CAUSE NO. 17-50655

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERNARD GRIGGS,

PLAINTIFF - APPELLANT

v.

S.G.E. MANAGEMENT, L.L.C.; STREAM GAS & ELECTRIC, LIMITED, DOING BUSINESS AS STREAM ENERGY; STREAM S.P.E. G.P., L.L.C; STREAM S.P.E., LIMITED; IGNITE HOLDINGS, LIMITED, FORMERLY KNOWN AS IGNITE ENERGY, LIMITED, DOING BUSINESS AS IGNITE, DOING BUSINESS AS IGNITE POWERED BY STREAM ENERGY; CHRIS DOMHOFF; ROB SNYDER; PIERRE KOSHAKJI; DOUGLAS WITT; STEVE FLORES; MICHAEL TACKER; DONNY ANDERSON; STEVE FISHER; RANDY HEDGE; LOGAN STOUT; PRESLEY SWAGERTY,

DEFENDANTS - APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION
CIVIL ACTION NO. 1:15-CV-422

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that these listed persons and entities have an interest in the outcome. These representations are made so the Judges of this Court may evaluate possible disqualification or recusal.

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4. Stream Gas & Electric, Ltd.
   Defendant-Appellee

5. Stream SPE GP, LLC
   Defendant-Appellee

6. Stream SPE, Ltd.
   Defendant-Appellee

7. Ignite Holdings, Ltd.
   Defendant-Appellee

8. Chris Domhoff
   Defendant-Appellee

9. Rob Snyder
   Defendant-Appellee

10. Pierre Koshakji
Defendant-Appellee

11. Douglas Witt
Defendant-Appellee

12. Steve Flores
Defendant-Appellee

13. Michael Tacker
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STATEMENT OF ORAL ARGUMENT

Oral argument is appropriate. The case presents a novel, unusual and difficult legal issue. It asks the Court to balance the law and public policy that encourages alternative dispute resolution (here arbitration) against arbitration to perpetuate a fraud.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 1965(a) and (b) as the defendants "transact[ed] affairs" in the Western District of Texas. The district court also had jurisdiction over this action under 28 U.S.C. § 1331 as it presented one or more federal questions and 28 U.S.C. § 1337 because it concerned the regulation of commerce. Because Griggs is appealing from a final decision rendered by the district court on June 30, 2017, this Court has jurisdiction under 28 U.S.C. § 1291 and 1294(1).[1] Griggs timely filed a notice of appeal on July 26, 2017.[2]

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[1] ROA.360-361.

[2] ROA.362-63.

STATEMENT OF THE ISSUE PRESENT FOR REVIEW

Did the district court erroneously stay and then dismiss Griggs's action due to an arbitration provision in the papers he signed with Ignite?

STATEMENT OF THE CASE

A. Basic information.

Nature of the case: Griggs claims the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*. by operating a pyramid fraud scheme. This Court's judges may be familiar with the essential facts and claims underlying Griggs's claim from this Court's recent *en banc* decision in *Torres v. S.G.E. Mgmt., L.L.C.*[3]

Course of proceedings: On November 11, 2015, the district court granted the appellees' motion to compel arbitration and stayed the case pending arbitration.[4] Griggs refused to submit his dispute to arbitration and on June 30, 2017, the district court entered a final judgment dismissing Griggs's claims without prejudice.[5] Griggs timely appealed on July 26, 2017.[6]

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[3] *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629 (5th Cir. 2016), *cert. denied*, No. 16-1309, 2017 WL 1650317 (U.S. Oct. 2, 2017).

[4] ROA.345.

[5] ROA.360-61.

[6] ROA.362-63.

District Court:	Judge Lee Yeakel, Western District of Texas, Austin Division.
District Court Disposition:	Griggs's claim is mostly the same as the claims in *Torres*, with the sole exception of defendants' assertion of a different arbitration clause. The defendants, following their defeat the *Torres* litigation changed their arbitration clause. Griggs faces the new arbitration clause. The district court held the defendants' new arbitration clause corrected the illusory nature of the clause in *Torres* and ordered Griggs to arbitrate his dispute.[7]

B. Statement of Facts

Jernard Griggs ("Griggs") sued Stream (a retail provider of electricity), Ignite (a claimed multi-level marketing program for Stream) and others alleging that they are operating an illegal pyramid scheme in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-68 ("RICO"). This Court recently reviewed the essential allegation made here in *Torres v. S.G.E. Mgmt.*,

[7] ROA.244-346.

L.L.C.[8] Stream and Ignite claim to run a multi-level marketing program that 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. The putative class members are those individuals who paid to become IAs and lost money.[9]

A complete description of the Stream/Ignite scheme is contained in the Fifth Circuit's September 30, 2016, *en banc* decision affirming the district court's certification of a class.[10]

In its prior decision, this Court held that Ignite's arbitration clause was illusory and unenforceable.[11] Following that decision, Ignite changed its arbitration clause, and Griggs joined Ignite after the change. The district court viewed its decision as merely whether Ignite's amendments to its arbitration clause removed the flaws so Ignite can now force Griggs to arbitration.[12]

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8 *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629 (5th Cir. 2016), *cert. denied,* No. 16-1309, 2017 WL 1650317 (U.S. Oct. 2, 2017).

9 *Torres*, 838 F.3d at 633.

10 *Id.* at 659.

11 *Torres v. S.G.E. Mgmt., L.L.C.*, 397 F. App'x 63, 68 (5th Cir. 2010).

12 ROA.10-11.

To become an IA, Griggs had to (a) "complete and execute an Independent Associate Agreement" ("agreement") and (b) pay Ignite an "application fee."[13] Griggs agreed to three documents Ignite gave him:

1. the Compensation Plan;
2. the Policies and Procedures ("P&P"); and
3. the Terms and Conditions ("T&C").

Griggs electronically "signed up" as an Ignite Associate on March 22, 2012.[14] The papers are silent on how much the application fee is, but in Griggs's case, he paid to Ignite $399.[15] Griggs also elected to pay to Ignite a monthly fee of $24.99 for at least one month for the Ignite website, for a total payment to Ignite of $423.99.[16]

To support their motion to stay the case for arbitration, the defendants filed the P&P and T&C.[17] They did not file the Compensation Plan, so its terms are a mystery. Given that one-third of the agreement is missing, the agreement between Griggs and Ignite is not in evidence or otherwise in the record.

From the two-thirds of the "agreement" in the record, hereafter called the "2/3rds," the Court knows:

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13 ROA.130; 84.

14 ROA.131.

15 ROA.84.

16 ROA.84.

17 ROA.133-158, 160.

1. The 2/3rds does not state what Griggs must pay Ignite.

2. The 2/3rds does not state what Ignite must pay Griggs.

3. The 2/3rds contains an arbitration provision.

SUMMARY OF THE ARGUMENT

Not so long ago in a city not so

far away ....

[18]

EPISODE II

A CONTINUATION OF FALSE HOPE

It is a period of economic uncertainty. Good jobs are few and far between. Arising from this economic dust is a promise, a false promise, made by Emperor Snyder and his Ignite Empire.[19] The Empire's purpose is to steal all the money it can get from people and – this is key – not be subject to any organized effort to have that money taken back. The Empire's Lord Domhoff has taken the secret plans of a previous and failed empire, Excel Communications, for constructing the Empire's ultimate weapon, the PYRAMID.[20] Lord Domhoff promised

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18 ROA.57.

19 In 2005, Rob Snyder and others formed Stream as a retail energy company to take advantage of Texas' and other states' deregulated gas and electricity markets. ROA.20, 63. To market Stream's retail business, Stream's founders created Ignite. Ignite, in turn, was based upon a structure created by Chris Domhoff. ROA.20. Ignite and the defendants' enterprise is alleged to be an illegal pyramid scheme in violation of RICO. ROA.13-108.

20 Ignite was patterned after Excel Communications, a company previously associated with Domhoff. ROA.8, 16-17, 21. By using Excel's experienced sales persons and placing

the PYRAMID, guarded by an arbitration weapon and shield, would be indestructible and allow the Empire to safely send its Storm Directors, led by Darth Swagerty, down to prey on the people by false promises of wealth that the Empire knew were unattainable.

The Empire's Storm Directors, led by Lord Domhoff and Darth Swagerty, invaded two recognized territories in the North American continent of the Earth, Texas and Georgia. The Storm Directors took money (by credit card debt or otherwise) from each they encountered, leaving him with a worthless document containing no promise and requiring that he kowtow to the PYRAMID's arbitration shield.[21]

At the end of Episode I, the Rebel forces successfully penetrated the PYRAMID's arbitration shield and attacked Empire in court.[22] Rebel forces raised a class of warriors led by one who stands against the Empire through the Rebel's RICO weapon.[23] That battle continues, but

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them at the top of the Ignite pyramid, Ignite was able to draw a large number of individuals from Excel into Ignite relatively quickly.

21 Unlike the Texas Lottery, Ignite not only accepts credit cards, it encourages them. ROA.43.

22 *Torres*, 397 F. App'x at 67 (*Torres I*) (holding Ignite's arbitration clause illusory and unenforceable).

23 *Torres*, 838 F.3d 629 (*Torres*, 838 F.3d 629).

the Empire still possesses the treasure it stole from over 86% of the individuals it encountered.[24]

The Empire realizes that unless it can shield the PYRAMID and Storm Directors from Rebel litigation, its fraud will fail, and it might be required to return the funds it stole.[25]

Episode II opens at Emperor Snyder's office:

Emperor Snyder, Lord Domhoff and their counsel, back at the PYRAMID

E. Snyder: Without our arbitration shield, our PYRAMID and the Empire's fraud will fail. Not only might the Empire have to stop stealing, but it might also have to pay back the money we have plundered. That, Lord Domhoff, was never our plan. You promised the Empire and me that the PYRAMID's arbitration shield was impenetrable, and nobody could ever hold us responsible for what we have taken.

L. Domhoff: Imperial Majesty, please graciously accept my apology. Certainly, we never expected to see a courthouse. However, I have met with the Empire's counsel, and they offer a scheme

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[24] *Torres*, 838 F.3d at 634 ("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.).

[25] *Torres*, 838 F.3d at 654 (Jones, J., dissenting) ("This amount [of claimed damages is] nearly $60 million, would be trebled pursuant to RICO, exposing Stream to over $190 million in potential damages, plus contingent attorneys' fees.).

that we can try to protect the PYRAMID.

E. Snyder: Master Adoy [evil twin of Yoda], come forward and explain your scheme.

C. Adoy: Majesty, we need to make the arbitration agreement appear lawful and like employment contracts. Texas law requires two things. First, the arbitration shield can have no retroactive effect, forward-looking only. Second, we should make sure that any changes have a thirty-day effective date. Several Texas employers have used this same arbitration shield. Essentially, tell the victim they have thirty days to leave or they can be bound to whatever we state. We can withdraw or change the arbitration shield and if the victim objects, he must leave Ignite and leave his payment to the Empire behind. Simple.

E. Snyder: But in all the instances where that arbitration shield was used, the victims were "at will" employees? These employees can leave anytime they want. So, to impose a new agreement on them was just to impose a new term of continued employment. However, aren't we different? We do not employ our victims. They pay us to join Ignite. Seems backward.

C. Adoy: You are correct. We would be changing an agreement where we took the money and then can change the terms. However, consider all your papers. It offers the Empire's victims no promise of anything. They are "eligible" to earn a bonus, but there is no promise that the Empire will ever pay the victims anything.

Isn't that the purpose of the PYRAMID? Heads the Empire wins and tails the victims lose?

E. Synder: Yea, Lord Domhoff promised that. However, the entire program required that we eliminate the threat of litigation. If sued, we have almost no defenses. But I am not persuaded that the courts will not see the obvious differences between our papers and those of "at-will" employees.

C. Adoy: We are not concerned your Majesty. We plan to use the best Jedi mind tricks on the courts.

A Storm Director's thoughts (Storm Director, Darth Swagerty).

While the *Torres* may have harmed the Empire, it is great for us Storm Directors. As Storm Directors, *Torres* says we are not bound to any arbitration shield with anyone . But we can use the arbitration shield against anyone, at our choice. We can fight and if we win, fine. We can just leave the battle.

Legally speaking,

This Court in *Torres I* found Ignite's "arbitration provision [was] illusory and unenforceable."[26] This Court explained the unenforceability of the arbitration clause, namely "[a] the arbitration clause may be eliminated or modified 'upon notice,' and [b] the agreement contains no clause preventing a modification from applying to disputes arising before the modification."[27] Ignite's new arbitration provision addresses and, at least to a casual reader, seems to remove the illusory quality of the provision.

But this entirely misses Griggs's argument.

Griggs makes no claims under the agreement with Ignite. Griggs is making claims solely under the RICO Act. Griggs alleges that the Ignite contract, including the revised arbitration provision, is no more than a sham designed to perpetuate a

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26 *Torres*, 397 F. App'x at 68.

27 *Torres*, 397 F. App'x at 68. The district court's take was similar: "In arriving at this holding, the Fifth Circuit faulted the arbitration clause for (1) the lack of a notice window prior to elimination of the clause becoming effective and (2) the ability to retroactively amend the agreement so as to avoid any promise to arbitrate. *Id.* at 67–68." ROA.319.

fraud through an illegal pyramid scheme. The arbitration clause is nothing more than a product of fraud and cannot be enforced.

Certain defendants are immune to arbitration. They are not entitled to arbitration and must face the court.

STANDARDS OF REVIEW

De novo review applies to all issues in this appeal.[28]

ARGUMENT AND AUTHORITIES

A. The arbitration provision is the product RICO fraud.

1. Griggs accuses Ignite and the defendants of participating in criminal activity – violation of the RICO Act.

The district court treated this is a simple contract case. It is nothing of the sort. Griggs has accused the defendants, with very specific allegations of their acts, of running a pyramid scheme though mail and wire fraud in violation of the Racketeer Influenced Corrupt Organizations Act ("RICO").[29] To be clear, that allegation, if made in a criminal proceeding and proven beyond a reasonable doubt, could imprison each individual defendant for "not more than 20 years."[30]

Please steel your mind against the thought this is a random act of fraud committed by a legitimate business. The fraud is the purpose, the raison d'etre, of the enterprise. The arbitration provision is an essential element of the enterprise. If Griggs proves his claims, these defendants are legally responsible for the acts of a criminal enterprise and liable for damages. Further, Griggs makes no claims under

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28 *Morrison v. Amway Corp.*, 517 F.3d 248, 253 (5th Cir. 2008)). *See also Concise Oil & Gas P'ship v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1471 (5th Cir. 1993) ("This Court also reviews a district court's interpretation of a state law *de novo*.").

29 ROA.13-108; 18 U.S.C. § 1961 - 1968.

30 18 U.S.C. § 1963.

any agreements he has with the defendants; his claim is simply that they are engaged in a RICO enterprise that stole his money.

2. How far do we let RICO enterprises use arbitration?

All acts of "racketeering activity" under RICO are treated the same. Mail and wire fraud can be acts of "racketeering activity."[31] Equally offensive as "racketeering activity" is "any act or threat involving … arson [or] extortion, …."[32]

Now, Sam Slithering is in the trash disposal business with many other of his friends, commonly known as the "Slithering Family," a mob organization. Sam has been working the blocks of his city and finally approaches the ABC Lane. Sam enters Able's Auto Repair and asks for its business in picking up its trash. Sam mentions he knows Able uses Zeek's trash business, but suggests that he change to Sam's business, which is about $200 more a week. Able says no, at first. Then Sam mentions that in the blocks Zeek serves, there have been many fires. But Sam notes with pride, "None of the businesses I have serviced have had a fire. It seems Zeek's trash business just draws fires like moths to a flame."

Able, while not the sharpest tool in the shed, understands. If he does not sign with Sam, his business will likely burn. So, Able agrees to hire Sam. Sam presents his contract which prominently states it is subject to arbitration and prohibits class

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31 18 U.S.C. § 1961(1)(B).

32 18 U.S.C. § 1961(1)(A).

actions. So, Sam slithers down ABC Lane and collects 100 more contracts, all replacing Zeek's services for Sam's.

After a year of this overpriced trash business, Betsy of Betsy's Bakery calls her son, Bob Lawyer, and asks what she can do about her contract with Sam. Bob says her claim of approximately $2400 is just not worth suing, but it if could be a class action, it could be a viable claim of $240,000.

Bob recognizes that every person on ABC Lane has suffered overcharges due to Sam's "threat[s] involving . . . arson [and] extortion. …"[33] Bob concludes the arbitration clause and prohibition against class actions was part of Sam's RICO enterprise's scheme. For Betsy, Bob sues.

Does Betsey's case get dismissed? Does the court recognize that part of Sam's fraud was using an arbitration clause to insulate him from liability for his "threat[s] involving . . . arson [and] extortion. …"[34]

3. The arbitration provision is an essential part of the defendants RICO fraud, and the district court erred in staying and dismissing Griggs's case.

1. As the district court found, "there is no dispute that Griggs is challenging the contract as a whole. Resp. 7 [ROA.281] ('Now is the time to challenge the entire agreement.')."[35] From this, however, the district court

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33 18 U.S.C. § 1961.

34 18 U.S.C. § 1961.

35 ROA.306.

mistakenly concluded that one cannot concurrently challenge both the entire contract and the arbitration provision within it.[36] But that begs the question, "Where is the entire contract?"

The district court erroneously concluded that "[b]ecause Griggs's challenge is to his entire contract with Ignite, it must be resolved by the arbitrator."[37] Wrong. Generally a challenge to the contract for, say lack of consideration, must go to the arbitrator. But that is far afield from what is occurring here. Long ago in the seminal case of *Prima Paint*, the Supreme Court held:

> *if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it.* But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.[38]

The district court ignored *Prima Paint*. Why? Because the district court treated this case as a contract case – a dispute over terms of a contract – when it is nothing of the sort. Alternatively, the district court treated this as a case of a lawful business that may have made one fraudulent contract. The district court failed to recognize this is a serious allegation that the defendants are engaged in a conspiracy that

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36 A hunter cannot kill a dove and then say, "Although it is dead, I am sure its heart still beats." No. Once the agreement is dead because it was birthed from fraud, its arbitration provision is dead as well.

37 ROA.306.

38 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (emphasis supplied) (footnote omitted).

violates the RICO Act, and in criminal terms, each defendant could be a felon.[39] Griggs claims that every breath the defendants take, every move they make and every step they take is to support a RICO enterprise.[40]

2. The *C.B.S. Employees* case is a straightforward example of what is necessary to invoke a district court's jurisdiction to decide whether a claim of fraud eviscerates an arbitration clause.

> The central issue, reduced to its simplest, is whether CBS' claim of fraud relates to the making of the arbitration agreement. If it does, the court should adjudicate the fraud claim. If it does not, then the Federal Arbitration Act requires that the fraud claim be decided by an arbitrator. We reach that conclusion, as we explain more fully hereafter, in obedience to the teaching of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).[41]

The *C.B.S. Employees* case involved a fraud in getting an investor to sign an arbitration clause to ratify unauthorized trades.[42] Because of that simple fraud claim,

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39 As noted previously, only 2/3rds of the agreement is in the record. The defendant/appellants could have introduced the entire agreement but chose not do so. Griggs does not care – his claim is based upon the entire fraudulent pyramid scheme, not limited to the fraudulent agreements that implement that scheme. Why kill a bee when the hive is your problem?

40 I apologize to Sting.

41 *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 912 F.2d 1563, 1566 (6th Cir. 1990).

42 *Id.* at 1568. ("In this case, plaintiff's complaint alleges defendants fraudulently procured their assent to the margin agreement and the arbitration clause contained therein to coerce plaintiff into ratifying the unauthorized trading occurring in its accounts.").

the Sixth Circuit held that the district court was justified in refusing to stay the case for arbitration.[43]

3. The fraud in *C.B.S. Employees* is ***nothing*** compared to the detailed complaint filed by Griggs that attacks all aspects of Ignite's operation as a fraudulent RICO pyramid scheme. As discussed throughout the complaint, the defendants' entire purpose was to operate a pyramid scheme and reap benefits from their violations of the RICO act. Hiding under the cloak of arbitration to support their fraud was a critical design feature of the defendants' RICO scheme. Griggs was approached and fell victim to the pyramid scheme by paying $423.99, just as many have before and after him.[44]

Not one of Grigg's claims is based upon the enforcement of the documents he signed with Ignite, but instead, he complains that each document was but a predicate act of mail and wire fraud to support the pyramid scheme in violations of RICO. ***Each step the defendants took, including seeking arbitration agreements, was to dupe unwitting participants to further the fraud.*** The district court did not recognize Griggs's challenge, ignored the *Prima Paint*'s precedent and erroneously concluded that Griggs's case is based on a contractual failure of consideration

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43 *Id.* at 1568.

44 ROA.84.

mandating arbitration. This is solely a case of fraud grounded entirely upon the RICO Act, not a contract case.

Griggs notes that the agreement itself offered him no consideration, a thought consistent with the notion that the arbitration agreement was part and parcel of defendants' deceit, fraud and trickery to operate a pyramid scheme in violation of the RICO Act for illegal profit. To compel arbitration on Griggs's claim of RICO would play into Ignite's design of its fraudulent pyramid scheme.

B. All the rest of 2/3rds is a product of fraud.

1. Griggs has properly and alleged that the arbitration provision was the product of fraud. That is enough to defeat the arbitration provision.

But it may be useful to establish that the 2/3rds was a product of the RICO fraud and pyramid scheme. In doing so, Griggs can offer this Court a better understanding of the fraudulent purpose of the pyramid. In simple terms, Griggs got nothing he was promised by the defendants. He, and the others like him (the 86%), were never meant to receive any benefit from the pyramid.

Griggs challenges the defendants to prove one enforceable promise in the 2/3rds. The entire 2/3rds provides no binding promises by Ignite to Griggs for any economic consideration. Stated as a question, "if Ignite chose not to pay Griggs anything, what promise could he have enforced by suit or arbitration under the 2/3rds?" The answer is, "nothing."

When deciding Griggs's challenge to the defendants in the district court, they identified a fictional consideration that Ignite gave to Griggs from this statement (out of the 26 pages of the 2/3rds): "IAs are granted 'the intangible right to sell Stream Energy products and services, enroll other Independent Associates and participate in Ignite's Marketing Compensation Plan.'"[45] Is this a joke? Does anyone think that any reasonable individual would spend over $400 so he or she can sell a product for the financial benefit of Stream ***with no*** promise that their labor would make them money? Not only is that silly, but it is also contrary to every promise that the defendants made – which were, essentially, if you join Ignite, you may make money.[46] Would a car salesman agree to sell cars and get others to sell cars for no money – all so the dealership could make money? No.

There is nothing to indicate that the IAs were told there was any purpose in signing up to Ignite other than for their economic gain. Griggs and others were told that signing up with Ignite was the "greatest financial opportunity in America today."[47] Here is the best the defendants can offer by way of an argument that the 2/3rds offered consideration:

> Under Texas law, the right to sell Stream Energy products alone provides adequate consideration to support the agreement—it grants Griggs a legal right that he would not otherwise have had. *See Bryant v. Cady*, 445 S.W.3d 815, 820 (Tex. App.—Texarkana 2014, no pet.)

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45 ROA.308.

46 ROA.30-39, for just a taste.

47 ROA.36.

> ("A promisor 'benefits' when the promisor acquires a legal right to which the promisor would not otherwise be entitled in exchange for a promise.") (citing *N. Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998)).[48]

In *Bryant*, the plaintiffs received the promise and payment of $1000 in consideration.[49] That is the watermark of our economy, you do x, I will pay you y. Here, there is you do x, and I promise you nothing. And there is nothing in the record that would indicate that Griggs or any other IA was invited to pay money to Ignite to sign up as a charitable effort for Ignite.

2. Beyond the fact that Ignite made no enforceable promise for any financial consideration to its IAs, it reserved the right to take any fictional consideration away "in the sole discretion of Ignite." The actual words Ignite used important:

> **Involuntary Suspension or Termination of Independent Associate Status**. At the sole discretion of Ignite, an IA's Agreement may be suspended or terminated for cause, including, but not limited to, the following reasons:
>
> * * *
>
> • Other material cause, in the sole discretion of Ignite.[50]

So, if Ignite, in its "sole discretion" does not like an IA's haircut or anything it claims, in its "sole discretion," might be material, Ignite can terminate the IA.

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48 ROA.308.

49 *Bryant*, 445 S.W.3d at 820.

50 ROA.138.

This Court cannot know what is in Ignite's "Compensation Plan" because the defendants did not place it the record.[51]

But it knows from the record that whatever it says can change at any moment:

> **Eligibility for Commissions**. All IAs must have "active" status and remain qualified in order to be eligible to receive any commissions, bonuses or other financial payments by Ignite. IA qualifications and eligibility requirements to receive commissions, bonuses or other financial payments are specified within the Ignite Compensation Plan or elsewhere herein. *Ignite may change commission percentages, commission structures, bonuses and/or any other form of IA compensation payment at its option and sole discretion*.[52]

Factually, ignite can terminate an IA for any reason, and even if it does not terminate, it can change whatever its compensation plan may be. All "at its option and sole discretion."[53] And to assure its lack of any obligation, Ignite has the IA agree "I am not hereby acquiring any interest in a security or property right."[54]

3. Ignite paid Griggs $96 dollars (a so-called $100 bonus minus Ignite's administrative fee) – but it was under no obligation to do so. Why? Under the

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51 Now the Court might ask why Griggs did not place it in the record. First, to place it in the record, Griggs would have to swear to a document he signed on the web when it might be unavailable to him.

But the big reason is simple. Griggs does not base his claim on any document he signed with Ignite. The very basis of his claim is that Ignite's documents are part of an enterprise designed to perpetuate a fraud upon him and others. The very basis of his claim is that these documents have no effect upon him.

Griggs paid Ignite money. For that money, he got nothing.

52 ROA.141 (emphasis supplied).

53 ROA.141.

54 ROA.160.

allegations, the payment was but a partial refund of the defendants' fraud to maintain the appearance that joining Ignite offered an opportunity. As is now known, 86-90% of those who joined Ignite would never even recoup the money they paid to join.[55] And those at Ignite understood that upon saturation of the pyramid, this would occur, as this is the pernicious nature of a pyramid and the very reason for its illegality.[56] The defendants perpetuated their fraud by promising money in promoting the scheme, but then requiring participants to sign agreements that made no such promise and that allowed the defendants to reap huge benefits on the backs of those duped participants. But to make their fraud appear viable to the unsuspecting, Ignite's marketing of the pyramid highlighted the payments it was making to the infinitesimal number of participants who had joined Ignite at the very top of the pyramid.

The appellees again can show no enforceable right Griggs had to compensation of any sort if he signed up Ignite enrollees or Stream customers.

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55 ROA.17.

56 In a pyramid scheme, saturation occurs when there are few opportunities to sale the product. ROA.34-35. Domhoff admitted that Ignite's sales persons would reach a "saturation point" in two years. ROA.35.

C. Comparisons to at-will employees are invalid.

This case raises whether an at-will employee's notice that new arbitration terms will bind her if she does not quit within thirty days ***equates*** to obligating a purchaser of a right to sell a product thirty-days' notice she must abandon her purchased rights without recourse or be bound by new arbitration terms. These issues are governed by Texas contract law, as in *Torres*.[57]

Griggs alleged two things. First, he has received nothing for his payment to Ignite. Without consideration, there is no contract. Second, as known by all, the failure of the contract to provide consideration does not invalidate the arbitration agreement. What cancels this arbitration agreement is that it was part of the very RICO fraud asserted by Griggs. Griggs proposes that an arbitration clause created and used as part of a RICO scheme is invalid and unenforceable, or at least that was an issue for the district court to determine.

The defendants who are Presidential Directors, and, more directly IAs, are yet in a different bag to the above. Under this Court's decision in *Torres*, they are not bound to arbitrate. Specifically, this Court found that the agreement signed by these defendants was "illusory and unenforceable."[58] While they can walk away from arbitration at any time, they seek to hold Griggs to arbitration. The arbitration

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57 *Torres*, 397 F. App'x at 66–67.

58 *Torres*, 397 F. App'x at 68.

agreement applied to Griggs has no counterparty and offers Griggs no consideration, and therefore is invalid under *Torres*.

Usually the agreement to arbitrate serves as consideration for an arbitration contract. However, when a party reserves the right to abolish or modify an arbitration agreement at will, its promise to arbitrate is illusory and does not provide the consideration that will permit enforcement of the arbitration agreement.

Griggs's claim against the Presidential Directors is not subject to arbitration.

D. The defendants Anderson, Fisher, Hedge, Stout and Swagerty are not bound to arbitration and cannot compel Griggs to arbitrate.

In *Torres* and here, the plaintiffs sued Ignite "Presidential Directors" Donny Anderson, Steve Fisher, Randy Hedge, Logan Stout and Presley Swagerty.[59] The defendants concur that Presidential Directors "are just IAs with a special title, required to sign the same agreements as IAs."[60] Because Anderson, Fisher, Hedge, Stout and Swagerty are bound by the decision in *Torres*, they are not bound by the arbitration agreement they signed.[61] In simple terms, this means that Griggs cannot force them to arbitrate against him. As these individual IAs want to play the arbitration game, they can try to force arbitration or simply run away.

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59 *Compare Torres*, 397 F. App'x at 64 *with* ROA.27.

60 ROA.312.

61 *Torres*, 397 F. App'x at 64.

"An arbitration agreement may be illusory if a party can unilaterally avoid the agreement to arbitrate."[62] Moreover, "most courts that have considered this issue have held that, if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory."[63] This circuit has since explained that in *Davidson*, "the court plainly held that if the defendant-employer retained the right to 'unilaterally abolish or modify' the arbitration program, then the agreement to arbitrate was illusory and not binding on the plaintiff-employee."[64]

This is an odd circumstance and likely not one that will often appear. However, under the established law of *Torres*, these individuals were never bound to any arbitration clause involving Ignite. They meet the very definition of a party who can avoid arbitration against Griggs. Under the case law, their unilateral right to avoid arbitration make the arbitration against Griggs illusory. They cannot demand Griggs arbitrate his case against them.

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62 *Torres*, 397 F. App'x at 65 (*citing J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 230–31 (Tex. 2003)).

63 *J.M. Davidson, Inc.*, 128 S.W.3d at 231 n. 2.

64 *Morrison*, 517 F.3d at 255 (emphasis in original).

E. The district court abused its discretion in ordering Griggs to arbitrate with the Presidential Director defendants based upon equitable estoppel.

1. The Fifth Circuit's applicable standard of review.

The Fifth Circuit applies an abuse of discretion standard to review the district court's determination of whether equitable estoppel may be invoked to compel arbitration.[65] A decision based on a mistake of law or a clearly erroneous assessment of the evidence constitutes an abuse of discretion.[66]

2. The district court's use of "concerted misconduct" is contrary binding Texas law.

The Presidential Directors are non-signatories to the arbitration agreement at issue between Griggs and Ignite. Lacking any contractual relationship with Griggs, the Presidential Directors sought to compel Griggs to arbitration based on a theory of equitable estoppel, to which the district court agreed.[67] To conclude that, however, the court relied on a case involving Louisiana law and applied a "concerted misconduct" theory of estoppel expressly rejected by Texas courts and this Court after the district court's opinion below.[68] Under Texas law, the Presidential Defendants cannot invoke equitable estoppel to compel Griggs to arbitration, and,

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65 *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 305 (5th Cir. 2016).

66 *Id.*

67 ROA.326-27.

68 *See Al Rushaid*, 814 F.3d 300.

under the *Al Rushaid*, a decision by this Court after the district court's opinion, must be reversed.

3. Texas law governs the invocation of estoppel to compel arbitration.

The Supreme Court has ruled that state contract law governs the ability of non-signatories to enforce arbitration provisions.[69] "[A] litigant who was not a party to the relevant arbitration agreement may invoke § 3 [of the Federal Arbitration Act] if the relevant state contract law allows him to enforce the agreement."[70] "'State law' ... is applicable to determine which contracts are binding under § 2 and enforceable under § 3 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'"[71]

4. District Court's invoking "concerted misconduct" estoppel is thoroughly rejected by Texas courts.

As recognized by the Fifth Circuit in *Al Rushaid v. National Oilwell Varco, Inc.*, Texas courts reject the concerted misconduct estoppel theory.[72]

In our case, the district court began its consideration of the defendants' estoppel argument : "Thus, the undersigned must determine whether the plaintiffs

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69 *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

70 *Arthur Andersen LLP*, 556 U.S. 624.

71 *Arthur Andersen LLP*, 556 U.S. 624.

72 *Al Rushaid*, 814 F.3d at 305 (citing *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 194 (Tex. 2007)); *see also G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 529 n. 23 (Tex. 2015)

allege 'substantially interdependent and concerted misconduct' by the signatory and non-signatory defendants."[73]

Next, observing that Griggs RICO complaint alleges concerted malfeasance among signatory and non-signatory defendants, the district court concluded that estoppel could be invoked by the non-signatory defendants to compel Griggs to arbitration. The problem is, however, that the case relied upon by the court to invoke "concerted misconduct" estoppel was based on Louisiana state law.[74] Texas law explicitly rejects the "concerted misconduct" theory of estoppel, and the district court's decision should be reversed.[75]

F. Conclusion

The district court's decision failed to apply the law and is erroneous. Griggs asks this Court to reverse the district court's order dismissing his case and remand for further proceedings consistent with this Court's ruling.

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73 ROA.11

74 *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 398 (5th Cir. 2006).

75 *Al Rushaid*, 814 F.3d at 305.

Respectfully submitted,

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CERTIFICATE OF SERVICE

At this moment, I certify that a copy of the above and preceding has been served upon all counsel for the defendants through EFC on November 27, 2017.

By: Scott M. Clearman
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CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(a)(7), the undersigned certifies this brief complies with the type-volume limitations of.

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