IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUAN RAMON TORRES and EUGENE ROBISON	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	**CIVIL ACTION NO.**
SGE MANAGEMENT, LLC, STREAM GAS &	§	**4:09CV2056**
ELECTRIC, LTD, STREAM SPE GP, LLC, STREAM	§	
SPE, LTD, IGNITE HOLDINGS, LTD., CHRIS	§	
DOMHOFF, ROB SNYDER, PIERRE KOSHAKJI,	§	
DOUGLAS WITT, STEVE FLORES, MICHAEL	§	
TACKER, DONNY ANDERSON, TREY DYER, STEVE	§	
FISHER, RANDY HEDGE, BRIAN LUCIA, LOGAN	§	
STOUT, AND PRESLEY SWAGERTY,	§	
	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS FOR IMPROPER VENUE, FOR FAILURE TO STATE A CLAIM AND FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY

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DEFENDANTS' MOTION TO DISMISS FOR IMPROPER VENUE, FOR FAILURE TO STATE A CLAIM AND FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW SGE Management, LLC ("SGE"), Stream Gas & Electric, Ltd. ("Stream Energy"), Stream SPE GP, LLC, Stream SPE, Ltd., Ignite Holdings, Ltd. ("Ignite"), Chris Domhoff, Rob Snyder, Pierre Koshakji, Douglas Witt, Steve Flores, Michael Tacker, Donny Anderson, Trey Dyer, Steve Fisher, Randy Hedge, Brian Lucia, Logan Stout, and Presley Swagerty (collectively the "Defendants") and in response to the *First Amended Complaint* of Juan Ramon Torres and Eugene Robison (collectively the "Plaintiffs") respectfully show the Court as follows:

I. NATURE AND STAGE OF THE PROCEEDING

On June 30, 2009, Plaintiff Juan Ramon Torres ("Torres") filed an *Original Complaint* alleging a cause of action against Defendants for purported violation of the Rackateer Influenced and Corrupt Organizations Act of 1970 ("RICO"), based on allegations that Defendants operate

an illicit pyramid scheme. Plaintiff alleged federal mail and wire fraud pursuant to 18 U.S.C. § 1341 and 18 U.S.C. § 1343, respectively, as the predicate RICO offenses. Later the same day, a *First Amended Complaint* added Eugene Robison ("Robison") as a Plaintiff while maintaining the same substantive facts and cause of action. This pleading consists of Defendants' pre-answer motions pursuant to Federal Rule of Civil Procedure 12(b).

II. INTRODUCTION

Plaintiffs Torres and Robison are former Independent Associates of Ignite, the wholly-owned marketing subsidiary of Stream Energy. Stream Energy, in turn, is the fourth largest Retail Electric Provider in the State of Texas and has been licensed since January 2005 by the Texas Public Utility Commission ("Texas PUC").

After becoming Independent Associates with Ignite, Plaintiffs were not as successful in their Ignite sales efforts as desired for various reasons (including an admitted lack of substantive effort). Yet rather than accept their lack of success with Ignite, Plaintiffs have tellingly brought an inflammatory federal RICO action against Stream Energy, Ignite, their affiliates and further against a host of randomly-targeted but notably-successful individuals within the Ignite organization (most of whom have had no personal interaction with Plaintiffs).

Plaintiffs' decision to turn their lack of success with Ignite into a concocted class action RICO witchhunt against the Defendants, smearing their good names with connotations of corruption and organized crime, is simultaneously both laughable and deplorable. The reality that the present lawsuit is little more than an apparent shakedown scheme by Plaintiffs and their self-styled class action specialist attorneys is underscored by the gratuitous press release[1] issued by Plaintiffs' counsel, Scott Clearman, concomitant with the filing of the *Complaint:* complete with

[1] http://www.pr-inside.com/the-clearman-law-firm-announces-federal-r1358138.htm

a self-promoting direct link to his own law firm's website and incorporating a scandalous accusation that the Ignite sales effort is a pyramid scheme.

Notwithstanding Plaintiffs' delusions as to the supposed illegality of the Ignite marketing effort, nothing could be farther from the truth. Like Mary Kay, Avon, Tupperware or Pampered Chef, Ignite is a fully-legitimate and well-reputed multi-level marketing company in complete good standing with both the Texas PUC as well as other state and Federal law enforcement agencies. Yet while Mary Kay's sales associates sell cosmetics, Ignite's Independent Associates sell electricity and natural gas services to their "friends & family" in the deregulated Texas & Georgia energy markets[2] and further enlist others to do the same. Moreover, like Mary Kay, Avon, Tupperware or Pampered Chef, Ignite's Independent Associates earn commissions both from direct product sales (*i.e.,* personally bringing Stream Energy's competitively-priced electricity, gas and related services to Texas and Georgia energy consumers) and from product sales accomplished by their newly enrolled Independent Associates who gather new customers on behalf of Stream Energy.

This entirely innovative word-of-mouth approach to promoting the lower costs and efficiencies availed by energy deregulation has caused Stream Energy to become one of the largest independent energy retailers in the United States. And as a result, hundreds of thousands of households in Texas and Georgia indisputably have gained through Stream Energy lower energy prices relative to their former providers, while tens of thousands of Ignite Independent Associates have gained income for their "warm market" sales to energy customers and enrollment of new Independent Associates upon the latter's sales of energy services.

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[2] On January 1, 2002, the Texas Legislature opened the retail electricity market to competition for energy consumers by enacting Senate Bill 7, entitled the Texas Electric Choice Act. Similarly, the State of Georgia opened its retail natural gas market for competition during 1999.

At the heart of the Plaintiffs' case is the fundamental assertion that the Ignite organization is a pyramid scheme illegal under federal and state law. However, the two hallmark elements of such illicit pyramid schemes are (1) the lack of an actual product or service, and (2) the payment of compensation to sales associates for the recruitment of other sales associates rather than the sale of an underlying product or service.[3] And in direct refutation of Clearman's concocted but absurdities, it is readily demonstrable that the Defendants both in the collective and individually have neither of these impermissible qualities.

Concerning this first foregoing criterion, Stream Energy and its Ignite subsidiary market and sell to residential consumers what are arguably the most essential and highly-demanded retail commodity products for any household: electricity and natural gas services. And given that Stream Energy should achieve 2009 sales of electricity and natural gas in excess of $900 million, there can be no legitimate argument that the activities of Stream Energy, Ignite or any of the other Defendants are not underpinned by the provision of an actual product or service.

In regard to the latter illicit element appearing above, the compensation plan for Ignite's Independent Associates prevents any individual from earning income without first achieving specified levels of sales of electricity and natural gas services. Indeed, the very structure of such compensation plan requires the gathering of energy service customers as a qualifying condition for any payments – and thus ensuring that no Ignite member can be renumerated solely for the recruiting of other associates.

Revered American companies such as Mary Kay and Avon with similar marketing structures also have had to face similar contrived accusations of being pyramid schemes from former sales associates disappointed with their own efforts. Indeed, the deplorable tactic of using

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[3] Texas State Securities Board, "Pyramid Scheme Frauds" (July 1986).

a federal RICO action as a weapon of extortion aimed at honest multi-level marketing companies has been previously attempted within, and rejected by, the federal district courts (including here in north Texas). The present suit by Plaintiffs and their self-promoting class action counsel similarly aspires to hold hostage the Defendants, but in its substance is no different from these past failed shysterly extortions.

III. STATEMENT OF THE ISSUES AND APPLICABLE STANDARDS

Defendants' motions to dismiss are based upon the following:

Improper Venue: Venue is not proper in this Court because the parties entered into a valid arbitration agreement. This action should therefore be dismissed pursuant to Rule 12(b)(3) and/or Rule 12(b)(6) and with the Plaintiffs compelled to pursue any claims against Defendants within the context of arbitration proceedings. The Fifth Circuit imposes a strong presumption in favor of arbitration and a party opposing the enforcement of an arbitration agreement bears the burden of establishing its invalidity. *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005).

Failure to State a Claim Upon Which Relief Can Be Granted: Plaintiffs have failed to meet the "facial plausibility" pleading standard for stating a claim and have failed to plead the required elements as a predicate to a RICO action. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

Failure to Plead Fraud With Particularity: Where, as here, mail fraud and wire fraud are alleged as predicate acts to establish a pattern of racketeering, the elements of mail fraud and wire fraud must be pled with particularity. *See Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir. 1997); FED. R. CIV. P. 9(b). Plaintiffs' *First Amended Complaint* fails to meet the pleading requirements of Rule 9(b).

IV. BACKGROUND

Plaintiffs' *First Amended Complaint*, while replete with irrelevant information about the ground-level workings of the Ignite organization (including, but not limited to, 19 pages inexplicably describing links to Ignite homesites on the internet), comprises an intellectually sloppy effort that falls inexcusably short on professional standards requiring the propagation of truthful or even good-faith assertions.

Business Relationships. First and towards bolstering their specious claims, Plaintiffs repeatedly incorrectly \characterize the business relationships among the Defendants.

- Defendant Trey Dyer is not an employee of either Stream Energy or Ignite and never has been. (1st AC ¶¶ 28-29.) Moreover, Dyer is not and never has been Director of Operations for Stream Energy or any of its subsidiaries. (*Id.)*
- Defendant Steve Fisher is not and never has been "an owner of or employed by" Stream Energy or Ignite or otherwise served as Director of Operations. (1st AC ¶ 31.)
- Defendant Brian Lucia is not and has never been employed by Stream Energy or Ignite as its Director of Operations. (1st AC ¶ 35.)

Nature of Independent Associate Standing. Plaintiffs suggest that some of the individual Defendants have been successful as Independent Associates (the "IA Defendants") solely due to the reality that such individuals started their marketing efforts at the beginning of Ignite's operations, with the further claim that subsequently-recruited Independent Associates will never surpass such founding members. (1st AC ¶¶ 33, 37, 39.) Such assertions are simply untrue. For example, Defendants Stout and Dyer began their Ignite careers months after the commencement of Ignite's initial marketing efforts, but have notably become more successful – due to their hard work and perseverence – than thousands of Independent Associates who started their businesses at the outset of Ignite's operations.

Original Enrollment of Independent Associate Defendants. Plaintiffs imply that the IA Defendants did not pay the initial $299 or $329 license fee generally required of prospective recruits to join the Ignite organization. (1st AC ¶¶ 27, 29, 31, 33, 35, 37, 39.) Yet again, Plaintiffs' claim is simply not true. With only a handful of exceptions over the last four years – but including none of the IA Defendants -- Independent Associates have been and are invariably required to pay the standard and published license fee then in effect towards joining Ignite.

No Promise of Profits. Plaintiffs' allegation that Defendants made "false promises of enormous profits" (1st AC ¶ 1.) is directly contradictory to the express written terms of Ignite's published governance and informative materials.

Becoming a successful Independent Associate within Ignite requires hard work, dedication, leadership and the dynamic interpersonal skills associated with success in the customer service and sales industries. Ignite's *Policies And Procedures* (Ex. B, C – App. p. 6, 45) -- compliance with which was previously agreed to by Plaintiffs -- expressly states in § I(D) thereof that there is no guarantee of income, with success depending upon personal effort:

> Ignite makes no guarantees of income, nor assurances of any profits or success. Furthermore, any profits or success resulting from activities as an IA will be based upon customer acquisition and the amount of services or product purchased by those customers. Any success achieved will be based solely upon the IA's personal effort, commitment and skills."

Quite tellingly, Ignite provides current and potential Independent Associates with an Income Disclosure (Ex. D – App. p. 75) that provides an up-front "reality check" as to the low, high and average incomes among its existing sales force. This prominent disclosure, generally uncharacteristic of the network marketing sector, is only one example of Ignite's diligent efforts to guide and inform both potential and existing Independent Associates as to the realities of the Ignite marketing opportunity. Far from the conduct of fraudulent schemes, Ignite prides itself on

the level of its business transparency and its own publications and training materials demonstrate that there is no promise of false profits as Plaintiffs have fabricated before this Court.

Nature of Advancement Within Ignite. Plaintiffs and their attorneys slovenly miscast the manner by which Independent Associates attain the different leadership levels within Ignite. First, Plaintiffs falsely assert that a Director becomes a Qualified Director after completing the acquisition of "3 [associates] and 10 [customers]" (1st AC ¶ 58.), while in reality towards becoming so qualified to receive future compensation an Independent Associate need only recruit four energy service customers. Moreover, this particular claim by Plaintiffs completely glosses over a certain compelling reality: that Independent Associates who reach higher positions within the Ignite organization receive bonus leadership compensation ***only in the event that newly-enrolled Independent Associates in their downline personally sign up new electricity customers*** (1st AC ¶ 59). Plaintiffs' attempt to gloss over this reality constitutes a crucial failure of truthfulness, as the mandatory enrollment of energy service customers is one of numerous factors that distinguishes Ignite's legitimate business model from an illegal pyramid scheme.

Marketing of Ignite Homesites. Plaintiffs assert that new Independent Associates can purchase "Homesites" offered by Ignite for $29 per month, and that Ignite "essentially requires" Independent Associates to do so. (1st AC ¶¶ 1, 55, 75, 86, 91.) These claims are also false. First of all, Ignite Homesites cost $24.95 per month and have never cost $29 per month. More substantively, however, the firm's marketing and governance materials make it unassailably clear that purchase of Ignite homesites by Independent Associates is entirely optional.

Standing of Ignite Leadership. The allegation that Independent Associates who have achieved the seniormost standing within the Ignite organization of Presidential Director are only "those individuals that initially sold the Services Program" (1st AC ¶ 49.) is false as is the follow-

on allegation that later-starting Independent Associates are incapable of attaining higher positions than earlier-joined Ignite members. (1st AC ¶¶ 76-83.) In fact, five of the ten Presidential Directors in the Ignite organization (including at least two of the Defendants) did not begin their Ignite businesses until timeframes after the firm's inception of operations, demonstrating that any Independent Associate -- regardless of their start date, but with hard work and diligence -- can achieve any senior leadership level within Ignite.

Nature of Ignite Sales Organization. Plaintiffs' allegations that the IA Defendants are "at the top of the Pyramid" are similarly untrue, intellectually inane and nonsensical. (1st AC ¶¶ 27, 37, 39.) Insofar as each Independent Associate is the leader of his own individual downline, Ignite's overall business model does not remotely resemble a pyramid, even in its basic structure. Moreover, the regulatory framework for the Ignite organization ensures that individuals cannot indefinitely remain at top leadership positions: an internal organizational process known as "leveling out" (as described in the attached *Compensation Plan*) allows *any* Independent Associate by virtue of relative outperformance to eclipse those Independent Associates who were previously in higher leadership positions.

In sum, the *First Amended Complaint* is replete with misstatements of material fact as well as inexcusable mischaracterizations of verifiable and well-established reality such that this Court should consider whether Plaintiffs' counsel should be found culpable for their failure to adhere to professional standards that require truthful and good-faith assertions before this Court.

V. MOTION TO DISMISS FOR IMPROPER VENUE

Notwithstanding these dozens of false assertions by Plaintiffs, Defendants now move to dismiss Plaintiffs' *First Amended Complaint* under FED. R. CIV. P. 12(b)(3) in light of a valid pre-existing arbitration agreement between the parties requiring arbitration of all disputes. Arbitration provisions are recognized as a subset of forum-selection clauses and are therefore

enforced by the Fifth Circuit pursuant to Rule 12(b)(3) providing for dismissal for improper venue. "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 519 (1974). *Accord Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995). While some circuits evaluate arbitration agreements under Rule 12(b)(1) or 12(b)(6), the Fifth Circuit has found they are most appropriately considered under Rule 12(b)(3)[4]. *See Lim*, 404 F.3d at 902; *Kessman & Assocs., Inc. v. Barton-Aschman Assocs., Inc.*, 10 F. Supp. 2d 682, 689 n.15 (S.D. Tex. 1997).

Attached hereto as Exhibit A and incorporated herein by reference is the Declaration of Robert Snyder (App. p. 3), Chairman of Stream Energy, attesting to Agreements between Ignite and each of the Plaintiffs and consisting of Ignite's *Compensation Plan* (Ex. E- App. p. 76), its *Policies and Procedures* (Ex. B, C- App. p. 6, 45) and its *Terms & Conditions* (Ex. F- App. p. 78), the latter two of which contain the relevant arbitration agreements. Plaintiffs each agreed to this three-part Agreement with Ignite by reviewing the referent documents on-line and electronically clicking on a checkbox indicating their assent to all terms thereof. Such electronic "clickwrap" agreements, which require an affirmative manifestation of assent via the electronic checkbox, have been routinely upheld. *See, e.g., Via Viente Taiwan, L.P. v. UPS*, 2009 LEXIS 12408 (E.D. Tex. Feb. 17, 2009); *Realpage, Inc. v. EPS, Inc*., 560 F. Supp. 2d 539, 545 (E.D. Tex. 2007): *Recursion Software, Inc. v. Interactive Intelligence, Inc*., 425 F. Supp. 2d 756, 782 n.14, 783 (N.D. Tex. 2006).

In paragraph 22 of said *Terms & Conditions*, Plaintiffs agreed to submit all disputes with Ignite or its parents, subsidiaries or affiliates to binding arbitration:

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[4] Defendants respectfully request the instant motion be evaluated under whichever section of Rule 12(b) the Court deems most appropriate, whether 12(b)(3), 12(b)(1) or 12(b)(6), and hereby move for such relief under that section.

> In the event a dispute or other difference between me and Ignite or its parents, subsidiaries and affiliated companies, including but not limited to those arising out of or relating to this Agreement and the Policies and Procedures of Ignite it is agreed that such disputes shall be exclusively resolved by binding arbitration. . . at Dallas. . .

Similarly, the *Policies and Procedures* contain a parallel provision mandating arbitration:

> D. Binding Arbitration. IAs agree that any claim, dispute or other difference between IAs and Ignite or among IAs and Ignite will be exclusively resolved by binding arbitration . . . at Dallas, Texas.

(App. p. 19.). Furthermore, the *Policies and Procedures* are expressly incorporated into the *Terms & Conditions,* which provides that Independent Associates agree to the terms of both such documents as well as the *Compensation Plan* as part of one collective Agreement:

> I have carefully read and agree to comply with the Ignite Policies and Procedures and the Ignite Marketing and Compensation Plan, both of which are incorporated into and made a part of these Terms and Conditions (these three documents shall be collectively referred to as the "Agreement"). . . . For adequate consideration received, I agree to the terms and conditions of this Agreement and of the Policies and Procedures applicable to Ignite Independent Associates ("IAs") as well as any other terms of use, guidelines, policies and procedures published by Ignite. . .

(App. p. 78.) As evidence of the Plaintiffs' assent to the Agreement, attached to the Declaration of Robert Snyder as Exhibits G and H are print-outs of electronic records showing the dates on which Robison and Torres, respectively, acknowledged and executed such Agreement via the electronic checkbox. (App. p. 78, 80.)

Having entered into a clear, unequivocal and twice-repeated arbitration agreement with each of the entity Defendants, Plaintiffs were not entitled to bring suit in this Court. An arbitration agreement is generally presumed to be *prima facie* valid and enforceable. *See Alexander v. U.S. Credit Mgmt., Inc.*, 384 F. Supp. 2d 1003, 1006 (N.D. Tex. 2005). The Fifth Circuit imposes a strong presumption in favor of arbitration and a party opposing the enforcement of an arbitration agreement bears the burden of establishing its invalidity. *See Lim,*

404 F.3d at 902. "[A]ny doubts as to the availability of arbitration must be resolved in favor of arbitration." *Fedmet Corp. v. M/V Buyalyki,* 194 F.3d 674, 676 (5th Cir. 1999).

Moreover, the scope of the arbitration language in the *Terms & Conditions* is extremely broad, covering not just disputes "arising out of or relating to this Agreement," but all "dispute[s] or other difference[s] between me and Ignite or its parents, subsidiaries and affiliated companies." Plaintiffs' purported RICO claim falls within the scope of this language as their supposed grievance is a dispute asserted by signatories to such Agreement against Ignite and its parents, subsidiaries and affiliates. Furthermore, the scope of the provision in the *Policy and Procedures* is equally broad, mandating that Independent Associates submit to binding arbitration "***any*** claim, dispute or other difference . . ." (Emphasis added.) Plaintiffs' and pyramid scheme and RICO allegations by their very nature are predicated upon the compensation structure of Ignite, its financial disclosures and the policies, procedures and other terms under which Independent Associates operate; thus Plaintiffs' claims necessarily "arise out of and relate to" the provisions of the *Compensation Plan*, *Policies and Procedures*, and *Terms & Conditions* that specifically address these respective issues. Accordingly, the present matter is therefore squarely within the scope of the pre-existing arbitration agreement.

Plaintiffs' *First Amended Complaint* entails eighty-nine (89) pages of inane commentary which attempts to accuse all Defendants of substantially interdependent and collective misconduct. Plaintiffs' allegations of a pyramid scheme accuse all Defendants of participating in concerted fraud which, in turn, forms the basis of Plaintiff's RICO action absurdly accusing all Defendants of being involved with a racketeering "enterprise." Indeed, this linked claim as to the existence of both an alleged fraudulent scheme as well as a racketeering enterprise are each essential elements of Plaintiffs' purported RICO action. In such regard, Plaintiffs assert that each

Defendant is a member of the alleged enterprise. *First Amended Complaint* ¶ 253. As a result – and although falling short of the requirements for sufficiently stating a RICO claim -- Plaintiffs are estopped from denying their allegations attempt to accuse all Defendants of substantially interdependent and concerted misconduct of the kind inherent in a valid RICO claim. *See, e.g.*, *Idea Media Corp. v. Encore Mktg Grp, Inc.*, 2009 LEXIS 3355, at *11-12 (N.D. Tex. Jan. 20, 2009); *Williams v. Coldwell Banker First Greenwood-LeFlore Realty, Inc.*, 2008 LEXIS 35067, at *5 (N.D. Miss. Mar. 13, 2008).

In light of the foregoing, although not signatories to the Agreement, the individual Defendants Domhoff, Snyder, Koshakji, Witt, Flores, Tacker, Anderson, Dyer, Fisher, Hedge, Lucia, Stout and Swagerty are entitled to enforce its arbitration provisions under an equitable estoppel theory. *See Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 398 (5th Cir. 2006). "[A] party to an arbitration agreement may be equitably estopped from litigating its claims against non-parties in court and may be ordered to arbitration." *Id.* A nonsignatory has the right to compel arbitration when the signatory plaintiff raises allegations of "substantially interdependent and concerted misconduct" by both signatories and non-signatories to the contract. *See Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000).

The lynchpin for equitable estoppel is equity: and equity does not permit Plaintiffs to hold all Defendants liable for actions related to the Agreement, yet deny the validity of the arbitration clause in the Agreement due to the fact that some of the Defendants are non-signatories. *See Brown*, 462 F.3d at 398; *Washington Mutual Finance Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004). Under principles of equitable estoppel, each Defendant may enforce the arbitration provision against Plaintiffs.

Further, the United States Supreme Court and the Fifth Circuit have routinely approved the enforcement of arbitration agreements in RICO cases. *See, e.g., Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 241 (1987); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 n.8 (5th Cir. 1992). The Fifth Circuit has consistently held that dismissal with prejudice is proper under the current circumstances. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). Where all claims are subject to arbitration, the entire matter should be dismissed with prejudice. *See id.* (affirming dismissal with prejudice because all of plaintiff's claims were arbitrable); *Armstrong v. Assocs. Int'l Holdings Corp.*, 242 F. App'x 955 (5th Cir. 2003).

VI. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendants request Plaintiffs' RICO claim be dismissed pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief may be granted. For the following reasons, Plaintiffs have failed to allege a cause of action under any section of 18 U.S.C. § 1962.

A. Plaintiffs' mere recitals and conclusory statements do not meet the pleading standards of Rule 8(a)(2) as explained by the United States Supreme Court.

While Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," the United States Supreme Court has cautioned that a complaint must nonetheless contain enough factual allegations to show that the pleader "is entitled to relief" – and not merely that a pleader has formulaically inserted names into the elements of a cause of action.

In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Court emphasized that the purpose of the pleading requirement of Rule 8(a)(2) is to give defendants fair notice of both what the claim is *and* the grounds upon which it rests. *See id*. at 555, n.3. "[A] plaintiff's obligation to provide the "grounds" showing "entitle[ment] to relief" requires more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 555. The factual allegations "must be enough to raise a right to relief above the speculative level" and must do more than "merely create[] a suspicion." *Id.* at 555. The complainant must provide "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570.

Earlier this year, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court reaffirmed *Twombly* and further clarified Rule 8(a)(2)'s "facial plausibility" pleading standard. *Iqbal* confirmed that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. The plausibility standard "asks for more than a sheer possibility that a defendant acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleader is entitled to relief." *Id*. at 1950. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. at 1949. *Iqbal* thus makes clear that Rule 8(a)(2) requires more than bare accusations, rote recitations of the elements of a cause of action, legal conclusions or simple assertions devoid of further factual enhancement. *See id.*

Moreover, the rule that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions or threadbare recitals of the elements of a cause of action. *See Iqbal*, 129 S.Ct. at 1949. "[C]ourts are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

As discussed below, Plaintiffs have utterly failed to allege ***almost all*** of the necessary elements of a RICO cause of action. Even more laughably, those required elements which Plaintiffs do attempt to allege are no more than inflammatory conclusions or empty recitals that

are clearly unsupported by facts sufficient to meet the facial plausibility standard and therefore are not entitled to the assumption of truth. Plaintiffs' allegations are so internally inconsistent, conclusory and legally insufficient that they do not even approach a good faith showing that Plaintiffs are entitled to relief under any section of 18 U.S.C. § 1962.

B. Plaintiffs fail to state a cause of action under 18 U.S.C. § 1962(a).

To state a claim under § 1962(a), a plaintiff must allege: (1) that each Defendant derived income from a pattern of racketeering activity; (2) that each Defendant used or invested such income to acquire an interest in or establish an enterprise; (3) that the specific enterprise is engaged in interstate commerce; and (4) that Plaintiffs were injured by reason of the use or investment of racketeering income. *See Nolen v. Nucentrix Broadband Networds*, 293 F.3d 926, 929 (5th Cir. 2002); 18 U.S.C. § 1962(a), 1964(c). As demonstrated below, Plaintiffs fail to properly allege any of the elements of a § 1962(a) claim or even recite them in a boilerplate manner.

1. Income derived from a pattern of racketeering.

Plaintiffs allege only that each Defendant "derived income" from the public, from a third party or from another Defendant. Plaintiffs fail to allege or even state in a boilerplate fashion that any Defendant derived income *from a pattern of racketeering*.

Plaintiffs cannot properly plead this element insofar as they cannot demonstrate that Defendants engaged in a pattern of racketeering. A pattern of racketeering activity is shown by alleging at least two continuing and related acts of racketeering by an enterprise pursuant to 18 U.S.C. § 1961(a). *See U.S. v. Turkette*, 452 U.S. 576, 583 (1981); 18 U.S.C. § 1961(5). A "racketeering activity" is defined to include "any act which is indictable" as, *inter alia*, mail fraud or wire fraud. *See* 18 U.S.C. § 1961(1)(B).

Plaintiffs have alleged only one act of racketeering: a "scheme and artifice to defraud and obtain money by false pretenses." *First Amended Complaint* ¶ 243. The fact that a singular purported "act" may indictable under more than one section of the United States Code does not mean that more than one "act" has occurred, but rather only that more than one indictment may result from such alleged solitary act. Had the accusations of Plaintiffs as to the existence of a fraudulent scheme been both true and sufficiently pled, such allegations would be indictable under both 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 1343 (wire fraud); however, only one purported underlying fraudulent scheme – a singular act – has been alleged by Plaintiffs. Therefore and as a matter of law, Plaintiffs have failed to plead more than one criminal act necessary to support a claim alleging a pattern of racketeering activity.

Additionally and as discussed hereinafter, Plaintiffs have failed to properly plead the element of racketeering because Plaintiffs' allegations of a purported fraudulent scheme are conclusory, patently untrue and fail to meet the requirements of Rule 9(b).

2. Used income to acquire interest in or establish an enterprise.

Plaintiffs allege the RICO enterprise consists of either Ignite, all of the entity defendants or the alleged pyramid (including each Defendant). *See First Amended Complaint* ¶ 253. Plaintiffs fail to allege which alleged enterprise each Defendant is accused of having acquired an interest in or established. Plaintiffs further fail to claim that any Defendant acquired an interest in or established an alleged enterprise using income derived from a pattern of racketeering. Plaintiffs cannot make such accusations, as each Defendant that holds an economic interest in another Defendant had acquired that interest *before* the alleged pattern of racketeering is alleged to have occurred.

Likewise, the alleged enterprise(s) – Ignite, the entities, and the alleged pyramid – were each "established" *before* any alleged pattern of racketeering. Ignite, for example, was

established, and all of its ownership interests already acquired, by February 2005. It is therefore impossible that any Defendant could have acquired an interest in or established Ignite through an alleged pattern of racketeering, given that such racketeering activity is alleged by Plaintiffs to have occurred subsequent to the date of formation of each of the entities or associations alleged as criminal enterprises.

Moreover, pursuant to *Iqbal*, Plaintiffs must allege specific facts – and not merely conclusory allegations -- to properly allege the existence of a criminal enterprise. *See Bonton v. Archer Chrysler Plymouth, Inc*., 889 F. Supp. 995, 1001 (S.D. Tex. 1995). Plaintiffs have pled no facts or even boilerplate recitations that the alleged enterprise(s) have the required "structural features" of common purpose, longevity, distinctiveness or even the relationships among those associated with such claimed enterprise. *See Boyle v. United States*, 129 S. Ct. 2237, 2244 (2009); *Turkette*, 452 U.S. at 583. Moreover, Plaintiffs have failed to plead that the alleged enterprise(s) exists separate and apart from the alleged pattern of racketeering or otherwise operate with a unified decision-making structure. *See Clark v. Natl' Equities Holdings, Inc*., 561 F. Supp. 632 (E.D. Tex. 2006), *aff'd* 2008 LEXIS 113 (5th Cir. 2008).

Further, Plaintiffs' mere insistence that Defendant Ignite Holdings, Ltd. is a criminal enterprise is insufficient to support a RICO claim against this entity. The same individual or entity may not be both a liable RICO "person" (*i.e.*, a defendant) and the "enterprise" underlying the purported RICO claim. *See Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 583 (5th Cir. 1992).

Additionally, Plaintiffs' fail to plead facts showing that a criminal enterprise exists for purposes other than simply to commit the predicate acts. *See Montesano v. Seafirst Commercial Corp*., 818 F.2d 423, 427 (5th Cir. 1987). "[T]he structure and goals of the enterprise must be

distinct from the predicate acts they have allegedly committed." *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991). If the only common or shared purpose of an alleged enterprise is to carry out the alleged racketeering activity, then the enterprise does not have an ascertainable structure distinct from the pattern of racketeering. Plaintiffs fail to make any distinction between the alleged enterprise(s) and the alleged racketeering -- or to ascribe any structure to the alleged enterprise(s) beyond the supposed existence of the fraudulent scheme in which Defendants are alleged to have engaged.

Plaintiffs' pleading is further deficient because the existence of a group of entities consisting of parent and subsidiaries does not satisfy the distinctiveness requirement for an enterprise. *See Atkinson v. Anadarko Bk. & Trust Co.*, 808 F.2d 438, 440 (5th Cir. 1987) (a bank, its holding company and three employees did not constitute a RICO enterprise); *Fogie v. Thorn*, 190 F.3d 889, 896-898 (8th Cir. 1999) (a conglomerate of corporate entities consisting of parent and subsidiaries does not satisfy distinctiveness requirement for "enterprise"); *Bachman v. Bear, Sterns & Co.*, 178 F.3d 930 (7th Cir. 1999) ("A firm and its employees or a parent and its subsidiaries are not an enterprise separate from itself"); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-27 (7th Cir. 1997) (Chrysler and its affiliated "Chrysler Family" companies did not constitute a RICO enterprise).

3. Enterprise engages in interstate commerce.

Plaintiffs have failed to assert nor supplied any supporting facts showing that the alleged enterprise(s) engage in interstate commerce. Indeed and at best, Plaintiffs' allegations suggest that several *Defendants* – but not the alleged enterprises – engage in interstate commerce. Plaintiffs have failed to claim that any of the corporate entity Defendants (other than Ignite Holdings, Ltd.) engage in commerce of any kind, interstate or otherwise. Similarly, Plaintiffs have made no allegations that individual Defendants Snyder, Domhoff or Koshakji personally

engage in any commerce, interstate or otherwise. Finally, Plaintiffs have alleged no facts that would permit imputing the separate alleged acts of some Defendants on any alleged enterprise.

4. Injury by reason of the use or investment of racketeering income.

The United States Supreme Court requires a RICO plaintiff to show his alleged injury bears a "direct relation" to the specific RICO violation. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). To properly state a § 1962(a) claim, Plaintiffs must allege their injuries stemmed from, and were proximately caused by, the use or investment of racketeering income (as distinct from injury allegedly caused by predicate acts or a mere "but-for" cause). *See Abraham v. Singh*, 480 F.3d 351 (5th Cir. 2007). Section 1962(a) provides a remedy solely for harm resulting from use or investment of income derived from racketeering activity, not harm from the alleged racketeering activity itself. *See Nolen*, 293 F.3d at 929. Plaintiffs' mere allegation that Defendants derived income from third parties or from other Defendants involved in the purported enterprise does not suffice to satisfy this requirement for proper standing for civil RICO claims.

Even if "but-for" causation resulting from predicate racketeering activity were the standard, Plaintiffs have not pled any facts to support the same. Plaintiffs do not allege that they read the contents of any alleged mailings, listened to the presentations of any alleged on-line videos, participated in any conference calls or were influenced by the alleged fraudulent scheme in any manner. Plaintiffs do not allege they relied on alleged fraudulent statements or omissions of any Defendant in deciding to pay the one-time sign-up fee -- intentionally mischaracterized by Plaintiffs as an "investment" so as to support their RICO claim -- or the license fee for an optional Ignite website. In fact, Plaintiffs do not allege any facts suggesting that *any* act by Defendants proximately caused Plaintiffs' injury or otherwise claiming that Plaintiffs relied on any alleged statements or omissions by Defendants, an essential element of their underlying

fraud claim. Rather, despite 89 pages of misquotes, absurd spin and hyperbole, Plaintiffs have not "shown" (as required pursuant to the facial plausibility standard) that their claimed injuries were caused by anything more than their own lack of effort, perseverance and sales skills. As Supreme Court Justice Anthony Scalia stated in discussing this element of a RICO claim: "Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (Scalia, J., concurring) (holding that mere "but-for" causation is not enough to confer civil RICO standing or plead injury).

C. Plaintiffs fail to state a cause of action under 18 U.S.C. § 1962(b).

To state a claim under 18 U.S.C. § 1962(b), Plaintiffs must properly allege that: (1) each defendant acquired or maintained an interest in or control of (2) an enterprise (3) through a pattern of racketeering activity, (4) that the enterprise engages in interstate commerce and (5) Plaintiffs were injured by reason of defendant's acquisition or maintenance of the enterprise. *See Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995); 18 U.S.C. § 1962(b).

The argument and authorities of the preceding sections are incorporated herein. As previously discussed, Plaintiffs fail to plead any of the existence of an enterprise, a pattern of racketeering activity or even that such alleged enterprise is engaged in interstate commerce. Plaintiffs fail to sufficiently allege any facts which show that Defendants acquired or maintained an interest in an enterprise, that such interest was acquired or maintained through a pattern of racketeering activity or that the acquisition of any such interest proximately caused harm to Plaintiffs. Defendants Tacker, Anderson, Dyer, Fisher, Hedge, Lucia, Stout and Swagerty have no interest in any of the named entities or alleged enterprises. The remaining Defendants have valid and legal interests -- either as limited partners, general partners or parent companies -- in

several of the entity Defendants pursuant to *pre-existing* partnership agreements. The pre-existence of such agreements eliminates any possibility that such interests were acquired through a subsequent pattern of alleged racketeering.

Plaintiffs' allegations under § 1962(b), page 80-82, are no more than erroneous and conclusory recitations of a portion of the elements of a § 1962(b) claim: allegations that are not aided by the remaining 86 pointless pages of Plaintiffs' distended pleading. A RICO pleading is insufficient where, "despite its bloated length," its accusations merely echo conclusory boilerplate language in an attempt to satisfy the required elements thereof. *AK Steel Corp. v. U.S.W.*, 2002 LEXIS 19676, *13 (S.D. Ohio March 30, 2002).

D. Plaintiffs fail to state a cause of action under 18 U.S.C. § 1962(c).

In order to state a cause of action under § 1962(c), Plaintiffs must sufficiently allege: (1) that each Defendant was employed by or associated with (2) an enterprise (3) which engages in interstate commerce, (4) that each Defendant conducts or participates in the conduct of an enterprise (5) through a pattern of racketeering and (6) Plaintiffs were injured by reason of the Defendant's conduct of an enterprise. *See* 18 U.S.C. § 1962(c), § 1964(c).

The argument and authorities of the preceding sections are incorporated herein. As previously discussed, Plaintiffs fail to sufficiently allege the existence of an enterprise, a pattern of racketeering activity, or that any alleged enterprise is engaged in interstate commerce. Defendants Anderson, Dyer, Fisher, Hedge, Lucia, Stout and Swagerty are not "employed" by any Defendant or alleged enterprise, nor are they "associated with" any Defendant or alleged enterprise other than Ignite Holdings, Ltd. (which, as stated, cannot be both a Defendant an "enterprise" as a matter of law).

Plaintiffs have alleged no facts whatsoever demonstrating that Defendants actively "conducted" an enterprise, nor have Plaintiffs even properly recited this element. Section

1962(c) provides, *inter alia*, that "it shall be unlawful for any person . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." 18 U.S.C. § 1962(c). The Supreme Court has held that the words "conduct" and "participate" in § 1962(c) both require that a defendant have some part in actually directing the affairs of the enterprise. *See Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). Given that Congress did not draft this section to read "participate in affairs" -- but rather "participate in the conduct of affairs" -- the *Reves* majority concluded: "[W]e understand the word 'conduct' to require some degree of direction and the word 'participate' to require some part in that direction." *Id*. at 177. Plaintiffs have pled neither facts nor boilerplate assertions showing that any Defendant actively conducted the affairs of an enterprise.

Plaintiffs' allegations imputing in conclusory fashion "every act" by each Defendant entity onto other Defendant entities are neither entitled to an assumption of truth nor relevant to the "conduct of affairs" inquiry. Plaintiffs' apparent theory that the various legal relationships between the entities is synonymous with a *per se* right to pierce the corporate veil or impute actions between the entities – or impose "enterprise" status – is ludicrous.

E. <u>Plaintiffs fail to state a cause of action under 18 U.S.C. § 1962(d).</u>

A conspiracy claim under § 1962(d) fails when the substantive claims under the preceding sections 1962(a)–(c) are without merit. *See Ashe v. Corley*, 992 F.2d 540, 544 (5th Cir. 1993). Because Plaintiffs' claims under those sections are without merit, the Court should dismiss Plaintiffs' purported § 1962(d) claim as well.

Plaintiffs' § 1962(d) claim asserts only that each Defendant committed "overt acts" to further the objectives of "the Pyramid." However, Plaintiffs must allege that a RICO "person" committed predicate acts independently wrongful under RICO and not merely the commission of overt acts in furtherance of a conspiracy. *See Beck v. Prupis*, 529 U.S. 494, 495 (2000).

Additionally, Plaintiffs fail to allege they have been harmed by reason of such predicate acts. *See* 18 U.S.C. § 1964(c). Having failed to allege any injury under this or any other section, Plaintiffs do not have standing to bring a RICO conspiracy claim. *See id*. Finally, the conspiracy under § 1962(d) is "to violate any provisions of [RICO]." Plaintiffs allege that Defendants conspired to further the objectives of an alleged pyramid, not to violate the provisions of RICO.

VII. MOTION TO DISMISS FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY

Finally and pursuant to FED. R. CIV. P. 9(b) and 12(b)(6), Defendants move to dismiss Plaintiffs' RICO claims for failure to plead fraud with particularity and therefore failure to state a claim upon which relief may be granted.

Plaintiffs purport to allege causes of action for RICO violations based upon the predicate "racketeering activity" of mail fraud and wire fraud. *See* 18 U.S.C. § 1961(1). However, where RICO claims are based upon allegations of fraud, Rule 9(b) applies and requires that the predicate acts be pled with particularity. *See Williams v. WMX Technologies, Inc*., 112 F.3d 175, 177 (5th Cir. 1997). Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). Plaintiffs have failed to plead their allegations of mail and wire fraud with the requisite particularity. Plaintiffs' *First Amended Complaint* contains no averments sufficient to place Defendants on proper notice of the "who, what, when, where and how" of their predicate allegations of fraud. Moreover and as previously discussed, Plaintiffs have failed to plead any facts showing they relied on any purportedly fraudulent statements or omissions. Indeed, Plaintiffs cannot do so insofar as they expressly disclaimed any reliance on representations of income when they signed Ignite's *Terms & Conditions*: "I acknowledge that I have not received any representation or statement from Ignite or any other person upon which I have relied in

entering into this Agreement to the effect that: the business may, can, or will generate income, or be profitable. . .” See Ex. F, ¶ 21.

Because Plaintiffs did not plead mail and wire fraud with particularity as required by Rule 9(b), Defendants request the Court to dismiss Plaintiffs’ RICO claim pursuant to Rule 9(b). Moreover, because a motion to dismiss under Rule 9(b) is in essence a motion to dismiss under Rule 12(b)(6), *see U.S. v. Columbia/HCA Healthcare Corp*., 125 F.3d 899, 901 (5th Cir. 1997), Defendants further move to dismiss Plaintiffs’ RICO action pursuant to Federal Rule 12(b)(6).

VIII. PRAYER

WHEREFORE, all Defendants respectfully pray that this Court grant *Defendants’ Motion to Dismiss,* and dismiss this matter in its entirety, with prejudice. Defendants request all other and further relief, both at law and in equity, to which they may show themselves entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all counsel for Plaintiffs, Scott M. Clearman and Brian D. Walsh, via the Court’s electronic filing system on this 21st day of August, 2009.

____/s/ Vanessa J. Rush_____
Vanessa J. Rush