IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-20128

JUAN RAMON TORRES; EUGENE ROBISON,

Plaintiffs - Appellees

v.

S.G.E. MANAGEMENT, L.L.C.; STREAM GAS & ELECTRIC, L.T.D.; STREAM S.P.E. G.P., L.L.C.; STREAM S.P.E., L.T.D.; IGNITE HOLDINGS, L.T.D.; et al.

Defendants - Appellants

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

AMICUS BRIEF OF TRUTH IN ADVERTISING, INC.

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STATEMENT OF INTEREST[1]

Truth in Advertising, Inc. (TINA.org) is a 501(c)(3) nonprofit, nonpartisan organization whose mission is to protect consumers nationwide through the prevention of false and deceptive marketing. To further its mission, TINA.org investigates deceptive marketing practices and advocates before federal and state government agencies, as well as courts.

With respect to pyramid schemes in particular, TINA.org has filed several complaints with the Federal Trade Commission regarding such deceptive marketing ventures. Recently, TINA.org's efforts in this regard prompted the FTC to file suit for a permanent injunction against an Arizona-based pyramid scheme, a case in which TINA.org worked with the Commission, providing it with its investigation findings, as well as testimony at the preliminary injunction hearing in the District Court of Arizona. *See* FTC Acts to Halt Vemma as Alleged Pyramid Scheme, Press Release (Aug. 26, 2015), https://www.ftc.gov/news-events/press-releases/2015/08/ftc-acts-halt-vemma-alleged-pyramid-scheme.

TINA.org has also conducted informational congressional briefings in Washington, D.C. regarding pyramid schemes,[2] has exposed several such

[1] All parties have consented to TINA.org participating as amicus curiae. Pursuant to F.R.A.P. § 29(c)(5), TINA.org states that its brief was not authored in whole or in part by either party or its counsel, and that no person other than TINA.org, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief.

schemes through its investigative reporting, and has become a source for consumers nationwide to both educate themselves about and submit complaints regarding pyramid schemes. *See Not Your Grandma's Tupperware: MLMs vs. Pyramid Schemes* (Mar. 31, 2015), https://www.truthinadvertising.org/not-your-grandmas-tupperware-mlms-vs-pyramid-schemes/; TINA.org's pyramid scheme publications, https://www.truthinadvertising.org/?s=pyramid+scheme.[3]

In short, TINA.org has a unique expertise in the area of pyramid schemes, the marketing used by such companies, and the impact such businesses have on consumers, all of which will assist this Court in better understanding the nature of the business at issue in this case. Furthermore, TINA.org, whose primary mission is to empower and protect consumers from false and deceptive marketing, has a strong interest in how consumers who are the alleged victims of pyramid schemes can seek restitution for their losses.

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[2] TINA.org's executive director presented along with Peter Vander Nat, Ph.D., former senior economist at the FTC, and William Keep, Ph.D., Dean of the School of Business at The College of New Jersey, both pyramid scheme experts who have co-written two seminal works analyzing the MLM industry.

[3] In addition to these efforts, when Herbalife, the high profile multi-level marketing company alleged to be operating a pyramid scheme, reached a settlement agreement in the class-action lawsuit filed against it in the Central District of California, TINA.org filed a brief as *amicus curiae* opposing the terms of the settlement reached between the parties on the basis that the agreement was unfair to class members. *See Bostick v. Herbalife Internat'l of Am., Inc.,* 13-cv-02488 C.D. Cal., Doc. 114, https://www.truthinadvertising.org/wp-content/uploads/2015/03/Herbalife-amicus.pdf.

ARGUMENT

Pyramid schemes are ingenious frauds whose survival depends upon a combination of operative simplicity, financial complexity, and the basic human desire to make money. "It is a lesson in psychological motivation and character study the likes of which would bring an envious smile on the face of P.T. Barnum." *Frye v. Taylor*, 263 So. 2d 835, 837 (Fl. App. 1972). And because pyramid schemes capitalize on "blinding potential prospects to the realities of the scheme," they present an inherent danger to investors, business competitors, and the general public alike. *Sec. Exch. Comm. v. Glenn W. Turner Enters., Inc.,* 348 F. Supp. 766, 771-72 (D. Ore. 1972), *aff'd* 474 F.2d 476 (9th Cir. 1973).

The FTC recognized over 40 years ago that:

> the marketing plan [of pyramid schemes] is not primarily designed as an offer to knowledgeable businessmen competent to weigh and evaluate commercial risks. It is designed, rather, to appeal to uninformed members of the general public, unaware of and unadvised of the true nature of the risks run – persons with limited capital who are led to part with that capital by promises and hopes that are seldom, if ever, fulfilled.

FTC Advisory Opinion, 16 C.F.R. § 15.155(d) (1972); *see also Sec. Exch. Comm. v. Koscot,* 497 F.2d 473, 475 n. 4 (5th Cir. 1974) ("Poor, unwary persons have been induced by high-pressure sales tactics to part with their money, and very few have harvested the large returns they were led to believe

were common for those participating in the program." (quoting *Sec. Exch. Comm. v. Koscot,* 365 F. Supp. 588, 590 (N.D. Ga. 1973)) (internal quotation marks omitted).

By making false, misleading, and deceptive representations regarding the commercial feasibility of these schemes for all participants, including the path of success followed by those promoted as examples, such illegal operations coax thousands of consumers to part with funds for an expected return on investment that is likely never to materialize. *See Koscot*, 497 F.2d at 475 (a pyramid scheme "thrives by enticing prospective investors to participate in its enterprise, holding out as a lure the expectation of galactic profits. All too often, the beguiled investors are disappointed by paltry returns.") This is so because pyramid schemes have the inherent instability of structures destined to fail. The entire marketing program of pyramid schemes is a fraud because it contemplates a virtually endless recruiting of participants in which later purchasers necessarily must lose their investments, to the benefit of those who joined earlier, as the supply of new participants shrinks exponentially. *See Webster v. Omnitrition Int'l, Inc.,* 79 F.3d 776, 781 (9th Cir. 1996) (citing *Sec. Exch. Comm. v. Int'l Loan Network, Inc*., 968 F.2d 1304, 1309 (D.C. Cir. 1992)). The promotional practices are as undesirable as the very structure of these schemes.

The economic inducement held out to all prospects that they will make money is a common thread that runs through all illegal pyramid schemes. The requisite commonality is the fact that the fortunes of all investors are inextricably tied to the efficacy of the recruitment process consummating in endless investments. *See Koscot*, 497 F.2d at 478 ("The critical factor is not the similitude or coincidence of investor input, but rather the uniformity of impact of the promoter's efforts."). The effect is substantial injury to investors, the public, and legitimate competitors.

In this case, wholly ignoring the corporate defendants' stable and continuous representations that Ignite is a legitimate organization, the Court seized upon fragments of random distributor marketing pitches to conclude that schemes in which investors hear the phrase "pyramid scheme" in sum or substance are necessarily excluded from the reach of The Racketeer Influenced and Corrupt Organizations (RICO) Act in the class-action context because "reliance cannot be inferred merely because a business is alleged to be a pyramid scheme, particularly when the record in this case suggests that investors were told that it was a pyramid scheme." Op. 16.

This holding, however, is premised upon faulty principles of basic advertising law. First, in determining what a reasonable consumer takes away from a marketing pitch,

> [i]t is . . . necessary . . . to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. "The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."

Fed. Trade Comm. v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) (quoting, in part, *Aronberg v. Fed. Trade. Comm.,* 132 F. 2d 165, 167 (7th Cir. 1942); *see also* FTC Policy Statement on Deception, https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception ("[I]n advertising the Commission will examine 'the entire mosaic, rather than each tile separately.'"); *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 502 (5th Cir. 2000). Here, the majority did just the opposite – it completely ignored the uniform representations of the defendants (*i.e.,* this is a legitimate organization) and instead selectively chose fragments of marketing pitches to conclude that rational investors may chose to participate in a pyramid scheme.

Second, a distributor's disclosure of the pyramid scheme (even if true) cannot be used as cover for a defendant's deceptive scheme. That is to say, as a matter of advertising law, it is ineffective for organizations to make a false claim (*i.e.,* "we are a legitimate company") and then post a disclosure saying just the opposite (*i.e.,* "we are a pyramid scheme."). As the FTC has

explained, "[a] disclosure can only qualify or limit a claim to avoid a misleading impression. It cannot cure a false claim. If a disclosure provides information that contradicts a material claim, the disclosure will not be sufficient to prevent the ad from being deceptive." *See* FTC's .com Disclosures: How to Make Effective Disclosures in Digital Advertising, https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf.

These observations militate against the conclusion that reliance can be thwarted by selective statements of random distributors. Indeed, cases such as this one require a functional approach grounded in economic realities in order to satisfy the remedial purposes of the RICO Act. *See* Report of the Comm. on the Judiciary U.S. Senate 91-617, available at https://bulk.resource.org/gao.gov/91-452/00004DB8.pdf ("The Congress finds that . . . organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten domestic security, and undermine the general welfare of the Nation and its citizens…"). The public policy of affording broad protection against fraud should not be circumvented by an unrealistic reliance test. As Justice Brennan pointed out, "one must apply a test in terms of the pur-

poses of the Federal Acts." *Sec. Exch. Comm. v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 80 (1959).

CONCLUSION

For the foregoing reasons, TINA.org respectfully urges this Court to hear this case *en banc* and reconsider the judgment of the panel.

DATED: November 25, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it is no longer than one-half the maximum length of a party's petition for rehearing.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Word 2007 in 14 point Times New Roman font.

/s/ Robert B. Gilbreath
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CERTIFICATE OF SERVICE

A copy of this Petition was sent on this 25th day of November 2015 to the following counsel via e-mail and the Court's electronic filing system.

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