NO. 16-1309

In the
Supreme Court of the United States

S.G.E. MANAGEMENT, L.L.C., ET AL.,
PETITIONERS,
v.
JUAN RAMON TORRES, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR INDEPENDENT ASSOCIATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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June 1, 2017

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INTEREST OF AMICI CURIAE*

Amici curiae Michelle Davis, Scott Dearwester, Raven Moreno, Andrew Moyer, Michael Schwartz, Julia Stern, Ron Stern, Jeff Stier, and Cassandra Talkington joined Stream Energy's multilevel marketing venture as Independent Associates ("IAs") after the close of the class period. They disagree with respondents' allegation that Stream Energy is an illegal pyramid scheme, but registering dissension on that point is not the purpose of this brief. Amici had a variety of reasons for becoming IAs, and they feel compelled to share their stories with this Court in light of the class-certification theory urged by respondents, the district court, and the Fifth Circuit. That theory wrongly assumes that over 200,000 absent class members—and by logical extension amici—had to be either irrational or gullible to pay $329 for IA status. *See, e.g.*, Pet. App. 118a ("It defies rational thought that the class members would knowingly pay for that 'opportunity.' "). In an effort to correct that mischaracterization of their motives, amici file this brief in support of petitioners.

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* Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amici curiae's intent to file this brief, and consented to it. Petitioners' letter giving blanket consent to amicus briefs, and respondents' written consent to this brief, are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

RICO's proximate-cause requirement obliges respondents to prove reliance for over 200,000 class members. *See* Pet. 13–17 (discussing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008)). The Fifth Circuit adopted an "inference-based theory of causation," reasoning that "a common inference of reliance" could be applied across the class because "it follows logically from the nature of the scheme." Pet. App. 19a–20a. On this view, it is "reasonabl[e] [to] infer that, in deciding to pay to become IAs, [class members] relied on [Stream Energy's] implicit representation that it is a legal multi-level marketing program, when it is in fact a fraudulent pyramid scheme." Pet. App. 23a. Awareness of an illegal pyramid scheme would have stopped every class member from paying the $329 fee, the argument goes, for fear that the only way to make money would be to illegally replicate the pyramid. *See* Pet. App. 23a ("[K]nowingly joining a pyramid scheme requires the individual to choose to become either a victim or a fraudster.").

This inference of class-wide reliance runs counter to the "common sense" said to justify its creation. Pet. App. 5a, 116a. Like all human beings, IAs have different reasons for their actions, but the decision below fails to account for this heterogeneity. As Judge Haynes observed in her dissenting opinion, "there are numerous and disparate motivations behind each [class member'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 (citing *Bridge*).

Amici can report, based on their own experiences and those of their fellow IAs, that there are rational reasons to become an IA that do not depend on a supposed misrepresentation about whether Stream Energy is an illegal pyramid scheme. It would take over 200,000 individualized reliance inquiries to discern which class members had which motivations, so class certification is foreclosed by the predominance requirement of Federal Rule of Civil Procedure 23(b)(3). *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407–08 (2014). Review is warranted because the Fifth Circuit's facile inference does not reflect the "rigorous analysis" that this Court demands. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (Scalia, J.).

A. People Become Independent Associates For Nonpecuniary Reasons.

The Fifth Circuit's inferential theory assumes that all IAs acted from the singular impulse to make money. For some people, however, money was not the motivating factor. As Judge Haynes pointed out, IAs "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.' " Pet. App. 48a (quoting *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004)).

When people make employment decisions that are not attributable to money, economists seek to explain the behavior by examining what they call "nonpecuniary job characteristics." B.K. Atrostic, *The Demand for Leisure and Nonpecuniary Job Characteristics*, 72 AM. ECON. REV. 428 (1982). Consider the lottery winner who keeps his day job

because he wants a sense of normalcy, the retiree who volunteers at the airport's information desk because she enjoys the social interaction, or the senior judge who carries a full docket because she values the intellectual challenges that attend federal judicial service. *See* 28 U.S.C. § 371 (providing a full salary for any senior judge who does a quarter of the work of a judge in regular active service). These hypothetical workers are responding to nonpecuniary job characteristics, and their decisions are rational even though money does not explain their behavior.

The opportunity for training and personal development is a nonpecuniary job characteristic that attracts some IAs. *See* Pet. App. 48a ("Other[s] may have joined [Stream Energy] solely to take advantage of [its] training courses . . . ."). For example, Raven Moreno joined Stream Energy in high school because she had watched her parents become successful IAs and was keen to develop entrepreneurial skills of her own. She then tapped Stream Energy's network during her college search, relying on fellow IAs to pick her up from the airport, provide lodging, and drive her to campus tours. Now a student at Rider University majoring in international business and entrepreneurial studies, Moreno appreciates that her $329 investment has yielded practical experience that she could not get while sitting in a classroom, a nationwide network of encouraging mentors, and inclusion in what she considers her second family.

The social aspect of working for Stream Energy is another nonpecuniary job characteristic that attracts IAs. *See* Pet. App. 48a (noting the allure of "networking opportunities"). Michelle Davis is a good

example: When her best friend asked her to become an IA, Davis paid the $329 fee because she thought it would be a fun activity for them to do together. And according to Jeff Stier, who signed up through his wife's cousin, working as an IA has created a social circle that feels like a family. Stier regularly hosts a Wednesday-night meeting where IAs can enjoy each other's company and share in each other's successes.

Relatedly, just as Judge Haynes has purchased Girl Scout cookies she did not want because of who asked her to buy, some IAs "participated without any intention of making a profit in order to help out a friend or family member who was already part of the program." Pet. App. 48a. For example, Michael Schwartz has joined multilevel marketing ventures to help his friends build something, with no real intention of working the business himself. After joining Stream Energy to help a friend, Schwartz chose to focus on his day job instead of devoting time and effort to recouping the fee he paid.

The Fifth Circuit's inference of class-wide reliance fails to account for IAs who, like these amici, were attracted by nonpecuniary job characteristics. Because these sensible people are not just in it for the money, it cannot be assumed that they would reject Stream Energy upon being told that earnings are contingent upon participation in an illegal pyramid scheme. The Fifth Circuit thus posed a false dichotomy in declaring that "knowingly joining a pyramid scheme requires the individual to choose to become either a victim or a fraudster." Pet. App. 23a. As Judge Haynes explained, IAs who were motivated by nonpecuniary job characteristics "obtained exactly

what they were hoping to receive by participating in [Stream Energy's] program." Pet. App. 48a.

B. People Become Independent Associates To Sell Energy.

As for the people who are attracted to Stream Energy by *pecuniary* job characteristics, there are some IAs whose motivation was to make a modest amount of money by selling energy. *See* Pet. App. 48a ("Other[s] could have joined . . . for the sole purpose of selling . . . energy . . . ."). The decision below overlooks IAs of this kind, whose plans have nothing to do with Stream Energy's putative status as an illegal pyramid scheme. These IAs paid the $329 fee with the goal of selling enough energy to recoup that expense and a little more. They had no intention of pursuing greater sums by recruiting other IAs, no matter whether that recruiting was legal or illegal.

Of course, not every IA who pursued this strategy enjoyed immediate success. As Judge Haynes noted, however, "their losses would have been caused by their own inability to sell the energy necessary in order to turn a profit." Pet. App. 48a. Cassandra Talkington sells energy, but she has not yet recouped the $329 fee because her job driving motor coaches keeps her on the road for long periods of time. Similarly, Scott Dearwester's job selling other things has not left him with enough time to sell the requisite amount of energy.

C. People Become Independent Associates After Drawing Their Own Conclusions About The Risks, Rewards, And Legality.

There are also IAs who seek to earn more money by recruiting others, having independently concluded that Stream Energy is not an illegal pyramid scheme. This caveat-emptor approach is hardly surprising, considering the media reports suggesting that Stream Energy was an illegal pyramid scheme. *See* Pet. App. 35a, 54a.

Andrew Moyer counts himself among these ambitious but cautious IAs. Before paying the $329 fee, Moyer took three days to read the entire complaint in this case, study Stream Energy's compensation structure, and review video presentations describing its business plan. He ultimately made his own determination that Stream Energy was a legal enterprise, because IAs must gather energy customers in order to make money. Since then, Moyer has earned enough money as an IA to allow his wife to leave her job.

To take another example, Julia Stern has made enough money as an IA to enable her retirement after three decades as a federal prosecutor in the Southern District of Texas. Stern's independent investigation of Stream Energy led her to the opinion that it is not an illegal pyramid scheme. In her words: "I've prosecuted fraud. I know what a pyramid scheme is. This ain't it." She and her husband, a former FBI agent named Ron Stern, encourage potential IAs to do their own research and decide for themselves whether to join despite the allegations of an illegal pyramid scheme.

These amici further undermine the Fifth Circuit's inference of class-wide reliance. Instead of crediting a self-serving statement from Stream Energy as to its own legality, IAs like Moyer and the Sterns relied solely on the conclusions they reached in their own investigations. Whether they made money or not, reliance cannot be established for these rational people. *See Farrar v. Churchill*, 135 U.S. 609, 615 (1890) ("If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations.").

The decision below also ignores the possibility that unscrupulous characters might have joined Stream Energy *because* they thought it was an illegal pyramid scheme. This regrettable behavior would show rational thought and betray a lack of reliance on Stream Energy's representations. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 243 (5th ed. 1998) (noting "that criminals respond to changes in opportunity costs, in the probability of apprehension, in the severity of punishment, and in other relevant variables as if they were indeed the rational calculators of the economic model"). Amici do not mean to point fingers at their Stream Energy colleagues. To be clear, they have not encountered fellow IAs who would appear to fall within this last category. But respondents themselves allege that some IAs knowingly profited from an illegal pyramid scheme—hence the individual IAs who are named as defendants in this case. If such scofflaws are indeed among the IA ranks, then the Fifth Circuit's inference of class-wide reliance necessarily fails.

After all, a person who wants to make money from an illegal pyramid scheme would be *more* likely to join if he learned respondents' version of the truth about Stream Energy. "By affirming the certification of a class that includes this subset of plaintiffs, the [decision below] provides a potential bailout for those who knowingly gambled and lost." Pet. App. 47a.

* * *

Amici's stories confound the Fifth Circuit's assumption that "common sense" dictates a one-size-fits-all motivation for becoming an IA. With so many different motivations for becoming an IA that do not depend on an alleged misrepresentation of legality, the only way to know why over 200,000 class members joined Stream Energy is to ask each one of them. Had respondents bothered inquiring why IAs paid $329 to join Stream Energy, the record would reflect the variety of rationales that is all but inevitable in such a large and diverse class of individuals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 2017