UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUAN RAMON TORRES; EUGENE ROBISON, *Plaintiffs-Appellees*, v. SGE MANAGEMENT, LLC, *et al.*, *Defendants-Appellants*.	Case No. 14-20128

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, DIRECT SELLING ASSOCIATION, AND NATIONAL ENERGY MARKETERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN *EN BANC* PROCEEDINGS IN FAVOR OF APPELLANTS AND IN SUPPORT OF REVERSAL

Pursuant to Federal Rules of Appellate Procedure 27 and 29, the Chamber of Commerce of the United States of America ("the Chamber"), the Direct Selling Association ("DSA"), and the National Energy Marketers Association ("NEM") respectfully request leave from this Court to file a brief *amicus curiae* in the *en banc* proceedings in this case. The brief, a copy of which is lodged with this motion, is in favor of Appellants and in support of reversal of the district court's class-certification decision. The movants (collectively, "*Amici*") previously submitted briefs as *amici curiae* in support of Appellants' petition for permission to appeal and at the panel stage in this case. All parties have consented to the filing of *Amici*'s brief.

1. 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. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Direct Selling Association ("DSA") is a 105-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 2014, approximately 18.2 million individuals were involved in direct selling in the United States, resulting in retail sales of approximately $34.5 billion. *See* DSA, *Direct Selling in 2014: An Overview*, http://goo.gl/ka3kvS (last visited Apr. 15, 2016). DSA estimates that its 165 member companies, which include some of the country's most well-known and respected businesses, *see* DSA Membership Directory, http://goo.gl/vMz8pN (last visited Apr. 15, 2016), account for the vast majority of the industry's annual sales.

DSA, of which Stream Energy is a member, has worked for decades to develop clear standards for distinguishing legitimate direct selling companies from illegal pyramid schemes. *See, e.g.*, DSA, *Legitimate Direct Selling vs. Illegal Pyramid Schemes: A White Paper*, http://goo.gl/xIM6w5 (2013). It has worked with state legislatures to pass legislation identifying and condemning such schemes. *See, e.g.*, Press Release, DSA, *Direct Selling Association Applauds Passage of Tennessee Law to Protect Against Pyramid Schemes*, http://goo.gl/Hzte4s (May 1, 2014). It also requires its members to comply with a rigorous Code of Ethics designed to protect consumers and salespeople. *See* DSA, *Code of Ethics*, http://goo.gl/znS1ux (last visited Apr. 15, 2016).

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.

2. *Amici* have a substantial interest in this case. *See* Fed. R. App. P. 29(b)(1). The district court's decision below poses a serious threat to companies

that engage in direct selling and to the broader business community by permitting certification of a class action under the Racketeer Influenced and Corrupt Organizations Act outside of Federal Rule of Civil Procedure 23's strictures, as recently, repeatedly, and clearly established by this Court and the Supreme Court. In particular, the district court's decision purports to hold 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, the decision 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. ROA.2266-68. The district court's decision sets forth a clear—but clearly erroneous—path by which plaintiffs can extract extortionate settlements from businesses regardless of the merits of an individual suit.

3. *Amici*'s submission of their brief is "desirable," and the matters addressed in the brief are "relevant to the disposition of th[is] case." Fed. R. App. P. 29(b)(2). *Amici*'s brief not only describes the legal errors committed by the district court, but also explains the serious threat that the court's decision poses to the direct selling industry and the broader business community. *See Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (noting that *amicus* briefs may be able to provide "unique perspective, or information, that can assist

the court of appeals beyond what the parties are able to do"); *see also Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (recognizing that *amici* may be able to assist the court by "explain[ing] the impact a potential holding might have on an industry" (internal quotation marks omitted)).

4. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amici* certify that no party's counsel authored their 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.

5. *Amici*'s brief is timely because *Amici* are filing the brief within seven days of the April 8, 2016 filing of Appellants' *en banc* brief. Fed. R. App. P. 29(e); 5th Cir. R. 29.1.

* * *

Amici participated in both the petition and panel stages of this case. With both parties' consent, *Amici* respectfully request that the Court permit them to participate in the *en banc* proceedings as well by granting them leave to file their *en banc amicus* brief.

Dated: April 15, 2016

Respectfully submitted,

/s/ Harry M. Reasoner

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v.

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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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Dated: April 15, 2016

/s/ Harry M. Reasoner
Harry M. Reasoner
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion 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 April 15, 2016.

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

Dated: April 15, 2016

/s/ Joshua S. Johnson
Joshua S. Johnson
Counsel for Amici Curiae

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v.

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

EN BANC BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, DIRECT SELLING ASSOCIATION, AND NATIONAL ENERGY MARKETERS ASSOCIATION IN FAVOR OF APPELLANTS AND IN SUPPORT OF REVERSAL

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Dated: April 15, 2016

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INTEREST OF *AMICI CURIAE*[1]

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NEM, together with its members, has developed National Marketing Standards of Conduct and a Consumer Bill of Rights.

Amici urge the *en banc* Court to reverse the district court's class-certification decision. The decision below 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 Federal Rule of Civil Procedure 23's strictures, as recently, repeatedly, and clearly established by this Court and the Supreme Court. In particular, the district court's decision purports to hold 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, the decision 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. ROA.2266-68. These marked deviations from recent, controlling precedent on the proper standards for class certification mandate reversal. The full Court's resolution of this case should be appropriately mindful of the need for strict adherence to Rule 23's requirements.

ARGUMENT

The district court certified a sprawling RICO class action seeking over $150 million in trebled damages based on the mere allegation that the defendants had

engaged in an unlawful pyramid scheme. That decision conflicts with this Court's recognition that, except in rare instances, individualized questions of causation and reliance predominate in RICO actions involving allegations of fraud, and thus preclude class certification. The decision 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.

I. This Court Should Demand Strict Adherence to Rule 23's Requirements

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). This case involves "'the most adventuresome' innovation" of Rule 23—the class action seeking monetary damages under Rule 23(b)(3). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969)).

Courts have frequently acknowledged the risk of abuse and unfairness inherent in Rule 23(b)(3). Plaintiffs' lawyers can use the threat of massive,

classwide damages to extort settlements of groundless claims. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). As this Court has explained, "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.").

The risk of extorted settlements is particularly pronounced where, as here, plaintiffs seek class certification of civil RICO claims. "Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). "The very pendency of a RICO suit can be stigmatizing," undermining the defendant's ability to conduct business. *Id.*; *see also Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990) (noting that "[a] civil RICO suit is in effect quasi-criminal in nature" (internal quotation marks omitted)). Furthermore, because the civil RICO statute authorizes recovery of treble damages and attorney's fees, 18 U.S.C. § 1964(c), a

defendant's potential liability for even a single RICO claim can be immense. *See Miranda*, 948 F.2d at 44. The liability exposure increases exponentially when such claims are aggregated through the class-action device. Here, for example, the certified class is seeking over $150 million in damages. *See* Appellants' Supp. *En Banc* Br. 16. The massive liability exposure that can result from the aggregation of RICO claims demands that courts take "particular care" to avert the "abusive or vexatious treatment of defendants." *Miranda*, 948 F.2d at 44.

To prevent the class-action device from being used as a tool for "judicial blackmail," *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996), courts have demanded strict adherence to Rule 23's requirements for class certification. 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*, 131 S. Ct. at 2551). To obtain class certification, a plaintiff "must affirmatively demonstrate his compliance" with Rule 23's mandates. *Id.* And in particular, plaintiffs "must actually *prove*—not simply plead—that their proposed class satisfies . . . the predominance requirement of Rule 23(b)(3)." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). Frequently this "rigorous analysis" will "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 131 S. Ct. at 2551.

In this case, the district court did not require the plaintiffs to affirmatively establish their compliance with Rule 23(b)(3)'s requirement that "the questions of law or fact common to class members predominate over any questions affecting only individual members." The district court's class-certification order must therefore be reversed.

II. Class Certification Is Improper Where, as Here, RICO Fraud Claims Raise Individualized Reliance Issues

The district court's class-certification order violates the well-established rule that a "class action cannot be certified when individualized reliance will be an issue." *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003) (quoting *Castano*, 84 F.3d at 745). To prevail on their civil RICO claims under 18 U.S.C. § 1964(c), the plaintiffs here 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); *see also* 18 U.S.C. § 1964(c) (creating a civil cause of action for persons "injured in [their] business or property by reason of a [RICO] violation"). To satisfy that burden, as both the panel decision and the district court correctly recognized, the plaintiffs and each of the putative class members must prove that they individually relied on the defendants' allegedly fraudulent misrepresentations and omissions. *See* ROA.2263-64 (explaining that "the complete absence of reliance" by either the

plaintiff or a third party "may prevent the plaintiff from establishing proximate cause," and noting that the plaintiffs in this case "have not" claimed and "could not" claim that their injuries stem from a third party's reliance on the defendants' alleged misrepresentations and omissions (quoting *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008))); *accord Torres v. S.G.E. Mgmt., L.L.C.*, 805 F.3d 145, 151 (5th Cir. 2015). Because proof of individual reliance is an essential component of the putative class members' claims, the proposed class should not have been certified.

This Court has previously recognized that Rule 23(b)(3) "preclude[s]" class certification where "[i]ndividual findings of reliance [are] necessary to establish RICO liability and damages." *Sandwich Chef*, 319 F.3d at 219 (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.* The need for individual inquiries into whether each class member knew of and relied on the defendants' alleged misrepresentations "defeat[s] the economies ordinarily associated with the class action device." *Id.* (quoting *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001)); *see also Torres*, 805 F.3d at 155 ("[I]n most cases, reliance will naturally turn on evidence that will differ from case to case.").

The district court's failure to follow established, well-reasoned precedent "preclud[ing]" Rule 23(b)(3) certification of RICO fraud claims raising individualized issues of causation and reliance demands reversal. *Sandwich Chef*, 319 F.3d at 219. Although the plaintiffs here argued in the district court that this precedent was overruled by the Supreme Court's decision in *Bridge*, they have backed away from that argument on appeal, for good reason. *See* Appellees' Panel Br. 39. *Bridge* merely held that a plaintiff asserting a RICO fraud claim can establish proximate causation through a third party's reliance on a misrepresentation, as long as "the plaintiff's loss [was] a foreseeable result of [the third party's] reliance." 553 U.S. at 656; *see also id.* at 648-49, 658 (concluding that the plaintiffs in *Bridge*, who regularly participated in tax-lien auctions, could establish proximate causation through the county government's reliance on the defendants' misrepresentations because those misrepresentations caused the county to award the defendants valuable liens that otherwise would have been awarded to the plaintiffs). As *Bridge* itself noted, this Court in *Sandwich Chef* recognized "a narrow exception to the requirement that the plaintiff prove direct reliance on the defendant's fraudulent predicate act" when "the plaintiff can demonstrate injury as a direct and contemporaneous result of [a] fraud committed against a third party." *Id.* at 646 (quoting *Sandwich Chef*, 319 F.3d at 223). *Sandwich Chef* is thus consistent with *Bridge*, and certainly was not overruled by that decision. In any

event, as the district court here noted, the question of third-party reliance addressed in *Bridge* is not at issue in this case because the plaintiffs "have not" claimed and "could not" claim that their injuries stem from third parties' reliance on the defendants' alleged misrepresentations. ROA.2264. The panel decision, too, concluded that the effect of *Bridge* is not at issue here. *See Torres*, 805 F.3d at 151 ("The extent to which *Bridge* alters the reliance requirement in RICO class actions is not at issue on appeal . . . as the Plaintiffs concede that proximate cause in their case depends on reliance."). *Bridge* is therefore inapposite, and this case is controlled by the well-established case law prohibiting certification of RICO fraud class actions raising individualized reliance issues.

III. This Court Should Reject the District Court's Novel Presumption of Reliance Based on the Plaintiffs' Mere Allegation of an Illegal Pyramid Scheme

Despite this Court's controlling precedent, the district court here certified the plaintiffs' proposed class based on the plaintiffs' "alleg[ation]" that the defendants were operating an illegal pyramid scheme. ROA.2266. According to the district court, the plaintiffs could avoid the predominance of individualized issues of reliance and proximate causation by invoking a "presum[ption]" that all "class members . . . rel[ied] on the same misrepresentation—that the [defendants'] business opportunity was a legal, non-fraudulent venture." ROA.2266.

The district court's novel theory is insufficient to overcome the "working presumption against class certification" in RICO fraud cases. *Sandwich Chef*, 319 F.3d at 219. As an initial matter, the district court clearly erred by certifying the proposed class based on the mere "alleg[ation]," rather than actual proof, that the defendants were operating an illegal pyramid scheme. ROA.2266. This approach cannot be squared with the Supreme Court's recent—and repeated—insistence that plaintiffs seeking class certification "must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23."[2] *Halliburton*, 134 S. Ct. at 2412; *accord Comcast Corp.*, 133 S. Ct. at 1432; *Wal-Mart*, 131 S. Ct. at 2551.

The district court's decision also suffers from another fundamental flaw: The court improperly "presumed" that all purported class members "rel[ied] on the same misrepresentation," ROA.2266, even though the court had previously recognized that proof of individual reliance was necessary to establish proximate causation, ROA.2263-64. *See Torres*, 805 F.3d at 149 ("The Plaintiffs allege that they were defrauded because the Defendants misrepresented to them that Ignite was a legitimate company when it was not."). This Court should not allow plaintiffs to satisfy by "presum[ption]" such an essential component of their

[2] This was true even in *Halliburton*, a case that allowed an initial presumption of "fraud on the market"—subject to rebuttal by the defendant—in the unique context of public statements regarding efficiently traded public securities. *See* 134 S. Ct. at 2412, 2414-17. As explained below, *see infra* pp. 13-18, no such presumption exists in the RICO context, so the district court's acceptance of mere allegations was doubly flawed.

claims. ROA.2266. 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); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016) (reiterating defendants' "right to litigate statutory defenses to individual claims" (citing *Wal-Mart*, 131 S. Ct. at 2561)). 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. Appellants are correct that "Stream Energy is entitled to defend itself by asking each Plaintiff what she knew, what she relied on, and whether she would have taken precisely the same action, had she known the truth." Appellants' Supp. *En Banc* Br. 34-35.

District courts should not be permitted to override this right by adopting novel and unsubstantiated "presum[ptions]." ROA.2266. Instead, plaintiffs must be required to prove their claims, and defendants must be allowed to challenge those claims, in accordance with the ordinary rules of our adversarial system. *See Sandwich Chef*, 319 F.3d at 220-21 (holding that putative class members were required to prove that they relied on misrepresentations in invoices and that defendants were "entitled to attempt to undercut this proof"). Absent a full opportunity for adversarial testing of individual claims, a significant risk will exist

that class members who did *not* in fact rely on the defendants' purported misrepresentations will nevertheless be allowed to recover, even though their claims should fail for lack of proximate causation. Loosening Rule 23's requirements in a way that permits meritless claims to prevail violates the Rules Enabling Act, which provides that procedural rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also* Appellants' Supp. *En Banc* Br. 54-56. It also runs afoul of Article III of the Constitution, which "does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring).

In support of its due-process-denying presumption, the district court relied on an inapt analogy to the "fraud-on-the-market theory" used to certify securities-fraud class actions. ROA.2266; *see also Basic Inc. v. Levinson*, 485 U.S. 224, 241-49 (1988). The plaintiffs have on appeal tried to distance themselves from the district court's invocation of the fraud-on-the-market theory, dismissing it as mere *dicta*. *See* Appellees' Panel Br. 47. The district court, however, stated that the plaintiffs' certification argument was "based on" an extension of the fraud-on-the-market theory, and the court expressly said that it "finds that the class can be certified" based on that rationale. ROA.2266. This Court should reject the district court's novel expansion of the fraud-on-the-market theory, which threatens to create havoc in other cases if left uncorrected.

Plaintiffs asserting securities-fraud claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, must prove that they relied on the defendant's alleged misrepresentations or omissions. *See Halliburton*, 134 S. Ct. at 2407 (noting that "the reliance element ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury" (internal quotation marks omitted)). In the specific context of Section 10(b) and Rule 10b-5 claims, the Supreme Court has explained that "[r]equiring proof of individualized reliance from each member of [a] proposed plaintiff class effectively would . . . prevent[] [plaintiffs] from proceeding with a class action, since individual issues . . . would . . . overwhelm[] . . . common ones," *Basic*, 485 U.S. at 242; *see also Halliburton*, 134 S. Ct. at 2416 (noting that without a classwide "presumption of reliance, a Rule 10b-5 suit cannot proceed as a class action").

The Supreme Court erected "a judicially created doctrine designed to implement [the] judicially created cause of action" under Section 10(b) and Rule 10b-5. *Halliburton*, 134 S. Ct. at 2411. Specifically, the Court permitted securities-fraud plaintiffs to "invok[e] a presumption that a public, material misrepresentation will distort the price of stock traded in an efficient market, and that anyone who purchases the stock at the market price may be considered to have

done so in reliance on the misrepresentation."[3] *Id.* at 2417. While a defendant is entitled to rebut this presumption before class certification, *see id.* at 2414-17, where the presumption goes unrebutted, class members can invoke the fraud-on-the-market presumption of reliance, and individual reliance issues no longer predominate.

The district court here did not hold that the fraud-on-the-market theory applies to this case by its own terms, nor could it have. The plaintiffs assert civil RICO claims, not securities-fraud claims under Section 10(b) and Rule 10b-5. The personalized recruitment of Stream Energy salespeople bears no resemblance to the type of efficient securities market on which the fraud-on-the-market theory is founded. *See infra* pp. 16-17; *see also Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000) (noting that "[a]n efficient market is a critical element" of the fraud-on-the-market theory), *overruled on other grounds by St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) (per curiam).

Nevertheless, the district court drew a false analogy between the presumption of reliance it concocted here and the fraud-on-the-market theory. ROA.2266. The fraud-on-the-market theory is an anomaly limited to securities-fraud cases. The theory has been subject to serious criticism, counseling against its

[3] To invoke the presumption, a plaintiff must show "(1) that the alleged misrepresentations were publicly known, (2) that they were material, (3) that the stock traded in an efficient market, and (4) that the plaintiff traded the stock between the time the misrepresentations were made and when the truth was revealed." *Halliburton*, 134 S. Ct. at 2408.

extension beyond current limits. *See, e.g.*, *Halliburton*, 134 S. Ct. at 2420 (Thomas, J., concurring in judgment) (stating that the fraud-on-the-market theory rests "on a questionable understanding of disputed economic theory and flawed intuitions about investor behavior" and "is at odds with [recent precedent] requir[ing] plaintiffs seeking class certification to affirmatively demonstrate" their fulfillment of Rule 23's requirements (internal quotation marks omitted)). Indeed, this Court has previously "rejected" a civil RICO plaintiff's attempt to extend the already-tenuous fraud-on-the-market theory beyond "the context of securities fraud." *Summit Props.*, 214 F.3d at 561; *see also CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1095 (10th Cir. 2014) (explaining that fraud-on-the-market theory "is uniquely applicable in the securities context and it has not gained traction in other fields of law"); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1286-87 (8th Cir. 1994) (also rejecting a civil RICO plaintiff's invocation of the fraud-on-the-market theory, and noting that "[c]ourts have generally limited the use of the . . . theory to securities fraud cases"). The Court should take the same approach here.

Extending the fraud-on-the-market theory is particularly inappropriate here because the rationale underlying that theory has no application to this case. In *Basic*, the seminal case adopting the fraud-on-the-market theory, the Supreme Court stated that "[r]equiring a plaintiff to show a speculative state of facts, *i.e.*,

how he would have acted if omitted material information had been disclosed or if the misrepresentation had not been made, would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff *who has traded on an impersonal market*." 485 U.S. at 245 (emphasis added). Unlike typical securities-fraud plaintiffs, who generally trade through brokers and thus have no interaction with the seller or purchaser on the other end of the transaction, Stream Energy's independent associates usually are recruited personally to sell electricity. ROA.2252-53. It is thus neither "unrealistic" nor unfair to require each putative class member to identify the particular misrepresentations on which he or she allegedly relied. *Basic*, 485 U.S. at 245.

Adopting the district court's rationale here has the potential of radically transforming civil RICO fraud actions. Seeking a gateway to class certification, RICO-fraud plaintiffs may assert meritless claims that defendants were operating illegal pyramid schemes, causing the focus of many cases to shift from the traditional inquiry into whether an individual "relied on the defendant's misrepresentations," to whether a pyramid scheme existed. *Bridge*, 553 U.S. at 658. The grave implications of class certification counsel against adopting the district court's approach. Given the intensely stigmatizing effect of a class-certification decision labeling a business as a pyramid scheme, legitimate companies may feel compelled to settle rather than continue litigating and risk the

consequences of an adverse ruling, creating yet another mechanism for plaintiffs to extort settlements based on groundless claims.

This Court should not permit this perilous venture into uncharted waters. Rather than approving a trial by "presum[ption]," ROA.2266, the Court should require the plaintiffs here to bear their burden of proof on the RICO element of proximate causation by establishing that they individually relied on the defendants' alleged misrepresentations. And because, under this Court's established and well-reasoned precedent, the putative class members' individual reliance issues predominate over the questions common to the class, *see Sandwich Chef*, 319 F.3d at 219, class certification in this case was improper. *Cf. id.* at 224 (rejecting the district court's efforts "to eliminate individual issues that predominate[d] in th[e] RICO fraud case and that preclude[d] [class] certification").

IV. The District Court's Decision Poses Serious Risks to the Business Community

The district court's decision sets forth a clear—but clearly erroneous—path by which plaintiffs can extract extortionate settlements from businesses regardless of the merits of an individual suit. 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. As noted by the defendants, Appellants' Panel Br. 25, 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); *see also* Anne T. Coughlan & Kent Grayson, *Network Marketing Organizations: Compensation Plans, Retail Network Growth, and Profitability*, 15 Int'l J. Research Mktg. 401, 425 (1998) ("[Certain forms of direct selling are] often incorrectly associated with deceptive 'pyramid schemes' . . . ."). Given the potentially "backbreaking" effect of an order granting class certification and the fact that such a decision may "place[] 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.*, 482 F.3d at 379 (internal quotation marks omitted), allowing *the mere allegation* of an illegal pyramid scheme to serve as the basis for class certification would make direct selling companies and their executives easy litigation targets subject to massive potential liability for the treble-damages claims of hundreds of thousands of class members, regardless of whether the companies actually operate unlawful pyramid schemes.

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 and reduces 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, because of its low barriers to entry, direct selling provides important economic opportunities to historically disadvantaged groups, including women, who comprise approximately 75% of direct sellers in the United States. *See* DSA, *Direct Selling in 2014: An Overview*, http://goo.gl/ka3kvS. Direct selling also offers salespeople advantages such as a flexible work schedule and the independence of being one's own boss. Moreover, consumers receive the benefit of a sales presentation tailored to their individual circumstances and, in many cases, instruction on the product's proper use. This Court should not leave uncorrected an erroneous decision that jeopardizes a $34.5 billion industry in which millions of Americans work as independent contractors. *See supra* p. 1.

The implications of the district court's decision also extend far beyond the direct selling industry. If individualized issues of causation and reliance can be "presumed" away based on novel analogies to the fraud-on-the-market theory, a wide range of businesses will be at risk of being held hostage by the filing of putative class actions based on spurious claims. ROA.2266. Under the district court's approach, the potential grounds for class treatment are bounded only by the creativity of the plaintiff's bar.

Certifying for class treatment claims that by their nature should turn on individualized issues vastly increases litigation costs for all businesses

disproportionate to any underlying merits of the claims. *Cf. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (noting that securities-fraud defendants are often forced "to expend large sums even for pretrial defense and the negotiation of settlements"). 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, as the district court held here, mere allegations of wrongdoing suffice to obtain class certification, businesses will face the risk of being coerced into extortionate settlements without having a meaningful opportunity to present legitimate defenses. The full 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 reverse the district court's class-certification order.

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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 contains 4789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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: April 15, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *En Banc* Brief of *Amici Curiae* the Chamber of Commerce of the United States of America, Direct Selling Association, 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 April 15, 2016.

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

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