendants simply challenge the district court's judgment regarding how a pyramid-scheme trial would develop, along with its factual finding that defendants introduced no contrary evidence. That places this case at the very peak of deference to the district court. *See* Dissent 36-37.

ARGUMENT

I. Settled Pyramid-Scheme Law Supports Certification.

Illegal pyramid schemes are a special kind of fraud where the very structure of the business has been deemed "inherently deceptive," *Gold Unlimited*, 177 F.3d at 479, and "*per se* illegal[.]" *Omnitrition*, 79 F.3d at 788. As the FTC's seminal *Koscot* decision explains, holding out a pyramid-scheme opportunity as valuable and legitimate is "inherently unlawful" because "the operation of such plan due to its very structure precludes the realization of [substantial] rewards to most of those who invest." 86 F.T.C. 1106, *59. The reason *Koscot* adopted this *per se* rule—as every federal court has since—is that such schemes are "likely to prove worthless for many participants, *by virtue of the very nature of the plan* as opposed to any particular dishonest machinations of its perpetrator." *Id.* (emphasis added).

Moreover, such schemes inevitably "cause[] substantial injury to the participants therein as well as to other members of the public." *Id.* As explained above, *supra* pp.6-7, MLMs become illegal pyramid schemes when recruitment incentives dominate. Op. 14. In that case, the "salesforce" ends up focused on endlessly recruiting until the market saturates, no one is left to recruit, and a huge, inevitable class ends up with a loss. Accordingly, the *per-se*-fraud rule codifies the law's observation that pyramid-scheme victims all lose money for the same, inexorable reason: "What compels the categorical condemnation of … [pyramid

schemes is] the *inevitably* deceptive representation (*conveyed by their mere existence*) that any individual can recoup his or her investment by means of inducing others to invest," when, in fact, such schemes "*must* end up disappointing those at the bottom who can find no recruits." *Koscot*, 86 F.T.C. 1106, *59-*60 (emphasis added); *Gold Unlimited*, 177 F.3d at 481-82 (same).

Many legal MLMs have rules to prohibit a recruiting-dominated structure and its inevitable harms (and have severely criticized *amicus* DSA for sheltering companies, like Stream, that don't). *Supra* p.6. Some such rules are easy to enact. Avon, for example, refunds those who cannot sell product, and limits "downlines" to three tiers, so that meaningful sales are necessary for anyone in the pyramid—including those at the top—to earn returns. PPBr. 54-55. But all courts agree that such rules must encourage meaningful sales in practice, not require some sales as a technicality. *BurnLounge*, 753 F.3d at 887; *Gold Unlimited*, 177 F.3d at 481-82; *Omnitrition*, 79 F.3d at 783-84. Defendants' passing defense (at 10) that they require one sale before IAs can obtain bonuses has thus been roundly rejected. PPBr. 53-54 (explaining same cases). Such minimal requirements do not incentivize IAs to do the hard sales work themselves, and "even where rewards are based upon sales to consumers, a scheme which represents indiscriminately to all comers that they can recoup their investments by virtue of the product sales of their

recruits must end up disappointing those at the bottom who can find no recruits capable of making retail sales." *Koscot*, 86 F.T.C. 1106, *59.

The FTC concisely explained these points in its prosecution of Fortune Hi-Tech:

> The fundamental problem with the pyramid structure is that, *inherent in its design*, at any point in time and no matter what the size, most participants will be out the money they have contributed to the pyramid. … Indeed, pyramid schemes might be more aptly explained as icebergs. No more than a small percentage of an iceberg is above water, no matter what the size. The *inevitable* consequence of a pyramid scheme, akin to an iceberg, is that most participants will remain 'underwater.'

FHTM Memo at 23 (emphasis added).

Critically for present purposes, the "*per se* illegality" of pyramid schemes thus depends on two propositions intimately connected to RICO's cause of action. First, settled law deems the scheme itself "inherently fraudulent"—and a *per se* predicate act of racketeering (mail fraud) under RICO, *Gold Unlimited*, 177 F.3d at 484—entirely apart from any particular misrepresentation about profitability or the like. And second, the condemnation of such schemes stems from a universally affirmed judgment about the *causative link* between the operation of the scheme and the "inevitable" losses of a large "underwater" class of participants without recruits below them. Accordingly, illegal pyramid schemes can be said—as a matter of law—to be fraudulent schemes that not just proximately but inevitably cause harm to a class of victims who, like the class here, must join and lose.

For that reason, in the best-cited private pyramid scheme case, the Ninth Circuit expressly held that "[t]he existence of a triable issue of fact as to Omnitrition's operation of a pyramid scheme raises triable issues of fact as to Webster's cause of action for common law fraud." *Omnitrition*, 79 F.3d at 788. In other words, when a plaintiff shows that defendants operate an illegal pyramid scheme, she necessarily permits a reasonable jury to infer not just the elements of a RICO claim, but any common-law fraud, including "intent to induce reliance, justifiable reliance, and resulting damage." *Id.* That is particularly so where, as here, defendants still "argue strenuously that their scheme was not fraudulent," suggesting they believe plaintiffs *were* justified in relying on the implied representation that Stream was legitimate. *Id.* Notably, *Omnitrition*—just like this case—was a RICO fraud class action about a supposedly legitimate MLM. *Id.* at 789. And while defendants previously cited it themselves, DPBr. 24, it is now entirely absent from their briefing.

Thus, while defendants endlessly emphasize that some small set of IAs made money, that fact is doubly irrelevant. First, none of these are class members; the class consists solely of *the victims*. And second, someone makes money in every illegal pyramid scheme (that's the whole point), which is why courts and regulators examine how the money is made, who makes it, and whether recruiting dominates. Each of these factors turns exclusively on common evidence—a point the panel

itself found, defendants concede, Op. 5, and is vividly shown by the purely common evidence identified above. And *if* the plaintiffs can prove with that common evidence that defendants are running an illegal pyramid scheme, they will have necessarily established an "inherently fraudulent" scheme that must "inevitably harm" *them*—the large and unavoidable class of victims at the bottom, who could only have avoided their loss by creating even more victims below. That "inevitable" class is exactly what the district court certified here, and so this case—like most pyramid-scheme cases; including every one either party has ever found—is ideally suited to Rule 23.

II. Under A Proper Predominance Inquiry, Class Certification Is Easily Affirmed.

Because defendants must avoid pyramid-scheme law, they begin from a different premise: that *all* fraud cases are unsuited for certification, and the only exception involves "somehow" finding "evidence" that "no rational actor would want what defendants offer." Br. 1-2, 23-40. This grossly misstates the law, and involves using ellipses or simple omissions to avoid contrary precedent. In fact, the Supreme Court, the Rules Committee, every relevant out-of-circuit precedent, and longstanding cases from this Court all agree that fraud cases involving uniform schemes of misrepresentation are frequently certifiable—particularly where, as here, they give rise to a "logical inference" of reliance. No case actually requires proof of defendants' insurmountable, "no-rational-person" test.

A. Rule 23(b)(3) requires predominance, not uniformity.

As the Supreme Court has recently confirmed, "Rule 23(b)(3) … does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof. What the rule does require is that common questions '*predominate* over any questions affecting only individual class members.'" *Amgen v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (quoting Rule 23(b)(3)). In other words, "[t]he predominance requirement is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re U.S. Foodservice*, 729 F.3d 108, 118 (2d Cir. 2013) (citing *Amgen*). This Court has long recognized the same rule, affirming certification even where causation will be an individual issue, so long as "[t]he common issues in th[e] case … are not only significant but also pivotal." *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 626 (5th Cir. 1999); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 n.36 (5th Cir. 2001).

Here, the most critical questions are indisputably common. *See* ROA.2256 (district court so finding). In particular, all the plaintiffs (and defendants) badly need a common answer to the question whether Stream is an illegal pyramid scheme, which is concededly susceptible of common proof. Op. 13, 20. As even

defendants' favorite cases make clear, the presence of such critical common questions makes certification far more appropriate, even where defendants believe that particular plaintiffs may present idiosyncratic issues on other questions or defenses. *See CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1093 n.11 (10th Cir. 2014) (where "legitimacy of [defendants'] operation" is "central" common question, it "places a thumb on the scale in favor of class certification").

Moreover, defendants entirely misunderstand what it means for an issue to be common in the first place. It most certainly does not exclude questions that plaintiffs can initially answer through common proof, simply because the defendants might theoretically rebut that showing for some class members on an individualized basis. As the Supreme Court has now repeatedly confirmed, "[t]hat the defendant might attempt to pick off the occasional class members here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) (Roberts, C.J.). Or, as the Court unambiguously put it this Term, "a common question is one where 'the same evidence will suffice for each member *to make a prima facie showing* or the issue is susceptible to generalized, class-wide proof.'" *Tyson*, 136 S. Ct. at 1045 (emphasis added). Certification is thus often appropriate "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class

members." *Id.*; *In re Nexium Antitrust Litig.*, 777 F.3d 9, 23-24 (1st Cir. 2015). As this Court has said, such defenses do "not establish that individual issues predominate, particularly in the face of defendants' common scheme of fraudulent concealment." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 421 (5th Cir. 2004).

Defendants thus mislead the Court—beginning on the very first page—when they suggest they have an inviolable right to present an unlikely defense regarding every single plaintiff, and that fraud cases thus cannot be certified unless common evidence "somehow" conclusively demonstrates "*every* plaintiff's state of mind." Br. 1-2, 50-56. Defendants omit the cases above or bury them in footnotes (at 50 n.15) because three times in the last four years, the Supreme Court has expressly rejected arguments, just like defendants' (and their *amici*'s), that allowing common proof where individual rebuttals might be theoretically possible would violate due process, the Rules Enabling Act, Rule 23, public policy, or anything else. *Compare* Br. 50-56 *and* Br. of Chamber of Commerce in *Tyson*, No. 14-1146, at 12, 17-19 *with Tyson*, 136 S. Ct. at 1046-47 (*amici* making, and Supreme Court rejecting, identical arguments).

In fact, defendants' claim about the need to examine every plaintiff is conclusively rejected by *Tyson*, whose reasoning is dispositive. *Tyson*'s overtime plaintiffs had no records, and so proposed to establish a "just and reasonable inference" regarding how much they worked from representative proof (*i.e.*,

statistics). The Court held this appropriate—and the class certifiable—because, even in an individual action, an overtime-claim plaintiff could rely on the same inference from representative proof to establish his solo case. But so too here: In an individual case, a plaintiff who proved that Stream was an illegal pyramid scheme could of course rely for his *prima facie* case on the "reasonable inference" that he did not want to join an illegal pyramid scheme. *Omnitrition*, 79 F.3d at 788 (so holding); *see CGC*, 773 F.3d at 1091-92 ("Were we deciding the merits of an individual plaintiff's RICO fraud claim, we would surely accept the introduction of such an inference … with little analysis."). Defendants could think about rebutting the inference by calling the plaintiff and interrogating him (either about how much he worked, or his willingness to pay to join illegal schemes). But, in either case, the plaintiff need not take the stand to make *his* case, and the Supreme Court has now conclusively rejected the view that individualized issues predominate in that setting. *Tyson*, 136 S. Ct. at 1046-47. In fact, as the Chief Justice himself clarified, the possibility of that kind of rebuttal does not "render class certification inappropriate" even though it may "leav[e] *individualized questions of reliance* in the case." *Halliburton*, 134 S. Ct. at 2412 (emphasis added).

In short, it is now settled that where, as here, every question is susceptible of at least a "prima facie showing" through classwide proof, defendants cannot defeat certification by simply speculating that some class members will give very unlikely

answers to their hypothetical questions. Instead, defendants must identify (1) an issue on which individual evidence is necessary for (2) a meaningful set of plaintiffs that (3) outweighs this case's concededly critical common questions. *Tyson*, 136 S. Ct. at 1045; *Halliburton*, 134 S. Ct. at 2412; *Amgen*, 133 S. Ct. at 1196. Here, they attempt nothing of the sort.

B. Fraud cases are frequently appropriate for certification.

Defendants continue the same error in suggesting that fraud cases are presumptively unfit for certification, Br. 23-31, and that the only exception arises when "no rational actor would want what defendants offer." Br. 36-40. Both propositions result from an over-reading of this Court's decision in *Sandwich Chef*—one that has been rejected by every other circuit's relevant law, the Supreme Court, the Rules Committee, and even previous decisions of this Court.

Initially, a presumption against the certification of fraud cases is directly contrary to binding precedent. The Supreme Court has expressly said that "[p]redominance is a test readily met in certain cases alleging consumer … fraud." *Amchem*, 521 U.S. at 625. This Court's influential opinion in *Grainger v. State Security Life Insurance* explained that there are two kinds of fraud cases, and "the key concept in determining the propriety of class action treatment is the existence or nonexistence of material variations in the alleged misrepresentations." 547 F.2d 303, 307 (5th Cir. 1977). If plaintiffs confront the same misrepresentations in the

same way, certification can be appropriate; the district court must decide whether "the circumstances surrounding each plaintiff's alleged reliance on fraudulent representations differ." *Unger*, 401 F.3d at 321.

Citing support from Rule 23's drafters, defendants suggest, to the contrary, that *every* fraud case presumptively includes such individual reliance issues, and so certification is presumptively inappropriate "even when fraud is 'perpetrated on numerous persons by use of similar misrepresentations.'" Br. 26 (quoting *Committee Note*, 39 F.R.D. at 103). Freed from defendants' careful elisions, however, the Committee's point was the exact opposite. It contrasted "a fraud perpetrated on numerous persons by the use of similar misrepresentations, [which] may be an appealing situation for a class action," with *other* cases that "may 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." *Id*. That distinction, like the one this Court identified in *Grainger* and *Unger*, calls on the district court to *make a judgment* about the kind of fraud at issue, not to presume all frauds are created equally uncertifiable. Defendants' suggestion that the Rules Committee believed the opposite is simple misquotation.

In fact, every authority—from treatises to other circuits—follows this Court's original approach. *See, e.g.*, 2 *Newberg on Class Actions* 223-25 (5th ed. 2011) (citing *Grainger* and noting that "critical question in certifying fraud cases

… is whether … the alleged misrepresentations or omissions or the related reliance vary materially across the class.”); *Moore v. PaineWebber*, 306 F.3d 1247, 1253 (2d Cir. 2002) (Sotomayor, J.) (citing *Grainger* and holding that “[f]raud actions must … be separated into two categories,” comprising “uniform” and “individualized misrepresentations”). Where—as here—the “gravamen of the alleged fraud is not limited to the specific representations made,” and is instead rooted in “the underlying scheme,” it “would be folly to force each [class member] to prove the nucleus of the alleged fraud again and again.” *In re First Alliance Mortg. Co.*, 471 F.3d 977, 991 (9th Cir. 2006); *see Brand v. Nat’l Bank of Commerce,* 2000 WL 554193, *1 (5th Cir. 2000) (certifying RICO fraud class action where allegations did “not require proof of individual representations” and depended instead on defendant’s uniform scheme).

In short, this Court long recognized that frauds depending on a uniform deceptive scheme tend to be *well*-suited to certification, not the other way around, and every authority agreed. Reaffirming that broadly accepted proposition would render this case obviously certifiable, as it involves the archetype of a common deceptive scheme.

To be sure, *Sandwich Chef* does seem to depart from *Grainger* in suggesting that all fraud cases involve reliance issues, and so are presumptively unfit for certification. Defendants concede that holding did not survive *Bridge*, Br. 24, 28

nn.6-7, however, and it depends for its force on the proposition that individual reliance is an *element* to be proven, rather than just one inquiry relevant to proximate cause. *Infra* pp.57-61. But even leaving that aside, *Sandwich Chef*'s own analysis confirms that it did not adopt the broad rule defendants propose—one that would have rejected *Grainger sub silentio* and be almost impossible to square with the Supreme Court's teaching in *Amchem*—not to mention the three subsequent decisions above, *supra* pp.33-34.

The theory in *Sandwich Chef* was that defendants mailed fraudulent invoices with charges higher than legally required "filed rates," and that plaintiffs could prove a common reliance theory merely by showing that they paid the illegal overcharges. *See* 319 F.3d at 215. This Court did not invalidate class certification on that theory based on the view that all fraud cases present issues of individual reliance. Instead, the *Sandwich Chef* defendants had "*introduced evidence* that … class members individually negotiated with [defendants]," and so knew or expected that their rates would vary. *Id.* at 220 (emphasis added). Trial by class action was thus inappropriate because it would "exclud[e] proof demonstrating a lack of reliance by individual plaintiffs." *Id.* at 221.

This evidence was so important that the *Sandwich Chef* plaintiffs attempted to strike all facts from defendants' appellate briefing that were not explicitly submitted during the class-certification hearing—an effort this Court rejected. *See*

id. at 216-17. The disputed references alone included some *140 factual citations* in defendants' opening brief. *Id.* at 216 n.6. Here, by contrast, the district court expressly found that defendants introduced no "contravening evidence" to demonstrate that any class member knew or suspected that Stream was an unlawful pyramid scheme. ROA.2266, Dissent 36-37. And defendants left that conclusion undisputed: Their panel brief's factual section was four pages, consisting mostly of procedural background, and citing not one piece of evidence demonstrating that individual plaintiffs were different in any respect at all. *See* DPBr. 3-7.

Every court of appeals to cite *Sandwich Chef* relies on this distinction, holding that when there is a logical inference of classwide reliance from the nature of the fraudulent scheme, the *defendants* must introduce evidence of individual issues to defeat certification. Because the Court is sitting *en banc*, it would perhaps be wise to simply disavow the "presumption" language in *Sandwich Chef* that no other Court has remotely endorsed—including the cases on which defendants most heavily rely. *Compare* Br. 38-39 (somehow deriving support for *Sandwich Chef* from fact that Tenth Circuit declined to apply it) with *CGC*, 773 F.3d at 1092-93 & n.10 (distinguishing *Sandwich Chef*, and recognizing that this Court might now regard it as a "closer case"). But, at a minimum, it should recognize the key distinction explained by the dissent (at 36-37) and endorsed by every other court, acknowledge that the certification of RICO fraud claims depends

on the kind of fraud at issue, and hold that the certification of fraud cases is inappropriate only if the "facts of [the] case require[] individual proof of reliance that would 'defeat the economies ordinarily associated with the class action device.'" *Sandwich Chef*, 319 F.3d at 221 (citing *Patterson v. Mobil Oil*, 241 F.3d 417, 419 (5th Cir. 2001)).

C. Certification is appropriate where the nature of the fraudulent scheme permits a logical inference of classwide reliance.

Having endorsed a presumption far broader than what animated *Sandwich Chef*, defendants next propose a "narrow" exception that "stand[s] in harmony" with this overbroad rule. Br. 40. Citing only one circuit case, and burying broadly endorsed, contrary precedents, they suggest a "no-rational-person standard" under which the plaintiffs must "somehow" submit proof that literally no one "would want what defendants offer." Br. 1-2. 36-41 & n.11. In truth, no case—including the one on which defendants rely—actually endorses this impossible standard.

For example, absent selective quotation, *CGC* itself clearly does not endorse a "no-rational-person" standard. Instead, citing several other circuit cases it called "persuasive," the Tenth Circuit held that "circumstantial evidence of reliance *is sufficient* to allege RICO causation for purposes of Rule 23." 773 F.3d at 1090 (emphasis added) (approving rule adopted in *Klay v. Humana*, 382 F.3d 1241, 1259 (11th Cir. 2014) and *Foodservice*, 729 F.3d at 120). Indeed, *CGC* endorsed the district court's decision *in this very case*, and expressly recognized that the

"primar[y]" kind of fraudulent misrepresentation that gives rise to a classwide inference of reliance involves "the alleged legitimacy of the counterparty," 773 F.3d at 1090-91 & nn.6-8. Moreover, the Tenth Circuit recognized that a logical inference of reliance permits certification because the jury may "utilize it as common evidence to establish the class's *prima facie* claims under RICO," not because the plaintiffs had somehow already proved that no theoretical class member could possibly have avoided relying on the fraud. *See id.* at 1093-94 (distinguishing appropriate "inference" of classwide reliance that jury *might* find from inappropriate "presumption" of classwide reliance); Dissent 37 (same).

This holding is not remotely unique: "Broadly speaking, the common inference involved in most such cases, as well as in the case at bar, is that members of the plaintiff class relied upon the purported legitimacy of the defendant with which they transacted." *Minter v. Wells Fargo*, 274 F.R.D. 525, 546 (D. Md. 2011); *see Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 560 (E.D. Va. 2000) (collecting cases where courts apply an inference of reliance "where it is logical to do so"). That is this case to a T.

This "logical-inference" standard is the test the Tenth Circuit and every other court actually applies, and the reason cases like *Foodservice* and *Humana* are buried in defendants' footnote 11, with no pincites or parentheticals, is that they have no language remotely endorsing a "no-rational-person standard." Instead,

they call for certification in fraud cases where classwide reliance can be established with "***legitimate inferences*** based on the nature of the alleged misrepresentations at issue." *Humana*, 382 F.3d at 1259; *see Foodservice*, 729 F.3d at 120; *Negrete v. Allianz Life Ins. Co.*, 287 F.R.D. 590, 611-12 (C.D. Cal 2012) (certification appropriate because "the jury in this case could ***reasonably infer*** that class members would have acted differently" if not for alleged misrepresentations); *Peterson v. H&R Block*, 174 F.R.D. 78, 84-85 (N.D. Ill. 1997) (certifying RICO fraud class because "courts will presume class members' reliance ***when it is logical to do so*** or when the complaint's allegations make reliance apparent"); *In re APA Assessment Fee Litig*., 311 F.R.D. 8, 17 (D.D.C. 2015) (same). In short, no actual reader of these cases will recognize the "narrow exception" defendants draw therefrom.

Other recent circuit decisions that defendants simply omit are even more fatal to their theory. For example, the Sixth Circuit recently held in a fraud class action that "classwide proof … that the alleged misrepresentation is material and was made in a generally uniform manner to all class members … would also suffice … to show actual reliance such that individual issues would not predominate." *Rikos v. Procter & Gamble*, 799 F.3d 497, 518 (6th Cir. 2015). Here, of course, there is no dispute that omitting that Stream was an illegal pyramid scheme was a universal and material misrepresentation; pyramid-

scheming is *per se* mail fraud, *supra* p.30, which has a materiality element. *Neder v. United States*, 527 U.S. 1, 24-25 (1999). In any event, "[c]ommon sense alone dictates that most consumers would not have joined … had Defendants disclosed that due to the very structure of the scheme, the vast majority of participants would [not] receive substantial income," and "[f]urther evidence of the materiality of this omission is provided by Defendants repeated assurances to consumers that [theirs'] was [not] a pyramid scheme." *Five-Star Auto*, 97 F. Supp. 2d at 532-33; *compare* ROA.2266 (district court adopting same, "common sense" view).

Tellingly, one cannot even apply defendants' "no-rational-person test" to the facts of *CGC*, *Humana*, *Foodservice*, *Rikos*, *Negrete*, or *Peterson* and still have them come out the same. Consider *CGC* itself. The theory there was that the defendant was largely unable to fund the loans for which it accepted prepaid application fees, and that no one would pay a fee for a loan that could not be filled. *See* 773 F.3d 1091-92. But it was acknowledged that *some* loans were filled, *id.* at 1082-83, and that plaintiffs (as here) would prove the illegitimacy of the scheme by the *low rate* that were. *Id.* at 1091-92. Defendants also argued that some plaintiffs had esoteric reasons for making the applications—including that they had been denied loans from more reputable lenders, and were desperate to obtain the brief relief from creditors that even a letter of application would provide. Br. of Defendant/Appellant Meisels, 2013 WL 4776357, at 8-9, 44. Several plaintiffs

also would have been denied loans anyway, because they never would have qualified. Br. of Hutchens Defendants, 2013 WL 5504239, at 16-20. But because its actual test was not remotely as defendants let on, the Tenth Circuit paid these points no heed.

Humana is the same. For example, defendants here cite non-pecuniary reasons for joining Stream as defeating the "no-rational-person test." Br. 43. But *Humana* approved a logical inference that doctors who accepted underpaid reimbursement checks relied on their implicit legitimacy, 382 F.3d at 1259, and surely some doctors might accept Humana patients for non-pecuniary reasons—like, perhaps, saving lives. Moreover, it's plausible that some doctors might have known Humana paid less than it promised in reimbursements, but decided to sign up anyway to grow their practice, achieve scale, or turn a profit (albeit a smaller one than Humana promised). Nonetheless, such speculation was insufficient for the Court to decertify the class where it was far more logical that the class of doctor plaintiffs accepted underpayment because it was falsely held out as legitimate payment in full.

In every case, it is easy to construct unlikely hypotheticals for why plaintiffs might not have relied on the fraud. *Foodservice*'s plaintiffs might have paid overstated bills because they were busy, or preferred goodwill to full payment. *See* 729 F.3d at 119-21. *Negrete*'s plaintiffs might have bought annuities "worth *less*"

than fungible alternatives, 287 F.R.D. at 596—not "worthless" as defendants egregiously say (Br. 37)—because they concluded defendants' product was good enough and had no time to shop around. The *holdings* of these cases thus show that such speculation cannot suffice for decertification. As Judge Weiner—and *Foodservice* itself—persuasively explained, "if bald speculation that some class members might have knowledge of a misrepresentation were enough to forestall certification, then no fraud allegations of this sort (no matter how uniform the misrepresentation, purposeful the concealment, or evident plaintiffs' common reliance) could proceed on a class basis." Dissent 37 (quoting 729 F.3d at 122).

This is the exact reason Judge Weiner, the Second Circuit, and every other authority distinguishes *Sandwich Chef* as a case in which the inference of reliance may have been logical, but decertification was appropriate because defendants rebutted that inference with record proof of individualized issues. *See, e.g.*, *Foodservice*, 729 F.3d at 120. Otherwise, purely hypothetical outliers will defeat even the most homogeneous classes. Even defendants eventually concede that, in cases where the plaintiff puts forth an appropriate logical inference supporting classwide reliance, the burden must be on them to offer concrete proof of individualization. *See* Br. 42 n.12. Here, plaintiffs offered such an inference, and the district court *found* that defendants offered no evidence in response. That uncontested factual finding was not clear error, and it thus cannot be an *abuse of*

discretion to find that defendants failed to rebut a perfectly logical inference of reliance based exclusively in classwide proof that Stream is not the legitimate business the defendants hold out.

D. This case easily satisfies the correct predominance test.

Is sum, applying the actual, universally accepted test, this case is simple, but not in the way defendants hope. *Omnitrition* expressly held (in a RICO class-action case) that making a pyramid-scheme showing suffices to make a showing of justified reliance, at least in the absence of contrary evidence—which is the exact holding the district court reached here. *Supra* pp.30-31. Separately, given the recognized materiality of Stream's (concededly common) representation that it is a legitimate company rather than an illegal pyramid scheme, *supra* pp.44-45, plaintiffs have necessarily established that an inference of classwide reliance is "logical" and "reasonable"—at least for purposes of a "prima facie showing." Conversely, defendants have no evidence that *anyone* would join Stream if it was truthfully held out as a pyramid scheme, and certainly cannot show that this issue involves anything more than "pick[ing] off" very unusual outliers. *Halliburton*, 134 S. Ct. at 2412; *Tyson*, 136 S. Ct. at 1045. Every other court would thus have certified this class action. This Court should too.

III. In Any Event, Rational People Do Not Join *Illegal* Pyramid Schemes

Even granting defendants' universally rejected test, plaintiffs would still prevail. For the first time in this case, defendants (and their new *amici*) hypothesize that there are actually four classes of individuals who might have joined Stream without relying on the implied representation that it was a legitimate business. Each argument here is either irrelevant or affirmatively helpful to plaintiffs' position; none relies on any record proof; and several are just false. In general, the problem is that defendants consistently ask the wrong question: The issue is not whether IAs had multiple reasons for joining Stream, but whether they would have joined *if* it were truthfully held out as *an illegal pyramid scheme*. Defendants cannot identify a single person who fits that bill, and have previously sworn to this Court that no one does.

Initially, it is critical that defendants have categorically rejected the panel majority's rationale. The majority apparently concluded that "knowledge" would be an issue because Stream was, at times, so obviously preaching or incentivizing recruiting that some plaintiffs might have known what was going on. Op. 20. Although that theory runs into substantive pyramid-scheme law, *supra* p.8; Dissent 33-34, it is at least intelligible—where the claim changes based on what different plaintiffs heard, certification can be problematic. But defendants say the exact opposite: For obvious reasons, they say they are categorically not a pyramid

scheme, and still hold themselves out as legitimate, to the point of telling the Court that *it* can justifiably conclude that they are not running an illegal pyramid scheme. Br. 5-10. They certainly will not be able to argue to a jury that anyone "knew" they were something they say they are not. *See Sandwich Chef*, 319 F.3d at 218 (inquiry requires considering how trial would be conducted). These are the very facts that have led other courts to find that the pyramid-scheme question will suffice to show the other elements of fraud. *See Omnitrition*, 79 F.3d at 788. And it leaves defendants relying entirely on the bizarre notion that rational people who join businesses held out as legitimate actually do not care if they are *illegal* scams.

Defendants first suggest that the class of over 200,000 IAs who lost money cannot be certified because it's possible to imagine class members who joined "for reasons unrelated to financial gain," likening Stream to "being in a club that comes with special perks." Br. 43. This analogy holds only if the "special perks" are the chance to lose money and/or defraud your family and neighbors. People may have joined Stream for fun, friendship, or a business-school-style experience, *see id.*, but if they did, they *certainly* relied on the representation of legitimacy. Just imagine telling employers that you have "the type of experience" an MBA provides because you successfully recruited others into an illegal fraud. At a minimum, there are certainly less costly and/or criminal ways to make new friends. *See*

Negrete, 287 F.R.D at 596 (holding that reliance inference was appropriate if fraudulently offered option was "fundamentally inferior to comparable products").

The Court should also be aware that the "stories" told here are likely false. Counsel begins by suggesting that Raven Moreno joined to hone "entrepreneurial skills," find "mentors," and get support from her "second family." IA-Br. 6. But Moreno is a Senior Director, in the top 3% of Stream's hierarchy, with a downline of at least 260 people. McGarrell, *Sophomore Recognized as Woman of Power*, Rider News (Dec. 1, 2015), www.theridernews.com/2015/12/01/sophomore-recognized-as-woman-of-power. As her Stream-related blog candidly discloses: "The reason I do this business is to build residual income!" https://powerrave.wordpress.com/2015/07/03/food-for-thought (July 3, 2015). This is hardly proof that the many people who inevitably *lost* money after Ms. Moreno or her downline recruited them will not have relied on the promise of a legal and legitimate opportunity for, say, "residual income."

Moreover, it is clear that Ms. Moreno's non-pecuniary reasons for joining—if they exist—would themselves be frustrated if Stream were truthfully revealed as a pyramid scheme. Ms. Moreno acknowledges trying to recruit her "friends and family," saying "it surprises [her] how many people say no," when "[t]his is the real deal," and "a real business that pays you like a business if you work at it." https://powerrave.wordpress.com/2015/08/02/super-saturday (Aug. 2, 2015).

Participating in Stream is clearly a source of pride for Moreno—one that intersects with her collegiate aspirations, and that she broadcasts to the word. Imagine the shame it will bring if Stream is revealed as an illegal pyramid scheme, and she is forced to confront the harms she's visited through her downline. Of course, having made money, Ms. Moreno is not a class member, nor remotely representative. But her story nonetheless clearly supports the view that *everyone* relies on the representation that Stream is a legitimate business, not the other way around.

Second, defendants and *amici* suggest that the reliance inference is defeated because some folks may have joined Stream to successfully sell energy. Br. 44; IA-Br. 8. As explained above, the stories here are also probably false and certainly rare; at $0.50/account, anyone who joined for this reason was likely disappointed. *Supra* p.11. And, again, defendants and *amici* omit the relevant question: Perhaps some people joined because they wanted to sell energy, but no rational person wants to sell energy for *an illegal pyramid scheme*.

Moreover, no rational person could think a $0.50 commission is worth *paying the company* $329 plus $25/month for the right to pursue. Instead, they would be much better off selling energy as employee of an actual utility—or doing basically anything else. This is what named-plaintiff Robison evidently concluded when he realized, shortly into his tenure, that he would never make money actually selling the product to strangers. *Compare* Br. 44 (suggesting Robison showed

"inadequate salesmanship skills or insufficient effort") *with* D.E. 159-Ex. C, 26:7, 64:10-73:11 (Robison explaining he quit because he could not sell the product commercially, was embarrassed about seeking family favors, and could not convince his wife to change their account because Stream was more expensive).

Third, defendants and *amici* suggest that reliance is defeated by individuals who did their own investigation and concluded Stream was legit. But these examples help *plaintiffs*' case. They plainly demonstrate that—consistent with settled pyramid-scheme law—being aware of the nature of Stream's compensation plan will not allow laypeople to detect the "inherently deceptive" structure at work. Moreover, if plaintiffs' are right that Stream is an illegal pyramid scheme, anyone who wanted to follow the law and still joined, Br. 44-45; IA-Br. 10-11, *necessarily* relied on Stream's misrepresentation of legitimacy.

To support their contrary argument, defendants use an ellipsis to cite a case for the opposite of its meaning. Quoting *N.Y. Life Insurance v. Strudel*, 243 F.2d 90, 93-94 (5th Cir. 1957), they say that a plaintiff's investigation, however unsuccessful, defeats a claim of reliance. Br. 45. But here is the full quote, with the elided portion emphasized: If a plaintiff "chooses to make an independent inquiry *and the subject matter and the circumstances are such that he is in a position to ascertain the facts by a reasonable search*, then he cannot plead reliance[.]" *Id.* at 93. Pyramid schemes are "inherently deceptive" as a matter of

law; there can be no defense that recruits are "in a position to ascertain the facts." Moreover, *Strudel* carefully explains that defendants' rule is "*unconscionable*," and so the bar applies only where plaintiffs "could *easily* have obtained the true facts." *Id.* at 93-94 (emphasis added). That, of course, is not this case.

Finally, defendants suggest that reliance fails because some people might just have been willing to join an illegal scheme to make money on the backs of their friends and neighbors. But here, defendants' own *amici* testify that they joined Stream "wholeheartedly" believing it was lawful, and don't know *one single IA* who did otherwise. IA-Br. 2, 12. With years of discovery and now the chance to offer hearsay witnesses with no cross-examination risk, defendants still haven't found one person who will say that Stream's legitimacy was immaterial. That is unsurprising, because any such person would be admitting to odious morals, and possibly a crime.

Moreover, as explained above, defendants grossly overstate the "very real prospect" of profit that Stream provided to *anyone* who joined after the privileged few. *Supra* pp.13-16. Outside defendants' capstone, there was, at best, an infinitesimal chance of earning a non-trivial return for those who aggressively recruited. But the *class members are limited to those who lost money*; if they believed they were going to profit in this scheme, they were in fact misled (as a huge group at the bottom "must" "inevitably" be). And even supposing that the

law can tolerate the assumption that rational people will join an inherently illegal enterprise—trading money for a guaranteed loss or a guaranteed victimization of their friends and family—any rational crook willing to chance a crime could find infinitely better ways to make a dishonest buck. *See Negrete*, 287 F.R.D. at 596.

In short, even defendants' friends agree that, outside the defendants who built this scheme, the fable of the willing-pyramid-fraudster-plaintiff—savvy enough to discover the illegal pyramid scheme, but not savvy enough to avoid losing money—is a very unlikely story. Defendants didn't bother developing it in discovery, as their own *amici* point out, IA-Br. 13, and nobody has any evidence that such a person exists.

In fact, in a crucial moment of candor, *defendants themselves argued the opposite in this Court*. The relevant pages from defendants' stay motion and affidavit are attached (App. A) so the Court can easily read them. In those pages, before they realized they needed this just-so story, defendants swore that the mere accusation that Stream was a pyramid scheme would "thwart Stream Energy from enlisting new IAs," App. A-3, "the same as if the district court enjoined Stream Energy from enrolling any more customers." App. A-10. These statements can mean only one thing: *No rational person* will join an MLM identified as an illegal pyramid scheme. This candid factual argument from defendants' own mouths means plaintiffs should prevail even under defendants' stilted view of the law.

That is so for two separate reasons. First, the district court could not have *clearly erred* or *abused its discretion* in relying on a fact the defendants would later rely upon themselves. And second, defendants must be judicially estopped from arguing otherwise, and we explicitly ask for that relief. Defendants' stay request prevailed; they cannot, in the very same case, maintain that a substantial number of potential recruits actually don't care whether Stream is an illegal pyramid scheme. *See, e.g.*, *Love v. Tyson Foods*, 677 F.3d 258, 261 (5th Cir. 2012) (judicial estoppel applies if party "did not act inadvertently" in asserting prior, plainly inconsistent position accepted by a court). At some point, defendants must be bound to keep their story straight.

In any event, defendants acknowledged in many other ways that rational people would not join Stream if it were truthfully held out as an illegal pyramid scheme. They developed a script for disproving pyramid allegations. D.E. 121 at 6 & App. II-Ex. 179. They conspired to suppress saturation evidence—including by advocating the same "5 percent" argument they are still making before this Court, Br. 10, even after they knew saturation had occurred. SRE30-31; Doc. 121, App. II-Ex. 100. They even start their brief here with three pages about their status as a "reputable" and "legitimate" company. Br. 8-10. Clearly, they do not believe rational people are indifferent to that legitimacy.

Stream's income disclosure is particularly telling. *See* App. B. In all-caps, it includes a striking disclaimer that the company cannot guarantee any returns, partly because selling energy is hard work. But immediately thereafter, it still makes a firm representation that Stream *is* a lawful and honest business that prides itself on integrity and expects the same of its IAs. Stream understood that, *above all else*, its very existence and the participation of any IAs in the system critically depended on it being seen as a legitimate MLM and not an illegal pyramid scheme. And, as defendants concede, the truth of that proposition is sufficient to certify this class under even their extreme test.

One final point. Stream's brief "repeat[s]" (at 49) that "Plaintiffs have already conceded that Defendants have produced evidence documenting numerous issues of individualized reliance." This is just one more gratuitous misquotation. Defendants' class-certification response listed evidence it thought *plaintiffs* should have to introduce, D.E. 129 at 32-33, and plaintiffs responded that this list of "*so-called* evidence" related only to first-party reliance. *Compare* D.E. 134 at 11; *with* Br. 49 (omitting italicized words). That pejorative reference to a list of issues for the *plaintiffs* plainly did not "concede" that *defendants* "produced evidence documenting" anything at all. Unfortunately, it should by now be clear that defendants' citations, to fact and law, need unusually careful review.

IV. This Case Is Certifiable Under *Bridge* and *Allstate* Without Regard To Individual Reliance.

As defendants concede (at 24, 28 nn.6-7), *Sandwich Chef* and its brethren were overruled by *Bridge*, which held that "that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim *or as a prerequisite to establishing proximate causation*, that it relied on the defendant's alleged misrepresentations." 553 U.S. at 661 (emphasis added). The specific issue in *Bridge* was whether a plaintiff injured "by reason of" a fraudulent scheme on which a third-party regulator had relied could assert a RICO claim. *Id.* at 641. The Supreme Court answered "yes," abrogating this Circuit's contrary cases predicated on individual reliance being an element of RICO fraud—*Sandwich Chef* included. *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009).

For two reasons, this holding suffices to permit certification here under the settled law governing illegal pyramid schemes.

First, as the Supreme Court suggested in *Bridge* and this Court recently confirmed in *Allstate*, it alters the specific question for the jury, eliminating any actual trial issue of subjective reliance. Defendants' argument is that *Bridge* divides the world into first-party reliance and third-party reliance, and because this was not presented as a third-party reliance case, plaintiffs would still have to prove first-party reliance at trial. Br. 24. But this argument is unambiguously foreclosed by *Allstate*, which postdated the panel's decision. As *Allstate* held, even where

"defendants contend that reliance is the only causal mechanism potentially at issue," the jury only needs to decide the "directness" of the relationship between the fraudulent scheme and the harm it allegedly caused. *See* 802 F.3d at 676.

Critically, that question is objective, not subjective: The point of reference is whether the *defendants* would reasonably anticipate the harm their fraudulent scheme would cause the plaintiffs, and not any question of the *plaintiffs'* state of mind. *See Bridge*, 553 U.S. at 658 (asking whether plaintiff's injury was a "foreseeable and natural consequence" of defendants' fraudulent scheme). Here, that question is easily answered on a classwide basis: As in *Bridge*, "there are no independent factors that account for [plaintiffs'] injury, there is no risk of duplicative recoveries …, and no more immediate victim is better situated to sue." *Id.* Indeed, a class consisting exclusively of the inevitable victims who lose money in any illegal pyramid scheme is exactly who defendants should expect to answer to when their fraud is found out.

In fact, in a pyramid-scheme case, proximate causation can be resolved essentially as a matter of law by a showing that defendants did in fact operate an illegal pyramid scheme. In that case, plaintiffs will have necessarily established a *per se* fraudulent enterprise that will "inevitably harm later investors." *Gold Unlimited*, 177 F.3d at 479. An inevitable harm is, *a fortiori*, a "reasonably foreseeable" consequence. Thus, under an appropriate understanding of RICO's

elements, this case will present no remotely individualized questions, other than the precise kinds of idiosyncratic defenses rejected as insufficient by *Amgen*, *Halliburton*, and *Tyson*.

Second, and relatedly, pyramid-schemes are a rare breed of fraud that does not neatly fall into the categories of first- and third-party reliance, but nonetheless readily fits RICO's elements. *Bridge* suggested that either first- or third-party reliance might be necessary to state a claim, but clearly *held* the opposite—that "one can conduct the affairs of a qualifying [fraudulent] enterprise through a pattern of such acts without *anyone* relying on a fraudulent misrepresentation." *Id.* at 649 (emphasis added). As we have explained, pyramid schemes are deemed *per se* mail fraud not because of any party's reliance on any particular representation, but because of the inherently deceptive structure of the scheme itself. *Supra* pp.28-30. *Bridge*'s holding thus presciently recognizes that there might be cases, like these special *per se* frauds, where RICO trials require no proof of reliance at all.

Indeed, given the judgments the law has already made about pyramid-scheme "enterprises," the money-losing plaintiffs who necessarily exist at the bottom of the pyramid clearly do not have to prove an individual-reliance element that finds no place in RICO's text. As this Court said in *Allstate*, to allow defendants to smuggle reliance back into RICO through the causation element would fly in the face of the unanimous holding of *Bridge*. *See Allstate*, 802 F.3d at

676; *Bridge*, 553 U.S. at 655 (“Reliance …. whether characterized as an element of the claim or as a prerequisite to establishing proximate causation, simply has no place in a remedial scheme keyed to the commission of mail fraud, a statutory offense that is distinct from common-law fraud and that does not require proof of reliance.”). As plaintiffs have consistently argued, this is the reason “courts have recognized that claims arising under RICO statutes … are often particularly appropriate for class action treatment.” PPBr. 39 (citing 1 *Newberg* at 254). It would be especially absurd to decertify this class on the theory that plaintiffs cannot prove by common evidence a question that, under the subsequent holding of *Allstate*, will never even be presented to their jury.

CONCLUSION

This Court should affirm.

DATED: May 9, 2016

Respectfully Submitted,

/s/Thomas C. Goldstein
Thomas C. Goldstein
Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
Telephone: (202) 362-0636
Facsimile: (888) 574-2033
tg@goldsteinrussell.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(7)(B)(i). According to the word count feature of Microsoft Word, the relevant sections contain 13,998 words.

/s/Thomas C. Goldstein
Thomas C. Goldstein
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2016, a true and correct copy of the foregoing brief was served via the Court's CM/ECF system on counsel for all parties.

/s/Thomas C. Goldstein
Thomas C. Goldstein
Counsel of Record

APPENDIX A

No. 14-90004

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, Case No. 4:09-CV-02056

OPPOSED MOTION FOR STAY PENDING PETITION AND APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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

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

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

COUNSEL FOR DEFENDANTS – PETITIONERS

"[t]hese concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues." FED. R. CIV. P. 23(f) advisory committee's note.

Stream Energy estimates that a classwide trial in this case will last at least six weeks and involve dozens of witnesses—including multiple expert witnesses on behalf of both sides. The costs of just preparing for such a trial would be massive—forgetting the costs of the trial itself. And preparations for a trial with potential liability of over $150 million would have to begin immediately if the trial is set for this September—thus warranting an immediate stay.[5]

3. Finally, if the class notice is distributed, it will cause immediate and irreparable damage to Stream Energy's business model and its success as an energy company. *See* Aff. of M. Schiro ¶¶ 7-12 (attached as Ex. D).

The success of multilevel marketing distribution channels, such as the one employed by Stream Energy to sell energy accounts, rests on (1) the reputation of the company and its associates; and (2) the trust and goodwill that is built up between the company, its associates, and its customers. If the notice is distributed, however, both of these vital features of Stream Energy will be irreparably injured.

[5] *See, e.g.*, *In re Lorazepam*, 208 F.R.D. at 6 (granting stay pending 23(f) in part because of "the very real potential of unnecessarily wasting significant resources of all parties"); *Brown v. Sec'y, Dep't of Corr.*, 2005 U.S. Dist. LEXIS 15174, at *4 (M.D. Fla. July 28, 2005) (granting stay pending 23(f) because "judicial resources, and the resources of the parties, are best conserved by the issuance of a stay pending action by the Eleventh Circuit").

The class notice not only accuses Stream Energy of engaging in racketeering, it carries with it the appearance that the claims have been blessed by a federal court (after all, the court has approved of a class). In an industry such as this, this accusation will devastate the trust and goodwill Stream Energy has worked hard to earn throughout its history. The destruction of that reputation and goodwill will cripple the IA program and tangibly undermine Stream Energy's economic interests. Class notice will both discourage current IAs from participating in retail activities and thwart Stream Energy from enlisting new IAs.

Stream Energy's core business is the retail sale of gas and electricity, and the IA program is Stream Energy's principal mechanism for obtaining those energy accounts. So if the program is compromised, Stream Energy's core business will be compromised along with it. This will occur because (1) existing customers who were signed up by IAs, or are IAs themselves, might depart; and (2) because there will be fewer IAs out there in the retail market selling Stream Energy accounts.

B. Harm To Potential Class Members

Not only will the denial of a stay harm Stream Energy, it will actually harm the potential class members that the Plaintiffs purport to represent. The district court has just approved of a class notice and ordered the parties to diligently deliver that notice. But, as courts have held, the harms caused by issuing a class notice while a 23(f) petition is pending is precisely why courts should grant a stay:

> Though the putative class members do not stand to be substantially injured by a stay, they do face a likelihood of harm should a stay not issue. First, the parties risk generating confusion among class members. Plaintiff seeks to disseminate class notice in the near future. Should the Ninth Circuit take Defendant's appeal, there is a likelihood that the court will have to modify or decertify the class after class notice has issued. Such a result would require the issuance of a second curative notice to the class, perhaps many months or more after the initial class notice was disseminated. Considering the class in this case is estimated to exceed 22,000 individuals, a curative notice would not be sufficient to stem the confusion that would arise in the event of a change to the class definition or decertification of the class altogether.

Brown v. Wal-Mart Stores, Inc., 2012 U.S. Dist. LEXIS 163731, at *12 (N.D. Cal. Nov. 15, 2012).[6] The *Brown* court was concerned with sending a class notice to 22,000 class members. Here, the alleged class consists of over *150,000* individuals. Allowing a notice to be sent to that purports to inform over 150,000 people of their legal rights—only to be forced to resend a curative notice following a decision from this Court decertifying or modifying the class—leads to precisely the type of confusion that courts should avoid.

[6] *See also In re Urethane Antitrust Litig.*, 2006 U.S. Dist. LEXIS 80425, at *23 (D. Kan. Oct. 23, 2006) ("[T]he court is persuaded that the potential confusion that could result if the Tenth Circuit were to vacate or modify the class certification order after notice has already been disseminated to class members counsels against proceeding to issue notice at least until the Circuit has resolved the request to take the appeal. In cases involving a Rule 23(f) appeal the court should ordinarily stay the dissemination of class notice to avoid the confusion and substantial expense of renotification that may result from appellate reversal or modification.") (citing *Manual for Complex Litigation* § 21.28); David F. Herr, *Manual for Complex Litigation* § 21.28 (4th ed. 2012) ("If the appeal is from a grant of certification, the district court should ordinarily stay the dissemination of class notice to avoid the confusion and the substantial expense of renotification that may result from appellate reversal or modification after notice dissemination.").

C. Harm To Both Class Members And Innocent Third-Parties

A failure to issue a stay will also harm countless innocent third parties—namely, all of Stream Energy's IAs (both members of this alleged class and those who are not). There are *thousands* of IAs in the field actively selling Stream Energy accounts and recruiting additional IAs. The issuance of this class notice will devastate both their business and their reputations. *See generally* Aff. of B. Wright (attached as Ex. E).

As explained above, the class notice will have devastating consequences on Stream Energy's business. That same harm will affect the individual IAs as well. The customers they have signed and the fellow IAs they have recruited will cancel their energy accounts and slacken their retail efforts—tearing down the business that these innocent IAs have spent years building.

Moreover, the IAs will also suffer ruinous injury to their personal reputations. The notice accuses them of embroiling their customers and recruits in a racketeering scheme. They will be held blamed, even though they are not parties to this litigation, causing them immediate and permanent harm.

And even if this Court ultimately reverses the class certification, this is a bell that cannot be un-rung. There is no reason to inflict this harm on thousands of innocent people right now—especially when the alternative is a delay of a few months during which this Court can decide whether the harm is necessary at all.

* * *

In sum, a failure to grant a stay will cause irreparable and unnecessary harm to Stream Energy, the potential class members, and innocent third parties.

III. Plaintiffs Will Not Suffer "Substantial" Harm If A Stay Issues.

A stay will not harm class members at all, let alone "substantially" harm them. To the contrary, only a denial of a stay will harm potential class members, as explained above.

This is a case about money damages for past harms—not injunctive relief. As a result, a minor delay will have no effect on the relief plaintiffs seek. *Cf. Sampson v. Murray*, 415 U.S. 61, 90–92 (1974) (finding no irreparable injury where monetary relief will be available).

Plaintiffs argued in the district court that they could suffer harm because the defendants may become insolvent in the future—and that Plaintiffs will accordingly be unable to enforce any potential judgment. Doc. 188 at 12. Yet Plaintiffs cited no evidence to even suggest that this is an actual risk—because they cannot. Stream Energy is the fourth largest energy provider in Texas. Any suggestion that it will become insolvent if this case is stayed for a few months is ridiculous—after all, the case has been pending for almost *five years*. *See also* Aff. of M. Schiro ¶¶ 5-6 (outlining financial strength of Stream Energy).

Exhibit E

No. 14-90004

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, Case No. 4:09-CV-02056

AFFIDAVIT OF BERNADETTE WRIGHT IN SUPPORT OF MOTION FOR STAY

Bernadette Wright, being duly sworn, deposes and states as follows:

1. I am over eighteen years of age, am competent to testify, and have personal knowledge of the facts stated in this Affidavit, which are true and correct.

2. I am a resident of Fayetteville, Fayette County, Georgia.

3. I have been a licensed attorney since 2001, and have operated my own law firm since 2007.

4. I have also served as an Independent Associate for Stream Energy since April 2008. In that capacity, I have personally enrolled over 20 Stream

Energy accounts and I have personally sponsored fellow IAs who, in turn, have also enrolled electricity and gas customers on behalf of Stream Energy.

5. I understand that Plaintiffs contend that Stream Energy and the other defendants have defrauded me, and others like me, because we were induced to join a multilevel marketing program that they claim is actually a pyramid scheme. I am not, however, a defined member of the putative class because I, along with thousands of other IAs, have made a profit through my involvement with Ignite/Stream Energy (and because I live in Georgia).

6. I have reviewed the class notice approved by the district court, which the court has ordered to be promptly distributed to every single IA who joined between January 1, 2005, and April 2, 2011.

7. Many, if not all, of the IAs I have recruited will receive this class notice. Moreover, because this is a business premised on a network model that promotes the rapid dissemination of information, the news of the issuance of the class notice will likely spread to everyone in this industry.

8. If the class notice is distributed, I will be irreparably harmed in two distinct respects.

9. First, it will significantly damage my reputation. Even though I am not a defendant, many of the customers I have signed and people I have recruited will accuse me of being complicit in these allegedly disreputable activities.

10. The class action notification accuses Stream of operating a racketeering scheme and states that a federal court has "certified" the lawsuit to proceed. The mere mention of "racketeering" (*i.e.*, a person who engages in fraudulent and dishonest business dealings), as well as the appearance of the claims bearing the approval of a federal court, will greatly injure my reputation with the IAs I have recruited and the customers I have signed, as well as have a chilling effect on my ongoing IA business.

11. Second, it will affect my economic livelihood. The customers I have signed and the IAs I have recruited will receive word of the notice and potentially cancel their accounts or slow-down their own efforts to sell Stream energy accounts—either of which will cause me financial harm that I will be unable to recover from any of the parties.

12. The consequences of the class notice will be the same as if the district court enjoined Stream Energy from enrolling any more customers pending the outcome of the suit. Many IAs will not want to work hard to gather customers for a company whose future is at stake. And current customers could react in exactly the same way. Electricity and gas are life essential services and no matter how much money you save each month, it isn't worth the risk of one day thinking you will not have service because your provider has been sanctioned. Customers will switch and IAs will quit.

13. All of these harms will result because this industry is based on customer goodwill and the maintenance of trustworthy relationships.

14. Moreover, all of this this will not only affect me, but also every business partner I have enrolled, many of whom have come to rely on the income we earn each and every month through this business.

15. Nonetheless, I understand that, if there was a proper correct class certification order, there would be little I could do to avoid the irreparable consequences of sending out a class notice.

16. However, I also understand that the certification order may be appealed to the U.S. Court of Appeals for the Fifth Circuit, which may ultimately decide that the order was improper.

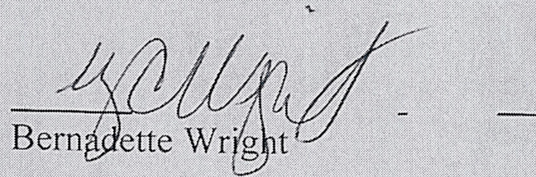
17. Given that fact, I see no reason to send the class notice now and subject me to all of these irreparable harms—when the alternative is to simply wait a few months and make sure that the class notice is proper before opening the Pandora's Box of harms that will result.

18. After all, if the distribution of the class is notice is not stayed, I will be irreparably harmed even if Stream Energy succeeds in its appeal. My reputation and income will be unrecoverable. There will be no one from whom I can recover business I worked *years* to build.

* * *

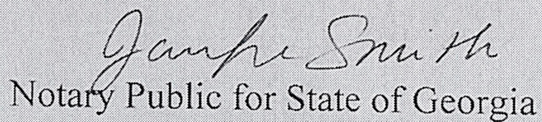
I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated: Fayetteville, Georgia
February 26, 2014



Bernadette Wright

Subscribed and sworn to before me on this 26th day of February, 2014, by Bernadette Wright, proved to me on the basis of satisfactory evidence to be the person who appeared before me.



Notary Public for State of Georgia

My Commission Expires: February 4, 2018

Jacquelyn Smith, Notary Public
Fulton County, State of Georgia
W00198469 Expires Feb 04, 2018

APPENDIX B

Income Disclosure

January 1, 2011 – December 31, 2011

ASSOCIATE POSITION	% OF PAID ASSOCIATES	ANNUAL INCOME		MONTHS IN IGNITE		
		LOW	HIGH	LOW	AVERAGE	HIGH
Executive Director	0.13%	$7,815.25	$2,622,008.75	12	12.00	12
Senior Director	2.39%	$11.50	$226,067.25	2	11.86	12
Managing Director	10.60%	$10.00	$84,219.25	1	11.24	12
Director	86.88%	$10.00	$5,991.25	1	8.97	12

The income statistics shown above are for all Ignite Qualified Directors who earned at least one commission or bonus payment during the calendar year 2011, which represents 89.49% of all associates who are Qualified Directors (Please see the Ignite Compensation Plan for the prerequisites for becoming a Qualified Director). During the reporting period, the average income of those associates was $692.58.

THE EARNINGS OF THE IGNITE ASSOCIATES IN THIS CHART ARE NOT NECESSARILY REPRESENTATIVE OF THE INCOME, IF ANY, THAT AN IGNITE ASSOCIATE CAN OR WILL EARN THROUGH HIS OR HER PARTICIPATION IN THE IGNITE COMPENSATION PLAN. THESE FIGURES SHOULD NOT BE CONSIDERED AS GUARANTEES OR PROJECTIONS OF YOUR ACTUAL EARNINGS OR PROFITS. COMPENSATION WITH IGNITE RESULTS ONLY FROM THE ENROLLMENT OF ENERGY CUSTOMERS (NO COMPENSATION IS PAID FOR RECRUITING INDEPENDENT ASSOCIATES), WHICH REQUIRES HARD WORK, DILIGENCE, AND LEADERSHIP. YOUR SUCCESS WILL DEPEND ON HOW EFFECTIVELY YOU EXERCISE THESE QUALITIES.

Responsibility and honesty are core values at Ignite. We conduct business in a professional, ethical and legal manner and require our Independent Associates to follow suit with respect to customers, other Ignite Independent Associates and Ignite. When you choose Ignite, you can be sure that you are teaming up with an organization rooted in a firm foundation of entrepreneurship and integrity.

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