No. 16–___

IN THE

Supreme Court of the United States

S.G.E. MANAGEMENT, L.L.C., ET AL.,
Petitioners,

v.

JUAN R. TORRES, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A plaintiff seeking to certify a class action under Rule 23(b)(3) has the burden to "affirmatively demonstrate" that "common questions predominate over individual ones." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). So a plaintiff in a RICO-fraud case must show that the issue of reliance is common to the entire class, not individualized—that virtually all class members relied on the allegedly false statement, and that different people would not react differently.

In this RICO-fraud class action, however, the Fifth Circuit did not require the plaintiff to demonstrate reliance *at all*—let alone that reliance is common to the entire class. Instead, the Fifth Circuit established a rebuttable presumption that a RICO fraud class action should be certified, unless the defendant shows that reliance is individualized, rather than common.

In doing so, the Fifth Circuit split with other circuits on not one but two bodies of law—RICO and Rule 23—presenting two issues worthy of review:

1. Must a RICO fraud plaintiff prove reliance, in order to establish causation—as this Court held in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 658 (2008), and as the Second, Ninth, Tenth, and Eleventh Circuits have since reaffirmed? Or is reliance no longer required—as the Fourth Circuit and now the Fifth Circuit have held?

2. To certify a RICO fraud class action, must the plaintiff show that reliance is a common issue because virtually *all* class members would have relied—as the Second, Ninth, and Tenth Circuits have all held? Or is it sufficient to show merely that it "follows logically" that *some* class members would have relied—as the Fifth Circuit has now held?

PARTIES TO THE PROCEEDING

The following petitioners were defendants–appellants in the Fifth Circuit:

SGE Management, LLC; Stream Gas & Electric, Ltd.; Stream SPE GP, LLC; Stream SPE, Ltd.; Ignite Holdings, Ltd.; SGE Energy Management, Ltd.; SGE IP Holdco, LLC; SGE Georgia Holdco, LLC; SGE Serviceco, LLC; SGE Consultants, LLC; Stream Georgia Gas SPE, LLC; Stream Texas Serviceco, LLC; SGE Ignite GP Holdco, LLC; SGE Texas Holdco, LLC; SGE North America Serviceco, LLC; PointHigh Partners, LP; PointHigh Management Company, LLC; Chris Domhoff; Rob Snyder; Pierre Koshakji; Douglas Witt; Steve Florez; 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.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that:

1. Petitioners Stream SPE GP, LLC; Stream SPE, Ltd.; Ignite Holdings, Ltd.; SGE IP Holdco, LLC; Stream Georgia Gas SPE, LLC; and SGE North America Serviceco, LLC are all wholly owned subsidiaries of Stream Gas & Electric, Ltd., which is a limited partnership controlled by its general partner, SGE Management, LLC, which is, in turn, a 99-percent–owned subsidiary of PointHigh Partners, LP.

2. The following petitioners do not have parent companies, nor do any publicly held companies own 10 percent or more of their stock: SGE Energy Management, Ltd.; SGE Georgia Holdco, LLC; SGE Serviceco, LLC; SGE Consultants, LLC; Stream Texas Serviceco, LLC; SGE Ignite GP Holdco, LLC; SGE Texas Holdco, LLC; PointHigh Partners, LP; PointHigh Management Company, LLC; Dyer Energy, Inc.; Kingdom Brokerage, Inc.; Fisher Energy, LLC; The Randy Hedge Companies, Inc.; Murlle, LLC; Rose Energy Group, Inc.; LHS, Inc.; Property Line Management, LLC; Property Line, LP; Swagerty Management, LLC; Swagerty Energy, Ltd.; Swagerty Enterprises, LP; Swagerty Enterprises, Inc.; Swagerty, Inc.; Swagerty Power, Ltd.; Sachse, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners (collectively, "Stream Energy") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The en banc judgment of the U.S. Court of Appeals for the Fifth Circuit (Pet. App. 1a–49a) is reported at 838 F.3d 629. The superseded panel opinion of the court of appeals (Pet. App. 50a–98a) is reported at 805 F.3d 145. The district court's certification order (Pet. App. 99a–121a) is unreported, but available at 2014 WL 129793. The order of the court of appeals denying rehearing (Pet. App. 122a–124a) is unreported.

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit entered its judgment on September 30, 2016. A timely petition for rehearing was denied on November 29, 2016. Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including April 28, 2017. *See* No. 16A788. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and Federal Rule of Civil Procedure 23 are reprinted at Pet. App. 125a–126a.

INTRODUCTION

This case lies at the intersection of two circuit splits on RICO and Rule 23. The Respondents allege that Petitioners made misrepresentations about their business. They filed a RICO action predicated on mail and wire fraud, and moved for class certification. But they never presented a shred of evidence that *anyone* in the proposed class *relied* on those alleged misrepresentations—let alone evidence to prove reliance on a class-wide basis. The Fifth Circuit nevertheless certified the case as a class action. In so doing, the Fifth Circuit deepened one circuit split, and created another.

First, the Fifth Circuit held that a plaintiff need not show reliance to prevail in a RICO-fraud action. That holding is irreconcilable with this Court's decision in *Bridge v. Phoenix Indemnity & Bond Co.*, 553 U.S. 639, 646 (2009). *Bridge* held that "first-party reliance" is not an element of a civil RICO-fraud claim. But it noted that, "[o]f course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it," and that "none of this is to say that a RICO plaintiff . . . can prevail without showing that *someone* relied." *Id.* at 656, 658–59 & n.6.

The Fifth Circuit flouted that ruling, holding instead that "no reliance requirement exists for civil causes of action under RICO for victims of mail fraud." Pet App. 11a (quoting *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009)). That decision solidified a 4-2 split among the courts of appeals over how to interpret *Bridge*. Four courts of appeals—the Second, Ninth, Tenth, and Eleventh Circuits—have stayed true to *Bridge*, requiring plaintiffs to show either first- or third-party reliance in order to prove causation in

a RICO suit predicated on fraud, while the Fourth Circuit and now the Fifth Circuit take the opposite view.[1]

Second, the Fifth Circuit went on to create a new circuit split over the certification of RICO-fraud class actions under Rule 23(b). It held that the putative class did not need to demonstrate reliance on a class-wide basis. Instead, the class needs to show only that reliance by *some* class members "follows logically from the nature of the scheme" alleged. Pet. App. 20a. This rebuttable presumption relieves the plaintiffs of their burden to establish class-wide reliance, and shifts that burden to defendants to show through affirmative evidence that there was no class-wide reliance. Pet. App. 24a–25a.

Put simply, then, the Fifth Circuit no longer asks whether *all* reasonable class members would have relied—as required to ensure that the issue of reliance is common to all members. Rather, the Fifth Circuit now asks whether it "follows logically" that *some* members would have relied. No circuit court has ever before blessed that dramatic expansion of Rule 23(b), and indeed three courts of appeals—the Second, Ninth, and Tenth Circuits—have rejected the Fifth Circuit's approach.

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[1] The en banc majority cited decisions from other circuits that it said "have adopted similar definitions of proximate causation under RICO." Pet. App. 1a. But other than the Fourth Circuit's decision in *Biggs v. Eaglewood Mortg., LLC*, 353 F. App'x 864, 867 (4th Cir. 2009), none of those cases holds that no reliance is necessary to prove proximate causation. Instead, they merely acknowledge that reliance is not itself an element of a RICO cause of action, and that *first-party* reliance is not necessarily essential. *See Wallace v. Midwest Fin. & Mortg. Servs., Inc.,* 714 F.3d 414, 419–20 (6th Cir. 2013); *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 759 (7th Cir. 2011); *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 37 (1st Cir. 2013).

In sum, the decision below misinterprets RICO by misreading *Bridge*, and it invents a burden-shifting inference incompatible with Rule 23(b). The Fifth Circuit's analysis wrongly asks whether any class member *could* have relied, when it should ask whether every class member *did* rely. And it imposes a class-wide inference of reliance based not on a showing of causation, but on the business structure at issue. If left unchecked, the decision below will fundamentally distort both RICO and Rule 23(b), and leave defendants vulnerable to the worst form of class-action abuse. This Court should intervene.

STATEMENT

1.a. Stream Energy is one of the largest retail energy providers in Texas. It sells natural gas and electricity in deregulated energy markets across the country through a direct-selling model. Since 2005, through a sales force of independent associates ("IAs"), Stream Energy has generated billions of dollars in energy sales to more than one million customers across seven states.

Stream Energy's popular multi-level marketing program is widely successful and has been broadly mimicked by many competitors across deregulated energy-service markets. The direct-selling methodology pioneered by Stream Energy and adopted by its copycat competitors now accounts for the majority of the millions of customers who left the legacy utility companies within the deregulated energy markets throughout the northeastern United States.

While some energy companies might pay celebrity endorsers millions of dollars to advertise their product, Stream Energy has invented a different approach. Under the mantra of "be my friend, give me your busi-

ness, and save," Stream Energy rewards its own customers in their role as IAs for promoting electricity and natural gas service to their friends and family. Much as other blue chip companies such as Avon and Tupperware have relied on multi-level marketing to drive their sales, Stream Energy offers its customers the chance to become marketing partners.

Individuals join Stream Energy's direct selling organization by paying a $329 fee to become an IA, and from there can enroll residential and commercial customers for electric or gas service. IAs receive commissions based on monthly energy sales to their customers. Additionally, IAs can recruit their own sales force of downline IAs, and earn additional compensation for sales made by their recruits.

The most devoted and successful IAs have reaped enormous financial rewards for their efforts. Most have pursued the IA program on a part-time basis, making a few hundred dollars per year to provide additional income for their families. Others join the IA program not to sell energy, but rather to gain access to the unique training and networking opportunities that Stream Energy provides to its IAs. To some IAs, the Stream IA program is an educational alternative to a business degree program.

b. For a variety of individualized reasons, not every IA succeeds at making money. Respondents here, two former IAs, filed suit under RICO against Stream Energy, its corporate partners, subsidiaries, officers, and several other IAs. 18 U.S.C. § 1962(c), (d). Their core complaint is that Stream Energy resembles a pyramid scheme in which IAs cannot recoup the fees they pay. These allegations distort the facts: Stream Energy sells a real—indeed, *essential*—product. It does not practice inventory loading or the other

hallmarks of an illegal scheme, the energy market is not saturated, and even those IAs who have joined the program recently can earn significant income.

Nevertheless, claiming mail and wire fraud as the predicate RICO acts, Respondents sought to certify a class of all current and former IAs who had failed to recoup their fees—a class of over 230,000 individuals. Respondents made no attempt to demonstrate that anyone had relied on Petitioners' alleged misrepresentations, arguing instead that such a showing was unnecessary under *Bridge*.

2. The district court rejected Respondents' argument that they need not show reliance in order to prove proximate causation. But the court nevertheless certified the class under a different legal theory. The court found that it could *presume* class-wide reliance based on an inference that no rational person would knowingly become an IA but for relying on some misrepresentation, and this was sufficient to meet Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement. Pet. App. 116a.

3. A divided Fifth Circuit panel reversed the district court's class-certification order. First, recognizing the circuit conflict, Pet. App. 70a–72a, the panel rejected the district court's stated rationale—that a presumption of class-wide reliance could be inferred from the alleged conduct—as "unsupported by our precedents or by the precedents in other circuits." Pet App. 68a. Such an inference was appropriate only where "there was no evidence . . . to suggest any other rational explanation for the plaintiffs' behavior other than that they were duped." Pet. App. 72a. That is not the case with Stream Energy's organization because "there are many reasons why someone would choose to join or not join." Pet. App. 73a.

Notably, the panel majority and the dissent agreed that reliance was still necessary in order to show causation under *Bridge*. The majority observed that "[a]lthough *Bridge* dispenses with first party reliance, 'none of this is to say that a RICO plaintiff who alleges injury by reason of a pattern of mail fraud can prevail without showing that someone relied on the defendant's misrepresentations.'" Pet. App. 60a (quoting *Bridge*, 553 U.S. at 658). Similarly, Judge Wiener noted in dissent that "plaintiffs 'must establish at least third-party reliance in order to prove causation.'" Pet. App. 81a (Wiener, J., dissenting) (quoting *Bridge*, 553 U.S. at 659).

4.a. The Fifth Circuit granted review en banc, vacated the panel decision, and issued a judgement affirming the district court's class-certification order for two alternative reasons.

First, the court held—contrary to the district court, the panel majority, and the panel dissent—that "in cases predicated on mail or wire fraud, reliance is not necessary." Pet. App. 11a. Instead, the Fifth Circuit (misreading *Bridge*) held that a plaintiff can prove causation so long as he or she is a "foreseeable victim" of a fraudulent enterprise. Pet. App. 12a.

Applying that rule to this case, the majority reasoned that "pyramid schemes are per se mail fraud" because the very legitimacy of the enterprise is a misrepresentation, and they will, by design, ultimately collapse. Pet. App. 14a, 16a. As a result, under the Fifth Circuit's view, "one who participates in a pyramid scheme can be harmed 'by reason of' the fraud *regardless of whether he or she relied on a misrepresentation about the scheme*." Pet. App. 16a (emphasis added) (quoting 18 U.S.C. § 1964(c)).

Thus, the court held, it makes no difference whether any plaintiff knew about the alleged fraud, or relied on any representation about Stream Energy. It is enough to show that their injuries were "a 'foreseeable and natural consequence' of the allegedly unlawful pyramid scheme" to sustain their claim. Pet. App. 6a.

Second, in an alternative holding, the Fifth Circuit held that, notwithstanding that reliance was wholly unnecessary, the district court could nonetheless infer class-wide reliance based on Steam Energy's "implicit representation that it is a legal multi-level marketing program." Pet. App. 23a. Respondents' allegations provided enough circumstantial evidence, the court said, to presume class-wide reliance and satisfy Rule 23(b)(3).

A class-wide presumption of reliance could be inferred, the court wrote, because it "follows logically from the nature of the scheme." Pet. App. 20a. That is, the majority opinion reasoned that, as a matter of logical inference, "individuals do not knowingly join pyramid schemes because (1) pyramid schemes are inherently deceptive and operate only by concealing their fraudulent nature; and (2) knowingly joining a pyramid scheme requires the individual to choose to become either a victim or a fraudster." Pet. App. 23a.

Although acknowledging a circuit conflict, Pet. App. 24a & n.62, the court rejected out of hand the notion that it had applied an incorrect, expansive test for presuming reliance for an entire class, or that significant numbers of IAs might have joined the organization regardless of whether it was an illegal pyramid scheme. Instead, it placed the burden on Stream Energy to produce evidence that class members had *not*

relied on any misrepresentation, rebutting the inference of reliance in order to defeat class certification. Pet. App. 24a–25a. Because Stream Energy could not bear its burden to *disprove* reliance among the class members, the court held that certification was proper. Pet. App. 25a–26a.

b. Five judges would have reversed the class certification order. The three dissenting opinions explained that the class-certification order cannot stand because individualized issues of reliance and knowledge precluded class certification. *See* Pet. App. 30a–44a (Jolly, J., dissenting, joined by Jones, Clement, and Owen, J.J.); Pet. App. 44a–46a (Jones, J., dissenting, joined by Clement, J.); Pet. App. 46a–49a (Haynes, J., dissenting).

Judge Jolly's principal dissent, as well as dissenting opinions by Judge Jones and Judge Haynes, laid out in detail how "[t]he majority opinion dilutes both RICO's causation requirement and Rule 23's predominance requirement to the point that they have little relevance." Pet. App. 44a (Jolly, J., dissenting). After discussing the en banc majority's failure to properly apply *Bridge*, Pet. App. 31a & n.1 (Jolly, J., dissenting), the dissenting opinions proceeded to explain in detail how the majority had erred under Rule 23(b)(3)'s predominance requirement in presuming class-wide reliance. Individualized issues precluded class certification because, as Judge Jolly wrote, "[i]t is impossible rationally to presume that, out of 200,000-plus investors, a significant number of the class were not aware of the precise character of their investment." Pet. App. 44a (Jolly, J., dissenting).

Judge Haynes elaborated that this class-wide presumption of reliance, inferred merely from the allega-

tions, "allows the plaintiffs to skirt their burden of establishing 'that the questions of law or fact common to class members predominate.'" Pet. App. 47a (Haynes, J., dissenting) (quoting Fed. R. Civ. P. 23(b)(3)). She noted that "[w]ith over 200,000 plaintiffs in this case, there are numerous and disparate motivations behind each plaintiff's decision to participate in [Stream Energy's] multi-level marketing program, many of which weaken or sever any chain of causation." Pet. App. 47a (Haynes, J., dissenting). Some plaintiffs "could have been fully aware of the questions surrounding [Stream Energy's] legality, but nevertheless decided to participate for the simple reason of making a profit." Pet. App. 47a (Haynes, J., dissenting). Others "could have joined [Stream Energy's] program for the sole purpose of selling (or learning the business of selling) energy." Pet. App. 48a (Haynes, J., dissenting). Still others "may have joined [Stream Energy] solely to take advantage of [Stream Energy's] training courses or networking opportunities, while others could have participated without any intention of making a profit in order to help out a friend or family member who was already a part of the program." Pet. App. 48a (Haynes, J., dissenting). As to these individuals, "it would be impossible for [Stream Energy] to have caused any alleged injury, because no injury exists: these plaintiffs obtained exactly what they were hoping to receive by participating in [Stream Energy's] program." Pet. App. 48a (Haynes, J., dissenting). The en banc majority never disputed that assessment.

The dissenting opinions further noted the circuit conflicts over this issue. Citing cases from the Second, Ninth, and Tenth Circuits, both Judge Jolly's and Judge Haynes's dissenting opinions explained that other circuits had allowed for an inference of reliance

to support class certification only in exceedingly narrow circumstances: where no rational person would have chosen to engage with the RICO enterprise unless he or she had relied on the misrepresentation. That situation is essentially limited to "something-for-nothing" transactions, where a class member agrees to pay money but receives nothing that any rational class member would value in return. Pet. App. 42a (Jolly, J., dissenting); Pet. App. 48a (Haynes, J., dissenting).

REASONS FOR GRANTING THE PETITION

The district court below certified a class of over 230,000 individuals based on little more than a naked allegation that the named plaintiffs were misled. It did so without a shred of common evidence that class members had relied on any of Stream Energy's representations. Although Stream Energy explained why reliance was necessary—and could not simply be presumed—the en banc court affirmed the district court's certification order. It concluded that reliance was unnecessary and, at any rate, could be inferred without common evidence based on the scheme alleged.

The Fifth Circuit reached this two-part conclusion based on its faulty understanding of *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 658 (2008): that "[proving] that the Defendants operated a fraudulent pyramid scheme will also suffice to show under *Bridge* that the fraud caused the Plaintiffs' injuries." Pet. App. 19a.

That is exactly wrong. This Court's unanimous opinion could not have been clearer: "Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it." *Bridge*, 553 U.S. at 656 & n.6. It reiterated that "*none of this is to say* that a RICO plaintiff . . . can prevail without showing

that *someone* relied," and suggested that "a RICO plaintiff alleging injury by reason of a pattern of mail fraud *must establish at least third-party reliance* in order to prove causation." *Id.* at 658–59 (emphases added). With its blatant misreading of this Court's precedent, the Fifth Circuit joined the Fourth Circuit in a 4-2 circuit conflict with the Second, Ninth, Tenth, and Eleventh Circuits, each of which has adhered to the limitation this Court set out in *Bridge*.

The Fifth Circuit further erred in holding that district courts may presume class-wide reliance whenever an inference of reliance "follows logically" from the nature of the alleged misrepresentation. Pet. App. 20a. In other words, plaintiffs need not show that *all* reasonable class members would have relied—it is now sufficient to show that *some* class members would have relied, even if others might not have. That holding not only conflicts with the standards of three other courts of appeals, but also violates this Court's Rule 23(b) precedents by eliminating plaintiffs' burden to show that common questions predominate for the class. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–33 (2013). It effects a fundamental burden shift upon the defendant that upends Rule 23's well-settled operation.

If the decision below is allowed to stand, scores of defendants are certain to face more putative class actions alleging faulty RICO enterprises predicated on fraud, demanding automatic class certification without any common evidence of reliance, with the goal of extracting an easy settlement. At the same time, these circuit conflicts will endure, and courts will continue to apply incompatible standards to RICO class actions, leading to inconsistent outcomes. This Court should intervene.

I. CERTIORARI IS NECESSARY TO ADDRESS THE FIFTH CIRCUIT'S MISINTERPRETATION OF RICO.

Respondents never attempted to present common evidence that putative class members relied on Stream Energy's representations. Citing *Bridge*, they said evidence of reliance was unnecessary. And though both the district court and Fifth Circuit panel unanimously rejected that argument, the en banc majority ultimately adopted it.

The Fifth Circuit's en banc majority did not even attempt to adhere to this Court's opinion. The unanimous opinion in *Bridge* stated *five times* that "none of this is to say a RICO plaintiff . . . can prevail without showing that someone relied on the defendant's misrepresentation." *Bridge*, 553 U.S. at 656–58 ("[P]laintiff's loss must be a foreseeable result of someone's reliance on the misrepresentation."); *id.* at 656 n.6 ("Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it."); *id.* at 658 ("In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation."); *id*. at 659 (plaintiffs "must establish at least third-party reliance in order to prove causation").

By disregarding that language, the Fifth Circuit held that a district court could certify a RICO-fraud class action *even if* the plaintiffs never present any evidence that anyone relied on the alleged misrepresentations—let alone evidence of class-wide reliance. All that is necessary is that the putative class members were the foreseeable victims of the alleged scheme, regardless of whether they joined with full knowledge of the alleged fraud or whether they ever saw any al-

leged misrepresentation. That decision is a clear deviation from this Court's precedent and warrants review.

A. The Fifth Circuit Disregarded This Court's Holding in *Bridge*.

1. *Bridge* addressed "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud." 553 U.S. at 646. This Court ruled unanimously it was not: "[A] plaintiff asserting a RICO claim predicated on mail fraud need not show . . . that it relied on the defendant's alleged misrepresentations." *Id*. at 661. Instead, it held that showing that a third party relied on the defendant's misrepresentations sufficed to plausibly allege RICO causation. *Ibid*.

But this Court's opinion in *Bridge* clearly set out that it was not eliminating reliance altogether: "Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it." *Id.* at 656 n.6. It wrote that "none of this is to say a RICO plaintiff . . . can prevail without showing that someone relied on the defendant's misrepresentation." *Id.* at 658. Citing the Restatement (Second) of Torts, the opinion reiterated that "the plaintiff's loss must be a foreseeable result of *someone's* reliance on the misrepresentation." *Id.* at 656 (citing Restatement (Second) of Torts § 548A (1976)).

This Court's holding that some form of reliance remains necessary in order to prove a RICO claim predicated on fraud follows from plaintiffs' need to prove the element of causation. Without some form of reliance on the alleged misrepresentations by either the plaintiff or a third party, a plaintiff cannot show that his or her injury was caused "by reason of" the RICO violation. 18 U.S.C. § 1964(c). That is, if a plaintiff

would have behaved in the exact same way regardless of whether he (or any third party) ever saw the alleged misrepresentation, then that misrepresentation cannot be a but-for—let alone proximate—cause of the plaintiff's injury. 18 U.S.C. § 1964(c). This Court requires both. *Bridge*, 553 U.S. at 654; *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267–69 (1992).

2. The Fifth Circuit's en banc decision wholly ignored RICO's statutory text and this Court's straightforward holding, and instead expanded the scope of RICO liability to anyone foreseeably harmed by an alleged enterprise. Thus, under the Fifth Circuit's holding, plaintiffs need not prove reliance because "[t]hose who lose money in a pyramid scheme necessarily do so 'by reason of' the fraud." Pet. App. 17a. In the Fifth Circuit, they can still maintain a RICO suit.

B. The Opinion below Deepened a Split, Now 4-2, on Whether Reliance Is Necessary to Prove Causation under RICO.

1. The Fifth Circuit's en banc decision also deepened an existing split over this Court's *Bridge* decision. The Second Circuit has expressly rejected the notion that reliance is unnecessary to show causation under RICO. In *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi–Aventis U.S. LLP*, the court explained that "plaintiffs' theory of injury in most RICO mail-fraud cases will . . . depend on establishing that someone—whether the plaintiffs themselves or third parties—relied on the defendant's misrepresentation." 806 F.3d 71, 87 (2d Cir. 2015). The reason is simple: "if the person who was allegedly deceived by the misrepresentation (plaintiff or not) would have acted in the same way regardless of the misrepresentation, then the misrepresentation *cannot be a but-for, much less proximate, cause* of the plaintiffs' injury."

Ibid. (emphasis added). *See also In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 119 (2d Cir. 2013).

The Ninth, Tenth, and Eleventh Circuits are in accord. The Ninth Circuit, applying *Bridge*, has ruled that "[a]lthough proximate cause, not reliance, is the essential element of statutory standing under RICO, proving reliance is necessary where it is integral to Plaintiffs' theory of causation." *Hoffman v. Zenith Ins. Co.*, 487 F. App'x 365, 365 (9th Cir. 2012).

Similarly, in *CGC Holding Co. v. Broad & Cassel*, the Tenth Circuit explained that "in cases arising from fraud, a plaintiff's ability to show a causal connection between defendants' misrepresentation and his or her injury will be *predicated on plaintiff's alleged reliance on that misrepresentation*." 773 F.3d 1076, 1089 (10th Cir. 2014) (emphasis added). Like other courts, it tied this reasoning to the element of causation: "Put simply, causation is often lacking where plaintiffs cannot prove that they relied on defendants' alleged misconduct." *Ibid.*

Finally, the Eleventh Circuit has held unequivocally that *Bridge* did not eliminate the requirement that *someone* must have relied on the alleged misrepresentation in order for that misrepresentation to have proximately caused the plaintiffs' injury. *Bridge*, the court wrote, "was clear that its holding dismissing the need for first-party reliance on the fraud *did not mean* that a party can prevail without showing that someone had relied on the fraud." *Ray*

v. Spirit Airlines, Inc., 836 F.3d 1340, 1350 (11th Cir. 2016) (emphasis added).[2]

2. In contrast, the Fourth Circuit, like the Fifth Circuit, has read *Bridge* to eliminate any need to consider reliance in a RICO-fraud suit. The court in *Biggs v. Eaglewood Mortgage, LLC*, failed to adhere to this Court's limited holding in *Bridge*: "[U]sing the mail in furtherance of a scheme to defraud is a predicate act of racketeering under RICO, even if there is no reliance on the misrepresentation," the court wrote. 353 F. App'x 864, 867 (4th Cir. 2009) ("If the defendant has engaged in a pattern of such behavior, he will be liable under RICO, without anyone actually relying on a fraudulent misrepresentation."). In a clear break from other circuits, the Fourth Circuit agreed "that *Bridge*'s holding eliminates the requirement that a plaintiff prove reliance in order to prove a violation of RICO predicated on mail fraud." *Ibid.*

That is irreconcilable with this Court's unanimous holding. Certiorari is necessary in order resolve this impasse over *Bridge*'s import.

II. CERTIORARI IS NECESSARY TO RESOLVE THE SPLIT OVER WHEN CLASS-WIDE RELIANCE CAN BE INFERRED, AND A CLASS ACTION CERTIFIED, UNDER RULE 23.

The Fifth Circuit's deepening of an existing circuit split over *Bridge* is worthy of review on its own. But

[2] A variety of district courts across multiple circuits have adopted this same view of *Bridge*. *See*, *e.g.*, *Coleman v. Commonwealth Land Title Ins. Co.*, 2016 WL 4705454, at *9 (E.D. Pa. Aug. 17, 2016) ("[S]ome form of reliance, whether first- or third-party, is necessary to establish causation."). *See also In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 903 F. Supp. 2d 880, 915 (C.D. Cal. 2012); *Brake Parts, Inc. v. Lewis*, 2010 WL 3470198, at *6 (E.D. Ky. Aug. 31, 2010).

the court's second, alternative holding also created a new circuit conflict over this Court's class-certification precedents. The court held that district courts may presume class-wide reliance when it "follows logically" from the plaintiffs' allegations. Pet. App. 20a.

That holding too is legal error. This Court's class-action decisions "have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). And the Fifth Circuit cannot justify its holding by relying on inapt precedents from this Court.

The decision is also inconsistent with the precedents of at least three other courts of appeals, all of which have applied a more circumspect standard. Namely, they have held that such an inference is appropriate only when class members' behavior "cannot be explained in any way other than reliance upon the defendant's conduct." *CGC Holding*, 773 F.3d at 1090.

These other circuits will not certify a RICO-fraud class action unless the plaintiff demonstrates that all reasonable class members would have relied. Under the new Fifth Circuit standard, by contrast, it is sufficient merely if it "follows logically" that *some* class members would have relied.

In sum, the Fifth Circuit's standard, if allowed to stand, would significantly dilute the standards for class certification and create inconsistent outcomes across federal courts. Certiorari is necessary to resolve this circuit conflict over when, if ever, plaintiffs can satisfy their burden under Rule 23(b) by employing a class-wide presumption of reliance, rather than through common evidence.

A. The Opinion below Undermines This Court's Class-Certification Precedents.

1. This Court has repeatedly reversed lower-court attempts to implement improper shortcuts that relieve plaintiffs of their Rule 23 burdens. The rule "imposes stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). In addition to the requirements contained in Rule 23(a), a plaintiff seeking class certification "must . . . satisfy through evidentiary proof at least one of the provisions of Rule 23(b)," among which is the requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Comcast*, 133 S. Ct. at 1432; Fed. R. Civ. P. 23(b)(3).

Although Rule 23(b)(3) speaks of "questions of law or fact," "'[w]hat matters to class certification . . . is not the raising of common "questions" . . . but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.'" *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (1999)).

As Stream Energy explained in the district court and the court of appeals, there are wide variations in IA's motivations and reasons for joining Stream Energy. These variations preclude inferring for all class members that their injuries were caused "by reason of" the allegedly fraudulent enterprise. 18 U.S.C. § 1964(c). And because Respondents offered zero other common evidence to answer this question, it is not "capable of classwide resolution . . . in one stroke." *Wal–Mart*, 564 U.S. at 350.

The Fifth Circuit circumvented that limitation by employing an expansive inference that reliance by at least some class members "follows logically" from Respondents' allegations, and thus could be presumed for all 230,000 class members. Without it, Respondents could not have complied with Rule 23(b)(3). But that inference is just the sort of "adventuresome innovation" that this Court has rejected as an inappropriate shortcut under Rule 23(b)(3). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

In *Wal–Mart*, for example, the Court rejected "Trial by Formula": the use of statistical sampling and averaging to establish Rule 23(a)(2) commonality among a huge number of class plaintiffs in a gender-discrimination suit. 564 U.S. at 367. *Comcast* reversed class certification based on faulty analyses as improper under Rule 23(b)(3) because the plaintiffs' statistical model fell "far short of establishing that damages are capable of measurement on a classwide basis." 133 S. Ct. at 1433. As this Court has explained, "[t]hose decisions have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton*, 134 S. Ct. at 2412.

2. The Fifth Circuit's "logically follows" inference suffers the same flaw as the lower court rulings overturned by *Wal–Mart* and *Comcast*: It allows Respondents to gain a presumption from their pleadings that relieves them of the burden to show reliance by common evidence. Just as the plaintiffs in *Wal–Mart* and *Comcast* attempted to use incomplete or inappropriate evidence to prove a common element of their claims, so too does the Fifth Circuit's decision err "in placing the burden regarding the appropriateness of

class certification with the defendants, instead of the plaintiffs." Pet. App. 37a–38a (Jolly, J., dissenting).

This Court has allowed plaintiffs to employ class-wide inferences to satisfy predominance only in limited contexts. In securities law, this Court recognizes the possibility for plaintiffs to invoke the *Basic* presumption of reliance if certain conditions hold. *Halliburton*, 134 S. Ct. at 2407–09. But this Court has never exported the *Basic* assumption to other areas of law. Indeed, the Court has explicitly observed that, without the *Basic* presumption, "the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages *because individual reliance issues would overwhelm questions common to the class*." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) (emphasis added). Similarly, this Court allowed the use of a "just and reasonable inference" in *Tyson Foods, Inc. v. Bouaphakeo*, only because "the employer failed to keep records [and] its liability was certain." 136 S. Ct. 1046, 1058 (2016). But there is no substantive basis in RICO to support a similar presumption in this case.

The Rules Enabling Act prevents a class from being "certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal–Mart*, 564 U.S. at 367. Reliance on a flawed inference to satisfy predominance—whether derived from a inapposite statistical model or from the subjective inferences a court draws from the allegations—undermines that principle, along with this Court's holdings in *Wal-Mart* and *Comcast*. That is what the Fifth Circuit did in this case, and certiorari is necessary for this Court to vindicate Rule 23(b).

B. The Opinion below Created a Conflict with Three Circuits over When Class-Wide Reliance Can Be Inferred.

1. The Fifth Circuit held that RICO plaintiffs seeking class certification can employ a class-wide presumption of reliance whenever it "follows logically" from the allegations. But that standard swallows the entirety of Rule 23(b)(3)'s predominance requirement. And at least three other courts of appeals have rejected such a capacious standard. Instead, they permit an inference of reliance only in extremely narrow circumstances: where no rational person would have acted in the manner the putative class members did, absent reliance.

In direct contrast to the Fifth Circuit's approach, the Second Circuit has held in at least three cases that it follows this narrower standard for inferring reliance. In *Sergeants Benevolent*, the Second Circuit faced plaintiffs seeking to certify a RICO-fraud class action against a drug manufacturer. The court explained that reliance could be inferred only in "certain factual contexts"—where "*each* class member would only have taken the action leading to its injury if it had relied on the defendant's alleged misrepresentation." 806 F.3d at 88 (emphasis added). It rejected the proposed inference in that case because, "given the number of factors that enter into doctors' prescribing decisions, it is simply not reasonable to infer . . . [that all] Ketek prescriptions were written in reliance on the alleged misrepresentations about Ketek's safety." *Id*. at 94. *See also UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 135 (2d Cir. 2010) (holding the same).

Similarly, in *McLaughlin v. American Tobacco Co.*, the Second Circuit reversed class certification in a RICO-fraud suit alleging misrepresentations related to light cigarettes. 522 F.3d 215, 225 (2d Cir. 2008). Plaintiffs there could not support a presumption that the entire class had relied on representations that light cigarettes were less deleterious than conventional cigarettes because "*each* plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was 'cool.'" *Ibid.* (emphasis added).

The Ninth Circuit has applied the same principle, ruling that courts can infer a class-wide presumption of reliance only where reliance is "[t]he *only* logical explanation for [class members'] behavior." *Pouolos v. Caesars World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004) (emphasis added). In that case, plaintiffs alleged that the defendants had misrepresented the odds on gambling machines, and they sought to infer from that a common presumption that class members had relied on the misstated odds. *Ibid.* The court rejected the argument, reasoning:

> Gamblers do not share a common universe of knowledge and expectations—one motivation does not "fit all." Some players may be unconcerned with the odds of winning, instead engaging in casual gambling as entertainment or a social activity. Others may have played with absolutely no knowledge or information regarding the odds of winning such that the appearance and labeling of the machines is irrelevant and did nothing to influence their

> perceptions. Still others, in the spirit of taking a calculated risk, may have played fully aware of how the machines operate.

Id. at 665–66.

Because reliance was not "[t]he only logical explanation for [class members'] behavior," the Ninth Circuit ruled that a class-wide presumption of reliance was impermissible. *Id.* at 668. *See also* Pet. App. 48a–49a (Haynes, J., dissenting)

Finally, the Tenth Circuit articulated the same principle in *CGC Holding*, where it permitted an inference of reliance only because "the behavior of plaintiffs and the members of the class *cannot be explained in any way other than reliance* upon the defendant's conduct." 773 F.3d at 1081, 1089–90 (emphasis added). The RICO-fraud suit alleged that the defendants had promised to make loans to the plaintiffs in exchange for paying upfront fees, but defendants never had the intent or ability to make good on the promises. *Id.* at 1081. In its opinion, the Tenth Circuit emphasized that "RICO class-action plaintiffs are not entitled to an evidentiary presumption of a factual element of a claim." *Ibid*. It held that a court could infer reliance only where "*no rational economic actor* would enter into a loan commitment agreement with a party they knew could not or would not fund the loans." *Ibid*. (emphasis added).

The standard expressed by these courts of appeals is significantly narrower than the one the Fifth Circuit employed, as the dissenting opinions detailed. *See* Pet App. 40a–41a (Jolly, J., dissenting); Pet. App. 48a–49a (Haynes, J., dissenting). Other circuits permit a class-wide presumption of reliance only when

there is no other explanation for class members' behavior. As Judge Jolly noted in dissent, this is generally true only in cases involving "'something-for-nothing' transactions"—where plaintiffs pay some consideration and fail to receive anything of value in return. Pet. App. 42a (Jolly, J., dissenting).[3]

Or, as the Second Circuit put it in *Sergeants Benevolent*, reliance may be inferred on a class-wide basis only in situations involving a "'one-dimensional decisionmaking process,' such that the alleged misrepresentation would have been 'essentially determinative' for each plaintiff." 806 F.3d at 88 (quoting Nagareda, 84 N.Y.U. L. Rev. at 121). When "something other" than the alleged misrepresentations can explain a putative class member's decision, a class-wide inference of reliance is not available. *See id.* at 93–94.

Had the Fifth Circuit applied this standard, there is no doubt that it would have reached the opposite ruling. Just as there are a variety of motivations for gambling or smoking, there are myriad reasons why individuals chose to become Stream Energy IAs. And both Petitioners and the dissenting opinions demon-

[3] It is for that reason that the en banc majority's reliance on two other circuit cases was misplaced. Pet. App. 20a–22a (citing *U.S. Foodservice*, 729 F.3d 108 (2d Cir. 2013), and *Klay v. Humana Inc.*, 382 F.3d 1241 (11th Cir. 2004)). Those cases involved allegations that the defendant either overcharged plaintiffs for purchases, or refused to pay plaintiffs under contracts. Thus, these cases follow the more narrow standard: No rational actor would willingly pay more than they promised to (or accept less money than they agreed to) under a contract. *U.S. Foodservice*, 729 F.3d at 119 & n.6; *Klay*, 382 F.3d at 1259.

strated that such variations made it impossible to presume reliance for the entire class. *See*, *e.g.*, Pet. App. 48a–49a (Haynes, J., dissenting).

This is a live controversy among the circuits, and the difference between the Fifth Circuit's "follows logically" standard and the other circuits' "only explanation" standard will often be outcome determinative. Certiorari is necessary to resolve this 3-1 split on when a class-wide presumption of reliance can properly be inferred from the allegations to satisfy Rule 23(b)(3)'s predominance requirement.

III. THE QUESTIONS ARE EXTREMELY IMPORTANT AND HIGHLY LIKELY TO RECUR.

Review is warranted to prevent the systematic misinterpretation of this Court's precedents, and to enforce the exacting requirements of Rule 23.

This case itself is substantial: a certified class of over 230,000 members has been certified, seeking well over $100 million in trebled damages. Even more, it has laid bare two distinct but related conflicts among the circuit courts of appeals, both relating to the standards for certifying class actions in RICO-fraud. Without this Court's intervention, these splits will recur and will deepen.

Class-action litigation "greatly increases risks to defendants": "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). *See also* Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment (class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

These stakes transform the class-certification hearing into the apex of the entire litigation. This is especially true in the RICO context, where the threat of treble damages compounds the consequences of certification. As a result, it is imperative that district courts safeguard defendants' substantive legal rights, and faithfully enforce the requirements of Rule 23, as this Court has instructed.

If the Fifth Circuit's decision is allowed to stand, these issues will repeat themselves, as plaintiffs facing few obstacles will seek to certify RICO-fraud class actions based on nothing more than allegations that defendants operate a fraudulent enterprise. Unburdened by the requirement to show that any class member or third party actually relied on the alleged misrepresentations, plaintiffs will forum shop to the Fifth Circuit, and defendants will be strong-armed into enormous settlements. *See* Pet. App. 46a (Jones, J., dissenting) ("Reckless allegations of undefined illegality, coupled with immense uncertainty as to outcomes, are an affront to the rule of law."). At the same time, as a result of the concomitant settlement pressures, these issues will frequently escape appellate review.

The division among the circuits will also persist without this Court's review. When starkly different standards are applied to RICO-fraud class actions, otherwise identical cases will result in opposite outcomes depending on which federal court decides the case. The need to unify the lower courts on such an important question of federal law is worthy of review.

* * *

Nine years ago, this Court granted review in *Bridge* because the courts of appeals were split over the role of reliance in proving RICO causation. That

division lingers today, notwithstanding *Bridge*'s clear guidance. Courts of appeals have ignored this Court's holding, and they have continued to inappropriately innovate with class-certification standards. Only this Court can reconcile these decisions and vindicate defendants' rights under RICO and Rule 23. This case presents an ideal opportunity to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-20128

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.

Appeal from the United States District Court for the Southern District of Texas

Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, WIENER, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, and COSTA, Circuit Judges.

WIENER and COSTA, Circuit Judges, joined by STEWART, Chief Judge, and DAVIS, SMITH, DENNIS, PRADO, ELROD, SOUTHWICK, GRAVES, HIGGINSON, Circuit Judges:

The Plaintiffs-Appellees brought a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–68, alleging that Stream Energy, through its multi-level marketing program, Ignite, as well as a number of other defendants, (collectively the "Defendants") operated a fraudulent pyramid scheme. The Plaintiffs allege that the fraud has caused them financial losses. The district court certified a class of plaintiffs (the "Plaintiffs"), comprising those who lost money participating as Independent Associates ("IAs") in Ignite's program. We now review that certification en banc.

I.

Stream Energy sells gas and electricity to customers in Texas, Georgia, Pennsylvania, Maryland, New Jersey, New York, and the District of Columbia. Ignite is the marketing arm of Stream. Although Stream sells energy to customers, it is not a public utility that directly produces energy by owning the energy-producing infrastructure. Instead, it acts more as a middleman, reselling gas and electricity in deregulated energy markets that it buys from actual utilities. According to the Plaintiffs, Stream has realized only small profits on its energy sales, despite its large revenues, because Stream sells energy just above, or sometimes even at, its costs.

Rather than making meaningful profits through its sales, the Plaintiffs contend that Stream is set up like a classic pyramid scheme to make almost all of its money through the recruitment of salespeople. According to the Plaintiffs, it works like this: Stream's marketing arm, Ignite, operates a multi-level marketing program in which IAs (1) sell energy to customers, and (2) recruit other individuals to join as IAs who in turn sell energy to customers and recruit individuals

to join as IAs. Under the IA program, Ignite charges individuals for the right to sell Stream services to customers and to recruit IAs. An IA pays Ignite $329 up front for the right to sell Stream energy and to recruit IAs, and also pays an optional recurring fee for a "Homesite" website that the IA can use to promote his or her Stream business.[1] The putative class members are those individuals who paid to become IAs and lost money.

For each energy customer recruited, Ignite pays the IA a small percentage of that customer's bill as a commission, known as "Residual Income" or "Monthly Energy Income" ("MEI"). According to the Plaintiffs, however, the far more lucrative opportunities come from the recruitment of other IAs. Ignite pays IAs "Leadership Income" for recruiting other IAs. When an IA recruits another IA, he or she receives income from both (1) energy sales by that IA and his downline IAs, and (2) recruitment of other IAs by that IA and his downline IAs.

An IA's success depends primarily on recruiting a "downline" of other IAs who, in turn, recruit other IAs and customers into the Ignite program. As an IA recruits more IAs, he proceeds up a ladder of Ignite leadership positions. All IAs start out as "Directors," the lowest level of Ignite leadership. By recruiting more IAs, an IA can move up three additional leadership levels, first to "Managing Director," then to "Senior Director," and finally to "Executive Director." By building a downline, the IA also receives MEI for customers whom the downline IAs recruit to join Stream,

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[1] The purchase of the Homesite website was not a requirement to participate as an IA, but many IAs nonetheless purchased it to provide "necessary" exposure to potential customers.

along with bonuses for the recruitment of IAs both by the first IA and his downline IAs.

Ignite also promotes a "3&10 program." Under this program, Ignite pays an IA a $100 bonus if the IA enrolls four customers in the first 30 days. An IA can substitute purchase of the Homesite for two customers, and can be his or her own first customer, in which case that IA needs to recruit only one other customer to receive this bonus. Ignite offers an additional $100 bonus if the IA can obtain six additional customers within sixty days, and a $100 bonus for the first three new IAs that an IA recruits. If an IA recruits another IA who in turn enrolls four customers in his or her first thirty days, Ignite will pay the first IA a third $100 bonus. If the IA recruits two IAs and those recruits each enroll four customers in their first thirty days, Ignite will pay two more $100 bonuses. Ignite calls this the "3&10 program" because it requires an IA to recruit three new IAs and ten new customers (or seven if the IA purchased the Homesite and enrolls his or herself as a customer).

Over time, Stream's market has become saturated, and the Plaintiffs claim that they have lost money as a result of their participation in the IA program. The Plaintiffs allege that over 86% of individuals who signed up as IAs lost money in fees, collectively losing over $87 million. In contrast, a miniscule number of individuals have made significant sums of money.

This suit was brought by former IAs Juan Ramon Torres and Eugene Robison, who allege that Stream, Ignite, and various individual defendants have violated RICO. They sought to certify a class consisting

of those IAs who have lost money as a result of participating in Ignite's program. The Plaintiffs sought certification under different theories.

The first was that the Defendants' common marketing materials were replete with fraudulent misstatements about how lucrative becoming an IA could be, and that—because all class members saw at least one of these statements—the Plaintiffs could show that their injuries arise from a common set of frauds. This theory did not require the Plaintiffs to prove that Ignite is a pyramid scheme; instead, it required only proof of specific misrepresentations.

But they also sought certification under theories that would require the Plaintiffs to prove that Ignite is a pyramid scheme. If they could prove that illegal conduct—and everyone acknowledges that the liability question is common to all class members—then the Plaintiffs contended that they did not need to identify specific misrepresentations on which particular class members relied, as individual reliance is not an element of a RICO claim. Instead, the Plaintiffs contended that RICO's causation requirement could be satisfied by classwide proof that their joining Ignite was a direct and foreseeable result of the Defendants' engaging in a pyramid scheme. Proximate cause could also be shown, they argued, through a common sense inference that they were duped into joining the pyramid scheme based on the representation that Ignite is a legitimate enterprise.

In response, the Defendants asserted primarily that the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) is not met because individual issues of reliance will necessarily lead to an individu-

alized causation inquiry under RICO. They also disagreed with the Plaintiffs' arguments that reliance is not a required element under RICO.

The district court rejected class certification on the Plaintiffs' theory that depends on specific misrepresentations, concluding that whether the Plaintiffs relied on the array of alleged misrepresentations would require an individualized inquiry. But the court found that class certification was appropriate as to the Plaintiffs' other theories that depend on common proof of a pyramid scheme. It held that first-party reliance is not an element of a RICO claim predicated on mail or wire fraud, and common proof could establish the proximate cause that is required. Although it focused primarily on the argument that a jury could logically infer that class members joined Ignite based on the implicit representation that it is a legal multi-level marketing program, it also recognized a more direct theory for proving proximate causation on a classwide basis: under the discussion of RICO causation in *Bridge v. Phoenix Bond & Indem. Co.*,[2] it is enough to show that a "foreseeable and natural consequence" of the allegedly unlawful pyramid scheme is "that the vast majority of the unwitting IAs would lose money."[3]

The Defendants then filed a petition for interlocutory review with this court under Federal Rule of Civil Procedure 23(f), and a motion to stay proceedings pending resolution of that petition. The district court declined to stay the proceedings, at which time the Defendants filed a motion to stay with this court. This

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[2] 553 U.S. 639 (2008).

[3] *Torres v. SGE Mgmt. LLC*, No. 4:09-CV-2056, 2014 WL 129793, at *9 n.13 (S.D. Tex. Jan. 13, 2014) (quoting *Bridge*, 553 U.S. at 657).

court granted a stay and granted the petition for review in March 2014. The panel majority agreed with the Defendants that individual issues of causation will predominate at trial and reversed the district court's class certification. We then granted the Plaintiffs' petition for rehearing en banc.

II.

The narrow issue in this case is whether the Plaintiffs may prove RICO causation through common proof such that individualized issues will not predominate at trial. The import of this inquiry is whether class certification is appropriate under Federal Rule of Civil Procedure 23(b)(3). We emphasize at the outset, and the Defendants conceded at the district court,[4] that whether Ignite's multi-level marketing program is a fraudulent pyramid scheme is a merits issue subject to common proof. The Defendants might well prove that Ignite is a legal multi-level marketing program. That question, however, is left to be resolved in the first instance at the district court.

A.

We review a district court's certification of a class for abuse of discretion, but if the court's error is a matter of law, the court necessarily abuses its discretion.[5] Our review is deferential "in recognition of the essentially factual basis of the certification inquiry and of

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[4] At the class certification hearing before the district court, defense counsel categorized the issue of whether Ignite operates a pyramid scheme as "irrelevant" to the issue of class certification.

[5] *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003).

the district court's inherent power to manage and control pending litigation."[6]

To obtain class certification, the party seeking it must initially comply with Federal Rule of Civil Procedure 23. That party must first satisfy Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation.[7] If successful, that party must next satisfy the provisions of one of Rule 23(b)'s three subsections.[8] Here, the Plaintiffs rely on subsection (3), "which requires that questions of law or fact common to the class predominate over questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[9] "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[10] The Plaintiffs have the burden of showing that these requirements are met.[11]

The Defendants do not dispute the district court's Rule 23(a) determination and contend only that it erred in finding Rule 23(b)(3)'s predominance requirement met. "Considering whether 'questions of

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[6] *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007) (internal quotation mark omitted) (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998)).

[7] FED. R. CIV. P. 23(a).

[8] FED. R. CIV. P. 23(b).

[9] *Ahmad v. Old Republic Nat'l Title Ins.*, 690 F.3d 698, 702 (5th Cir. 2012) (citing FED. R. CIV. P. 23(b)).

[10] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

[11] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action."[12]

B.

RICO makes it unlawful to conduct or participate in an enterprise's affairs "through a pattern of racketeering."[13] To bring a RICO claim, a plaintiff must prove: "(1) the identification of a person, who, (2) through a pattern of racketeering activity, (3) uses or invests income derived therefrom to acquire an interest in or to operate an enterprise engaged in interstate commerce, or acquires, maintains an interest in, or controls such an enterprise."[14] The second element, the pattern element, requires "at least two predicate acts of racketeering activity."[15] Here, the putative class members advance two patterns of racketeering activity: (1) mail fraud in violation of 18 U.S.C. § 1341 and (2) wire fraud in violation of 18 U.S.C. § 1343.

RICO affords a private right of action only to a plaintiff who can show that he or she has been injured "by reason of" a violation of RICO's criminal prohibitions.[16] The Supreme Court requires plaintiffs to es-

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[12] *Erica P. John Fund, Inc. v. Halliburton Co*., 563 U.S. 804, 809 (2011); *see also Castano v. Am. Tobacco Co*., 84 F.3d 734, 744 (5th Cir. 1996) ("[A] court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.").

[13] 18 U.S.C. § 1962(c).

[14] *Crowe v. Henry*, 115 F.3d 294, 296 (5th Cir. 1997) (citing 18 U.S.C. § 1962(a), (b)).

[15] *Id*. at 297.

[16] 18 U.S.C. § 1964(c).

tablish both but-for cause and "proximate cause in order to show injury 'by reason of' a RICO violation."[17] Proximate cause "should be evaluated in light of its common-law foundations [and] . . . requires 'some direct relation between the injury asserted and the injurious conduct alleged.'"[18] "When a court evaluates a RICO claim for proximate cause, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."[19]

The Defendants' challenge to predominance rests on their belief that this causation element will require individualized proof. But that premise, and thus much of their opposition to class certification, is at odds with recent decisions from the Supreme Court and this court emphasizing that RICO claims predicated on mail and wire fraud do not require first-party reliance to establish that the injuries were proximately caused by the fraud.[20]

As the Supreme Court put it in *Bridge v. Phoenix Bond & Indemnity Co*.: "[A] person can be injured 'by reason of' a pattern of mail fraud even if he has not relied on any misrepresentations."[21] The Court explained that "[p]roof that the plaintiff relied on the defendant's misrepresentations may in some cases be

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[17] *Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639, 654 (2008) (quoting *Holmes v.Sec. Inv'r Prot. Corp*., 503 U.S. 258, 268 (1992)).

[18] *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (quoting *Holmes*, 503 U.S. at 268).

[19] *Anza v. Ideal Steel Supply Corp*., 547 U.S. 451, 461 (2006).

[20] *Bridge*, 553 U.S. at 654; *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015).

[21] 553 U.S. at 649.

sufficient to establish proximate cause, but there is no sound reason to conclude that such proof is always necessary."[22] It further recognized that "the absence of first-party reliance may in some cases tend to show that an injury was not sufficiently direct to satisfy § 1964(c)'s proximate-cause requirement, but it is not in and of itself dispositive."[23] At bottom, "the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance into an element of the cause of action."[24] Indeed, "[u]sing the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud, and hence a predicate act of racketeering under RICO, even if no one relied on any misrepresentation."[25]

We applied *Bridge* in *St. Germain v. Howard*, explaining that "no reliance requirement exists for civil causes of action under RICO for victims of mail fraud."[26] We relied on the same principle in *Allstate Ins. Co. v. Plambeck*, noting again that "[i]n cases predicated on mail or wire fraud, reliance is not necessary."[27] That case involved a group of telemarketing companies, chiropractic clinics, and law offices that convinced not-at-fault car accident victims to obtain chiropractic services so as to receive settlement payments from insurance companies. Allstate alleged

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[22] *Id.* at 659.

[23] *Id.*

[24] *Id.* (quoting *Anza*, 547 U.S. at 478 (Thomas, J., concurring in part and dissenting in part)).

[25] *Id*. at 648.

[26] 556 F.3d 261, 263 (5th Cir. 2009).

[27] 802 F.3d 665, 676 (5th Cir. 2015).

that this group of defendants was liable under RICO's civil fraud statute for racketeering activity involving mail and wire fraud. After a trial, the jury returned a verdict in Allstate's favor. As to RICO causation, the district court instructed the jury that "proximate cause was present if 'the injury or damage was either a direct result or a reasonably probable consequence of the act.'"[28] The defendants appealed, challenging the jury's causation determination based on the absence of evidence that Allstate relied on the misrepresentations. We affirmed the verdict, holding that Allstate proved proximate cause because it was a foreseeable victim, and not one "wronged by the caprice of chance": "The objective of the enterprise was to collect from the insurance companies; the entire structure of the system . . . shows that Allstate's paying up was not just incidental but was the object of the collaboration."[29]

Other circuits have adopted similar definitions of proximate causation under RICO. For example, the Sixth Circuit considers whether a direct relationship between the injury and alleged conduct exists, whether the plaintiff's injury is a foreseeable consequence of the alleged conduct, and whether the casual connection between the injury and alleged conduct is logical and not speculative.[30] The Seventh Circuit

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[28] *Id.*

[29] *Id.*

[30] *See Wallace v. Midwest Fin. & Mortg. Servs., Inc.*, 714 F.3d 414, 419 (6th Cir. 2013); *Brown v. Cassens Transp. Co.*, 546 F.3d 347, 357 (6th Cir. 2008) (applying *Bridge* and concluding that the plaintiffs pled proximate cause because "the defendants' fraudulent acts were a 'substantial and foreseeable cause' of the injuries").

looks simply to the "probability of a harm attributable to the defendant's wrongful act."[31] The First Circuit, relying on the Supreme Court's discussion in *Holmes v. Securities Investor Protection Corp.*,[32] looks to the directness between the injury and alleged conduct with reference to "three functional factors": (1) concerns about proving damages from attenuated injuries, (2) preventing multiple recoveries, and (3) whether societal interest in deterring the alleged conduct is served by the case.[33] The Fourth Circuit has also held in an unpublished decision that "*Bridge's* holding eliminates the requirement that a plaintiff prove reliance in order to prove a violation of RICO predicated on mail fraud" in all contexts, not just third-party reliance cases.[34]

As will be shown below, this understanding of the causation requirement for fraud-based RICO claims—that such claims, unlike most common law fraud claims, do not require proof of first-party reliance—largely dooms the Defendants' attempt to identify individual issues of causation sufficient to preclude a finding of predominance.

C.

Under *Bridge*, the most straightforward way of demonstrating reliance in a classwide manner is the

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[31] *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 759 (7th Cir. 2011).

[32] 503 U.S. 258 (1992).

[33] *In re Neurontin Mktg. and Sales Practices Litig.*, 712 F.3d 21, 35–36 (1st Cir. 2013).

[34] *Biggs v. Eaglewood Mort., LLC*, 353 F. App'x 864, 867 (4th Cir. 2009).

Plaintiffs' foreseeability argument.[35] This just requires showing that the Plaintiffs' losses were caused "by reason of" the Defendants' operation of a fraudulent scheme.

That showing could flow directly from a jury's finding that the Defendants are operating a pyramid scheme as opposed to a lawful multi-level marketing program. Pyramid schemes are "inherently fraudulent" and are per se mail fraud, a RICO predicate act.[36] And, by design, a pyramid scheme's fraud inheres in its concealment of the deceptive nature of the "robbing

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[35] Although the panel found that the *Bridge* theory was forfeited (Majority Opinion at 10), we reach a different conclusion. The only "concession" the Plaintiffs made in their original briefing to the panel was simply a worst-case-scenario alternative argument: "Plaintiffs maintained below that *Bridge* marked an important change by moving the lens from reliance to proximate cause. But that proposition is irrelevant because, as defendants acknowledge . . . the district court agreed with defendants and applied a reliance theory of proximate cause in this case." The alternative nature of that argument is evident from the several pages in both the Plaintiffs' panel and en banc briefing advancing this *Bridge*-based causation theory. We thus find this issue is not forfeited.

And, as noted above, in certifying the class, the district court adopted both the *Bridge* argument and the argument that a classwide inference of reliance was permissible. It seemed to combine the two. We will address each theory on its own as either one seems sufficient.

[36] *See Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 781 (9th Cir. 1996); *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 484 (6th Cir. 1999) ("Unquestionably, an illegal pyramid scheme constitutes a scheme to defraud.").

Peter to pay Paul" payment structure.[37] In fact, the Defendants' CEO characterized this payment structure in an internal document as a "pyramid" in which "[t]here are Peters here to rob for the purpose of paying Paul." **SRE.26**.

The Federal Trade Commission has recognized that a pyramid scheme harms its participants "by virtue of the very nature of the plan as opposed to any dishonest machinations of its perpetrators."[38] Likewise, the Ninth Circuit recognizes that "[o]peration of a pyramid scheme constitutes fraud for purposes of . . . various RICO predicate acts."[39] The Federal Trade Commission instructs that a pyramid scheme is characterized by payments by participants in exchange for "(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 the sale of the product to ultimate users."[40] The fraud lies in the concealment of the inevitable collapse that results from the scheme's structure because "[t]he promise of lucrative rewards for recruiting others tends to induce participants to focus on the recruitment side of the

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[37] *See In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181–82 (1975) (recognizing that "the right to sell product in an entrepreneurial chain is also 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 perpetrators"); *see also Webster*, 79 F.3d at 781 (recognizing that "the operation of a pyramid scheme constitutes fraud" and stating that "[m]isrepresentations . . . follow from the inherently fraudulent nature of a pyramid scheme as a matter of law" (emphasis added)).

[38] *In re Koscot*, 86 F.T.C. at 1182.

[39] *Webster*, 79 F.3d at 781.

[40] *In re Koscot*, 86 F.T.C. at 1180.

business at the expense of their retail marketing efforts, making it unlikely that meaningful opportunities for retail sales will occur."[41] That structure, which focuses on recruitment of people, not products, inevitably causes the scheme to collapse when participants run out of individuals to recruit and there are no more new recruits to pay those higher up the pyramid. But "[n]o clear line separates illegal pyramid schemes from legitimate multilevel marketing programs."[42] Indeed, "the very reason for [their] per se illegality . . . is their inherent deceptiveness and the fact that the futility of the plan is not apparent to the consumer participant."[43]

Because pyramid schemes are per se mail fraud, which include inherent concealment about the deceptive payment scheme, one who participates in a pyramid scheme can be harmed "by reason of" the fraud regardless of whether he or she relied on a misrepresentation about the scheme. "An inherently fraudulent pyramid scheme . . . would fall within the[ ] broad definitions of fraud" under RICO even if no misrepresentations occur.[44] Participants are then harmed by the fraud involved in pyramid schemes not because of any misrepresentations, but because the ultimate collapse of the scheme, and thus harm to participants, is

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[41] *Webster*, 79 F.3d at 782; *see also id*. at 784 ("By the very structure of a pyramid scheme, participants' efforts are focused not on selling products but on recruiting others to join the scheme.").

[42] *Gold Unlimited*, 177 F.3d at 475.

[43] *Webster*, 79 F.3d at 788 (citation and quotation marks omitted).

[44] *Id*. at 788, 789, & n.7.

a direct and foreseeable consequence of such structure.

Here, the Plaintiffs allege that the Defendants operated a fraudulent pyramid scheme, which has caused them financial losses. There can be no question that the Plaintiffs are both the direct and foreseeable victims of the alleged fraud. By definition, a pyramid scheme operates by taking money from downline recruits, like the Plaintiffs, who will never recoup their payments, and funneling the money to those at the top of the pyramid. Such schemes depend on "there [being] Peters . . . to rob for the purpose of paying Paul." Those who lose money in a pyramid scheme necessarily do so "by reason of" the fraud because the fraud is necessary to temporarily sustain the scheme, and ultimately causes the scheme's collapse. And, those who profit from a fraudulent pyramid scheme make money only by virtue of the participation of downline investors, like the Plaintiffs, who lose money.

The Plaintiffs are necessary to the scheme and are the direct victims of the scheme. Equally clear is that the Plaintiffs are the foreseeable victims of the alleged fraud: "Pyramid schemes are destined to collapse, and the most recent entrants to lose their money."[45]

Whether the Plaintiffs relied on a misrepresentation about the scheme is thus not determinative of whether the Plaintiffs can prove causation under *Bridge*. As was true in that case, the class members here can prove injury "'by reason of' a pattern of mail

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[45] *Id*. at 785.

fraud even if [they have] not relied on any misrepresentations."[46] The participants' injuries arise from the scheme's payment structure, and the inherent concealment of the inevitableness of those injuries.

Further, although a class member's knowledge that Ignite is an illegal pyramid scheme could serve as an intervening cause that would break the chain of causation,[47] the Defendants, as will be discussed more below, have offered no evidence that any putative class member knew Ignite was an illegal pyramid scheme before joining as an IA. The district court expressly found that the record contained no such evidence, and we find no error in that determination.

Moreover, the directness of the Plaintiffs' alleged injuries obviates any concerns that might exist in cases with attenuated injuries. As in *Bridge*, "there are no independent factors that account for [the Plaintiffs'] injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue."[48]

The Plaintiffs' claims under this foreseeability theory of proving causation will rise or fall on common

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[46] *Bridge*, 553 U.S. at 649; *see also Kerrigan v. ViSalus, Inc.*, 112 F.Supp.3d 580, 607 (E.D. Mich. 2015) (noting that the plaintiff's "mail and wire fraud allegations do not rest upon misrepresentations" but only on the operation of the pyramid scheme, which "as a matter of law, constitutes a scheme to defraud in violation of the mail and wire fraud statutes").

[47] *Bridge*, 553 U.S. at 659 ("[I]f the county knew petitioners' attestations were false but nonetheless permitted them to participate in the auction, then arguably the county's actions would constitute an intervening cause breaking the chain of causation between petitioner's misrepresentations and respondents' injury.").

[48] *Id.* at 658.

evidence. The facts necessary to prove that the Defendants operated a fraudulent pyramid scheme will also suffice to show under *Bridge* that the fraud caused the Plaintiffs' injuries. Accordingly, under this theory of causation, individualized issues of causation will not predominate.

D.

We will also address the inference-based theory of causation that was the focus of the panel opinions. We find that this is a separate basis on which to affirm the certification ruling.

Under this theory, the Plaintiffs argue that Ignite's holding itself out as a legitimate multi-level marketing program, when in fact it was a fraudulent pyramid scheme, gives rise to a reasonable inference that that misrepresentation induced their paying to join as IAs and caused their losses. This, the Plaintiffs assert, is because (1) it may be rationally assumed that a precondition for joining Ignite was that it was a legal business opportunity, and (2) the Defendants have offered no evidence of any putative class member who joined or would have joined knowing Ignite was a fraudulent pyramid scheme, in which the majority of participants are bound to lose money.

We note initially that the Defendants do not challenge whether Ignite represented itself to be a legal multi-level marketing program or whether this question is common to the class. They do not do so for good reason: by operating its program, Ignite has and continues to hold itself out as a legal multi-level marketing program. The Federal Trade Commission's persuasive precedent recognizes that pyramid schemes make "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."[49] Pyramid schemes are inherently deceptive because their very structure conceals the fact that those at the bottom of the pyramid will be unable to recoup their investment. Accordingly, we conclude that the misrepresentation at issue here—that Ignite is a legal multi-level marketing program—is subject to common proof and is not even disputed.

We turn next to the question whether the Plaintiffs may employ a common inference of reliance based on that alleged misrepresentation. The Defendants concede that a common inference of reliance is appropriate in some cases. They urge us to adopt a rule requiring that, to invoke an inference of reliance in a fraud case, the Plaintiffs must establish that no rational actor would have participated had they known of the misrepresentation. Other circuits, however, have not applied such a narrow rule. Instead, they have permitted inferences of reliance when it follows logically from the nature of the scheme, and there is common, circumstantial evidence that class members relied on the fraud.

In *Klay v. Humana, Inc.*,[50] the Eleventh Circuit upheld the certification of a class of physicians claiming that health maintenance organizations (HMOs) misrepresented that they would pay them for medically necessary services, but instead underpaid them.[51] The Eleventh Circuit affirmed the class certification based on a common inference of reliance on those misrepresentations, explaining that "[a] jury

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[49] *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975) (emphasis added).

[50] 382 F.3d 1241 (11th Cir. 2004).

[51] *Id.* at 1259–61.

could quite reasonably infer that guarantees concerning physician pay—the very consideration upon which those agreements are based—go to the heart of these agreements, and that doctors based their assent upon them."[52] Similarly, in *In re U.S. Foodservice Inc. Pricing Litigation*,[53] the Second Circuit held that customers who were allegedly overbilled by a food distributor's inflated invoices scheme could be certified as a class.[54] It reasoned that "customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed."[55] Conspicuously absent from both the Eleventh and Second Circuits' decisions was any requirement that the plaintiffs prove that no other rational explanation existed for their behavior other than reliance.[56]

Given the unfavorable holdings of the courts' decisions in *Klay* and *U.S. Foodservice*, it is unsurprising that the Defendants relegated these opinions to a

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[52] *Id.* (emphasis added).

[53] 729 F.3d 108 (2d Cir. 2013).

[54] *Id*. at 122.

[55] *Id*. at 120 (quoting *Klay*, 382 F.3d at 1259).

[56] *See Klay*, 382 F.3d at 1259 (requiring only a "reasonabl[e] infer[ence]"); *U.S. Foodservice*, 729 F.3d at 120–22 (requiring only a common inference of reliance and rejecting mere conjecture about whether class members would have overpaid anyway even if they knew of fraud). In contrast, the narrower standard proposed by Ignite could not be applied to the facts of *Klay* or *U.S. Foodservice* given that we can easily imagine reasons why the physicians in *Klay* would have assented to the underpayments with full knowledge of the misrepresentation (for example, the need to maintain access to the HMOs' patients), or why the customers in *U.S. Foodservice* might have paid the overstated bills (for example, a desire to maintain their business relationships).

footnote in their en banc briefing. Instead, they urge this court to rely on the Tenth Circuit's recent opinion in *CGC Holding Co. v. Broad & Cassel*.[57] That court approved a common inference of reliance to certify a class when a class of borrowers alleged that a group of lenders fraudulently extracted nonrefundable loan commitment fees from the borrowers for loans that the lenders never intended to provide.[58] It explained that:

> The plaintiffs' theory of the case rests on a straightforward premise—that no rational economic actor would enter into a loan commitment agreement with a party they knew could not or would not funds the loans. Accordingly, plaintiffs' payment of up-front fees allows for a reasonable inference that the class members relied on lenders' promises [to fund their loans], which later turned out to be misrepresentations. . . .[59]

Although the Tenth Circuit approved the theory of inferred reliance after concluding that no rational actor would join the scheme had he or she known of the fraud, we do not read its opinion as limiting an inference of reliance to that situation. That court's opinion says only that the absence of another rational explanation for the plaintiffs' behavior is sufficient to

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[57] 773 F.3d 1076 (10th Cir. 2014)

[58] *Id*. at 1080.

[59] *Id*. at 1081, 1091–92 ("More specifically the fact that a class member paid the nonrefundable up-front fee in exchange for the loan commitment constitutes circumstantial proof of reliance on the misrepresentations and omissions regarding Hutchens's past and the defendant entities' ability or intent to actually fund the promised loan.").

infer reliance— it does not say it is a necessary condition. And tellingly, the Tenth Circuit cited the district court's opinion in this case approvingly.[60]

Turning to the facts of this case, we conclude that if the Plaintiffs prove that Ignite is a fraudulent pyramid scheme, they may use a common inference of reliance to prove proximate causation under RICO. A jury may reasonably infer that, in deciding to pay to become IAs, the Plaintiffs relied on Ignite's implicit representation that it is a legal multi-level marketing program, when it is in fact a fraudulent pyramid scheme. Two points support this conclusion.

First, it is reasonable to infer that individuals do not knowingly join pyramid schemes because (1) pyramid schemes are inherently deceptive and operate only by concealing their fraudulent nature; and (2) knowingly joining a pyramid scheme requires the individual to choose to become either a victim or a fraudster. Both points support a reasonable inference that the class members would not have knowingly joined a fraudulent pyramid scheme.

Whether a multi-level marketing program is fraudulent or legitimate depends on its internal structure. And such information is not readily apparent or interpreted. "[T]he very reason for the per se illegality of [such] schemes is their inherent deceptiveness and the fact that the 'futility' of the plan is not 'apparent to the consumer participant.'"[61] If a scheme's illegality were apparent, the scheme would not work. After all,

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[60] *Id*. at 1091 n.8.

[61] *Webster v. Omnitrition Int'l, Inc*., 79 F.3d 776, 788 (9th Cir. 1996) (quoting *People v. Bestline Prods., Inc*., 132 Cal. Rptr. 767, 788 (1976)).

the whole point of a pyramid scheme is to dupe unwitting investors into joining. The sheer improbability that more than a handful of class members (and even a handful seems unlikely) would be able to recognize that Ignite was a fraudulent pyramid scheme before joining as IAs supports the reasonableness of the Plaintiffs' inference of reliance.[62]

Second, the record is devoid of evidence that a single putative class member joined as an IA despite having knowledge of the fraud. Even after the close of discovery and the commencement of summary judgment motions before the district court, the Defendants produced no evidence that a single class member even knew of the fraud or would have paid to become an IA knowing of the fraud. Faced with this vacuum of evidence, the district court correctly concluded that individual issues of reliance will not predominate at trial.

The Defendants protest, however, that our pointing to the absence of evidence supporting their defense somehow improperly shifts the burden of proof to them. Not so. The Defendants, while advocating a narrower rule, have now conceded in their en banc brief that the absence of contrary evidence would sup-

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[62] Notably, the representation that Ignite was a legal multilevel marketing scheme, which was a precondition to class members' participation in this financial transaction, is distinguishable from the misrepresentations involving consumer purchases in which courts have rejected an inference of reliance. *See, e.g., McLaughlin v. Am. Tobacco Co*., 522 F.3d 215, 225 & n.7 (2d Cir. 2008) (rejecting an inference of reliance in a case involving the consumer purchase of light cigarettes because individuals purchase light cigarettes for a number of reasons, but recognizing that "a financial transaction does not usually implicate the same type or degree of personal idiosyncratic choice as does a consumer purchase").

port class certification based on an inference of reliance: "To be sure, in cases where a plaintiff has demonstrated that nobody would want the opportunity the defendant is offering, then class certification could be appropriate—absent contrary evidence." The district court was tasked with determining how a trial would proceed. That court did not simply presume that individual issues of reliance would not predominate; rather, it specifically made this conclusion based on its determination that the Plaintiffs' case could be made with common evidence. And, in the absence of any evidence showing that individuals joined the pyramid scheme knowingly—the district court correctly ruled that individual issues of reliance will not predominate.[63]

Neither now nor before the district court have the Defendants even attempted to bear this burden of rebutting the Plaintiffs' evidence of reliance.[64] On appeal, they do not even contest the district court's factual finding, which we review only deferentially for an abuse of discretion. Had the Defendants presented evidence that could rebut the Plaintiffs' common inference of reliance on an individualized basis, we and the

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[63] *See Webster*, 79 F.3d at 788 ("As to justifiable reliance, the defendants have not carried their burden on summary judgment of showing a lack of evidence to prove this element. To the contrary, defendants argue strenuously that their scheme was not fraudulent, and that plaintiffs were justified in relying upon the statements made in the promotional materials.").

[64] Notably, the Plaintiffs are not required to prove the negative fact that they did not have knowledge of the fraud: "The plaintiff doesn't have to prove a series of negatives; he doesn't have to 'offer evidence which positively exclude[s] every other possible cause . . . .'" *BCS Servs.*, 637 F.3d at 757 (quoting *Carlson v. Chisholm-Moore Hoist Corp.*, 281 F.2d 766, 770 (2d Cir. 1960) (Friendly, J.)).

district court might have concluded that individual issues of reliance would predominate at trial. In the total absence of such evidence, however, we have no evidentiary basis to conclude that the district court abused its discretion in holding otherwise.

Rather than pointing to evidence, the Defendants rely on speculation alone that a hypothetical class member *could* have joined as an IA despite knowing of the fraud. But such sheer speculation as to the improbable motivations of an undefined, but likely minute number of class members does not cause individual issues of reliance to predominate. Our inquiry looks to how the trial will proceed;[65] trials are grounded in evidence, not extra-record attorney speculation. As our sister circuit recognized, "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."[66] And mere conjecture that some class members may have acted with knowledge of the misrepresentation seems particularly inappropriate here as anyone who joins a

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[65] *See Sandwich Chef*, 319 F.3d at 220 ("Certification of a class under Rule 23(b)(3) requires that the district court consider how the plaintiffs' claims would be tried.").

[66] *U.S. Foodservice*, 729 F.3d at 122; *see also Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 119 (S.D.N.Y. 2011) ("Sheer conjecture that class members 'must have' discovered [the misrepresentations] is insufficient to defeat Plaintiff's showing of predominance when there is no admissible evidence to support Defendant's assertions.").

pyramid scheme hoping to become one of the few winners sitting at the top of the pyramid would become liable as a knowing participant.

For these reasons, our result in the instant case is not inconsistent with *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance*.[67] There, insureds alleged that insurers charged premiums in excess of approved rates, then misrepresented the correctness of the premiums charged.[68] We rejected class certification because the insureds could not prove proximate causation through common proof. Unlike the Defendants in the instant case, the insurers in *Sandwich Chef* not only contended that the insureds "were aware that [the insurance] carriers were charging them more than the filed rates," but also "*introduced evidenc*e that . . . class members individually negotiated with insurers regarding workers' compensation and insurance premiums."[69] Thus, "[k]nowledge that invoices charged unlawful rates, . . . according to a prior agreement between the insurer and the policyholder, would eliminate reliance and break the chain

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[67] 319 F.3d 205 (5th Cir. 2003). We also note that to the extent it believed RICO requires proof of individualized reliance, *Sandwich Chef* is overruled by *Bridge*.

[68] *Id*. at 224.

[69] *Id*. at 220 (emphasis added); *see id*. at 216 ("In concluding that individual issues predominate in this case, we have relied on evidence that defendants maintain shows that Wall Street and other potential class members, directly or through others, negotiated premiums that varied from filed rates, and that they were aware that carriers were charging them more than the filed rate.").

of causation."[70] Here, the Defendants have put forth no such evidence.[71]

None of this is to say that if the Plaintiffs prove that Ignite is a fraudulent pyramid scheme, they must necessarily prevail at trial if this inference-theory is advanced. The inference of reliance to which the Plaintiffs are contingently entitled is simply the common mechanism by which they seek to prove their affirmative case. The jury may or may not make this inference in the Plaintiffs' favor: "[T]he trier of fact is not required to accept the inference; it is merely permitted to utilize it as common evidence to establish the class's *prima facie* claims under RICO."[72] And the district court may revisit its decision and choose to decertify the class should the Defendants eventually produce individualized rebuttal evidence causing their individualized defense to predominate.

But the focus must remain on the predominance inquiry. We thus recognize that even if conjecture alone is sufficient to establish that a few class members might have knowingly joined a fraudulent pyramid scheme, this will not necessarily cause individualized issues of reliance to predominate at trial. In the context of the fraud-on-the-market theory, the Supreme Court's recent pronouncement in *Halliburton Co. v. Erica P. John Fund, Inc*. is highly instructive:

> While this [argument that an individual plaintiff aware of the fraud would have still

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[70] *Id*. at 220.

[71] *See U.S. Foodservice*, 729 F.3d at 120 (distinguishing our precedent in *Sandwich Chef* because there, the record contained "no such individualized proof indicating knowledge or awareness of the fraud by any plaintiffs").

[72] *CGC Holding Co*., 773 F.3d at 1093.

> bought the stock] has the effect of "leav[ing] individualized questions of reliance in the case," there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.[73]

This reasoning applies with equal weight here.[74] Evidence indicating that a few class members decided to take the risk of being a winner in an illegal pyramid scheme does not automatically rebut the inference of reliance for the overwhelming remainder of class members or mean that individual issues concerning the atypical knowing fraudsters will predominate at trial. This is underscored by the fact that the instant class is comprised of only those who lost money participating in Ignite's program.

In sum, we conclude that if the Plaintiffs prove that the Defendants operated a fraudulent pyramid

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[73] 134 S. Ct. 2398, 2412 (2014) (second alteration in original) (internal citation omitted).

[74] This principle that a small number of anomalous class members should not defeat predominance is not unique to securities fraud cases. The Supreme Court made a similar pronouncement last term in an opinion addressing an overtime time class action. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" (quoting 7AA Wright & Miller § 1778)).

scheme, a jury may reasonably infer from the Plaintiffs' payments to join as IAs that they relied on Ignite's implicit representation of legitimacy, when in fact it was a fraudulent pyramid scheme. Although it is not impossible that some class members might have joined as IAs despite knowledge of the fraud, economic speculation alone as to what could have motivated an individual class member is not enough to defeat class certification. Based on the deception inherent in pyramid schemes and the losing proposition that they present to the vast majority of participants, it is highly unlikely that many—if any—of such class members exist. And more importantly, the district court expressly found no evidence indicating that any putative class member knew of the fraud. Because the Defendants failed to demonstrate that such individualized issues will affect even a single class member at trial, we find no error in the district court's conclusion that individualized issues of causation will not predominate. Accordingly, we affirm the district court's class certification.

III.

The class certification of the district court is AFFIRMED.

E. GRADY JOLLY, Circuit Judge, joined by Edith H. Jones and Edith Brown Clement, Circuit Judges, and joined, as to Parts I B and II, by Priscilla R. Owen, Circuit Judge, dissenting:

The majority concludes that the plaintiffs do not need to make any showing of reliance to establish proximate cause under RICO. Citing the Supreme Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), and this circuit's recent

decision in *Allstate Insurance Co. v. Plambeck*, 802 F.3d 665 (5th Cir. 2015), the majority opinion holds that the plaintiffs have satisfied Rule 23's predominance requirement for RICO proximate cause simply because the plaintiffs have made a sufficient showing that Ignite is an illegal pyramid scheme, and that they lost money by investing. The majority thus asserts that the plaintiffs do not need to show that the defendants made any false representation upon which the plaintiffs relied to make their losing investment.

I.

A.

First, the majority errs in its cavalier disregard of evidence of individualized knowledge among the class members. The majority concludes that the plaintiffs have met Rule 23's predominance inquiry with respect to causation under RICO simply because there is evidence suggesting Ignite was a pyramid scheme. In reaching this holding, the majority opinion ignores that, from the outset of their involvement with Ignite, the plaintiffs were provided all the information needed to warn investors of Ignite's likely illegality.

Again, there is no quarrel here with the majority opinion's simple assertion that reliance is not a prerequisite for proving proximate cause under RICO.[1]

[1] However, the plaintiffs' brief accompanying their motion for class certification concedes, on numerous occasions, that some degree of reliance is still necessary to sustain a RICO claim, even following *Bridge*. *See*, *e.g.*, Doc. 134, at 9 n.13 ("The Supreme Court cautioned [in *Bridge*] that 'someone' must have relied on the misrepresentations for the [plaintiffs] to prove the 'by reason of' RICO language. . . . Third-person reliance of any kind is sufficient to meet the *Bridge* standard."); *see also id*. at 12–13 ("Proximate cause here is very simple and requires no individualized

The facts of this case, however, do not allow for such a glossy approach to class certification. The majority's reasoning has force only to the extent that the plaintiff-investors were actually unaware of Ignite's fraudulent structuring. *See Bridge*, 553 U.S. at 658–59 (stating that, although first-party reliance is not a formal element of a RICO claim, proximate cause fails where there is evidence that the aggrieved party or an intermediary knew of the fraud, because such knowledge acts as an "intervening cause breaking the chain of causation between petitioners' misrepresentations and respondents' injury"); *see also Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem*. Ins. Co., 319 F.3d 205, 218–19 (5th Cir. 2003) (recognizing that knowledge, which is actually a defense to causation, is a relevant consideration when addressing class certification). Moreover, as both parties concede, for the purposes of proximate cause, it does not matter whether Ignite actually is a pyramid scheme. Instead,

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proof: it is akin to a fraud-on-the market scheme in which common sense provides the natural and straightforward inference that the enticement to invest was acted on by the purchasers of the worthless product."); *id.* at 13 ("Here, 274,000 people acted on the representations made by the Defendants on the SGE website and in countless 'business representations' that the 'business opportunity' presented a lucrative financial opportunity. Proof of reliance is contained in the proximate cause."). These comments are telling of the inconsistent, shifting character of the plaintiffs' causation arguments. Throughout this litigation, the plaintiffs have leaned primarily, if not exclusively, on their theory of "inferred reliance." Their briefing included only passing, vague statements suggesting the opposite. Now, after downplaying the "no reliance needed" theory of proximate cause before the district court and the three-judge panel, the plaintiffs revive it as their principal argument in these en banc proceedings. In doing so, the plaintiffs move the goal posts on both the defendants and this court.

the relevant inquiry is whether there are class members who understood Ignite was likely to be a pyramid scheme, but invested anyway. If so, the line of causation becomes too tenuous to maintain through common evidence solely based on the contention of Ignite's alleged illegality.

The majority opinion takes for granted that no individualized issues of knowledge exist among the plaintiff class, asserting that "the record is devoid of evidence that a single putative class member joined [Ignite] despite having knowledge of the fraud." It adopts this position notwithstanding that the plaintiffs, by their own admission, were provided the information that Ignite was likely an illegal pyramid scheme. The record shows that the tell-tale signs of an illegal pyramid scheme were disclosed to the plaintiffs in the documents they were provided before signing up for Ignite. Ignite's business plan, published to potential investors, openly preached recruiting additional IAs over selling Ignite's purported product, residential energy.[2] Similarly, Ignite's published compensation scheme, which the plaintiffs do not dispute is accurate and was provided to all investors, also bears all the hallmarks of an illegal pyramid scheme. For example, Ignite paid only fifty cents in commission to new IAs per each energy customer they enrolled. In contrast, those IAs that were higher up in the pyramid structure received the bulk of profit resulting from the sale of residential energy. This mark,

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[2] The Ignite business plan states "[f]ortunately, [Ignite] is not about becoming an energy expert or salesperson. You need only a few customers to be successful." Similarly, an Ignite PowerPoint slide, reproduced in the instructional materials handed out to new IAs, instructs IAs to enroll only "a few customers," and to then teach downline IAs to "do the same."

of course, is a defining trait of a pyramid scheme, but it is also a trait that the plaintiffs themselves assert was made obvious to Ignite's investors from the outset.

In their en banc briefing, the plaintiffs themselves repeatedly urge that *anyone* could see that the only realistic way to make money as an Ignite IA was to recruit new IAs to work underneath you, and to teach those new IAs to do the same. The plaintiffs emphasize that common sense compels the conclusion that Ignite's business model was illegal from the outset, since the unsustainability of such a scheme is apparent on its face; eventually, there are no more new IAs to recruit. According to the plaintiffs, "[a]ny '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." Appellees' Supplemental En Banc Brief at 7. Taking the plaintiffs at their own emphatic word, it follows that the class members who took minimal time to read the investment materials would have developed serious concerns about Ignite's risk and illegality. Still, they invested. The plaintiffs, however, contend, in contradictory fashion, that these overt "buyer beware" warnings were insufficient to put even a single plaintiff on notice that Ignite was actually an illegally structured venture. At the very least, these warnings were sufficient to cause the prudent investor to question Ignite's business structure before blindly investing.

It is true that our caselaw, of course, does not require an investor to comb through the finest details of a defendant's business plan to preserve a later claim

for fraud. But it does, however, require that a plaintiff-investor do some minimum amount of research into the nature of an investment opportunity before signing up, losing money, and crying fraud. *See Martinez Tapia v. Chase Manhattan Bank, N.A.*, 149 F.3d 404, 409 (5th Cir. 1998) ("The investor who seeks to blame his investment loss on fraud or misrepresentation must himself exercise due diligence to learn the nature of his investment and associated risks. . . . [T]he party claiming fraud and/or misrepresentation must exercise due diligence to discover the alleged fraud and cannot close his eyes and simply wait for facts supporting such a claim to come to his attention.").

In addition to the investment documents, a cursory Google search would have led the plaintiffs to a *Dallas Morning News* article, published during the time frame relevant to class certification, in which an economic expert expressly stated that Ignite was an illegal pyramid scheme, destined to result in a loss of money for most of its investors. Indeed, the plaintiffs themselves refer to this article in their complaint, but still contend that there is no sound basis to conclude that at least part of the class members were aware that Ignite was thought to be an illegal venture, but chose to "take their chances" and sign up anyway.

Standing on its own, the evidence above is enough to undermine the notion that all 200,000-plus members of the putative class were unaware that Ignite had all the indicia of an illegal pyramid scheme. But this is not the extent of the evidence suggesting knowledge of the defendants' fraud, which the plaintiffs now allege was a surprise. In fact, there is significant evidence that Ignite's own promoters, when talk-

ing to potential investors, were explicit about the company's dubious structuring. The defendants routinely held large, revival-style recruitment events, where Ignite executives and promoters explained Ignite's business model. Although each recruiter's style differed, there was a common theme in their presentations: Ignite offered potential IAs a great opportunity to make money, albeit through recruiting other IAs instead of through actual sales. Indeed, one promoter, Randy "the Cowboy" Hedge, told a crowd of potential investors that, to scare off the faint of heart, he would sometimes refer to Ignite as a "pyramid" deal. Hedge suggested that he did this because he knew that those people who remained interested in joining Ignite, even after hearing the alarm-sounding descriptive "pyramid" applied to its business model, were chiefly concerned about making money, and not about the details of Ignite's structuring.[3]

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[3] *See* Audio Recording 207.16. This "pyramid deal" reference was not as a stray remark. *See id*. (Hedge, when referring to allegations that Ignite is a pyramid scheme: "Hey look, have any of y'all heard that? Has anyone ever . . . Let's get something straight—I don't care if you call it an octagon, parallelogram, rectangle—they're sending me a check."); Audio File 207.3 ("Let's be honest, I don't know what you do, but I guarantee you there's somebody above you who does less and makes more, yes? You're in a pyramid [in tone of a doubter]. Hey, if you're married, if you're married you're in a pyramid, and she's on the top. You can call it a hexagon, octagon, rectangle, circle, oblong, I don't care! Pay me!"). Other promoters, although perhaps not as brazenly as Hedge, regularly emphasized in their speeches that the only way to make money as an Ignite IA was to minimize selling energy in favor of recruiting down-line IAs. *See* Recording of Ignite Executive Greg McCord, Audio File 627571 ("How do you make money [as an IA]? Well, if you keep concentrating on customers, you won't make money. It's the end of story.").

The majority opinion dismisses this evidence of individualized knowledge by deeming it too speculative. Citing a four-decade-old order from the Federal Trade Commission, published when pyramid schemes were still a relatively new form of potential fraud, the majority urges that pyramid schemes are "inherently deceptive," to the extent that unsophisticated consumer-investors could not possibly discern whether Ignite's business model was illegal before joining up. What is implied by this statement is that a multi- level marketing scheme that, at first glance, bears the indicia of legality may, upon deeper investigation, reveal subtleties of its structuring that actually make it an illegal pyramid scheme. Such subtleties, however, are entirely absent from this case. Indeed, as discussed above, all the evidence necessary to conclude Ignite was a pyramid scheme was provided to the class members and they still chose to invest; moreover, at least a number of the plaintiffs were exposed to recruitment pitches that emphasized Ignite's pyramid character. This evidence, even if thought not to be conclusive on whether most plaintiffs knew of the likelihood that Ignite was an illegal pyramid scheme, is far more than "speculative." At the very least, the defendants are entitled to probe these plaintiffs' understanding of the Ignite investor documents and accompanying sales pitches, in an effort to challenge the plaintiffs' supposed naiveté of Ignite's unsustainability. Accordingly, these lingering problems of individualized knowledge among many of the class preclude a finding that, consistent with the meaning and requirements of Rule 23, common issues predominate with respect to proximate cause under RICO. *See Sandwich Chef*, 319 F.3d at 220.

B.

Next, given that the evidence discussed above raises concerns of individualized knowledge, the majority errs in placing the burden regarding the appropriateness of class certification with the defendants, instead of the plaintiffs. The majority opinion asserts that, even assuming there is record evidence showing an indeterminate number of plaintiffs knew of Ignite's illegality, the record evidence fails to show that individualized issues of knowledge will actually undermine those issues common to the class. The majority opinion points out that knowledge is an affirmative defense, which the defendants must raise and prove at trial. According to the majority, the fact that a "few" plaintiffs might be "picked off" because of issues of individualized knowledge does not defeat class certification, so long as issues common to the class continue to predominate over the "outliers."

There is no questioning that, as a general proposition, a class may be certified even when a few stray issues of individualized knowledge remain among the class's members. It is certainly correct that Rule 23 requires a predominance of common issues, not a uniformity of them. More relevant here, however, is that Rule 23 also requires that the *plaintiffs*, not the defendants, carry the burden of establishing whether class certification is appropriate under Rule 23; the plaintiffs must do so by showing that individualized inquires will not cast a shadow over those issues common to the entire class. *See Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This burden includes showing that a defendant's proffered affirmative defense, if based on individualized issues of knowledge, applies only to an insignificant segment of the putative class. *See Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 329 (5th Cir. 2008). ("An affirmative defense is not per se irrelevant to the predominance inquiry,

as the parties seem to believe. We have noted that the predominance of individual issues necessary to decide an affirmative defense may preclude class certification." (internal citation and quotation marks omitted)); *Sandwich Chef*, 319 F.3d at 220 (stating that Rule 23 requires that the district court's predominance inquiry account for any individual issues of knowledge that will be "components of defendants' defense against RICO fraud.").

The plaintiffs, however, disregard this burden under Rule 23. Importantly, the plaintiffs *do not even attempt* to show that the defendants' proffered defense of individualized knowledge applies only to an insignificant number of plaintiffs. Instead, they argue that a lack of knowledge may be presumed, because no "rational" individual would ever participate in an illegal pyramid scheme. Again, this theory—which, at different points in this case's history, the plaintiffs have referred to as the "fraud-on-the-market" theory, the "rational economic actor" theory, and the "inferred reliance" theory—is the only basis upon which the district court granted class certification.[4] It follows that, if such a theory were accepted in error, individualized issues of knowledge overwhelm those issues common to the class, rendering this class action unfit for certification. The plaintiffs, however, did not even confront

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[4] *See* Dist. Ct. Doc. 169 at 15 ("To the extent the plaintiffs seek 23(b)(3) certification based on a fraud-on-the-market theory and the common sense inference that independent associates ["IAs"] were duped into joining a pyramid scheme, the Court finds that the class can be certified."); *see also id*. at 15 n.13 ("[A]ll the class members are presumed to be relying on the same misrepresentation—that the Ignite business opportunity was a legal, non-fraudulent venture.").

the evidence suggesting individualized knowledge; instead, as stated, they chose to seek an inference of reliance—and hence, an inference that all of the plaintiffs lacked knowledge of Ignite's illegality—based solely on an "implicit" misrepresentation, made by virtue of Ignite's mere existence.

As discussed below, the plaintiffs' theory of "inferred reliance" is both logically strained and is belied by the absence of any actual misrepresentation on behalf of the defendants. Ultimately, however, it does not matter whether reliance is required to establish RICO proximate cause; even if no showing of reliance is necessary, superseding issues of individualized knowledge cloud the waters of RICO causation. Accordingly, the plaintiffs have failed to meet their burden, under Rule 23(b)(3), of showing that common issues predominate with respect to RICO's proximate cause element.

II.

Let us now turn to the majority's alternative holding regarding the appropriateness of an inference of reliance in this case. The majority opinion asserts that, assuming reliance on a misrepresentation must be shown to establish RICO causation, the plaintiffs have done so through common evidence. The plaintiffs, however, do not point to any common, specific misrepresentation upon which they relied, much less offer evidence demonstrating reliance. Instead, they seek an "inference" of reliance on an "implicit" misrepresentation. The plaintiffs contend that, simply by seeking to recruit new customers and investors, Ignite falsely held itself out as a legitimate business opportunity. They further assert that, because the legality of Ignite's business structure would have been a bedrock assumption of any reasonable investor, the court

may infer that the plaintiffs relied on this implicit misrepresentation when choosing to join Ignite.[5] In arguing that an inference is appropriate here, the plaintiffs point to a handful of circuit-level cases that have allowed a class-wide inference of reliance under certain circumstances: *CGC Holding Company, LLC v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014), *In re U.S. Foodservice Inc. Pricing Litigation*, 729 F.3d 108 (2d Cir. 2013), and *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004).

These cases are distinguishable. Both *Foodservice* and *Klay* allowed a jury to "infer" reliance when the false representations at issue were straightforward misstatements of an amount owed or paid on a bill or invoice. Those courts concluded that a jury could infer reliance because an individual's payment of a bill or acceptance of a payment was, in effect, an acknowledgment of reliance on the correctness of the amount in the bill or payment. This reliance makes sense, as no rational economic actor would knowingly pay extra for nothing. *CGC Holding* also involved a scenario where the plaintiffs were purchasing a worthless product; they were applying for loans and paying a non- refundable fee to the defendants, even though the defendants had already decided that they would eventually deny the plaintiffs' loan applications. Indeed, every single case, cited by the plaintiffs or the district court, where an "inference of reliance" was

[5] As I have already indicated, although cast as an inference of "reliance," the plaintiffs' theory doubles as a means of inferring that all of the class members lacked knowledge of Ignite's likely illegality, since, according to the plaintiffs, no rational economic actor would ever pursue a fraudulent business opportunity.

used to establish RICO causation involves allegations of a palpable, specific misrepresentation.[6]

The plaintiffs here, however, seek a wholly novel application of the inferred reliance theory. They urge the court to conclude that, as a matter of law: No rational person would ever knowingly invest in a business venture that could be illegal. Such an implausible argument ignores that, even if Ignite was a pyramid scheme, it allowed IAs the chance to make money. By the plaintiffs' own admission, roughly 10–15% of investors made a profit over the time frame relevant to this litigation. Unlike the "something-for-nothing" transactions that served as the basis for an inference of reliance in the other circuit-level decisions, a person could rationally invest in a pyramid scheme with the hope that he or she might profit significantly, notwithstanding knowledge that a majority of participants will likely be losers. As for the majority's altruistic suggestion that an inference of reliance is appropriate because no rational individual would ever knowingly chance defrauding others in an effort to make money

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[6] *See, e.g., Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015) (defendant falsely advertised its dietary supplement as promoting digestive health when it, in fact, had no such effect); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D. 590 (C.D. Cal. 2012) (defendant induced class members to purchase deferred annuities by means of misleading statements and omissions regarding the value of those annuities); *Minter v. Wells Fargo Bank, N.A.*, 274 F.R.D. 525 (D. Md. 2011) (defendant was a mere front organization formed to circumvent legislation designed to prevent market-distorting business practices within the real estate settlement services industry); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538 (E.D. Va. 2000) (defendants conspired with one another in a "churning" scheme to defraud consumer used-car purchasers).

for herself, I respectfully suggest that our criminal docket demonstrates the error of this assumption.

There is no attempt here to defend the legality of the defendants' alleged pyramid scheme. The point is that the plaintiffs cannot maintain this class action as it has been structured and presented to the court. The plaintiffs do not allege, much less offer any common evidence, that the defendants misrepresented any aspect of its business structure; nor do they allege that the defendants misrepresented the plaintiffs' likelihood of being able to sign up enough customers or downline recruits to make a profit. One is blind to reality to assume perfunctorily that approximately 200,000 IAs, pitching this scheme to each other and among themselves, were predominantly motivated only by an implicit, unspoken representation that Ignite was a "legal business opportunity." Given the lack of an actual misrepresentation, coupled with the fact that the plaintiffs had all the information necessary to know that Ignite was a risky pyramid scheme, the plaintiffs' theory of reliance is ill-adapted and out of place. Without this inference, the plaintiffs do not offer any common evidence with respect to proximate causation under RICO. Thus, the class should be decertified for failure to meet Rule 23's predominance requirement.

III.

To sum up: the majority opinion allows the plaintiffs to overcome Rule 23's predominance inquiry with respect to RICO causation, even though all of the plaintiffs were provided the information to understand the risk that Ignite was an illegally structured enterprise. Moreover, at least part of the class was warned of the risk of investing in Ignite by the defend-

ants' own promotional representatives. It is impossible rationally to presume that, out of 200,000- plus investors, a significant number of the class were not aware of the precise character of their investment.

The majority opinion dilutes both RICO's causation requirement and Rule 23's predominance requirement to the point that they have little relevance in cases based on allegations of a pyramid scheme. Indeed, if the court finds class certification appropriate here—in a case with over 200,000 putative class members, all of whom learned about Ignite at different times and through different channels of communication, and undoubtedly held different levels of knowledge about the company's business plan—it is difficult to see when individualized issues among class members would preclude certification under Rule 23.

Accordingly, I respectfully dissent.

EDITH H. JONES, Circuit Judge, joined by EDITH BROWN CLEMENT, dissenting.

I am pleased to join Judge Jolly's dissent to the class certification approval in this case. The majority's rules, as Judge Jolly's dissent shows, afford far less scrutiny to class actions in cases involving mere allegations of "illegal pyramid schemes," and are legally ill-founded. I wish to make two observations, lest the reader of the majority opinion believe that Stream Energy is already condemned for operating an illegal pyramid scheme. Courts should not be in the business of writing one-sided opinions that lay a thumb on the scale simply by ignoring proof that does not comport with their conclusions. Thus, a few facts, as opposed to suppositions and allegations, cast doubt on the ease

with which the majority condemns Stream's marketing method as illegal.

First, Stream Energy has existed in Texas for more than a decade and has become the fourth largest retail gas and electrical energy provider in this state. Stream is also authorized to sell energy in a half dozen additional jurisdictions. Stream serves over a million Texas customers, in part because it offers energy at competitive prices. Stream characterizes its marketing subsidiary Ignite's business as multilevel marketing, the bare bones of which are sketched in the majority and dissenting opinions. Whatever else may be the case, however, Stream sells a lot of real product to real people at favorable prices and its marketing model has yet to collapse.

Second, the majority never defines an "illegal pyramid scheme." The majority cites two elements described by the FTC over forty years ago: it is characterized by payments by participants in exchange for "(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 the sale of the product to ultimate users." *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975). But the FTC has refused more rigorously to define an illegal pyramid scheme, and the majority opinion admits that "[n]o clear line separates illegal pyramid schemes from legitimate multilevel marketing programs." (citation omitted). Indeed, there are dozens of legitimate, longstanding multilevel marketing companies in the United States (*e.g.*, Avon, Mary Kay Cosmetics, Amway, and Tupperware). The majority thus leaves it to the unfettered and untutored discretion of the district court and jury to decide whether Ignite is an "illegal pyramid scheme." I do not ever recall sending a

case to a jury with so little definition of the elements of the offense, much less, for class action purposes, assuming guilt from the enterprise's mere structure, allowing an inference of class-wide reliance and requiring no proof of individual causation.

If this isn't stacking the deck legally, I don't know what is. But I surmise that even plaintiffs' counsel do not really believe Stream runs an "illegal pyramid marketing scheme." Had they truly believed this, they could have invoked the Department of Justice or FTC to assist in shutting Stream down. Instead, they claim to be suing to recover about $329 apiece for over 200,000 IAs who, they assert, lost money on their "investments" with Stream. This amount, nearly $60 million, would be trebled pursuant to RICO, exposing Stream to over $190 million in potential damages, plus contingent attorneys' fees. Since this is far more than Stream is worth, however, the plaintiffs' attorneys must either want to take over the business themselves or simply strong-arm a settlement, leaving the "illegal pyramid scheme" in place until it pays off.

This, I suggest, is the price of lowering the standards for liability and stripping businesses of the ability to know in advance what the law commands. Reckless allegations of undefined illegality, coupled with immense uncertainty as to outcomes, are an affront to the rule of law.

HAYNES, Circuit Judge, dissenting:

The majority opinion allows any group of plaintiffs who have lost money in a multi-level marketing program to automatically obtain class certification by making the simple allegation that the program was in actuality an illegal pyramid scheme. In so doing, it

minimizes the fact that many plaintiffs would be unable to show that defendants caused their injuries, and it allows the plaintiffs to skirt their burden of establishing "that the questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3).

The Supreme Court has emphasized that for plaintiffs to satisfy the causation requirement of a civil RICO claim, there must be "some direct relation between the injury asserted and the injurious conduct alleged." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (citation omitted). With over 200,000 plaintiffs in this case, there are numerous and disparate motivations behind each plaintiff's decision to participate in Ignite's multi- level marketing program, many of which weaken or sever any chain of causation.

For example, some of the plaintiffs could have been fully aware of the questions surrounding Ignite's legality, but nevertheless decided to participate for the simple reason of making a profit. For these plaintiffs, there would be no "direct relation" between the funds lost and Ignite's actions; the cause of any losses incurred would be based on the plaintiffs' own informed decision to take on a calculated risk that ultimately did not pay off. In other words, these plaintiffs' own assumption of risk "would constitute an intervening cause breaking the chain of causation between" Ignite's actions and these plaintiffs' injuries. *Id* at 658. By affirming the certification of a class that includes this subset of plaintiffs, the majority opinion provides a potential bailout for those who knowingly gambled and lost.

Other plaintiffs could have joined Ignite's program for the sole purpose of selling (or learning the business of selling) energy, which, as Judge Jones's dissenting opinion points out, is an aspect of the business that is indisputably legal. For these plaintiffs, Ignite's structure as a purported pyramid scheme could not have caused their injury, as any losses would be directly related only to an "independent[] factor[]." *Id.* at 654 (citation omitted). Specifically, their losses would have been caused by their own inability to sell the energy necessary in order to turn a profit.

Other plaintiffs may have joined Ignite solely to take advantage of Ignite's training courses or networking opportunities, while others could have participated without any intention of making a profit in order to help out a friend or family member who was already a part of the program. For these plaintiffs, it would be impossible for Ignite to have caused any alleged injury, because no injury exists: these plaintiffs obtained exactly what they were hoping to receive by participating in Ignite's program. By affirming the certification of a class that includes these plaintiffs, the majority opinion allows those who have already received the benefit of their bargain with Ignite to potentially recoup the fees paid and effectively receive Ignite's products and services for free. In so doing, the majority opinion undermines one of the purposes of RICO causation, which the Supreme Court has stated is "to obviate the risk of multiple recoveries." *Id.* (citation omitted).

Plaintiffs could have participated in the program as "a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 668 (9th

Cir. 2004) (concluding that class certification was inappropriate in a civil RICO case because the various motivations for gambling precluded common issues from predominating over individual ones). Each plaintiff had subjective and individualized reasons for joining Ignite's multi-level marketing program. As the parties seeking class certification, plaintiffs had the burden to show that— despite each plaintiff's differing motivations and expectations—common questions "predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3); *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). This they failed to do. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-20128

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.

Appeal from the United States District Court for the Southern District of Texas

Before JOLLY, WIENER, and CLEMENT, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Stream Energy, its marketing arm Ignite, and a number of other defendants (collectively, the "Defendants") appeal the district court's order certifying a class of some 150,000 plaintiffs (the "Plaintiffs") in this civil action brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–68. The Plaintiff investors are Independent Associates in Ignite's multi-level marketing

program, who are claiming to be victims of an illegal pyramid scheme. Specifically, the Plaintiffs claim that the Defendants induced the Plaintiffs to participate in the scheme by misrepresenting that Ignite is a legitimate business opportunity, causing them to suffer monetary losses.

The Defendants argue both that Ignite is not an illegal pyramid scheme and, more significantly relevant here, that class certification is inappropriate because individualized questions of reliance and knowledge predominate over any common issues, defeating class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The district court rejected the Defendants' argument and certified the case as a class action. This Court granted the Defendants leave to file this interlocutory appeal under Federal Rule of Civil Procedure 23(f). After full briefing and argument, we VACATE the district court's class certification order and REMAND the case for the entry of a proper order not inconsistent with this opinion and for such further proceedings as may be appropriate.

I.

Stream Energy began in 2004 as a venture to provide energy services in deregulated energy markets. Stream does not own energy infrastructure. Instead, it resells gas and electricity that it buys from other utilities. According to Stream, it can provide consumers with cheaper services through this arrangement. Stream began its operations in Texas after it received approval from the Texas Public Utility Commission in 2005. Beginning in 2008, Stream sought to expand beyond Texas, and it has expanded operations to other states, including Georgia, Maryland, New Jersey, New York, and Pennsylvania. According to Stream, it

has over one million energy customers, and it has sold billions of dollars in electricity and natural gas. It claims that the vast majority of its revenues come from energy sales, not from the profits it receives from its multi-level marketing system.

This appeal, however, primarily involves Ignite and its multi-level marketing venture designed to promote Stream's energy services to consumers.[1] To participate in Ignite's marketing program, a willing individual pays a fee, typically $329, and may also pay an additional, but optional, monthly fee for an Ignite-based website, or "homesite," to promote his or her Ignite marketing efforts. In return, the individual becomes an "Independent Associate," or "IA," within the Ignite program and receives marketing materials along with opportunities to attend training sessions hosted by Ignite executives and other successful IAs. The IAs may then recruit potential energy customers for Stream as well as additional IAs to join the Ignite program.

Ignite compensates IAs in three primary ways. First, as the Defendants emphasize, IAs receive a monthly commission based on the number of customers they have recruited to purchase energy from Stream. Ignite calls this income Residual Income or Monthly Energy Income ("MEI"). Second, IAs receive compensation for recruiting other IAs into Ignite, which Ignite calls Leadership Income. Finally, Ignite also compensates IAs for completing an initial recruit-

[1] Many of the individual Defendants in this appeal came to Ignite after working at Excel Telecommunications, a failed long-distance company that offered long-distance services in the deregulated telecommunications market through a similar multi-level marketing program.

ment of energy customers and IAs in a prompt manner. Ignite has developed a "3&10" model, through which a new IA recruits three new IAs and ten new customers. By meeting various targets, an IA is entitled to receive various payments of what Ignite calls Quick Start Income.

An IA's success depends primarily on recruiting a "downline" of *other* IAs who, in turn, recruit *other* IAs and customers into the Ignite program. As an IA recruits more IAs into the Ignite program, the IA proceeds up an Ignite ladder of leadership positions. All IAs start out as Directors, the lowest level of the Ignite leadership. By recruiting more IAs, the IA can move up three additional leadership levels, to Managing Director, then to Senior Director, and finally to Executive Director. By building a downline, the IA also receives MEI for the customers whom the downline IAs recruit to join Stream, along with bonuses for recruiting additional IAs. As Ignite touts in its marketing materials, "the power of Ignite's Leadership Income plan is that these bonuses are paid not just to five levels, but on every level to unlimited depth. That's geometric growth to infinity!"

For its top recruiters, Ignite also developed a "Presidential Director" level. Presidential Directors received luxury cars and other perks from Ignite. Many of these individuals promoted the opportunities of the Ignite program at events across the country.

Ignite has promoted its multi-level marketing program through many forms of media. Ignite developed a magazine called *Empower*, which featured profiles of the most successful IAs along with other stories encouraging prospective IAs to join Ignite. Presidential Directors promoted Ignite through presentations to IAs and prospective IAs. For example, Presley

Swagerty, known as the "Coach," and Randy Hedge, known as the "Cowboy," were particularly prolific in promoting Ignite through videos, presentations, and conference calls. Ignite also produced a series of videos and presentations explaining the basic structure of the program, and IAs were encouraged to show these presentations to prospective IAs to inform them about the program.

In addition to its own promotional activities, Ignite drew attention from a number of outside media sources. The Plaintiffs allege that, as early as 2005, the *Dallas Morning News* published a story on Ignite that included a quote from a marketing professor suggesting that Ignite was a pyramid scheme. In years following, the *Dallas Morning News*, the *Atlanta Journal-Constitution*, and other media outlets began to feature stories indicating that Ignite may be a pyramid scheme. Indeed, IAs reported to Ignite executives and the Presidential Directors that many prospective IAs asked them to address rumors that Ignite was an illegal pyramid scheme.

Although the parties appear to dispute the numbers, the clear majority of IAs have lost money as a result of participating in Ignite. In contrast, a small number of individuals have made significant sums of money.

This suit was brought by former IAs Juan Ramon Torres and Eugene Robison, who allege that Stream, Ignite, and various individual defendants have violated RICO. They have sought to certify a class consisting of those IAs who have lost money as a result of participating in Ignite's program. The district court

granted the Plaintiffs' motion and certified a class.[2] In its certification order, the district court considered whether the Plaintiffs could establish the proximate cause element of their RICO claim through common evidence of reliance. The district court concluded that the Plaintiffs could not establish classwide reliance on any particular misrepresentation; but it certified the class because it ruled that the Plaintiffs were entitled to an inference of reliance, which a jury could draw from the fraudulent and illegal nature of a pyramid scheme. Thus, the district court held that, if the Plaintiffs can prove that Ignite is a pyramid scheme, which the parties concede requires only common proof, then the jury is entitled to infer that the Plaintiffs only invested in the pyramid scheme in reliance on an implicit representation that Ignite is a legitimate business. This interlocutory appeal followed.

Thus, to summarize, the Plaintiffs seek to certify a class action for victims of an alleged pyramid scheme. The underlying cause of action is brought under RICO. The Plaintiffs allege that they were defrauded because the Defendants misrepresented to them that Ignite was a legitimate company when it was not. Ordinarily, the Plaintiffs must show that the class relied on this misrepresentation in making their investment. The Plaintiffs have not offered evidence that such an actual representation was ever made or

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[2] The district court defined the class more broadly than the Plaintiffs' proposed definition, extending the class to "all IAs who joined Ignite on or after January 1, 2005, through April 2, 2011, excluding the IAs subject to the Eleventh Circuit opinion in *Betts* [*v. SGE Management, LLC*, 402 F. App'x 475 (11th Cir. 2010)]." Thus, the district court did not explicitly limit the class to consist only of those IAs who lost money by participating in Ignite.

that they relied on such a misrepresentation. They argue, however, that such a general representation, and reliance thereon, can be inferred, essentially because such a representation is inherent in all investment opportunities and it is only on such a reliance that a rational investor would invest in Ignite.

To establish a class action, the Plaintiffs must show that the evidence of reliance is common to the class and predominates over individualized issues of reliance under Rule 23(b)(3). In this connection, the Plaintiffs must show (if inferred reliance is indeed a viable theory) that there is no other reasonable scenario that could explain the investors' decisions to invest, other than the inferred misrepresentation that Ignite offered a legitimate business opportunity. Here, we hold that the Plaintiffs have not met this standard.

This appeal involves several complex and overlapping issues. First, we will discuss the standard for class certification under Rule 23(b)(3), along with the substantive elements of the Plaintiffs' RICO claim, which bears on the class certification issue. We will also explain the district court's basis for class certification, which the Plaintiffs adopt on this appeal. Then, we will describe the typical aspects of a pyramid scheme, along with the specific representations, which suggest that Ignite might be a pyramid scheme. Finally, we will consider the relevant legal authorities and explain why the Plaintiffs' case falls short under these precedents. For these reasons, we will conclude that the Plaintiffs' class must be decertified.

II.

A.

The Defendants' appeal seeks an interlocutory review of the district court's ruling on class certification.

Thus, we begin with a discussion of the standards applicable to our review of class certification orders.

District courts exercise substantial discretion when deciding whether to certify a class, and we will reverse only if the district court abused its discretion or applied an erroneous legal standard. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999). At the same time, we are mindful that "[t]he 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)). Consequently, a plaintiff seeking to certify a class "must affirmatively demonstrate his compliance" with Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 2551. The Plaintiffs have the initial burden of demonstrating that the litigation should proceed on a class-wide basis. *See Howard v. City of Greenwood*, 783 F.2d 1311, 1313 n.2 (5th Cir. 1986) (concluding that "the plaintiffs failed to sustain their burden of proving" the necessary commonality to support class certification under Rule 23(b)(3)).

On appeal, the Plaintiffs have focused their argument to contend that class certification was appropriate specifically under Rule 23(b)(3).[3] "A class may be certified under Rule 23(b)(3) only if it meets the four

[3] In the district court, the Plaintiffs sought certification under Rule 23(b)(2) and Rule 23(b)(3). The district concluded that the Plaintiffs were not entitled to certification under Rule 23(b)(2) but certified the class under Rule 23(b)(3). Both parties now focus exclusively on certification under Rule 23(b)(3).

prerequisites found in Rule 23(a) and the two additional requirements found in Rule 23(b)(3)."[4] *Mullen*, 186 F.3d at 623. The parties do not presently dispute that the Plaintiffs meet the requirements of Rule 23(a). Instead, the arguments address whether the Plaintiffs have satisfied Rule 23(b)(3), which permits class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available

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[4] Rule 23(a) provides as follows:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Then, Rule 23(b)(3) provides that the district court may certify the putative class if:

the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Although Rule 23(b)(3) requires both "predominance" of common questions of law and fact and "superiority" of a class action as a remedy, the Defendants here focus only on the predominance requirement.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). In short, "[w]here the plaintiff seeks to certify a class under Rule 23(b)(3), the Rules demand 'a close look at the case before it is accepted as a class action.'" *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 554 (5th Cir. 2011) (quoting *Amchem*, 521 U.S. at 615).

B.

We must consider the predominance issue under Rule 23(b)(3) in the light of the elements of the Plaintiffs' cause of action. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (recognizing that "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues"). The Plaintiffs' claims here are RICO claims; thus, we turn to discuss the elements of a civil RICO claim.

RICO provides, *inter alia*:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

> racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Additionally, RICO prohibits conspiracies to violate § 1962(c). *Id.* § 1962(d). A plaintiff may bring a civil action for RICO violations under § 1962 if he or she is "injured in his business or property *by reason of a violation* of section 1962 of this chapter." *Id.* § 1964(c) (emphasis added).

This appeal thus implicates § 1964(c), which we have held requires "a showing that the fraud was the 'but for' cause and 'proximate' cause of the injury." *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003). The Plaintiffs alleged a pattern of racketeering activity consisting of acts of mail and wire fraud. *See* 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud). We have traditionally required a plaintiff presenting a civil RICO claim based on predicate acts of mail and wire fraud to establish proximate cause by showing that he or she relied on a defendant's fraudulent misrepresentations. *See In re Mastercard Int'l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) ("[A]lthough reliance is not an element of statutory mail or wire fraud, we have required its showing when mail or wire fraud is alleged as a RICO predicate."). The Supreme Court has since held, however, "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." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 661 (2008). Although *Bridge* dispenses with *first* party reliance, "none of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail

without showing that *someone* relied on the defendant's misrepresentations." *Id.* at 658. The extent to which *Bridge* alters the reliance requirement in RICO class actions is not at issue on appeal, however, as the Plaintiffs concede that proximate cause in their case depends on reliance. The Plaintiffs argue instead that they have set forth an adequate common theory of reliance.

C.

The Plaintiffs must establish that they can prove reliance through common evidence, as we have said that a class action cannot be certified if proof of reliance will depend on individualized evidence:

> [A] district court [considering a motion for class certification] must perform sufficient analysis to determine that class members' fraud claims are not predicated on proving individual reliance. If the circumstances surrounding each plaintiff's alleged reliance on fraudulent representations differ, then reliance is an issue that will have to be proven by each plaintiff, and the proposed class fails Rule 23(b)(3)'s predominance requirement.

Unger v. Amedisys Inc., 401 F.3d 316, 321 (5th Cir. 2005). The Defendants argue that the Plaintiffs' theory of reliance is necessarily an individualized inquiry.

Relying on the extensive record, the Defendants point out that the Plaintiffs were subject to abounding representations about Ignite, including: (1) positive and negative treatment in the popular press; (2) Ignite's standard forms and marketing materials, which new IAs received; and (3) varying presentations from Presidential Directors who attempted to recruit new

IAs to join Ignite in presentations throughout the country. Because the record establishes that each Plaintiff was subject to different representations about Ignite, the Defendants argue that each Plaintiff must establish causation by: identifying a particular misrepresentation that he or she received; and then showing that the misrepresentation *caused* the Plaintiff to invest in Ignite, thereby causing his or her loss. Similarly, the Defendants argue that even if the Plaintiffs can make this showing, they are also entitled to rebut this evidence with other evidence in the record, which might suggest that the Plaintiffs knew that Ignite was an illegal pyramid scheme. *See Sandwich Chef*, 319 F.3d at 218–19 (recognizing that knowledge, which is actually a defense to causation, is a relevant consideration when addressing class certification). In sum, the Defendants contend that the nature of the proof in this case on the issue of proximate cause will necessarily be individualized, meaning that common issues of law and fact will not predominate over this significant individualized issue.

The district court recognized that the Plaintiffs could not show through common proof that they received an actual common misrepresentation about Ignite. Instead, the district court acknowledged that the Plaintiffs would have to show the receipt of a misrepresentation through individualized proof and that it was certainly possible that some class members may have known from Ignite's marketing pitches that it was a pyramid scheme. Nonetheless, the district court certified the class on a second ground, that is, it concluded that a jury could "infer" reliance if the Plaintiffs could establish that Ignite was a pyramid scheme. The district court explained its decision as follows:

> Although the litany of reasons that 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. That the defendants' business opportunity is allegedly an unlawful pyramid scheme in which the vast majority of participants are sure to lose money, gives rise to an inference that the only reason the class members paid the $329 sign-up fee (and possibly other fees) is because the true nature of the 'opportunity' was disguised as something it was not. As such, establishing proximate cause would not be an individualized inquiry; rather, it could be determined as to all the class members at once. 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, a showing that the program was actually a facially illegal pyramid scheme would provide the necessary proximate cause.

On appeal, the Plaintiffs defend class certification on this basis, arguing that they can establish proximate cause merely by establishing that Ignite was a pyramid scheme.

The Plaintiffs' theory relies not on a particular misrepresentation, but instead on a "common sense" inference of reliance, which exists from the nature of pyramid schemes. According to the Plaintiffs, a pyramid scheme is a unique species of fraud because pyramid schemes are both illegal and require participants to profit in the scheme by victimizing others, which, in the context of Ignite, were most often friends

and family. Thus, the Plaintiffs argue that the fact-finder is entitled to infer that the Plaintiffs relied on a misrepresentation regarding Ignite's legitimacy if the Plaintiffs can prove that Ignite is a pyramid scheme, which the parties agree can be done through common proof. Thus, the common proof that the Plaintiffs offer in this case is evidence that Ignite is actually a pyramid scheme; and this evidence, they claim, is sufficient to establish causation as well.

In response to this argument, the Defendants argue that the individualized representations are still relevant. Even if Ignite was a pyramid scheme, they say, it provided investors at the top of the scheme with an opportunity to profit. Some individuals who lost money might still have invested in the hope that they would be near the top of the pyramid. In this connection, pyramid schemes are little different from other species of fraud— some knowing participants in the fraud will profit, whereas many others will lose money. Thus, the Defendants urge us to decertify the class so that the Defendants can rebut the Plaintiffs' common theory of reliance through individualized trials.

For the reasons that will follow, we conclude that the Plaintiffs' claimed common theory of reliance does not hold together.

III.

First, the Plaintiffs' theory of reliance depends on the premise that a pyramid scheme is a unique type of fraud. We thus begin with a brief discussion of pyramid schemes and turn to the actual representations about the Ignite business, which are part of the record in this case.

A.

The Plaintiffs rely on *Webster v. Omnitrition International, Inc.*, 79 F.3d 776 (9th Cir. 1996), to define the basic characteristics of an illegal pyramid scheme. We now turn to the description of pyramid schemes in that case.

Initially, we should be clear that a "pyramid scheme" can be distinguished from the many types of businesses organized in a "pyramid-shaped" hierarchical structure. A true pyramid scheme, as that term is used here, refers to a type of illegal and fraudulent activity, structured in a fashion that it "must eventually collapse." *Id.* at 781. Pyramid schemes, unlike pyramid-structured organizations, will collapse because such schemes are designed to produce income from the continuous recruitment of new members into a constantly narrowing sales market and not upon sales revenue from a legitimate product to consumers in a normal market. *Id.* at 781–82. In short, the scheme collapses when those recruited to sell dwarf the market of those available to buy.

There are typically two elements to such a pyramid scheme: (1) payment to an entity in return for the right to sell its product; and (2) the right, in exchange for the payment, to receive rewards from the entity that are based almost exclusively on the recruitment of new program participants. *Id.* at 781. Under this standard, some businesses that engage in retail sales may still be a pyramid scheme if "[t]he promise of lucrative rewards for recruiting others tends to induce participants to focus on the recruitment side of the business at the expense of their retail marketing efforts, making it unlikely that meaningful opportunities for retail sales will occur." *Id.* Thus, the primary factor in deciding whether a business is a pyramid

scheme is whether the business focuses exclusively or almost exclusively on *recruiting* as opposed to *sales*.

Pyramid schemes, however, are not losing propositions for all investors. Instead, "pyramid schemes may make money for those at the top of the . . . pyramid, but 'must end up disappointing those at the bottom who can find no recruits.'" *Id.* at 781 (quoting *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975)). Thus, an individual who participates in a pyramid scheme necessarily takes a gamble that she will be reasonably near the top of the pyramid. Although an individual may lose money if it turns out that she invested at the wrong time, this misjudgment does *not*, a fortiori, mean that the individual is irrational. Such an investor may have rationally assumed both that the business was a pyramid scheme *and* that the investment was worth the gamble of being near the top of the pyramid. So, with this background, we turn to examine some of the representations regarding Ignite in this case.

B.

The record suggests that Ignite often promoted its multi-level marketing program as just this sort of gamble to prospective IAs. Ignite's Presidential Directors, who traveled the country promoting Ignite to IAs and prospective IAs, implied that Ignite was a pyramid scheme. In presentations to IAs and prospective IAs, these officers repeatedly underscored that the way to make money was by *recruiting other IAs*, not *recruiting customers*. The record shows, for example, that Greg McCord admonished IAs in one presentation that "if you keep concentrating on customers, you won't make money." Although these Presidential Directors did not use the term "pyramid scheme" to de-

scribe Ignite, a reasonable prospective IA could reasonably construe these representations as the hallmarks of a pyramid scheme: Ignite predominately pushes recruiting over selling, and thus expanding the number of IA participants, over customer acquisition.[5] *See Webster*, 79 F.3d at 782.

Some representations were even more direct. Presidential Director Randy Hedge repeatedly referred to the multi-level marketing business as a "pyramid." To illustrate, he told his audience on one occasion: "I don't care if you call [Ignite] an octagon, parallelogram, rectangle—they're sending me a check." In another presentation, he shared an anecdote about recruiting an individual into Ignite after calling it a "pyramid deal" because the prospective IA was only really interested in whether the deal was "makin' any money." Similarly, various media outlets began to investigate whether Ignite was a pyramid scheme. The Plaintiffs suggested in their complaint that the *Dallas Morning News* published a story in 2005, which contained an indication that Ignite could be an illegal pyramid scheme. Other media outlets produced similar critical reports about Ignite in 2010 and 2011.

These promotions, although supportive of the Plaintiffs' contention that Ignite is a pyramid scheme, also buttress the Defendants' position in opposition to class certification, i.e., these comments suggest that the Plaintiffs will have to prove RICO causation by relying on individualized, and not common, proof of reliance. The Plaintiffs argue that these individualized

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[5] Although many of these pitches targeted IAs, the Presidential Directors apparently often gave these presentations at widely-attended, "revival style" events attended by IAs and prospective IAs alike.

representations about Ignite drop from the case, however, based on the strength of their proposed inference. Specifically, the Plaintiffs claim that a jury should infer that the Plaintiffs did *not* rely on these representations because a rational investor would not participate in a pyramid scheme.

IV.

Turning to the Plaintiffs' argument that reliance may be inferred, we hold that reliance cannot be inferred merely because a business is alleged to be a pyramid scheme, particularly when the record in this case suggests that investors were told that it was a pyramid scheme. Such an inference is unsupported by our precedents or by the precedents in other circuits.

A.

1.

We begin with a discussion of our relevant precedents. Generally, proximate cause of the alleged injury (here, misrepresentations caused monetary loss) is a distinct element of a RICO claim, which must be established separately from proving an underlying fraud. Thus, even *if* the Plaintiffs can establish through common evidence that the Defendants engaged in fraudulent or illegal conduct, common issues of law and fact do not predominate over individualized issues unless the Plaintiffs can establish through common evidence that the fraudulent conduct *caused* their injury. *See Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001) ("While there may be an issue of fact common to all class members—the question of whether or not Mobil was a valid subscriber to the workers' compensation system—that question does not predominate over the question of whether or not each member of the class suffered a RICO injury."). In

Patterson, we concluded that a plaintiff could establish proximate cause, and thus prove a RICO injury, by showing "that she could have and would have sued Mobil, but did not do so because the asserted false statements led her to believe her suit to be barred by the workers' compensation regime." *Id.* Obviously, such a showing of proximate cause would depend on the individual circumstances and motivations of each plaintiff; and these types of individualized inquiries "defeat the economies ordinarily associated with the class action device." *Id.*

This point is illustrated by a case that bears a striking resemblance to this case. *Sandwich Chef*, 319 F.3d at 224. In *Sandwich Chef*, the district court certified a class action against a group of insurance companies, on the basis that they had charged excessive premiums by sending inflated invoices to policyholders and misrepresented the correctness of the premium charged. *Id.* at 211. Evidence in the record also suggested that the charged rates were illegal. *Id.* at 212. Nonetheless, we decertified the class. *Id.* at 224. We reasoned that the plaintiffs in *Sandwich Chef* could not prove proximate cause through common proof, because individualized issues of knowledge and reliance would overwhelm any common proof. *Id.* at 220–21. Specifically, we pointed out that the plaintiffs and the defendants negotiated the insurance policies in individualized transactions; and evidence in the record suggested that the plaintiffs could have voluntarily assented to the illegal rate structures so that they could receive other benefits in return. *See id.* at 212–13, 220–21. Because the proof suggested that at least some of the plaintiffs could have knowingly participated in the fraud, we held that the defendants were entitled to undercut the plaintiffs' evidence of reliance "with evidence that might persuade the trier of

fact that policyholders knew the amounts being charged varied from rates filed with regulators and that they had agreed to pay such premiums." *Id.* at 220.

In sum, our precedents do not support an inference of reliance from fraudulent conduct, even when the fraudulent conduct at issue is illegal. Instead, we have recognized that, in most cases, reliance will naturally turn on evidence that will differ from case to case. Individual plaintiffs will receive different pitches to join a business, and they will have differing expectations in terms of what they expect to receive from the business. Generally, the defendants are entitled to probe these differences at trial by presenting evidence that the plaintiffs knew of the fraud, yet nonetheless participated in it because they believed that it would benefit them.

2.

The Plaintiffs argue, however, that precedents in other circuits allow for an inference of reliance in certain RICO fraud cases; and they further contend that such an inference is warranted on the facts of this case. The Plaintiffs primarily rely, on appeal, on three decisions from other circuits, to which we now turn.

First, they point to *Klay v. Humana*, in which the Eleventh Circuit approved the certification of a class of physicians who alleged that a group of health maintenance organizations ("HMOs") defrauded the physicians out of adequate reimbursement for their services rendered by programming their computer systems to pay the physicians less than they were entitled. 382 F.3d 1241, 1260 (11th Cir. 2004). The *Klay*

court concluded that the plaintiffs' claims could be certified as a class action because a jury could infer reliance, stating:

> It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations and assumed they would be paid the amounts they were due. A jury could quite reasonably infer that guarantees concerning physician pay—the very consideration upon which these agreements are based—go to the heart of these agreements, and that doctors based their assent upon them. . . . Consequently, while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue).

Id. at 1259. The Second Circuit reached a similar conclusion in a case involving fraudulent overbilling. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013). Relying on *Klay*, the *Foodservice* court allowed the case to proceed as a class action, in part because "payment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed." *Id.* at 120.

Finally, the Tenth Circuit in *CGC Holding Co. v. Broad & Cassel* confronted a certified class of prospective borrowers who paid a non-refundable "loan commitment fee" for a loan that the lender never intended to issue. 773 F.3d 1076, 1082 (10th Cir. 2014). There,

the court concluded that the class could proceed because a fact-finder could infer that the plaintiffs paid the fee in reliance on a misrepresentation that the transaction was legitimate. *See id.* at 1091–92. Specifically, the court reasoned that such an inference was appropriate in significant part because the victims of the fraud "were completely deprived of any benefit from their transaction." *Id.* at 1093.

In sum, these cases allow for class certification based on an inference of reliance when all individualized issues truly drop out of the case. In each of these cases, a class of plaintiffs paid a sum of money or declined full payment for services rendered without receiving anything of value in return. Additionally, there was no evidence in the cases to suggest any other rational explanation for the plaintiffs' behavior other than that they were duped by the defendants. Thus, those courts allowed class certification because the *only* reasonable explanation for the plaintiffs' behavior was that they relied on a misrepresentation.

B.

Turning to the record in this case, we conclude that the Plaintiffs' evidence does not support a sufficient inference of reliance. Individuals may knowingly choose to invest in a pyramid scheme such as Ignite for any number of reasons, most notably because Ignite provides an opportunity to make money. Thus, the class cannot be certified under our precedents or the precedents cited by the Plaintiffs because individualized issues of reliance and knowledge will be relevant to each Plaintiff's case.

1.

First, the mere fact that this case involves a pyramid scheme does not take this case outside our well-

settled precedents regarding predominance in both *Patterson* and *Sandwich Chef*. Although the Plaintiffs may be able to establish common proof of a fraud, the common evidence that a fraud existed is not common evidence that the Plaintiffs were *injured by* the fraud.

This case is less compelling for class certification than *Patterson*. In *Patterson*, there was a common misrepresentation, i.e., the defendant allegedly misrepresented to them that it had workers' compensation insurance. Here, it is not clear that all Plaintiffs were told that Ignite was a lawful business, given the differing pitches to differing prospective IAs. It appears that some prospective IAs received only versions of the pitch that Ignite provided an opportunity for them to make significant sums of money. Additionally, even if the Plaintiffs here *could* establish an actual common misrepresentation that Ignite was a legitimate business, they would still have to show that they were injured by the misrepresentation. In *Patterson*, we recognized that the plaintiffs had to show that they would have sued Mobil had they known that the misrepresentation about its insurance was false. 241 F.3d at 419. Just as there are many reasons why a party would choose to file or not file a lawsuit, there are many reasons why someone would choose to join or not join a pyramid scheme. The evidence here suggests that investing in Ignite was quite similar to gambling—individuals could have become IAs as "a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004).

Nor is a pyramid scheme unique because it is illegal. In *Sandwich Chef*, the plaintiffs accused the de-

fendants of lying to state regulators and charging illegal rates. 319 F.3d at 212. Nonetheless, we also pointed out that the evidence suggested that the plaintiffs could very well *want* their insurance policies to deviate from filed rates because such deviations could actually benefit the plaintiffs in other respects. *Id.* at 213. Thus, we decertified the class because the defendants were entitled to show through individualized evidence that the plaintiffs "knew the amounts being charged varied from rates filed with regulators and that they had agreed to pay such premiums." *Id.* at 220.

A pyramid scheme is no different from the insurance regime in *Sandwich Chef*. By joining Ignite, an IA had the opportunity to make money, perhaps even significant sums of money, by building a large pyramid beneath them. Although the Plaintiffs suggest that they would not join a pyramid scheme like Ignite because such a scheme would depend in large part on defrauding friends and family members, this supposed distinction is unavailing. First, an individual could rationally believe that he could make money for friends and family members if they were *all* investing at the top of the pyramid. Indeed, the record reflects that the Presidential Directors regularly told prospective IAs that they had enriched their spouses, children, and friends by bringing them into the Ignite program. Second, the same arguments could be made about gambling, i.e., that spending money on gambling harms an individual's family. But gambling is just the type of activity where no such broad assumptions can be made about the reasons for human behavior. *See Poulos*, 379 F.3d at 668. And finally, the Plaintiffs have cited no case law that has adopted such an elevated view of human nature.

Thus, the Plaintiffs will have to rely upon individualized proof, and not a generalized inference, to establish proximate cause in each particular RICO case.[6]

2.

In that connection, the Plaintiffs' cases also fail to support class certification on the basis of an inference of reliance. *Klay*, *Foodservice*, and *CGC* all involved fraudulent schemes in which the plaintiff victims had no hope of recovering their investments. The courts could not point to any evidence that might provide an alternative explanation for the plaintiffs' conduct other than that they relied on a misrepresentation that they might profit.

By contrast, an investor could reasonably choose to knowingly invest in a pyramid scheme in the hope that they would make money. As we have already explained, a pyramid scheme provides an opportunity for those at the top of the pyramid to profit from their investments. *Webster*, 79 F.3d at 781. While many of the Plaintiffs might have decided to invest in the scheme in the belief that it was legal, it is equally possible that many of the Plaintiffs chose to invest in the scheme in the belief that, legal or illegal, it provided them with an opportunity to make money.

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[6] We note as well that, even if the Plaintiffs could establish reliance through an inference, the Defendants would still be entitled to offer the evidence in the record regarding the misrepresentations about Ignite to probe each Plaintiff's knowledge in individualized trials. *See Sandwich Chef*, 319 F.3d at 220. Knowledge is a defense to a RICO fraud claim, and the Defendants would be entitled to present this evidence on an individualized basis, as pertains to each Plaintiff. *See id.* at 220–21.

Additionally, the representations at issue in this litigation are far more varied than the misrepresentations in *Klay*, *Foodservice*, and *CGC*. In each of those cases, the many individual representations essentially said the same thing—the invoices and bills provided either an amount due or an amount paid, representing that the stated amount was correct. By contrast, the representations here vary in their contents. Some of Ignite's marketing materials touted its legitimacy, whereas other presentations undermined that legitimacy. To recover on their RICO claims, the Plaintiffs must show that they relied upon the former materials, and not the latter; they may only do so through individualized proof. Thus, the class must be decertified.

V.

In sum, the district court erred in certifying the class because common questions of law and fact will not predominate over individualized inquiries into causation and knowledge. The case is therefore REMANDED for the entry of an order, VACATING the order of certification and for such further proceedings as may be appropriate and not inconsistent with this opinion.

VACATED and REMANDED

WIENER, Circuit Judge, dissenting:

I am compelled to respectfully dissent today by the realization that the panel majority's opinion will vaccinate illegal pyramid schemes against *all* civil litigation, immunizing them not just from class actions but ultimately from all judicial challenges. By erecting this barrier to class certification based on nothing more than the theoretical possibility of prior

knowledge of illegality, the panel majority creates an insurmountable barrier in this circuit to future class certification of cases that claim the presence of an illegal pyramid scheme. But, even worse, because individuals who are duped into joining such schemes uniformly invest relatively few dollars, none will possibly be able to afford to litigate their individual claims separately. Absent the availability of a class action, there simply will be no possibility of court challenges to such pyramid schemes.

The majority opinion will 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. Because illegal pyramid schemes are certain to be indistinguishable (to the average consumer) from legal multi-level marketing programs, all such arrangements are likely to present some indication of "illegality." Thus, defendant schemers will always have some basis to demonstrate *possible* knowledge of the fraud on the part of potential class members and thereby defeat reliance.

I readily acknowledge that even if a class action were certified here, the defendants might go on to prove that their enterprise is legal and legitimate.[1] But, that will never be known. Absent the availability of a class action such as the one sought in the instant civil RICO suit, no putative prevailing plaintiff will be able to afford to litigate his or her claim individually.[2] The victims of such schemes are never big investors with huge losses (as they usually are in Ponzi schemes). Rather, they are virtually always unsophisticated individuals whose relatively small losses can

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[1] Any inference of reliance at the class certification stage is only that and nothing more: "the sole result of this inference is that the class members will not be required to testify as to their reliance on the [defendants'] misrepresentations and omissions." *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1093 (10th Cir. 2014). The "inference does not shift the burden of proof at trial on the element of RICO causation (or any other elements of the claim)—plaintiffs will still have to prove RICO causation by a preponderance of the evidence to win on the merits." *Id*. "Similarly, the trier of fact is not required to accept the inference; it is merely permitted to utilize it as common evidence to establish the class's prima facie claims under RICO." *Id*.

[2] *Reyes v. Netdeposit, LLC*, ___ F.3d ___ , 2015 WL 5131287, at *18 (3d Cir. Sept. 2, 2015) ("Class actions are often the only practical check against the kind of widespread mass- marketing scheme alleged here. The individual claims arising from such conduct are usually too small to justify suit unless aggregated in a class action. This is particularly true when, as is often the case, the scheme targets unsophisticated consumers with little disposable income and without the means or wherewithal to seek assistance of legal counsel. As a practical matter, the average victim of such a scheme nearly always finds it far easier—and much cheaper—to reluctantly accept any loss and move on than to undertake the expense and inconvenience endemic in the protracted process of trying to recover a few dollars years later.").

never justify separate litigation of their claims.[3] Absent the availability of a class action through which to pursue the claims of all similarly situated parties in globe, the founders and operators of illegal pyramid schemes will be totally shielded from civil litigation and thus from civil liability. Here, this means that over 200,000 plaintiffs will be left entirely without recourse.

At bottom, this appeal requires us to decide whether aspiring class members—allegedly the victims of an allegedly illegal pyramid scheme—can show proximate causation through common evidence sufficient to satisfy Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement at the initial class certification stage. The defendants contend that the district court erred in certifying the plaintiffs' claim that the defendants induced them to participate in an illegal pyramid scheme by misrepresenting Ignite as a legitimate business opportunity, thereby causing the plaintiffs to suffer monetary losses.

Although the defendants vociferously deny that Ignite is an illegal pyramid scheme, the panel majority selectively cherry picks the factual record to reach the conclusion that it is at least possible that the putative class members had some knowledge that the scheme was illegal. In doing so, the majority allows the defendants to contend that the plaintiffs knowingly participated in the fraud, all the while maintaining that there was none. The majority holds that the mere "possibility" that class members knew of Ignite's illegality creates individualized issues of reliance suf-

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[3] At oral argument, the plaintiffs' counsel represented that the average loss of each potential class member is $200 to $300.

ficient to defeat class certification. I am firmly convinced that, to the contrary, the district court—to which we owe considerable deference—correctly ruled that the plaintiffs can adequately demonstrate proximate causation through common proof, making class certification appropriate. Satisfied that the plaintiffs may rely on a common inference of reliance and that the district court did not err in so holding, I would affirm the district court's class certification. Here's why.

I.

We review a district court's class certification decision under the very deferential abuse of discretion standard "in 'recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation . . . . Whether the district court applied the correct legal standard in reaching its decision on class certification, however, is a legal question that we review de novo.'"[4]

To certify a class, initially the party seeking certification must comply with Federal Rule of Civil Procedure 23. That party must first satisfy Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation.[5] Next, that party must satisfy one of Rule 23(b)'s three provisions.[6] Here, the plaintiffs rely on subsection (3) of Rule 23(b), "which requires that questions of law or fact common to the class predominate over questions affecting only

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[4] *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007) (quoting *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 408 (5th Cir. 1998)).

[5] Fed. R. Civ. P. 23(a).

[6] Fed. R. Civ. P. 23(b).

individual class members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[7] The defendants do not dispute the district court's Rule 23(a) determination and contend only that it erred in finding Rule 23(b)(3)'s predominance requirement met. "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action."[8]

II.

To establish a civil RICO violation here, the plaintiffs must demonstrate proximate causation.[9] Although they need not necessarily prove first-party reliance, the plaintiffs "must establish at least third-party reliance in order to prove causation."[10] The district court held that the plaintiffs may establish proximate causation through common proof. First, the district court recognized Ignite's implicit representation that it is a lawful venture.[11] Second, the district court held that the allegation that the defendants were running an illegal pyramid scheme supports an inference

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[7] *Ahmad v. Old Republic Nat. Title Ins.*, 690 F.3d 698, 702 (5th Cir. 2012) (citing Fed. R. Civ. P. 23(b)).

[8] *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011).

[9] *Bridge v. Phoenix Bond & Indem.* Co., 553 U.S. 639, 654 (2008).

[10] *Id.* at 659, 661 ("RICO's text provides no basis for imposing a first-party reliance requirement.").

[11] The defendants do not dispute this point, yet the majority notes that "it is not clear that all Plaintiffs were told that Ignite was a lawful business . . . ." This statement ignores that the alleged misrepresentation—that Ignite is a lawful venture—is implied.

that the plaintiffs chose to participate in the Ignite program only because its illegal nature was hidden from them. Put simply, the plaintiffs could use a common inference that they relied on the implicit misrepresentation that Ignite presented a legitimate business opportunity. In so holding, the district court found that illegal pyramid schemes present a sure loss for the vast majority of participants. The court stated that "[b]ecause it can rationally be assumed (at least without contravening evidence) that the legality of the Ignite program was a bedrock assumption of every class member, a showing that the program was actually a facially illegal pyramid scheme would provide the necessary proximate cause."[12] Under this theory, if the plaintiffs are able to prove that Ignite was an illegal pyramid scheme—an element that will undoubtedly be satisfied by common proof—they will also prove both a misrepresentation and proximate causation.

As the district court noted, this theory is far from novel. Indeed, many courts, including the Second, Tenth, and Eleventh Circuits, have recognized that class certification is warranted in this context when proximate causation may be established through a "common sense" inference that the class members' actions cannot be explained by anything but reliance on the defendants' conduct.[13] In such cases, courts infer

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[12] *Torres v. SGE Mgmt. LLC*, No. 4:09-CV-2056, 2014 WL 129793, at *9 (S.D. Tex. Jan. 13, 2014).

[13] *See CGC Holding Co*., 773 F.3d at 1089–90 ("In the RICO context, class certification is proper when 'causation can be established through an inference of reliance where the behavior of plaintiffs and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct.'"

(quoting *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.*, 277 F.R.D. 586, 603 (S.D. Cal. 2011)); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 120 (2d Cir. 2013) ("In cases involving fraudulent overbilling, payment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed."); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004) ("It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations [of legitimacy] and assumed they would be paid the amount they were due."); *see also Cohen v. Trump*, 303 F.R.D. 376, 385 (S.D. Cal. 2014) ("Courts have found that reliance can be established on a class-wide basis where the behavior of plaintiffs and class members cannot be explained in any way other than reliance upon the defendant's conduct."); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D. 590, 611–12 (C.D. Cal. 2012) ("That Allianz annuities are allegedly inferior in value and performance to comparable investment products . . . gives rise to an inference that consumers decided to purchase the 'inferior' annuities because of the standardized marketing materials at issue in this litigation, for they otherwise had no reason to do so."); *Minter v. Wells Fargo Bank*, N.A., 274 F.R.D. 525, 546 (D. Md. 2011) ("[I]t is reasonable to infer that plaintiff class members would not have transacted with Prosperity had they known Prosperity was not a legitimate lender . . . ."); *Robinson v. Fountainhead Title Grp. Corp.*, 257 F.R.D. 92, 95 (D. Md. 2009) ("[I]t would be a reasonable inference to assume that a class member who purchased services from Assurance Title relied on the legitimacy of that organization in paying the rate charged."); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 561 (E.D. Va. 2000) ("[Plaintiffs] clearly made payments in reliance upon the assurance that the process of repossession, sale and all subsequent steps were taken in conformity with the law and that their rights were protected. To conclude otherwise would deny human nature, run counter to the traditional presumption in favor of actors operating under rational economic choice, and leave the Court with an absurd conclusion."); *Minterme Peterson v. H&R Block*

that "members of the plaintiff class relied upon the purported legitimacy of the defendant with which they transacted."[14]

For example, in *CGC Holding Co. v. Broad & Cassel*, a class of borrowers sued a group of lenders, claiming that, up front, the lenders fraudulently extracted nonrefundable loan commitment fees from the borrowers for loans that the lenders never intended to provide.[15] There, the plaintiffs sought class certification on the theory "that no rational economic actor would enter into a loan commitment agreement with a party they knew could not or would not fund the loans."[16] The Tenth Circuit held that "plaintiffs' payment of up-front fees allows for a reasonable inference that the class members relied on lenders' promises, which later turned out to be misrepresentations or omissions of financial wherewithal."[17]

Tax Servs., Inc., 174 F.R.D. 78, 84–85 (N.D. Ill. 1997) ("It is inconceivable that the class members would rationally choose to pay a fee for a service they knew was unavailable . . . . The only logical explanation for such behavior is that the class members relied on the RAL Fact Sheet's representation that they could take advantage of RAL by paying the requisite fee.").

[14] *Minter*, 274 F.R.D. at 546.

[15] 773 F.3d at 1080.

[16] *Id.* at 1081.

[17] *Id.* at 1081, 1091–92 ("More specifically the fact that a class member paid the nonrefundable up-front fee in exchange for the loan commitment constitutes circumstantial proof of reliance on the misrepresentations and omissions regarding Hutchens's past and the defendant entities' ability or intent to actually fund the promised loan.").

In *In re U.S. Foodservice Inc. Pricing Litigation*, the Second Circuit upheld class certification in a similar context.[18] There, customers alleged that a food distributor engaged in a fraudulent overbilling scheme by producing inflated invoices, and the district court granted class certification. On appeal, the distributor asserted that individualized issues of reliance should defeat certification. The Second Circuit upheld the class certification, holding that proximate causation could be proved through a generalized inference of reliance:

> In cases involving fraudulent overbilling, payment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed. Fraud claims of this type may thus be appropriate candidates for class certification because "while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue)."[19]

Finally, in *Klay v. Humana, Inc.*, physicians alleged that health maintenance organizations (HMOs) conspired to underpay them for their services.[20] The alleged misrepresentations at issue were the HMOs' assurance that they would reimburse the physicians

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[18] 729 F.3d at 120.

[19] *Id*. (quoting *Klay*, 382 F.3d at 1259).

[20] 382 F.3d at 1246.

for medically necessary services and their provision of explanation of benefits (EOB) forms representing that they paid the physicians the proper amounts.[21] Despite recognizing individualized issues of reliance surrounding the EOB forms, the Eleventh Circuit found no such issues regarding the HMOs' "antecedent representations about [their] reimbursement practices":

> It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations and assumed they would be paid the amounts they were due. A jury could quite reasonably infer that guarantees concerning physician pay—the very consideration upon which those agreements are based—go to the heart of these agreements, and that doctors based their assent upon them.[22]

Rejecting the district court's analysis and the applicability of this line of cases from other circuits, the majority now holds that the plaintiffs here cannot establish proximate causation through common proof because a few potential class members *might* have known of Ignite's illegal nature. Based on that theoretical possibility that a class member might have had actual knowledge of the scheme's illegality, the majority jumps to the conclusion that individual issues of reliance predominate. In so doing, the majority fundamentally misunderstands—or misrepresents—the nature of pyramid schemes and ignores the absence of evidence, as found by the district court, suggesting

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[21] *Id*. at 1259.

[22] *Id*.

that any class member had knowledge of Ignite's alleged illegality. The majority further errs in assuming that rational economic actors would knowingly participate in an illegal pyramid scheme. This leads to the majority's stripping these and future plaintiffs of any means to pursue class actions against pyramid schemes in this Circuit. And this, in turn, immunizes such illegal schemes from any judicial challenge because individual losses can never justify solo litigation of such claims.

A.

First, the majority's conclusion that the class members might have recognized the Ignite program as an illegal pyramid scheme is based on the false premise that such schemes are easily recognizable. A pyramid scheme is

> 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 the sale of the product to ultimate users.[23]

But alone possessing these two characteristics does not make a pyramid scheme illegal.[24] Rather, "satisfaction of the second element of the . . . test is the *sine*

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[23] *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975).

[24] Indeed, as the defendants note, many, presumably legal, multi-level marketing programs such as Mary Kay, Tupperware, Amway, and Avon use this approach. *See United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 479–80 (6th Cir. 1999) ("Some structures pose less risk of harm to investors and the public, however, and authorities permit these programs to operate even

qua non of a pyramid scheme . . . ."[25] For this reason, in determining a scheme's legality, careful attention must be paid to whether the program emphasizes *recruitment* over *marketing*. Notably, "[n]o clear line separates illegal pyramid schemes from legitimate multilevel marketing programs; to differentiate the two, *regulators* evaluate the marketing strategy (*e.g.*, emphasis on recruitment versus sales) and the percent of product sold compared with the percent of commissions granted."[26] Because illegal pyramid schemes are not easily recognizable and their (temporary) success rests on disguising the scheme, they are "inherently deceptive."[27] Indeed, "the very reason for [their] *per se* illegality . . . is their inherent deceptiveness and the fact that the futility of the plan is not apparent to the consumer participant."[28] Further obstructing a superficial judgment on whether a pyramid scheme is in fact illegal is that internal policies, such as those that "deter inventory loading and encourage retail sales,"[29] must be examined closely. Here, the majority assumes that the information necessary to make this determination was available to the class. But, just because an officer of a corporation—never mind its independent

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though the programs contain some elements of a pyramid scheme.").

[25] *Webster v. Omnitrition Intern., Inc.*, 79 F.3d 776, 781 (9th Cir. 1996).

[26] *Gold Unlimited*, 177 F.3d at 475 (emphasis added).

[27] *Kugler v. Koscot Interplanetary, Inc.*, 293 A.2d 682, 690 (N.J. Super. Ct. Ch. Div. 1972).

[28] *Webster*, 79 F.3d at 788 (citation and quotation marks omitted).

[29] *See id.* at 783 (citing *In re Amway Corp.*, 93 F.T.C. 618 (1979)).

contractors or the media—insinuate that something is pyramid-like does not make it illegal.

The majority posits that isolated representations by Ignite could have or should have put class members on notice that they were joining an illegal pyramid scheme. Stated differently, the majority uses the very evidence on which the plaintiffs rely to establish that Ignite is an illegal pyramid scheme to reject a common inference of reliance. Although the record contains isolated representations by Ignite that emphasize recruiting over marketing or even reference the word "pyramid" in relation to Ignite, these random representations fall well short of those that would be necessary to put enough class members on notice that they were joining an *illegal* pyramid scheme. As courts have long recognized, pyramid schemes are inherently deceptive, and their very success depends on keeping their illegality a secret.

More importantly, the line between a legal "multilevel marketing entity" and an "illegal pyramid scheme" is fuzzy at best. The two are likely indistinguishable to the typical consumer participants or even to the corporate officers themselves. Whether a scheme is illegal is often determinable only after the scheme has failed and extensive litigation. Courts, let alone the typical unsophisticated participants, cannot decide whether or not a scheme is illegal based only on a handful of isolated representations. Yet this is what the majority has done, and this is the very responsibility with which the majority now charges prospective consumer participants in pyramid schemes: they must immediately recognize a scheme as illegal when faced with divergent representations as to marketing and recruitment. It is simply unrealistic to require unsophisticated consumer participants to be so

finely attuned to the intricate mechanics of sophisticated fraudulent schemes and to predict how those schemes will be viewed by regulators and courts.

More concerning to me is the reality that the panel majority's opinion provides illegal pyramid schemers with a free pass to avoid any court challenge by immunizing them from class actions. The majority allows such schemers to maintain the appearance of legitimacy while injecting just enough suspicion into the consumer marketplace to defeat class certification. Simply warning participants that "if you keep concentrating on customers, you won't make money," referring to the scheme as "an octagon, parallelogram, [or] rectangle," and calling the scheme a "pyramid deal," will now be sufficient to avoid all litigation and thus all liability. In other words, even if the program otherwise holds itself out as a legitimate business opportunity and even emphasizes, as Ignite did, the importance of marketing over recruiting,[30] isolated intimations of illegality or stray remarks are all that it

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[30] At least one iteration of Ignite's "Independent Associate Terms & Conditions" required participants to assent to the following acknowledgment:

> I understand that I will not receive any compensation whatsoever for the act of sponsoring or recruiting, and that I will only be compensated for selling Stream Energy products and services to customers and based upon activities of other IAs only to the extent of sales of Stream Energy products and services to customers.

(Underlining in original.) In its briefing, the defendants again confirm this point: "The *only* way an IA can receive any compensation is to sell energy to customers. Stream Energy pays *zero* compensation solely for recruiting." (Emphasis in original.)

will take to put prospective consumer participants on notice of the fraud.[31]

B.

Second, even if participants could have reasonably recognized Ignite as an illegal pyramid scheme, I am

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[31] Recently, the Third Circuit recognized and avoided a similar problem to the one the majority now creates. In *Reyes*, 2015 WL 5131287, at *1, the plaintiffs sought certification on a RICO sham-enterprise theory, alleging that telemarketing firms contacted unsuspecting individuals and, in offering them something of little or no value, obtained bank account information later used to make unauthorized debits from the individuals' bank accounts. Recognizing the class members' sham theory of liability, the district court found that the class members failed to satisfy Rule 23(b)(3)'s predominance requirement "because different sales pitches were used and different products were pitched." *Id*. at *17. The Third Circuit rejected this analysis, holding:

> if absolute conformity of conduct and harm were required for class certification, unscrupulous businesses could victimize consumers with impunity merely by tweaking the language in a telemarketing script or directing some (or all) of the telemarketers not to use a script at all but to simply orally convey a general theme designed to get access to personal information such as account numbers.

Id. The court recognized further: although such subtle but irrelevant variations in the manner of defrauding members of the public would not insulate unscrupulous marketers from liability in individual suits, it would—for all practical purposes—insulate them from class actions. An interpretation of Rule 23 that places class actions beyond the reach of consumers who have been victimized by fraudulent schemers who are wise enough to adopt schemes with subtle (but meaningless) variations would invite the kind of consumer fraud that . . . is alleg[ed] here.

Id. at *18.

convinced that the majority errs in rejecting a common inference of proximate causation in the absence of evidence demonstrating that participants had actual knowledge that Ignite was an illegal pyramid scheme. This approach by the majority is inconsistent with our precedent which requires evidence of actual knowledge, not the mere possibility of knowledge. The panel majority approvingly cites *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance*,[32] categorizing it as "a case that bears a striking resemblance to this case." But, the majority ignores a crucial distinction. In *Sandwich Chef*, the insureds alleged that the insurers charged premiums in excess of approved rates and misrepresented the correctness of the premiums charged.[33] We rejected class certification because the insureds could not prove proximate causation through common proof. But there, the insurers not only contended that the insureds "were aware that [the insurance] carriers were charging them more than the filed rates," but also "*introduced evidence* that . . . class members individually negotiated with insurers regarding workers' compensation and insurance premiums."[34] Thus, "[k]nowledge that invoices charged unlawful rates, . . . according to a prior agreement between the insurer and the policyholder, would eliminate reliance and break the chain of causation."[35]

Unlike in *Sandwich Chef*, the district court here expressly found that there was *no* evidence that *any*

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[32] 319 F.3d 205 (5th Cir. 2003).

[33] *Id*. at 224.

[34] *Id*. at 220 (emphasis added).

[35] *Id*.

class member knew Ignite was an illegal pyramid scheme![36] The district court made this finding after hearing argument and testimony, considering the evidence, reviewing the parties' submissions, and examining the record. As here we must deferentially review a district court's factual findings for abuse of discretion, I cannot join the majority in its endeavor to find its own facts without any deference—or recognition that such deference is owed—to the district court's factual determination.[37]

Reversing the district court's finding of an absence of evidence of class members' actual knowledge of the alleged fraud, the panel majority holds that individual issues of reliance predominate based on only a theoretical possibility. Critically, the majority's approach will preclude a predominance finding in each and every class action fraud case that requires a showing of reliance. Indeed, "if bald speculation that some class members might have knowledge of a misrepresentation were enough to forestall certification, then

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[36] *See Torres*, 2014 WL 129793, at *9 ("[I]t 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 . . . ." (emphasis added)). Other courts have distinguished *Sandwich Chef* on the same basis. *See, e.g.*, *In re U.S. Foodservice*, 729 F.3d at 120 (distinguishing *Sandwich Chef* because "the record . . . contain[ed] no such individualized proof indicating knowledge or awareness of the fraud by any plaintiffs" (emphasis in original)).

[37] *See Credit Suisse First Bos.*, 482 F.3d at 380 (We review a district court's class certification decision "for abuse of discretion in recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation . . . ." (quotation marks omitted)).

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 . . . ."[38]

C.

Third, even assuming that an average prospective participant could have reasonably known that Ignite was an illegal pyramid scheme and that there is evidence of this knowledge, I find the panel majority's assumption that a rational economic actor would join an illegal pyramid scheme to be unreasonable. The majority hypothesizes that individuals might join illegal pyramid schemes to exploit them because early investors in such schemes just might reap profits from downstream investors. I note initially that the defendants presented *no* evidence that *any* class member joined or would have joined the Ignite program in spite of its illegality. The defendants only point to evidence of participants profiting from the scheme, contending that this is enough to indicate that a rational actor would knowingly participate in an illegal pyramid scheme. But this syllogism proves too much. That individuals can profit from illegal pyramid schemes does not necessarily support the conclusion that rational individuals will knowingly participate in illegal pyramid schemes.

More to the point, and as the district court noted, even though class members might have joined Ignite

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[38] *In re U.S. Foodservice*, 729 F.3d at 122; *see also Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 118–19 (S.D.N.Y. 2011) ("Sheer conjecture that class members 'must have' discovered [the misrepresentations] is insufficient to defeat Plaintiff's showing of predominance when there is no admissible evidence to support Defendant's assertions.").

for a vast array of reasons, it flies in the face of reason to conclude that any of these reasons conflict with a universal "bedrock assumption" that Ignite presented a legitimate business opportunity. Simply put, in the face of almost certain losses, illegal pyramid schemes do not present the sort of opportunity in which a reasonably informed rational economic actor would invest. "Rational economic actors do not ordinarily conspire to injure themselves."[39] The assumption that class members knowingly participated in an illegal pyramid scheme rests on the slender reed that those class members either sought knowingly to become victims or knowingly to become fraudsters. Critically, in illegal pyramid schemes, it is mathematically inevitable that participants will become victims or will victimize others. It goes too far to assume that rational economic incentives motivate individuals to participate in illegal schemes when faced with these options. But this is what the majority holds.

Belying the logic of its approach, the majority analogizes participating in illegal pyramid schemes to gambling. They reason that knowing participation in an illegal pyramid scheme—an investment opportunity in which the vast majority of participants are sure to face losses or to defraud others—is similar to gambling, a recreational (or compulsive) game of chance.[40] Under this analysis, the majority estimates

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[39] *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001).

[40] *See, e.g.*, N.Y. Penal Law § 225.00(2) ("A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a

that individuals might choose to participate in illegal pyramid schemes for the same reasons they would choose to gamble: to make money, but also as a form of escape, a casual endeavor, or a hobby. Tellingly, though, the most notable cases in which courts have found a host of additional reasons explaining class members' conduct involved gambling and the consumer purchase of "light" cigarettes.[41] In *Poulos v. Caesars World, Inc.*, the plaintiff-gamblers alleged that gambling machine manufacturers and casinos misrepresented electronic gambling devices as presenting true games of chance (like their mechanical counterparts) when, instead, computer programming predetermined individual outcomes.[42] Rejecting class certification, the Ninth Circuit held that individuals choose to gamble for a wide range of reasons, and the fact that a game is truly one of chance is not implicit in every class members' choice to gamble.[43] In other words, because all class members did not necessarily

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certain outcome."); *Id*. § 225.00(1) (defining the term "contest of chance" as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein").

[41] *See Poulos v. Caesars World, Inc*., 379 F.3d 654, 665–66 (9th Cir. 2004) ("[G]ambling is not a context in which we can assume that potential class members are always similarly situated. Gamblers do not share a common universe of knowledge and expectations."); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 225 (2d. Cir. 2008) ("[E]ach plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was 'cool.'").

[42] *Poulo*s, 379 F.3d at 659–60.

[43] *Id.* at 665–66.

rely on electronic gaming devices presenting the same odds (or formulating odds in the same manner) as their mechanical counterparts, an individualized showing of reliance was required.[44]

Here, the plaintiffs' claims would be similar to those raised in *Poulos* only if they had alleged that Ignite misrepresented some intricacy of, for example, its compensation policy. If that were the case, we could correctly conclude that an alleged misrepresentation of the inner workings of Ignite would not warrant an inference of reliance because such information would likely be irrelevant to most class members' choice to participate. But that is not the case here: The plaintiffs allege a much more fundamental misrepresentation by the defendants, *viz.*, that Ignite is a legal venture when, instead, it is an illegal pyramid scheme meant to defraud its participants. As other courts have recognized, the choice to participate in a financial transaction does not implicate the same range of possible incentives as does the decision to gamble or to purchase a particular type of cigarette.[45]

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[44] *Id.*

[45] *See CGC Holding Co.*, 773 F.3d at 1092 ("Unlike entering into a serious financial transaction, many people gamble without any consideration, let alone reliance, on the representations about the likelihood of striking it rich. Nor does every slot player spend any serious money expecting something (other than a good time, perhaps) in return."); *McLaughlin*, 522 F.3d at 225 n.7 (distinguishing the choice to enter a financial transaction from making a consumer purchase because "a financial transaction does not usually implicate the same type or degree of personal idiosyncratic choice as does a consumer purchase"); *Cohen*, 303 F.R.D. at 386 ("[U]nlike gambling, purchasing real estate seminars is not the type of consumer activity that is susceptible to wide-ranging behavioral rationales.").

Finally, the plaintiffs advance that individuals will not knowingly participate in illegal pyramid schemes because it requires them to defraud those who they recruit, often family and friends. The panel majority rejects this reasoning, suggesting—gratuitously and without record basis—that, like the gambler, participants in pyramid schemes might act at the expense of their family and friends. This analogy is strained at best. Unlike "spending money on gambling," which, according to the majority, "harms an individual's family," a pyramid schemer's success in this example depends not on expending his or her family's resources, but, instead, on exploiting his or her family members.

III.

I conclude my dissent where I began: By holding that the mere possibility that a few random revelations by individuals associated with the defendants can somehow defeat class certification despite our owing great deference to the district court that decided otherwise, the panel majority gives putative illegal pyramid schemes a Teflon coating, protecting them not only from class actions but, as a practical matter, from any suits claiming fraud, whether civil RICO or otherwise. One of the core reasons that class actions exist is to give large groups of minor players like the instant plaintiffs a way to have their claims heard in court. Because, by definition, none of the individual claims can ever amount to enough dollars to justify separate and individual litigation, the elimination of class actions in pyramid schemes insures their total immunity from otherwise viable civil claims.

For the foregoing reasons, I respectfully DISSENT.

APPENDIX C

FOR PUBLICATION

UNITED STATES DISTRICT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

JUAN RAMON TORRES; *et al* , *Plaintiffs,* v. SGE MANAGEMENT LLC, *et al*, *Defendants,*.	Civil Action No: 4:09-CV-2056

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Pending before the Court is the plaintiffs', Juan Torres and Eugene Robison (collectively, "the plaintiffs"), motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure (Docket No. 121). Also before the Court is the defendants', SGE Management et al. ("the defendants"), response (Docket No. 129) and the plaintiffs' reply (Docket No. 134). On November 6, 2013, the Court heard oral argument and received expert testimony on the relevant issues. Having carefully reviewed the parties' submissions, the record and the applicable law, the Court finds and concludes as follows.

II. FACTUAL BACKGROUND

Ignite, the marketing arm of Stream Electric, is a retailer of electricity and natural gas services that conducts its sales through a system in which independent employees (known as independent agents, "IAs") make sales to customers and recruit individuals to become new IAs. The plaintiffs are former IAs. Premised upon their experiences in that capacity, they bring this suit, alleging violations of 42 U.S.C. § 1962(c) and (d), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), by the defendants.

Under Ignite's business structure, which the defendants describe as multi-level marketing, IAs are categorized in one of multiple tiers. An IA begins his tenure with the company as an "associate" and works his way into higher tiers by selling energy accounts and recruiting new IAs. An IA can sell energy accounts to commercial entities (Commercial Compensation Plan) or households (Residential Compensation Plan). An IA's pay varies depending on how many IAs he recruits, the number of sales he makes, the entity making the purchase (commercial or residential) and the sales of his recruits.

The manner in which an IA may make sales or recruit is highly circumscribed by Ignite's Policies and Procedures and Training Workbook, both of which are among the initial materials provided to all IAs. Before IAs begin recruiting, they are trained and provided with approved marketing materials to use when meeting with potential recruits. IAs are encouraged to do live presentations of the Ignite business opportunity to recruits, and ideally, take the recruit to a live public presentation, put on by Ignite or an experienced IA.

After their tenure with Ignite, the plaintiffs brought this suit, naming as defendants various business entities associated with Ignite, and certain employees of Ignite. In this suit, the plaintiffs assert that Ignite is an illicit pyramid scheme run by the defendants, the operation of which violates RICO. They claim mail fraud and wire fraud as the predicate RICO offenses.

The plaintiffs allege that they were injured by the defendants' operation of the pyramid scheme because they lost money as a result of becoming IAs—the $329 sign-up fee and any monthly payments for the Ignite "homesite" (i.e. personal website) was greater than the pay they received from Ignite for working as IAs. The plaintiffs seek to certify a class composed of the 236,544 IAs who have lost money as a result of the defendants' operation of the pyramid scheme.

III. LEGAL STANDARD

"To obtain class certification, parties must satisfy Rule 23(a)'s four threshold requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *Maldonado v. Ochsner Clinic Foundation*, 493, F.3d 521, 523 (5th Cir. 2007) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). This is not a pleading exercise; the party seeking certification must affirmatively establish that the proposed class meets the requirements of Rule 23. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) ("Rule 23 does not set forth a mere pleading standard.").

Before certifying a class, the court "must conduct a rigorous analysis of the Rule 23 prerequisites." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837

(5th Cir. 2012) (internal citation omitted). In conducting that analysis "sometimes it may be necessary to probe beyond the pleadings," and the court may need to evaluate "the merits of the plaintiff's underlying claims." *Wal-Mart*, 131 S.Ct. at 2551.

IV. ANALYSIS AND DISCUSSION

The Court begins its analysis with an evaluation of Rule 23(a)'s requirements.

A. FRCP 23(a)

The four requirements of Rule 23(a) are generally referred to as numerosity, commonality, typicality and adequacy.

i. Numerosity

Rule 23(a)(1) requires the class to be so numerous that joinder of all members is impracticable. The plaintiffs seek to certify a class of 236,544 people. The defendants do not challenge certification on this basis. The Court finds the proposed class to be sufficiently numerous to satisfy Rule 23(a)(1).

ii. Commonality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. The plaintiff must "demonstrate that the class members 'have suffered the same injury,'" *Wal-Mart*, 131 S.Ct. at 2551 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)), and that "the claims of every class member depend upon a common contention that is capable of classwide resolution." *Stukenberg*, 675 F.3d at 838 (quoting *Wal-Mart*, 131 S.Ct. at 2551). In other words, the contention must be "of such a nature that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The plaintiffs assert that the injury suffered by each class member was the net loss after the $329 initial sign-up fee to acquire the Ignite business opportunity and any monthly fees paid to maintain their Ignite homesite. They argue that there are a multitude of common questions, including: whether the defendants have formed a RICO enterprise; whether the defendants have engaged in a scheme to defraud as defined in 18 U.S.C. § 1341(a); whether the defendants used mail or wire services to effectuate their allegedly illegal conspiracy; whether the defendants multi-level marketing scheme was devised and implemented as a facially illegal pyramid scheme; whether the class members have collectively been harmed by the defendants' activities; and so on. The plaintiffs contend that these common questions will generate common answers that will help resolve this litigation.

The defendants argue that Robison's pursuit of the Commercial Compensation Plan is fatal to class certification because his claim does not present a question in common with most of the class. This is so, they assert, because the undisputed fact is that the vast majority of IAs pursued the Residential Compensation Plan. The defendants contend that whether the Commercial Plan is a pyramid scheme is a separate question from whether the Residential Plan is a pyramid scheme. Because the lead plaintiff does not have this fundamental question in common with the great majority of the class, the defendants argue that commonality is not met.

In reply, the plaintiffs argue that "the existence of the pyramid revolves around the legality of the system in toto, not whether a percentage of the 274,000 people who signed up intended to sell to their friends,

their neighbors, the local business owner, or elsewhere."

In the Court's view, the gravamen of the plaintiffs' complaint is that the defendants, with use of the mails and wires, operated an illegal pyramid scheme through which they defrauded the class members. The questions outlined by the plaintiffs are central to the validity of all the class members' claims and the resolution of those questions would determine the validity of the claims in one stroke. The defendants either did or did not form a RICO enterprise; they either did or did not engage in a section 1341(a) scheme to defraud; they either did or did not use mail or wire services in the course of the scheme; they either did or did not operate an illegal pyramid scheme; the operation of that scheme either did or did not harm the class members. Those questions will generate answers common to the class; they do not turn based on the individual class member considered. The Court is satisfied that those answers will drive the resolution of this litigation. Accordingly, the Court finds that commonality is met.[1]

iii. Typicality

Rule 23(a)(3) requires that the claims of the representative party be typical of the claims of the proposed class. Typicality is satisfied when the representative plaintiff's claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. *See* 7A Charles

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[1] Tellingly, the Court has been pointed to no evidence (and finds none) that an IA who intended to sell to commercial entities actually locked himself into that decision and could not later begin selling to households.

Alan Wright & Mary Kay Kane, Federal Practice & Procedure § 1764 (3d ed. 2005); *see also Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 2012 WL 565997, at *2 (N.D. Tex. Jan. 27, 2012) aff'd sub nom. *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423 (5th Cir. 2013) cert. granted, 134 S. Ct. 636 (U.S. 2013).

The defendants argue that because Robison pursued the Commercial Compensation Plan, while the vast majority of IAs pursued the Residential Compensation Plan, his claim is not typical of those of the rest of the class. For the reasons previously discussed, the Court rejects this contention. The Court finds that the claims of the representative plaintiffs are typical of those of the proposed class. The representatives, like all class members, allegedly suffered an economic loss as a result of their unwitting participation in an allegedly illegal pyramid scheme.

iv. Adequacy

Rule 23(a)(4) requires a determination that the representative party will fairly and adequately protect the interests of the class. "A plaintiff must show that plaintiff's counsel has the zeal and competence to represent the class, and that the proposed class representative is willing and able to take an active role in controlling the litigation and protecting the absent class members." *Id.* at *2 (citing *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001)). The 23(a)(4) inquiry also serves to uncover conflicts of interest between the representative plaintiff and the proposed class. *Berger*, 257 F.3d at 480.

Counsel for the plaintiffs have extensive experience in class action litigation that makes them well-qualified to represent this class. Further, counsel

have invested significant time and resources in this litigation, and shown themselves to be zealous advocates. The plaintiffs are prototypical IAs, willing to take an active role in controlling the litigation and protecting absent class members, as evidenced by obtaining reversal of an adverse determination on a dispositive motion. Finally, the Court knows of no conflict of interest between the plaintiffs and other members of the putative class. Therefore, the Court finds that adequacy is met.

Having concluded that the Rule 23(a) requirements are met, the Court now turns to the 23(b) inquiry. The plaintiffs seek certification under 23(b)(2) and (3).

B. FRCP 23(b)(2)

Certification under Rule 23(b)(2) is only available when the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. The focus is "on the defendants' alleged unlawful conduct, not on individual injury." *Rodrigues v. Countrywide*, 695 F.3d 360, 362-63 (5th Cir. 2012). Certification under 23(b)(2) is not permissible "when each class member would be entitled to an individualized award of monetary damages." *Wal-Mart*, 131 S. Ct. at 2557. However, where the requested monetary relief is incidental to the requested injunctive or declaratory relief, certification may be proper. *Id.* at 2560 (discussing the exception recognized by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) and declining to reach the issue); *see Allison*, 151 F.3d at 413-15 (explaining the exception and its underlying rationale).

Although in limited instances a party may seek both injunctive and monetary relief under rule 23(b)(2), "certification under [the provision] is appropriate only if members of the proposed class would benefit from the injunctive relief they request." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th Cir. 2004). As such, "the question whether the proposed class members are properly seeking such relief is antecedent to the question whether that relief would predominate over money damages." *Id.*

The plaintiffs seek an order enjoining the defendants from continued operation of the alleged pyramid scheme and any further engagement in unlawful, fraudulent or deceptive acts. The defendants argue that the plaintiffs do not have standing to request injunctive relief, and even if they did, certification under 23(b)(2) is improper because the claim for money damages predominates over the claim for injunctive relief.

The Court agrees with the defendants that the plaintiffs do not have standing to seek an injunction. A party seeking injunctive relief must "demonstrate either continuing harm or a real or immediate threat of repeated injury in the future." *Grant ex rel. Family Eldercare v. Gilbert*, 324 F.3d 383, 388 (5th Cir. 2003); *see also Howard v. Green*, 783 F.2d 1311, 1313 n.2 (5th Cir. 1986) ("Past exposure to illegal conduct would not in itself show a present case or controversy for injunctive relief ... if unaccompanied by any present adverse effects.") (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). By the terms of the complaint, it is clear that any harm the class is alleged to have suffered occurred in the past. There is no allegation of present adverse

effects or a threat of future harm to the class members.[2]

Rule 23(b)(2) certification is "inappropriate when the majority of the class does not face future harm." *Maldonago*, 493 F.3d at 525 (citing *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 978 (5th Cir. 2000)). Where, as here, not a single member of the putative class of over 200,000 faces present adverse effects or a threat of future harm, 23(b)(2) cannot be the means by which the class is certified, and the plaintiffs must look elsewhere.[3]

C. FRCP 23(b)(3)

Class certification under Rule 23(b)(3) is only available when common questions predominate over any questions affecting individual class members, and when class resolution is the best means of fair and efficient adjudication of the controversy. *See Amchem* 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3)). "The predominance inquiry is more demanding than the commonality requirement of Rule 23(a) and requires courts to consider how a trial on the merits would be conducted if a class were certified." *Maldonado*, 493 F.3d at 525. The focus is on whether the proposed

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[2] That an injunction would prevent potential IAs from being duped by the alleged pyramid scheme is of no moment; those potential IAs are not members of the proposed class.

[3] The Court notes that the plaintiffs have specifically requested injunctive relief and not declaratory relief. (Docket No. 60, Second Am. Compl. at 13 ¶ e). Because the Court will not read into the complaint what is not there, whether the plaintiffs could properly request declaratory relief has not been considered. Further, because the Court finds that the plaintiffs do not have standing for certification under 23(b)(2), the Court does not decide whether the requested monetary relief is incidental to the request for injunctive relief.

class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "[T]he superiority analysis requires an understanding of the relevant claims, defenses, facts, and substantive law presented in the case." *Maldonado*, 493 F.3d at 525. Economies of time, effort and expense, and the promotion of uniform decisions as to persons similarly situated, without sacrificing procedural fairness, are important considerations. *See* Fed.R. Civ. P. 23(b)(3), 1996 Amendment, Advisory Committee Notes.

Because the 23(b)(3) inquiry requires the Court to consider how a trial on the merits would be conducted, the Court begins with an examination of the plaintiffs' RICO claim.

i. RICO Substantive Law

Any person injured in his business or property by reason of a violation of section 1962 can bring a civil cause of action. *See* 18 U.S.C. § 1964(c). To prove a violation of section 1962(c) or (d), a plaintiff must establish three elements: "(1) a person[4] who engages in (2) a pattern of racketeering activity[5] (3) connected to the acquisition, establishment, conduct, or control of an enterprise[6]." *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000) (quoting *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d

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[4] A "person" is an individual or entity capable of holding a legal or beneficial interest in property. *See Whelan v. Winchester Production Co.*, 319 F.3d 225, 229 n.3 (5th Cir. 2003).

[5] "Racketeering activity" is any of the predicate acts defined in 18 U.S.C. § 1961(1), which includes mail fraud and wire fraud.

[6] An "enterprise" is "a group of persons or entities associating together for the common purpose of engaging in a course of conduct." *Whalen*, 319 F.3d at 229 (citing *United States v. Turkette*, 425 U.S. 576, 583 (1981)).

241, 242 (5th Cir. 1988) (emphasis omitted, footnotes added). The person who engages in the racketeering activity must be distinct from the enterprise, and the enterprise must be distinct from the series of predicate acts that constitute the racketeering activity. *Id.* For a plaintiff to prevail in a civil RICO action alleging mail and wire fraud, he must "establish proximate cause in order to show injury 'by reason of' a RICO violation." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008). Proximate cause is a flexible concept—not a black letter rule—that demands "some direct relation between the injury asserted and the injurious conduct alleged." *Id.*

ii. Contentions of the Parties

The defendants argue that certification under Rule 23(b)(3) is improper because common questions do not predominate over questions affecting individual class members. More specifically, the defendants contend that the plaintiffs cannot establish proximate cause, on a classwide basis with classwide proof, that each of the nearly 250,000 proposed class members over the course of many years were defrauded by the defendants. Instead, the argument goes, to establish proximate cause, the plaintiffs will have to introduce individualized evidence as to which alleged misstatements each IA read or heard, and the extent to which that misstatement induced him to join Ignite.

The defendants also argue that to the extent the class relies on the pyramid scheme claim so as to establish classwide proof based on evidence of "whether the Compensation Plan emphasized recruiting over customer gathering,"[7] the deficiency is still

[7] The defendants maintain that this is not the standard by which the legality of a multi-level marketing plan is determined.

not cured. (Docket No. 121, Pls.' Mot. for Class Certification, App. III, Ex. 2 at ¶ 15). Because of the regular promotion activities conducted by Ignite, the economic incentives of the Compensation Plan vary wildly among the class members, depending on when they became IAs. The defendants argue that even under the plaintiffs' proposed legal standard, the answer to whether the defendants operated an illegal pyramid scheme could be different for each IA depending on the promotions available when he enrolled.

In sum, the defendants argue that without individualized proof, the plaintiffs will not be able to establish proximate cause between the asserted injury and alleged RICO scheme, and because questions affecting individual class members will predominate over common questions, the proposed class is not eligible for (b)(3) certification.

The plaintiffs, citing *Bridge*, assert that first-party reliance is not necessary to bring a civil RICO claim predicated on mail or wire fraud, and therefore, they will not have to submit individualized evidence as to each IA. They argue that proximate cause in this instance is akin to a fraud-on-the-market scheme in which it can be rationally inferred that the enticement to invest (i.e. the representations made by the defendants that Ignite is a lucrative financial opportunity) was acted upon by the purchasers of the worthless product (i.e. the 274,000 IAs). The plaintiffs allege that every IA signed the Policies and Procedures, which requires each signatory to acknowledge that he was given and read the materials offered by the defendants. They further allege that the defendants require IAs to use only approved marketing material when recruiting new IAs. Thus, they argue, the exist-

ence of 274,000 IAs is circumstantial evidence of class-wide reliance (and thus proximate cause) on the defendants' misrepresentations. Accordingly, the plaintiffs maintain, no individual class member need testify about which particular misrepresentation induced him to sign up as an IA.

iii. Analysis

In *Bridge*, the Cook County Treasurer's Office auctioned off various tax liens, and the plaintiffs alleged that the defendants circumvented the rules by filing false attestations with the Treasurer's Office, and thereby obtained more than their fair share of liens. The Supreme Court rejected the defendants' first-party reliance argument—that to recover under RICO for mail fraud, the plaintiffs must show that they relied on the alleged false statements, and because the false statements were sent to the Treasurer's Office and never seen by the plaintiffs, the plaintiffs had no claim under the statute. The Court observed, "a person can be injured 'by reason of' a pattern of mail fraud even if he has not relied on any misrepresentations." *Id.* at 649. The Court held that RICO's "by reason of" language only requires the plaintiff to show that the defendant's violation was the proximate cause of his injury. *Id.* at 654. First-party reliance is not an element of a RICO claim predicated on mail or wire fraud, and the plaintiff need not establish first-party reliance to prevail. *Id.* at 661. The Court then found that third-party reliance—the Treasurer's Office relied on the defendants' misrepresentations and the plaintiffs were thereby injured—was sufficient to establish proximate cause. *Id.* at 658. The Court concluded its opinion cautioning, "none of this is to say that a RICO plaintiff who alleged injury

'by reason of' a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations" and "the complete absence of reliance may prevent the plaintiff from establishing proximate cause." *Id.* at 658-59 (emphasis in original).

Though the plaintiffs are correct that they are not required to show first-party reliance, the defendants are equally correct that the plaintiffs must establish proximate cause. The crux of the disagreement is whether there is a manner of proof whereby the plaintiffs can establish classwide proximate cause. Unsurprisingly, the plaintiffs believe there is such a manner of proof.

The defendants, on the other hand, believe the plaintiffs can only make out proximate cause on an individualized basis—by showing first-party reliance on various misrepresentations or parsing out the economic incentives present when each individual class member signed up to be an IA.[8] The plaintiffs seek 23(b)(3) certification on the theory that because IAs were only allowed to use the defendants' marketing materials (allegedly replete with fraudulent misstatements)[9] when they recruited new IAs, and every class member signed the Policies and Procedures (which contained at least one misstatement)[10] when they became IAs, classwide reliance can be shown without resort to individual testimony. Simply put, the plaintiffs' position is that because every class member saw

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[8] The plaintiffs have not, indeed could not under these facts, claim third-party reliance.

[9] *See generally* Docket No. 121, Pls.' Mot. for Class Certification, FRE 1006 Misrepresentations and Omissions Chart, App. III, Ex. 8.

[10] *Id*. at ¶ 29.

at least one of the many documents that contained fraudulent misstatements, classwide reliance can be shown. The Court disagrees.

Even assuming that all the defendants' marketing materials contained misstatements and omissions, and that IAs were required to adhere to those materials when recruiting new IAs, it is not apparent, and could not be determined without individual testimony, which specific materials each IA used when recruiting other IAs. Establishing proximate cause in this instance would require each class member to testify or otherwise provide evidence as to which materials he saw, the misstatements he read or heard, and the extent those misstatements induced him to become an IA. Similarly, even assuming the sole identified misstatement in the Policies and Procedures is actually a misstatement, each IA would still be required to provide the counterintuitive testimony that it was that specific misstatement that induced him to become an IA.[11]

Equally true, the defendants would be entitled to cross-examine each class member on the substance of his testimony. It is at least possible that some number of the class members saw none of the materials or presentations by the defendants and only signed up to become an IA at the prodding of a friend or neighbor

[11] The notion is counterintuitive because it appears that the Policies and Procedures is similar to an employee manual in that it spells out the dos and don'ts of the position and articulates the legal relationship between Ignite and the IA. As such, it would presumably be given only to those who have made the decision to become IAs; not used as a recruiting device. If these assumptions are correct, then the Policies and Procedures could not have been the catalyst for an IA becoming an IA.

IA who did not use those recruitment aids. Furthermore, it could be the case that some especially entrepreneurial class members read the allegedly fraudulent claims about how easy it was to make money, maintained a healthy degree of skepticism regarding those claims, but became IAs nonetheless because they believed they (though not necessarily everyone else) would make a significant amount of money, even if not as much as advertised. Again, the defendants would be entitled to explore all these areas.

In that vein, this case is similar to *David v. Signal International, LLC*, 2012 U.S. Dist. LEXIS 114247, at *106-12 (E.D. La. Jan. 3, 2012). There the plaintiffs, citizens of India, pursued a market approach theory of reliance whereby first-party reliance could be proven by circumstantial, classwide evidence. They claimed that the class members traveled to the United States and worked for the defendant under deplorable conditions because they were enticed by the false promise of a green card. The court rejected the theory because undisputed facts evidenced many possible reasons any given class member came to the United States to work for the defendant.[12]

Here, as in *David*, individualized reliance issues as to the plaintiffs' knowledge, motivations and expectations bear heavily on the proximate cause

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[12] For example, the court observed that some of the class members had previously worked in the United States and therefore must have understood the temporary nature of the H-2B visas they had been issued, yet they still went to work for the defendant. *David*, 2012 U.S. Dist. LEXIS 114247, at *108-09. Another possible reason the court noted was testimony that some of the class members were so adamant about coming to the United States that they were willing to do so even though it might mean not getting a green card. *Id*. at 109.

analysis, rendering 23(b)(3) certification unavailable under that theory.

To the extent the plaintiffs seek 23(b)(3) certification based on a fraud-on-the-market theory and the common sense inference that IAs were duped into joining a pyramid scheme, the Court finds that the class can be certified. 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. That the defendants' business opportunity is allegedly an unlawful pyramid scheme in which the vast majority of participants are sure to lose money, gives rise to an inference that the only reason the class members paid the $329 sign-up fee (and possibly other fees) is because the true nature of the "opportunity" was disguised as something it was not. As such, establishing proximate cause would not be an individualized inquiry; rather, it could be determined as to all the class members at once. 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, a showing that the program was actually a facially illegal pyramid scheme would provide the necessary proximate cause.[13] The defendants' knowing misrepresentations

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[13] The concept of proximate cause ensures "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury." *Bridge*, 553 U.S. at 657. If the plaintiffs' allegations are true, their alleged injury—the loss of money—is the direct result of the defendants' fraud. *See id*. at 658. "It [is] a foreseeable and natural consequence of [the defendants'] [pyramid] scheme" that the vast majority of the unwitting IAs would lose money. *Id*.

about the scheme directly resulted in the losses incurred by the defrauded class members.[14]

The plaintiffs' theory is not novel. In *Negrete v. Allianz Life Insurance Co. of North America*, the plaintiffs in a RICO class action sought to prove causation on a classwide basis on the theory that reliance on the defendant's alleged misrepresentations is the common sense explanation for class members' purchasing decisions. 287 F.R.D. 590, 611-12 (C.D. Cal. 2012). The court allowed the plaintiffs to prove classwide reliance under that theory, explaining:

> "That [the defendant's] annuities are allegedly inferior in value and performance to comparable investment products…gives rise to an inference that consumers decided to purchase the 'inferior' annuities because of the standardized marketing materials at issue…for they otherwise had no reason to do so. Consumers are nearly certain to rely on prominent (and prominently marketed) features of a product which they purchase, particularly where there are not otherwise compelling reasons for purchasing a product that is allegedly worth less than the purchase price."

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[14] To the extent this seems to conflict with the Court's reasoning in denying 23(b)(3) certification under the plaintiffs' misrepresentation theory, the Court notes that the misrepresentation theory rested on the fact that every IA read or saw at least one of the many misstatements in the defendants' marketing materials and Policies and Procedures. Whereas here, all the class members are presumed to be relying on the same misrepresentation—that the Ignite business opportunity was a legal, nonfraudulent venture. In the former scenario, individual issues would predominate for the reasons previously stated. In this latter scenario, the issue is classwide.

287 F.R.D. at 612.

Similarly, in *Peterson v. H & R Block Tax Services, Inc.*, the court certified the class under the presumption that the class members relied on the defendant's alleged misrepresentations. 174 F.R.D. 78, 84-85 (N.D. Ill. 1997). The court so concluded because it found the presumption logical and the allegations in the complaint made reliance apparent. The plaintiffs alleged that each class member paid a significant fee for a service for which no class member was eligible. The court held that reliance was apparent because "it is inconceivable that the class members would rationally choose to pay a fee for a service they knew was unavailable." *Id.*

The central claim in the case before this Court is that the defendants purported to be offering a potentially lucrative business opportunity for an initial fee of $329 when in actuality all that was being offered was a position as a pawn in an illegal pyramid scheme. It defies rational thought that the class members would knowingly pay for that "opportunity." Because both logical inference and circumstantial evidence allow the class members to establish proximate cause on a classwide basis, the Court finds that common, rather than individual issues, predominate.[15]

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[15] The Court is unpersuaded by the defendants' contention that calculating damages would require individualized mini-trials, precluding certification. Here, damages are capable of computation by objective standards. *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006) ("[C]alculating damages on an individual basis will not…preclude class certification…where individual damages [can] be determined by reference to a mathematical or formulaic calculation") (citation omitted). Furthermore, the pertinent records are in the defendants'

The Court also finds that a class action is the superior method of adjudication of this controversy. Having carefully reviewed the facts, claims and substantive law, the Court is convinced that a class action would promote economies of time and uniform decisions among similarly situated individuals. The Court also takes note of the fact that in light of the relatively small individual claims at issue, relief is unlikely if each proposed class member proceeded individually. *See Amchem*, 521 U.S. at 616.

For these reasons, the Court finds certification under Rule 23(b)(3) to be proper.

D. Class Members Subject to Arbitration

The parties disagree about which IAs are eligible for inclusion in the putative class.

Because the Court has certified the class, it is now necessary to resolve this dispute.

i. Arbitration Clause as to Fifth Circuit Torres Decision

When this action was first filed, the defendants filed a motion to dismiss arguing, *inter alia*, that all IAs were subject to the arbitration agreement they entered into with the defendants.[16] The Court granted the motion, but the Fifth Circuit reversed, finding the agreement to arbitrate illusory and thus void. *See Torres v. SGE Management*, 397 F. App'x 63, 66 (5th

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possession. Although the damage calculations only provide a snapshot in time, that photograph can be taken on the eve of trial so as to provide the most up-to-date picture of who has lost money and the exact amount of the loss.

[16] The arbitration agreement is contained in the Policies and Procedures that all IAs signed upon becoming IAs.

Cir. 2010). After remand and as the litigation proceeded, Ignite modified its arbitration clause in an attempt to cure the deficiencies identified by the Fifth Circuit. On March 3, 2011, it amended its Policies and Procedures to include the modified arbitration agreement, which became effective April 3, 2011.

The defendants then submitted a motion to amend their answer to add an affirmative defense and the motion was granted. The new defense is that all IAs who joined Ignite on or after the effective date of the new arbitration agreement are subject to arbitration and cannot be a member of this class. Having reviewed the Fifth Circuit's opinion in *Torres* and the amended arbitration agreement, the Court finds that the deficiencies have been cured. Accordingly, the class is limited to IAs who joined Ignite beginning January 1, 2005, through April 2, 2011.

ii. Arbitration Clause as to Eleventh Circuit Betts Decision

In *Betts v. SGE Management*, the Eleventh Circuit found Ignite's original arbitration agreement (the one the Fifth Circuit found illusory and void) to be valid and enforceable. 402 F. App'x 475 (11th Cir. 2010). Accordingly, it dismissed the case and its putative class of 10,000 IAs, all residents of Georgia, and required them to submit to arbitration if they wished to pursue their claims. The defendants allege that instead of the Georgia IAs initiating arbitration proceedings, the plaintiffs in this action expanded the scope of the proposed class to include the Georgia IAs.

The four elements of res judicata are: "(1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent

jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions." *Test Masters Educational Services, Inc. v. Singh*, 438 F.3d 559, 571 (5th Cir. 2005) (citing *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004). Because the Court is satisfied that all the element of res judicata are met here, the Georgia IAs are bound by the decision in *Betts*, and cannot be included in the certified class.

V. CONCLUSION

For the foregoing reasons, the plaintiffs' motion for class certification under Rule 23(b)(2) is DENIED and the motion for class certification under Rule 23(b)(3) is GRANTED. The class will consist of all IAs who joined Ignite on or after January 1, 2005, through April 2, 2011, excluding the IAs subject to the Eleventh Circuit opinion in *Betts*. The Court appoints, from the law firms Clearman Prebeg LLP and Sommers Schwartz P.C., Scott Clearman, Andrew Kochanowski and Matthew Prebeg as class counsel.

IT IS SO ORDERED.

SIGNED on this 13th day of January, 2014.

Kenneth M. Hoyt
United States District Judge

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUAN RAMON TORRES; EUGENE ROBINSON, *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*.	No. 14-20128

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 9/30/16, 5 Cir.,___, ___F.3d __)

Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, WIENER, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:

Defendants-Appellants filed a petition for rehearing seeking to ensure that the certified class is limited to parties who were injured, viz., who lost money, and asking us to vacate the district court's order regarding the definition of the class and remand this case for further proceedings. This is unnecessary. Our en banc opinion unequivocally states that the certified class comprises only "those who lost money participating as Independent Associates ("IAs") in Ignite's programs."[1]

Appellants claim that the district court certified a class of "all IAs who joined Ignite on or after January 1, 2005, through April 2, 2011, excluding the IAs subject to the Eleventh Circuit opinion . . . ," not just those who lost money.[2] Appellants and appellees agree, however that the class must be limited to IAs who lost money. Appellees have consistently made clear that they do not purport to represent any IA who made money by participating in the programs. Even if the district court's language on class certification was not perfectly clear on this point, that court has since clarified that the class is limited to individuals who were damaged. Most notably, the district court approved plaintiffs-appellees' class notice that limited the class to IAs who "lost money."[3] No one appears to dispute defendants-appellants insistence that the class is limited to those who lost money.

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[1] *Torres v. S.G.E. Mgmt., L.L.C.* (*Torres III*), 2016 WL 5746309, *2 (5th Cir. Sept. 30, 2016) (en banc).

[2] *Torres v. S.G.E. Mgmt., L.L.C.* (*Torres I)*, 2014 WL 129793, at *11 (S.D. Tex. Jan. 13, 2014).

[3] ROA.2477.

Therefore, IT IS ORDERED that appellants' Petition for Rehearing is DENIED.

ENTERED FOR THE COURT:

s/Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX E

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in

the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Federal Rule of Civil Procedure 23 – Class Actions

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

* * *

No. 16–___

IN THE

Supreme Court of the United States

SGE MANAGEMENT, LLC; STREAM GAS & ELECTRIC, LTD.; STREAM SPE GP, LLC; STREAM SPE, LTD.; IGNITE HOLDINGS, LTD.; ET AL.,
Petitioners,

v.

JUAN RAMON TORRES, ET AL.,
Respondents.

CERTIFICATE OF COMPLIANCE

I hereby certify that I am a member in good standing of the bar of this Court and that the Petition for a Writ of Certiorari contains 7,297 words and complies with the word limitation established by Rule 33.1(g)(i) of the Rules of this Court.

Dated: April 28, 2017

Jesenka Mrdjenovic

No. 16-___

IN THE

Supreme Court of the United States

SGE MANAGEMENT, LLC; STREAM GAS & ELECTRIC, LTD.;
STREAM SPE GP, LLC; STREAM SPE, LTD.; IGNITE HOLDINGS, LTD.; ET AL.,

Petitioners,

v.

JUAN RAMON TORRES, ET AL.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 28th day of April, 2017, I caused three copies of the Petition for a Writ of Certiorari to be served by third-party commercial carrier for next-business-day delivery on the counsel and parties identified below, pursuant to Rule 29 of the Rules of this Court. I further certify that I caused an electronic version of the same to be transmitted to the counsel identified below at the addresses indicated. All parties required to be served have been served.

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