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

BRIEF OF AMICI CURIAE DIRECT SELLING ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ENERGY MARKETERS ASSOCIATION IN SUPPORT OF DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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

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INTEREST OF AMICI CURIAE[1]

The Direct Selling Association ("DSA") is a 103-year-old national trade association that represents companies that sell products to customers through independent salespeople who personally demonstrate and explain the products, usually in the customer's home or workplace. In 2012, over 15.9 million individuals were involved in direct selling in the United States, resulting in retail sales of over $31 billion. *See* DSA, 2012 Direct Selling Statistics, http://goo.gl/Bnw17 (last visited Feb. 1, 2014). DSA estimates that its 169 member companies, which include some of the country's most well-known and respected businesses, *see* DSA Membership Directory, http://goo.gl/STSXQ (last visited Feb. 1, 2014), account for more than 90% of the industry's annual sales.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than 3,000,000 U.S. businesses and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing *amicus curiae* briefs in cases implicating issues of concern to the nation's business community.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amici*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

The National Energy Marketers Association ("NEM") is a nonprofit trade association representing leading retail and wholesale suppliers and major consumers of natural gas and electricity, as well as energy-related products, services, information, and advanced technologies, throughout the United States, Canada, and the European Union. NEM's membership includes suppliers that sell energy and related products, services, and technologies to millions of consumers. NEM, together with its members, has developed National Marketing Standards of Conduct and a Consumer Bill of Rights.

Amici urge this Court to grant the defendants' petition under Federal Rule of Civil Procedure 23(f) and reverse the district court's class-certification decision. That decision poses a serious threat to the business community by permitting certification of a class action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") outside of Rule 23's strictures, as recently, repeatedly, and clearly established by this Court and the Supreme Court. In particular, it purports to find that questions about the plaintiffs' reliance upon and knowledge of allegedly fraudulent statements—questions that by their nature are inherently individualized inquiries—can be resolved on a classwide basis. Furthermore, it authorizes class treatment of those issues based on a mere *allegation*, rather than actual proof, that a company's method of direct selling constitutes an unlawful pyramid scheme. Order 15-17. Such marked deviations

from recent precedent on the proper standards for class certification warrant this Court's prompt review and correction.

ARGUMENT

Based on an inapt analogy to the fraud-on-the-market theory used to certify securities-fraud class actions—a theory that the Supreme Court is currently considering whether to overrule—the district court here certified a sprawling class action seeking a nine-figure verdict based on the mere allegation that the defendants had engaged in an unlawful pyramid scheme. That decision conflicts with this Court's recognition that individualized questions of reliance generally predominate in RICO actions involving allegations of fraud, thus precluding class certification. It also cannot be squared with precedent clearly establishing that plaintiffs seeking class certification must prove, not merely allege, that their action satisfies the requirements of Rule 23. If left uncorrected, the district court's decision would subject businesses to the risk of extortionate settlements coerced by the improper certification of meritless class claims that could not be proved at trial.

I. The District Court's Decision Ignores Rule 23's Requirements And Conflicts With Supreme Court And Circuit Precedent

The plaintiffs here seek treble damages and attorney's fees under 18 U.S.C. § 1964(c), which creates a civil cause of action for persons "injured in [their] business or property by reason of a [RICO] violation." To prevail under § 1964(c), the plaintiffs must establish that the pattern of racketeering activity alleged in their

complaint, which involves allegations of mail and wire fraud, proximately caused their alleged injuries. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). To satisfy this burden, the district court correctly acknowledged, the plaintiffs and each of the putative class members must prove that they individually relied on the defendants' allegedly fraudulent misrepresentations and omissions. *See* Order 12-14; *see also Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008) (explaining that a RICO plaintiff alleging "injury 'by reason of' a pattern of mail fraud" generally must establish that the plaintiff or a third party relied on the defendant's misrepresentations "in order to prove causation"); Order 13 n.8 (stating that the plaintiffs in this case "have not" and "could not" claim that their injuries stem from third parties' reliance on the defendants' alleged misrepresentations and omissions).

This Court has recognized that "'[i]ndividual findings of reliance necessary to establish RICO liability and damages preclude'" class certification under Federal Rule of Civil Procedure 23(b)(3). *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003) (quoting *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000)). "This is so," the Court has explained, "because cases that involve individual reliance fail" Rule 23(b)(3)'s requirement that legal or factual questions common to the class predominate over questions affecting only individual members. *Id.* Defendants have a due-process

right to "present every available defense" to the claims asserted against them. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (internal quotation marks omitted). Therefore, where, as here, individuals claim to have been injured by a defendant's fraudulent misrepresentations, the defendant is entitled to probe whether each of those individuals actually knew of and relied on the alleged misrepresentations. Such individualized inquiries "'defeat the economies ordinarily associated with the class action device.'" *Sandwich Chef*, 319 F.3d at 219 (quoting *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001)).

The well-established rule that a "'class action cannot be certified when individualized reliance will be an issue'" should have resolved this case. *Id.* (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996)). The district court, however, concluded that class certification was appropriate here based on the plaintiffs' "alleg[ation]" that the defendants were operating an illegal pyramid scheme. Order 15. If the defendants' business was actually an unlawful pyramid scheme, the district court reasoned, reliance (and thus proximate cause) could be established on a classwide basis, for no rational person would participate in such a scheme unless she were misled about its true nature. *See* Order 15-17.

The district court's novel theory is insufficient to overcome the "working presumption against class certification" in RICO actions involving allegations of fraud. *Sandwich Chef*, 319 F.3d at 219. But even if the district court was correct

that the plaintiffs could establish proximate cause on a classwide basis if an illegal pyramid scheme were shown to exist,[2] the court erred by certifying the proposed class without first requiring the plaintiffs to *prove*, rather than merely "allege[]," that the defendants were operating such a scheme. Order 15. Rule 23, the Supreme Court has explained, "'does not set forth a mere pleading standard.'" *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). To obtain class certification, a plaintiff "'must affirmatively demonstrative his compliance'" with each of Rule 23's requirements. *Id.* Therefore, a plaintiff seeking class certification under Rule 23(b)(3) must prove any fact "needed to ensure" that the legal and factual questions "common to the class will 'predominate over any questions affecting only individual members' as the litigation progresses." *Amgen*, 133 S. Ct. at 1195 (quoting Fed. R. Civ. P. 23(b)(3)).

[2] Although the district court drew an inapt analogy between the reasoning underlying its decision here and the fraud-on-the-market theory used to certify securities-fraud class actions, *see* Order 15; *see also Basic Inc. v. Levinson*, 485 U.S. 224, 241-49 (1988), the court did not assess whether the prerequisites for invoking that theory were satisfied in this case, *see Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) (explaining that securities-fraud plaintiffs "must prove certain things" to invoke the fraud-on-the-market theory, including the existence of "an efficient market"). Furthermore, at least four Supreme Court Justices have questioned the continuing vitality of the fraud-on-the-market theory, *see Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1204 (2013) (Alito, J., concurring); *id.* at 1208 n.4 (Thomas, J., joined by Scalia and Kennedy, JJ., dissenting), and the Court is currently considering whether to overrule *Basic*, the seminal case endorsing the theory, *see* Brief for Petitioners, *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. Dec. 30, 2013). If the Court repudiates the fraud-on-the-market theory, the district court's insupportable attempt to *extend* that theory in this case certainly cannot stand. At a minimum, the Court should grant the defendants' Rule 23(f) petition to ensure that it has jurisdiction over this case when the Supreme Court issues its decision in *Halliburton*.

Under the district court's own theory, the existence of an illegal pyramid scheme is a fact "needed to ensure" that Rule 23(b)(3)'s predominance requirement is satisfied. Absent proof that the defendants' enterprise met the legal definition of an unlawful pyramid scheme,[3] the putative class members' RICO claims would not necessarily be doomed. An individual class member could, for example, attempt to prove that (1) the defendants engaged in a pattern of misrepresenting the amount of money independent salespeople could earn under the defendants' otherwise legitimate direct selling program, and (2) the individual relied on such misrepresentations to her detriment. In such a case, however, individual reliance issues would predominate—precisely the result the district court sought to avoid by adopting a presumption that no rational person would knowingly participate in an illegal pyramid scheme.[4] Because, even under the district court's own theory, proof of an illegal pyramid scheme's existence is necessary to ensure that common

[3] *See In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1180 (1975) ("[Pyramid] schemes are characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product *and* (2) the right to receive in return for recruiting other participants into the program rewards *which are unrelated to sale of the product to ultimate users*." (second emphasis added)).

[4] This case thus differs substantially from *Amgen*, in which the Supreme Court held that proof of materiality is unnecessary at the class-certification stage in a securities-fraud action because a failure of proof on that issue "would end the case," meaning that "no claim would remain in which individual reliance issues could potentially predominate." 133 S. Ct. at 1196. Here, by contrast, the plaintiffs' inability to prove that the defendants operated an illegal pyramid scheme would not necessarily defeat their RICO claims, but it would cause individualized questions to predominate over common ones. *Cf. id.* at 1199 (explaining that unlike materiality, "market efficiency and the public nature of the alleged misrepresentations must be proved before a securities-fraud class action can be certified" because those issues are "not indispensable elements of a [securities-fraud] claim," and thus a failure of proof on the issues "leaves open the prospect of individualized proof of reliance").

questions will predominate over individualized questions "as the litigation progresses," *id.*, the district court erred by failing to demand such proof before certifying the plaintiffs' proposed class.

II. The District Court's Decision Subjects Businesses To The Risk Of Extortionate Settlements

The district court's disregard of the requirements of Rule 23, as interpreted by this Court and the Supreme Court, demands this Court's immediate attention. As this Court has recognized, "class certification may be the backbreaking decision that places insurmountable pressure on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) (internal quotation marks omitted); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."). Requiring strict adherence to Rule 23's mandates is thus necessary to prevent the class-action device from being used as a tool for "judicial blackmail." *Castano*, 84 F.3d at 746.

The district court's decision below charts a clear—and clearly erroneous—path by which plaintiffs can threaten businesses with the risk of extorted settlements. The threat to direct selling companies is obvious. Many direct selling companies compensate salespeople not only for their own sales, but also for the

sales of individuals they recruit. But as noted in the defendants' petition, Pet. 17, companies using such a compensation model are vulnerable to false accusations of being illegal pyramid schemes. *See, e.g.*, *In re Amway Corp.*, 93 F.T.C. 618, 715-17 (1979); Anne T. Coughlan & Kent Grayson, *Network Marketing Organizations: Compensation Plans, Retail Network Growth, and Profitability*, 15 Int'l J. Res. Marketing 401, 425 (1998) ("[Certain forms of direct selling are] often incorrectly associated with deceptive 'pyramid schemes' . . . ."). Under the district court's decision, the mere allegation that such a scheme exists could subject a direct selling company and its executives to massive liability for the aggregated treble-damages claims of hundreds of thousands of class members.

If the district court's decision is allowed to stand, some companies may reconsider their use of direct selling, concluding that the liability risk outweighs the practice's undeniable benefits. Those benefits are substantial. As the Federal Trade Commission has recognized, direct selling alleviates the need for companies to spend large sums of money on advertising and promotion, reducing barriers to entry, especially in "highly concentrated market[s]" where a small number of firms control a large percentage of the market. *In re Amway*, 93 F.T.C. at 710-11. Furthermore, direct selling offers salespeople advantages such as a flexible work schedule and the independence of being one's own boss, and consumers receive the benefit of a sales presentation tailored to their individual circumstances and, in

many cases, instruction on the product's proper use. Especially when the country is still struggling to overcome years of stubbornly high unemployment, this Court should not leave uncorrected an erroneous decision that jeopardizes a $31 billion industry that employs millions of Americans. *See supra* p. 1.

The implications of the district court's decision also extend far beyond the direct selling industry. Certifying for class treatment claims that turn on individualized questions of knowledge and reliance vastly increases litigation costs for all businesses disproportionate to any underlying merits of the claims. This harms the entire economy—most recognizably by increasing prices for consumers, but also by raising the risk that businesses may need to reduce operations and capital investments. And if mere allegations of fraud sufficed to obtain class certification, a wide range of businesses, from mortgage lenders to for-profit colleges, would face the risk of being coerced into extortionate settlements without having a meaningful opportunity to present legitimate defenses. The Court should take this opportunity to correct the district court's faulty Rule 23 analysis and reaffirm the stringent requirements for class certification.

CONCLUSION

For the foregoing reasons, the Court should grant the defendants' Rule 23(f) petition and reverse the district court's class-certification order.

Dated: February 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This *amicus* brief complies with the requirements of Fed. R. App. P. 29(d) because it is no more than half the maximum length of 20 pages authorized by Fed. R. App. P. 5(c) for the defendants' petition for permission to appeal.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font, except for the footnotes, which have been prepared in proportionally spaced Times New Roman 12-point font pursuant to 5th Cir. R. 32.1.

Dated: February 3, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* Direct Selling Association, the Chamber of Commerce of the United States of America, and National Energy Marketers Association with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on February 3, 2014.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: February 3, 2014

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