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 REPLY

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In their response, appellees argue that Griggs "cannot state a claim under RICO *because his pyramid-scheme allegations are actionable as fraud under the [Federal] securities laws*."[1] According to the appellees, all pyramid schemes are actionable under Federal securities laws.[2] Following their logic, the appellees (now, generally called "the pyramid") and their conduct admittedly constitute a pyramid scheme,[3] and Griggs has either a RICO case or a case under the Federal securities laws.

Stream is a successful retail electric company. By the pyramid's admission, Ignite is a pyramid, and the scheme at the heart of Griggs' RICO claims is a pyramid scheme. A critical element of the pyramid's fraud is forcing arbitration. Stream had Independent Associates (hereafter "IA's") sign the illusory agreement (only 2/3rds of which is here) to (a) perpetrate a fraud by presenting papers to make the 2/3rds look official while insuring that Ignite had no obligations and (b) protect the pyramid from having to answer for their fraud in court by having an arbitration clause in the

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1 Appellees' Br. at 2.

2 "This Court has clearly established that allegations that a company operates an illegal pyramid scheme are actionable as securities fraud." Appellees' Br. at 15.

3 In the highly unlikely event this Court agrees that the pyramid is a security covered by the PSLRA, Griggs is fully entitled to amend his pleading as "a Matter of Course" since the pyramid has yet to trigger FED. R. CIV. P. 15(1). And upon remand, Griggs will replead, if necessary and appropriate.

bogus agreements.[4] People losing $400 in a scam simply cannot afford to arbitrate with a multi-million dollar company and the "IA defendants" (Anderson, Fisher, Hedge, Stout and Swagerty) who have reaped literally millions of dollars from their fraud.

The pyramid dwells on the 2/3rds because it contains various arbitration provisions. "[T]his Application, together with the Ignite Policies and Procedures and ***Ignite Marketing Compensation Plan***, as may be amended from time to time, shall constitute the entire agreement (the "Agreement") between Ignite and me."[5] So, where is the 1/3rd, the "Ignite Marketing Compensation Plan"? The pyramid seeks to enforce "the Agreement" – not Griggs. The pyramid has the missing Ignite Marketing Compensation Plan ("Compensation Plan" or "1/3") within its possession or, at least, its control. Neither this Court nor Griggs' counsel knows the terms and conditions of the Compensation Plan to which the pyramid purports to bind Griggs.[6] Hypothetically, perhaps, the Compensation Plan says something like "not withstanding anything else in this agreement, arbitration will never be enforced

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4 To support their motion to stay the case for arbitration, the defendants offer only 2/3 of their "agreement" with Griggs – specifically the Policies and Procedures and the Terms and Conditions ("T&C"). 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 fully in the record.

5 ROA.118, 160.

6 Since the pyramid changes its documents at whim, absent access to the very document that Griggs "e-signed" as part of a click-through agreement, the terms and conditions remain unknown to the Court and Griggs' counsel.

against you." The pyramid's failure to proffer the 1/3rd operates as an inference against its claims.[7]

Griggs' opening brief sets forth three material facts about Griggs and Ignite this Court can glean from the 2/3rds:

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

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

3. The 2/3rds contains an arbitration provision.[8]

Griggs' case is not related in any way to the 2/3rds because the 2/3rds promises him nothing, so he has nothing to enforce. Moreover, Ignite has nothing to enforce against Griggs.

Rather, Griggs is seeking redress for having been duped into paying for a misrepresented "opportunity" that has served only to enrich a few to a staggering degree.[9] Labeling this case a contract or fraudulent inducement to contract case misses the mark. It is a fraud case about a pyramid scheme,squarely within the ambit of RICO.[10] There is no contract to be induced by fraud. Also, please recall Griggs' initial example in his appeal brief of the "Slithering Family" and know that

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7 The longstanding rule of adverse inference provides that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R. B.*, 459 F.2d 1329 (D.C. Cir. 1972).

8 Appellant's Br. at 6.

9 *See, e.g.*, ROA.31, 91.

10 ROA.13-108 (Original Complaint).

arbitration was never intended to protect criminals.[11] To allow the pyramid to continue to fraudulently lure future victims into joining the pyramid without fear of courts is to condone the pyramid's criminal actions. The pyramid should face a jury.

A. This Court has jurisdiction.

1. The notion that Griggs sought to voluntarily dismiss his case without prejudice is a recurring misrepresentation in the pyramid's brief:

a. "[T] he district court granted Plaintiff-Appellant Jernard Griggs's request to voluntarily dismiss his case."[12]

b. "At Griggs's request, the court dismissed his case *without prejudice*."[13]

c. "Griggs attempts to use his own voluntary dismissal of his claims as an end-run around the finality requirement, but established precedent forecloses his flagrant attempt to expand this Court's jurisdiction."[14]

d. "At Griggs's request, however, the court later dismissed Griggs's claims without prejudice. Dkt. 27, 28."[15]

e. "Griggs's voluntary dismissal (without prejudice) is not a final decision and does not create appellate jurisdiction."[16]

f. "Nor did the district court's decision become appealable simply because the court granted Griggs's request, under Federal Rule of Civil Procedure 41(a), for a voluntary dismissal without prejudice."[17]

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11 Appellant's Br. at 13-14.

12 Appellees' Br. at iii (underline emphasis added).

13 Appellees' Br. at 1 (underline emphasis added, italics original).

14 Appellees' Br. at 7 (underline emphasis added).

15 Appellees' Br. at 9 (underline emphasis added).

16 Appellees' Br. at 9 (underline emphasis added).

17 Appellees' Br. at 10 (underline emphasis added).

For 606 days Griggs' case was benched.[18] The district court entered four orders nudging Griggs to arbitration, but Griggs opted to decline pursuing that course.[19]

2. Finally, when the district court ordered to show cause on why the case should not be dismissed for want of prosecution, Griggs responded:

> This Court's June 13, 2017 order required that '[the] Plaintiff shall show cause in writing why this cause should not be dismissed for want of prosecution on or before June 30, 2017.' Griggs anticipated that this Court would have already dismiss [sic] this case for want of prosecution because this Court left him only an arbitration which he has not pursued.
>
> So, Griggs states the following for the Court's consideration:
>
> 1. Griggs understands and appreciates this Court's order compelling arbitration. Griggs believes that the Court consiconsidered [sic] all arguments before it ruled.
>
> 2. However, Griggs disagrees with this Court's conclusion that this matter must go to arbitration.
>
> 3. Griggs will not pursue arbitration.
>
> *4.* *Griggs stands ready to litigate this case before this Court to a conclusion.*

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[18] Days from the "Order" (November 5, 2015), ROA.344-46, until the "Final Judgment (June 30, 2017), ROA.360-62. If it were not for the district court's "Final Judgment," as of this filing, the case would have been in storage for 861 days.

[19] The district court stayed the case on November 4, 2015 and ordered the parties to submit a joint status report by February 3, 2016. ROA.344-46. On February 3, 2017, the parties filed the ordered status report that stated "Plaintiff has not submitted the dispute to arbitration. Accordingly, there is no arbitrator, date of arbitration, or location of arbitration to report." ROA.347-38. On May 23, 2017, the district court again asked for a status report by June 9, 2017. ROA.353. On June 9, 2017, the parties submitted a more succinct status report, stating that "[t]he plaintiff has not submitted the dispute to arbitration." ROA.354. On June 13, 2017, the court ordered the plaintiff to "show cause in writing why this cause should not be dismissed for want of prosecution on or before June 30, 2017." ROA.356-57.

> Different district courts do not stay, but dismiss, allowing the plaintiff to appeal an order of arbitration. As the forefather, *Torres v. S.G.E. Mgmt., L.L.C.*, 397 Fed. Appx. 63, 64 (5th Cir. 2010) shows, there is always a possibility that a district court may make a reversible mistake on arbitration.[20]
>
> Griggs and his counsel mean no offense to this Court. However, they respectfully disagree with this Court's arbitration order and *Griggs will either litigate this matter now before this Court or will appeal when dismissed.*[21]

Griggs twice stated his desire to litigate and, thus, had no excuse to proffer in response to the motion to show cause. The district court chose to dismiss without prejudice.

3. The pyramid's misrepresentations were intended to trigger *Marshall v. Kansas City Southern Ry. Co.*[22] *Marshall* involved a plaintiff appealing his voluntary dismissal, an act that removes jurisdiction.[23] Griggs never sought dismissal. Griggs relies upon the authority *Westlake Styrene Corp. v. P.M.I. Trading, Ltd*. but only for its reasoning.[24] There, this Court cites cases holding that a dismissal without prejudice that ends litigation on the merits and leaves the district court nothing more

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20 Judge Hoyt did, after the arbitration appeal, certify a plaintiffs' class in *Torres* that was subsequently affirmed by the Fifth Circuit's *en banc* decision in *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 633 (5th Cir. 2016), *cert. denied*, 138 S. Ct. 76, 199 L. Ed. 2d 24 (2017) (*en banc*). That has now settled, and this description is no longer accurate to fact but was accurate when written.

21 R.358-59 (emphasis by underline and italics added).

22 *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495 (5th Cir. 2004).

23 *Id.* at 499–500.

24 71 Fed. Appx. 442 (5th Cir. 2003).

to do than execute the judgment is a final decision, giving this Court jurisdiction.[25] A dismissal "'[w]ithout prejudice' ... simply mean[s] without detriment to [Plaintiff's] ability to present the claims to an arbitrator."[26] But, if Griggs refiles, he will meet the same fate – dismissal.

B. The "IA defendants" are not bound to arbitration.

1. Griggs sued five "IA defendants" (Anderson, Fisher, Hedge, Stout and Swagerty) who, per this Court, are not bound to arbitrate. In *Torres*, this Court held that the arbitration agreement that bound the IA defendants is "illusory and unenforceable."[27] That decision was rendered against them, despite their efforts to prove it enforceable.[28]

The IA defendants now claim that "the IA [d]efendants' original contracts with Stream differed *slightly* from the agreement that Griggs later signed, …."[29] If the arbitration agreement is, as they aver, only "slightly" different, then the pyramid

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25 *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000) ("where ... the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final'"); *Salim Oleochemicals v. M/V SHROPSHIRE*, 278 F.3d 90, 93(2d Cir. 2002) ("dismissals with and without prejudice are equally appealable as a final orders"); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002) (noting Green Tree decision did not hinge on whether dismissal was with or without prejudice and holding dismissal without prejudice was final and appealable).

26 *Hirras v. Nat'l R.R. Passenger Corp.*,10 F.3d 1142, 1144 n. 2 (5th Cir.1994), *vacated on other grounds*, 512 U.S. 1231 (1994).

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

28 *Id.*

29 Appellees' Br. at 22.

has admitted defeat. For if the difference is only "slight," then Griggs' agreement falls under *Torres* making it "illusory and unenforceable."[30] Contrary, to their averment, the pyramid (inclusive of the "IA defendants") would have this Court find that, in fact, there is a ***key*** difference between the arbitration agreement signed by the IA defendants and the one signed by Griggs; a difference that, in effect, renders the one signed by the IA defendants "illusory and unenforceable," and the one signed by Griggs enforceable.

Indeed, Griggs filed this case because Judge Hoyt's decision in *Torres*, holding that, as of April 2, 2011, Ignite changed its arbitration agreement to make it appear enforceable effectively excluding Griggs from the *Torres* class.[31] Below, the pyramid trumpeted Judge Hoyt's decision.[32] However, the pyramid seems to have acquired an appreciation for the box into which Judge Hoyt's decision put them vis-à-vis the decision's adverse effect on the IA defendants. As a result, in an effort to

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

31 Judge Hoyt's certification decision occurred ***without*** any IA who, like Griggs, signed up after April 2, 2011. He was defining a class, not ruling on the merits. Judge Hoyt had no party who, like Griggs, signed up after April 2, 2011, to rule against. *Id.*

32 In a case in his court dealing with the same claims that Griggs raises here, Judge Hoyt held that IAs who joined Stream Energy during the same time period as Griggs must raise these claims in arbitration. *Torres v. SGE Mgmt. LLC*, 2014 WL 129793, at *10 (S.D. Tex. Jan. 13, 2014). There is no reason for this Court to disagree with Judge Hoyt's conclusion.

ROA.116. Again, Judge Hoyt had ***no*** plaintiff before him that signed up after April 2, 2011, so he had no justiciable controversy.

squirm out of that box, the pyramid's response makes nary a mention of Judge Hoyt's decision.

2. The pyramid states that "Stream officially amended all of its preexisting IA contracts—including those of the IA [d]efendants—well before Griggs enrolled in the Program."[33] There is no evidence in the record that such occurred. Moreover, because none of the IA defendants signed an arbitration agreement after April 2, 2011, none ever had a non-illusory and binding arbitration agreement to amend.[34]

The result is clear: wielding their loss in *Torres*, the IA defendants can avoid arbitration at will. As such, the IA defendants cannot enforce the arbitration agreement against Griggs.[35] That should end this matter.

3. The district court and the pyramid rely entirely upon direct benefits estoppel to press Griggs into arbitration against the IA defendants. That doctrine applies when a claim depends on a contract's existence and is a claim that would be "unable to 'stand independently' without the contract."[36] That law looks to the claimant and examines whether "a direct benefit from a contract containing an arbitration clause turns on the substance of the claim, not artful pleading."[37] The

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33 Appellees' Br. at 23.

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

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

36 *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 609 (5th Cir. 2016) (*quoting G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 528 (Tex. 2015) (*quoting In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739–40 (Tex. 2005))).

37 *Id*. at 527.

pyramid seeks to turn that doctrine on its head and substitute the *IA defendants'* efforts to seek benefits under the agreement with the *claimant's* desire for benefits under the agreement. Griggs seeks no benefits from any agreement, and denies the existence of any agreement between the IA defendants and him. The substance of Griggs' claims arises from RICO violations.

"'[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law,' *rather than from contrac*t, 'direct benefits' estoppel does not apply, even if the claim refers to or relates to the contract."[38]

C. Some RICO claims may be subject to arbitration; this one is not.

The entire pyramid's pyramid scheme, not a part, is a racketeering enterprise. Below, the pyramid stated that "Griggs's ***entire*** Complaint is premised on an alleged conspiracy undertaken by the signatory and non-signatory Defendants—and allegations that the signatory and non-signatory Defendants together comprise a RICO enterprise…."[39] Here, the pyramid attempts to turn Griggs' argument into a

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[38] *Hays*, 838 F.3d at 609; (*quoting In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182, 184 n.2 (Tex. 2009)).

[39] ROA.122 (emphasis added).

strawman – *e.g.*, that *all* RICO claims cannot be arbitrable.[40] Griggs' argument is that *his* RICO claim is not arbitrable due to the unique circumstances of *his* case.[41]

Starting with the complaint, Griggs has consistently argued that he is the victim of racketeering through mail and wire fraud. His case has nothing to do with the 2/3rds that the pyramid waves about in a desperate attempt to avoid litigation or, stated another way, force arbitration.

The test for arbitrability begins with determining whether the parties agreed to arbitrate by considering (1) whether a valid agreement to arbitrate between the parties exists, and, if so, (2) whether this dispute falls within the scope of that agreement.[42] Here, the arbitration agreement may be interpreted as broadly as is reasonable, subject to a key limitation – *i.e.*, to "any claim, dispute, or other difference" that is "in any way related to" the agreement.[43] Griggs has advanced no argument that the pyramid, including the corporate defendants (Stream, Ignite) and the IA defendants, are liable to Griggs because of anything contained in any agreement. Griggs' RICO claim has absolutely nothing to do with any agreement

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40 Appellants' Brief at 15.

41 *Celanese Corp. v. Martin K. Eby Const. Co.*, 620 F.3d 529 (5th Cir. 2010) is inapplicable. That case involved the *de novo* review of a district court's ruling on a motion to amend or alter a judgement after a jury trial, wherein the jury found that a waiver had occurred because the appellant had never advanced a theory of liability in the trial that they were asserting on appeal. *Id.* at 532.

42 *Graves v. BP Am., Inc.*, 568 F.3d 221, 222 (5th Cir. 2009).

43 ROA.160.

but, instead, has everything to do with the pyramid's extra-contractual fraudulent actions in setting up and perpetrating a pyramid scheme using false and misleading information to entice others to pay money and submit to arbitration if they want to seek redress for having been duped. To send any issue to the arbitrator, there needs to be an issue that does not go to fraud in procuring the arbitration agreement.

When considering a motion to compel arbitration, the federal court may consider issues relating to the making and performance of the agreement to arbitrate.[44] Understandably, the pyramid tries to characterize Griggs' RICO claims as a "fraud in the inducement to contract" case concerning "questions about the validity of the contract as a whole…".[45] Again, Griggs repeats, he is seeking no redress under any contract, or seeking to enforce anything in a contract. There is nothing in any contract to enforce.

Every case cited by the pyramid to support its arguments on this issue concerns "questions about the validity of the contract as a whole…."[46] In each case

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44 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) ("[I]n passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate."); Appellee's Br. at 17.

45 *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 423 (Tex. 2015) (per curiam) To prove fraud in the inducement of a contract, a plaintiff must show that the (1) defendant made a material representation, (2) representation was false and was either known to be false when made or made without knowledge of its truth, (3) representation was intended to be and was relied upon by the injured party, and (4) injury complained of was caused by the reliance.

46 *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (the plaintiff alleged that "Buckeye charged usurious interest rates and that the Agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face. Buckeye

relied upon by the pyramid, the claimant sought to undo the contract "as a whole."[47] Griggs' claim under RICO does not require him to attack the 2/3rds as a whole.[48] Griggs sees the entire 2/3rds as a waste of paper containing no enforceable promises and has neither alleged that he was fraudulently induced into entering the 2/3rds beyond the arbitration terms, nor claimed reliance on the 2/3rds.

Griggs' individual reliance is not even an element of his RICO claims.[49] Rather, the pyramid's RICO scheme, in totality, proximately caused his injuries. Griggs claims the arbitration clause is unenforceable because it is a part of the RICO scheme. But there is no challenge to the enforceability of the agreement generally.

To withhold jurisdiction under the FAA, there must be something to send to the arbitrator. The only thing to send to an arbitrator is "Was the arbitration agreement procured by fraud?" But that is a question only the courts can answer.

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moved to compel arbitration."; *Preston v. Ferrer*, 552 U.S. 346, 350 (2008) ("Ferrer's petition to the California Labor Commissioner charging that the contract was invalid and unenforceable under the California Talent Agencies Act…"); *Overstreet v. Contigroup Companies, Inc.*, 462 F.3d 409, 411 (5th Cir. 2006) ("(1) Appellants fraudulently or negligently induced [Overstreet] into growing chickens for them, (2) Appellants' guidelines for raising the chickens required her to use chemicals that damaged her former farm, and (3) Appellants wrongfully terminated the contract."); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 642 (Tex. 2009) ("Dancy ... an employee of Labatt, elected to participate in the plan and signed an agreement [containing an arbitration provision]. Dancy later died from an apparent asthma attack that occurred while he was working. His parents and children filed a wrongful death action against Labatt.").

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

48 It bears mention that the whole agreement is not in the record.

49 *Torres*, 838 F.3d at 637.

D. The Death Pyramid fires its "PSLRA" weapon and blows-up.

1. How did this appeal about arbitration turn into a motion to dismiss or for summary judgment?

On the same page where the pyramid argues that matters not raised below are waived, it argues *for the first time* that the Privates Securities Litigation Reform Act ("PSLRA") applies to bar Griggs' RICO case. To support its newly proffered argument, the pyramid does nothing more than declare that the plethora of activities in which it engages amount to a "pyramid scheme" that is actionable as a fraud in the purchase or sale of securities because all pyramid schemes are actionable as such.

In so concluding, the pyramid relies on cases that predate the PSLRA.[50] In contravention to its own argument about the perils of entertaining arguments not presented below, the pyramid is asking this Court to consider a new, albeit meritless, argument that procedurally should have been made below as a FED. R. CIV. P. 12(c) motion for judgment on the pleadings or a FED. R. CIV. P. 56 motion for summary judgment. Since Griggs filed the complaint, the "pyramid scheme" upon which the pyramid constructs their argument has been at issue, and the pyramid has been on notice that Griggs' claims are RICO claims. Yet, below, the pyramid failed to raise the alleged applicability of the PLSRA and cannot raise it here.

The pyramid's newly-proffered PSLRA argument that their activities are in fact a pyramid scheme fails to address the rationale for deeming an IA investment in

[50] Appellant's Br. at 15.

the pyramid as a security subject to PSLRA. Nonetheless, after making the unsupportable (and untimely) claim that the IA investment is subject to PSLRA, the pyramid seeks to dismiss the Griggs' claims, it seems, for failing to state a valid claim for relief – a dismissal that if properly sought could be addressed via an order to amend any pleadings found to be deficient.[51]

Griggs is confused on the procedural vehicle that the pyramid purports to invoke. Is this a FED. R. CIV. P. 12(c) motion for judgment on the pleadings, filed for the first time before this Court? Not, for the pyramid's response brief makes no reference to the complaint but references materials outside of the complaint, specifically, evidence of the 2/3rds; nor does the pyramid's response brief state how Griggs pled himself out of court. Perhaps, then, the pyramid's brief is a FED. R. CIV. P. 56 motion for summary judgment? Not in a case where a material fact or collection of material facts is so clearly missing, *e.g.*, the other "1/3rd," the Compensation Plan, and the caselaw cited predates the statute at the heart of the argument. Either way, the entire argument is untimely, lacks merit, and should be rejected.

In the highly unlikely event this Court finds this issue properly before it, the only conceivable remedy would be for a remand to allow Griggs to replead his case.

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[51] *See, e.g.*, *Kerrigan v. ViSalus, Inc.*, 112 F. Supp. 3d 580, n.7 (E.D. Mich. 2015).

2. Griggs' claim is not, on its face, actionable under the federal securities laws.

Griggs will make this simple. If you joined in the very inception of the pyramid, like the IA defendants, you were an investor in what you knew would be income based upon the labors of those beneath you in the pyramid. If, however, you became an IA after April 2, 2011, your only hope was to work **your** tail off to get new Ignite IAs and Stream customers. Then, with **your** own Herculean efforts, you might have a miniscule chance of making anything above what you had spent to join the pyramid.

Whether Ignite sold the IAs a "security," and, as such, whether the scheme might be "actionable" under federal securities laws is determined by the Supreme Court's *Howey* test, which defined an investment contract as a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits *solely from the efforts of the promoter or a third party*…."[52] In *United Housing Foundation, Inc. v. Forman*, the Supreme Court reaffirmed *Howey* and held that the touchstone of an investment contract for the securities acts is "the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[53]

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52 *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (empathies supplied).

53 421 U.S. 837, 852 (1975).

Here, whether anticipated profits were to come solely by the efforts of Stream or Ignite, with no substantial personal effort by the IA, is a matter determined by the expectations of a "reasonable investor" rather than the subjective beliefs of any particular IA.[54] The pyramid and now *Griggs* rely upon *Piambino v. Bailey*, a dispute over the sale of distributorship contracts (Bestline Direct Distributorships) to sell and distribute personal and home care products through a pyramid sales scheme.[55] In *Piambino,* 610 F.2d 1306, this Court started its analysis with the decision in *S.E.C. v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974).[56] This Court recognized that the *Koscot* pyramid scheme was held to be a security under the Securities Act of 1933 and the Securities Exchange Act of 1934.[57]

In *Piambino*, as here, the Court recognized that the Bestline Direct Distributorships (hereafter "Bestline") comprised a retail sales component and a recruiting component and that both were integral parts of one common scheme.[58] The *Piambino* court recognized that the degree of "investor" participation and

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54 *See, e.g.*, *United Housing Foundation, Inc.*, 421 U.S. at 852.

55 *Piambino v. Bailey*, 610 F.2d 1306, 1388 (5th Cir. 1980).

56 *Id.* at 1316.

57 *Id.* at 1316–17.

58 *See Piambino*, 610 F.2d at 1318–19.

control differed significantly with respect to each of these aspects.[59] It is silly to consider any IAs payment to Ignite as an expectation to receive a return on capital.[60]

Stream earns money on its energy sales and, if an IA meets certain standards, shares that income with the IA. Concurrently, on a separate path, Ignite is receiving income from each IA by way of sales of its (a) Services Program ($329) and (b) monthly fees for its Ignite Homesite ($29.00). Ignite can be compared to Bestline's sales scheme in *Piambino* – it has two levels of participation, selling and recruiting. The effort that an IA joining after April 2, 2011 would need to expend to get a return of any sort on his/her "investment" in the Ignite pyramid is illustrated by the following summary of hypothetical IA "Ruby."

3. Let's follow Ruby, our Purchaser of Ignite's Services Program.

a. Ruby, Ruby don't take your money to Ignite …[61]

Let's analyze the two aspects of the Ignite pyramid using the "reasonable investor" test. Griggs will do so using a year horizon for Ruby. The analysis will

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59 *Id.* at 1318.

60 *Piambino* explains the *Bestline* alleged pyramid scheme this way:

> It is apparent that the purchasers of *Bestline* Direct Distributorships would not profit by "capital appreciation resulting from the development of the initial investment". Neither is there any indication that prepurchasers of Direct Distributorships expected a "participation in earnings resulting from the use of investors' funds".

Id. at 1318 (5th Cir. 1980).

61 Apologies to Kenny Rogers.

stop when Ruby makes money – an untenable feat for 89% of non-hypothetical IAs.[62]

Step 1: <u>*Ruby pays Ignite.*</u>

$329 for Ignite's Service Program[63] and

$348 for her Ignite Homesite (12 months at $29 per month).[64]

Summary*:* Ruby's total "investment" is $677.

Step 2: <u>*Earn four points*</u>. Ruby can earn four points, if, within 30 days of becoming an IA, Ruby:

Signs herself up as a Stream customer (1 point);

Signs herself up for an Ignite Homesite (2 points); and

Signs up one other Stream customer (1 point).[65]

Summary: Ignite pays Ruby a "bonus" of $100 for the four points that she earned, and Stream pays Ruby $12 for the two customers (*i.e.*, 50¢ per each of the 2 customers -- $1 for the 2 customers -- 12 months). At this point, Ruby remains out of pocket $565 (Ruby paid $677 and received $112.)

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62 ROA.17.

63 ROA.27.

64 ROA.28.

65 ROA.28.

Note: Fisher, an IA defendant, has stated that, at this point, the IA should stop gathering Stream customers and try to gather new IAs.[66]

Step 3: <u>*Earn six more points*</u>. To collect six more points, Ruby must sign up six Stream customers in 60 days.[67]

Summary: Ignite pays Ruby an additional bonus of $100 for the six points that she has earned, and Stream pays her $30 for the six customers (50¢ per each of six customers for 10 months). Ruby's net outlay at this point of her first year is $435 (Ruby paid $677 and received a payment of $112 and another payment of $130).

Step 4: *Get three new IAs who each, in turn, collect 10 points*.

Get three new IAs to join the pyramid, and

Help each of the three new IAs gather 10 points.[68]

Note: Jones, a Presidential Director, compares "bringing new investors into the Pyramid to Harriet Tubbman's [sic] work. She saved slaves; Ignite saves financial futures."[69]

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66 ROA.196.

67 ROA.28.

68 ROA.28-29.

69 ROA.42.

Summary: Ignite pays Ruby $300 ($100 for each of 3 new IAs that have purchased the Ignite Services Program and gathered 10 points). Stream pays her an additional $240 (*i.e.*, $1 for each new actual Stream customer – each of the 3 IAs collected 8 customers for a total of 24 customers -- for 10 months (please recall that each IA gets 1 point for becoming a Stream customer and 1 point for signing-up another customer, provided that this occurs within 30 days of becoming an IA, and that points count towards a bonus from Ignite but not payment by Stream)). Ruby has now earned a profit of $105 in year 1 for all of this work.

b. "... unless you want to work your tail off for next to nothing."

To date, Ruby has sold herself Stream energy, purchased a website for a year, convinced seven of her "friends and family" to purchase Stream energy, persuaded three other "friends and family" to purchase Ignite's Services Program thereby becoming IAs and, then, helped those three IAs convince eight of each of their "friends and family" to purchase Stream energy. The pyramid told her this ***before*** she signed up! Ruby knew she would have to work hard on **her** "Ignite business," she just did not know what the pyramid knew: that she had no chance. Only those who joined early, years before Ruby, would ever obtain the gems. She would get coal.

So, as Ruby greets her second year, having met all of her milestones and making $105 in the first year, what can she expect to earn from her work? Stream will pay her a royalty of sorts, or $4.00 a month for her direct Stream Customers and $24 a month for her indirect customers, or $28 a month, which will not cover the $29 per month she will be paying Ignite for her homesite. And, if Ruby fails to meet just about any of her first-year milestones, she will lose money like 89% of the "investors" in the Ignite pyramid.[70]

Now, what caused this Court to hold open the idea in *Piambino* that *Bestline* was not a security? It was the work required by the "investor." All of that, in simple terms, meant that to pay Bestline was to invest in a business that required your labor, not based on the labor of others.[71] This is precisely what Griggs was "investing" in, namely, a "job" for himself with training and assistance from Ignite. Thus, assuming for argument that the pyramid properly placed its PSLRA argument properly before

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70 Assume Ruby only gets two directors then Ignite has only paid her $400 in bonuses, and she has only earned $4 a month from her Stream customers, for total receipts of $424. Less her investment, $508, Ruby will be out $84 in one year. If Stream continues to pay her $4 a month, and she pays Ignite $29 a month, she will be losing $25 a month.

71 It was at the latter level that Bestline emphasized the building and supervisory aspects of the business, with which Bestline promised "plenty of help". The assurances of "plenty of help" infers that the person receiving that help would also have to be exerting efforts of his own, else there would be no need for help. "We all work together on this" could be construed as notice that it would be necessary for the "investors" to "work".

Piambino, 610 F.2d at 1319.

this Court, which it did not do, no reasonable investor at Griggs' stage of the game would see the Ignite pyramid as simply an investment in the efforts of others.

4. The Complaint show the need IA's to work their business.

As pled, and as Ruby's example shows, Ignite's Services Program requires new IAs to work hard *themselves* to earn money, specifically, to recruit others and sell energy.[72] Each IA must "personally sponsor" others to make any money at all.[73] Even the very highest in the pyramid "are very motivated to work to promote and support the Pyramid."[74] Success is dependent upon "the already awesome training provided by [Ignite]."[75] IAs are instructed on "how to sign up customers for Stream."[76] Stout, an IA defendant, would teach IA's "about how to use 'cold market recruiting' to find investors for the Pyramid" and how training to do your "job" is critical.[77]

E. Conclusion.

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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72 ROA.27-30, 63.

73 ROA.37.

74 ROA.39.

75 ROA.28.

76 ROA.40.

77 ROA.41.

Respectfully submitted,

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F. 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 March 15, 2018.

By:__Scott M. Clearman_____
SCOTT M. CLEARMAN

G. 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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United States Court of Appeals

FIFTH CIRCUIT
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March 23, 2018

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No. 17-50655 Jernard Griggs v. S.G.E. Management, L.L.C., et al
USDC No. 1:15-CV-422

Dear Mr. Clearman,

The following pertains to your brief electronically filed on 3/15/18.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
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cc:
Ms. Kathryn Cherry
Mr. Andrew Patrick LeGrand