UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KERRIGAN, et al,

Plaintiffs,

vs.

VISALUS, INC., et al

Defendants.
_____/

Case No. 2:14-cv-12693
Hon. Matthew F. Leitman

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF LEAD COUNSEL

NOW COME Plaintiffs, Timothy Kerrigan, Lori Mikovich, and Ryan M. Valli, by and through their counsel, Sommers Schwartz, P.C., Prebeg, Faucett, & Abbott, PLLC, and Wexler Wallace, LLP, and pursuant to Fed. R. Civ. P. 23(a), (b)(3), and (g), request that this Court issue an order certifying this action for the reasons set forth below and in the attached Memorandum of Law in support of their Motion. Pursuant to Fed. R. Civ. P. 23(g)(1)(C)(i). Plaintiffs further seek appointment of their attorneys as lead counsel in this matter.

1. Proposed Class Definition

The Moving Plaintiffs propose the following class definition:

> *The class consists of individuals*[1] *who reside in the United States and Canada who became Independent Promoters between July 9, 2008 and the present who have lost money they paid to ViSalus.*

For purposes of a class notice, Plaintiffs propose that the individuals identified, be sent the following description in the class action notice:

> All persons who joined ViSalus as Independent Promoters any time during the period from July 9, 2008 to the present (the "Class"). The Class is comprised of people, who were identified by ViSalus as Independent Promoters, who lost money by enrolling in the ViSalus multilevel marketing program.

2. Standards Under FRCP 23(a) and (b)(3)

a. Numerosity

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, the proposed damages class consist of more than 400,000 people who paid moneys to become Independent Promoters for the ViSalus, Inc., "business opportunity." Individual joinder of this many putative class members is impracticable.

[1] The Preliminary Expert Report of Paul Taylor identifies a total of 387,496 US Independent Promoters having economic activity from June 2006 to June 2016. (Ex. D to the Memorandum of Law accompanying this Motion, p. 5). There are another approximately 83,000 Canadian Independent Promoters enrolled since 2010. The data pertaining to the Canadian promoters was not provided at the time of Mr. Taylor's preliminary report and has not been analyzed to determine the economic activity of the Canadian promoters, so a total number of class members cannot yet be determined.

b. Commonality

Rule 23(a) also requires there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The plaintiff, by generalized proof, "must demonstrate that the class members have suffered the same injury." *Dukes v. Walmart*, 131 S. Ct. 2541 (2011). The existence of "a single issue common to all members of the class" suffices. *In re Am. Medical Sys. Inc*., 75 F.3d 1069, 1079 (6th Cir. 1996). The Court has previously issued orders setting forth which individual Plaintiffs' counts of the Second Amended Complaint pertain to which defendant, as follows:

	Count I RICO	Count II RICO Consp.	Count III Section 10b-5	Count IV Section 12(2)	Count V MCPA (b)	Count VI MCPA	Count VII Unjust Enrichment	Count VIII Conv.	Count IX Civil Consp.	Count X MFIL Sections 13, 25, 28	Count XI MFIL Section 5
ViSalus	X	X	X	X	X	X		X	X	X	X
R. Blair	X	X	X			X	X		X		
Sarnicola	X	X	X			X	X		X		
B. Mallen	X	X	X			X	X		X		
R. Goergen		X	X				X		X		
T. Goergen		X	X				X		X		
IR Defs.		X					X		X		

Under each of these claims, whether articulated as RICO, securities violations, common law, or state statutory law, common questions of law and fact are present which satisfy Rule 23(a)(2). These include:

- Whether Defendants' multi-level marketing business was devised and implemented as a facially illegal pyramid scheme;

- Whether Defendants have formed a RICO "enterprise";
- Whether Defendants have engaged in a RICO "pattern of racketeering activity;"
- Whether Defendants used mail and wire communications in furtherance of the scheme;
- Whether Defendants intended to commit fraudulent activity;
- Whether Defendants have profited from their illegal activities; and
- Whether putative class members have been collectively harmed by those activities.

c. Typicality

Rule 23(a)'s third requirement is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). A claim meets the *typicality* prerequisite if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am Med. Sys., Inc.*, 75 F.3d at 1082.

Plaintiffs challenge an illegal pyramid scheme under RICO and other state law claims because ViSalus designed and implemented its compensation system to pay for recruiting other promoters over selling its products. A pyramid scheme by its nature depends on a uniform system. The typicality requirement is also satisfied.

d. Adequacy of Representation

Rule 23(a)'s final requirement is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The requirement exists to show that (1) the representatives' interest do not conflict with the class members' interest and (2) the representatives and their attorneys are able to prosecute the action vigorously. *In re Am. Med. Sys.*, 75 F.3d at 1083.

No conflicts of interest exist. Plaintiffs Timothy Kerrigan, Lori Mikovich, and Ryan M. Valli are prototypical ViSalus promoters and there is no antagonism between the interests of Plaintiffs and those of the other class members. Plaintiffs' counsel are experienced lawyers with the skills and resources to try this case. (See Exhibits E, F, and G to the Memorandum Of Law accompanying this motion).

e. Predominance

In addition to the four requirements of Rule 23(a), Plaintiffs need to show, under Fed. R. Civ. P. 23(b)(3), that the common issues predominate over individual questions. Common legal issues predominate because the class members' claims arise out of the operation of the same scheme. Common fact issues also predominate. There are no individual issues that so dominate the common issues that the predominance inquiry is not met.

f. Superiority

Rule 23(b)(3) also requires that a class action be the superior method for adjudicating the claims. Certifying a class is the "superior" way when the "'class action would achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997). No action seeking class certification arising out of a pyramid scheme has ever not been certified.

Plaintiffs' RICO and Securities Claims (Counts I, II, III, and IV of the Second Amended Complaint [Doc. 78]) are appropriate for class certification for Independent Promoters who reside in the United States and Canada because each class member has common and typical claims that predominate over any individual inquiry.

Plaintiffs' common law and state statutory claims are appropriate for class certification for Independent Promoters who reside in the United States and Canada due to the choice of law provision requiring the parties to be bound by Michigan law in the event of a dispute between ViSalus and its US and Canadian Promoters.

In the alternative, Plaintiffs' common law claim of unjust enrichment is sufficiently uniform to warrant a nationwide class of US Promoters.

In the alternative, the claims under the Michigan Consumer Protection Act, Michigan Franchise Investment Act, and the remaining unjust enrichment, civil conspiracy, and conversion claims are common and typical for all Michigan Independent Promoters and should be certified as to all Michigan Independent Promoters, or in the alternative, held in abeyance as each of these claims would be subsumed into the national classes brought under the Counts listed above.

PLAINTIFFS' COUNSEL SHOULD BE APPOINTED AS LEAD COUNSEL IN THIS MATTER

Fed. Rule. Civ. P. 23(g) provides:

> In appointing class counsel, the court: (A) must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Plaintiffs' counsel should be appointed as lead counsel in this litigation. They meet all criteria set forth by the rule.

Plaintiffs have submitted a Memorandum of Law in support of this Motion.

Plaintiffs' counsel has contacted opposing counsel in accordance with Local Rule 7.1(a) and obtained confirmation that the instant motion will be opposed.

WHEREFORE, because the proposed class meets the requirements of Rules 23(a), (b)(3), and (g), Plaintiffs request that the Court certify the class, appoint

Plaintiffs Timothy Kerrigan, Lori Mikovich, and Ryan M. Valli as class representatives, and appoint Plaintiffs' attorneys as class counsel.

Respectfully submitted this 6th day of January, 2017.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF LEAD CLASS COUNSEL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

INTRODUCTION

Plaintiffs Kerrigan, Valli, and Mikovich (hereafter "Moving Plaintiffs") brought a complaint under RICO, securities laws, state consumer laws, and common law against ViSalus, Inc. ("ViSalus") and its operators and promoters, running a multi-level marketing ("MLM") operation. The Court found that the claims brought under federal securities laws and RICO set forth a plausible scheme to defraud that arises from the common question whether the defendants operated an inherently illegal pyramid scheme. [Dkt. # 75, resulting in the Second Amended Complaint ("SAC")]. The Moving Plaintiffs' claims were the result of participation in a "guide to prosperity" "business opportunity" to become distributors, or Independent Promoters ("IPs"), for ViSalus. (**Ex. A**; **Ex. B)**. The Moving Plaintiffs and about 85% of over 400,000 other US and Canadian IPs who purchased the "business opportunity" lost money after joining ViSalus. The total losses are mind boggling: in the United States alone, there appear to have been over 387,000 people who lost over $360 million.

Every pyramid scheme case arising from the MLM marketing model, including a factually indistinguishable case currently litigated in the 5th Circuit, has resulted in class certification.[1] Common issues affecting class members naturally

[1] *Nguyen v. FundAmerica, Inc.*, 1990 U.S. Dist. LEXIS 15031, Fed. Sec. L. Rep. (CCH) P95,497 (N.D. Cal. Aug. 16, 1990); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176-77 (9th Cir. 1977); *In re Glenn W. Turner Enters. Litig.*, 521 F.2d

predominate in pyramid scheme litigation. The victims of pyramid schemes all lose money in the same way, for the same reasons, and their claims all stand or fall together around the key issue of whether a putatively lawful business is really a pyramid scheme. The small, widely distributed harm in such cases lie, "at the very core of the class action mechanism." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

There exist no individualized issues making class certification inappropriate, especially given the Court's careful earlier parsing of the elements of the causes of action in the SAC. Moving Plaintiffs offer proof common to all class members that while ViSalus was holding itself out as a lawful business opportunity, it was really an inherently unlawful enterprise, inevitably causing class members at the bottom of the pyramid to lose the fees they paid the company to participate. Common evidence exists that defendants' compensation structure *actually* resulted in the outcomes

775 (3d Cir. 1975); *Davis v. Avco Financial Services, Inc.*, 371 F.Supp. 782 (N.D. Ohio 1974), aff'd, 739 F.2d 1057 (6th Cir. 1984); *Webster v. Omnitrition International, Inc.*, 79 F.3d 776 (9th Cir. 1996), *Stull v. YTB Int'l, Inc.*, No. 10-600, 2011 WL 4476419, at *1 (S.D. Ill. Sept. 26, 2011); *Piambino v. Bailey*, 610 F.2d 1306, 1308 (5th Cir. 1980); *Arata v. Nu Skin Int'l, Inc.*, 5 F.3d 534 (9th Cir. 1993); *Bell v. Health-Mor, Inc.*, 549 F.2d 342 (5th Cir. 1977); *In re Am. Principals Holdings, Inc. Sec. Litig.*, 1987 WL 39746, M.D.L. No. 653, at *1, *3 (S.D. Cal. July 9, 1987). The recent *Torres v. Stream Energy, et al.*, Fifth Circuit case will be addressed in more detail below.

associated with pyramid schemes. Because the design grossly rewarded recruitment and early entry into the system over actual sales, ViSalus created an inevitable tiny class of winners at the top and a huge pool of losers at the bottom. Those losers are the putative class members whose common claims should be certified.

PROPOSED CLASS

ViSalus enrolled approximately 417,000 IPs in the United States since 2006. An additional 83,000 IPs were enrolled in Canada since 2010. (**Ex. C,** Bosev Dep. at 142:3-22). The Moving Plaintiffs propose the following class definition:

> *The class consists of individuals who reside in the United States and Canada who became Independent Promoters between July 9, 2008 and the present who have lost money they paid to ViSalus*.

GENERAL PRINCIPLES FRCP 23(a) AND FRCP (b)(3)

Courts have broad discretion in deciding whether an action may be maintained as a class action within the framework of Fed. R. Civ. P. 23. *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 559 (6th Cir. 2007). Four general requirements must exist to maintain a class action: 1) the class is so numerous that joinder of all members is impracticable (*numerosity*) (Rule 23(a)); 2) questions of law or fact are common to the class (*commonality*) (Rule 23(a)); 3) claims or defenses of the representative parties are typical of the claims or defenses of the class (*typicality*) (Rule 23(a)); (4) the representative parties will fairly and adequately protect the interests of the class (*adequacy*) (Rule 23(a)); and (5) the common questions must predominate over

any questions affecting only individual members (*predominance*) (Rule 23(b) (3)), *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-4 (1997); *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc).

- The *numerosity* element is believed not to be in dispute. The proposed class here consists of more than 400,000 IPs. Joinder of this many putative class members into a single action would be impossible.

- The *adequacy* requirement exists to show that (1) the representative's interest do not conflict with the class members' interest and (2) the representatives and their attorneys are able to prosecute the action vigorously. *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996).[2]

- *Commonality* requires the plaintiff to, by generalized proof, "demonstrate that the class members have suffered the same injury." *Dukes v. Walmart*, 131 S. Ct. 2541 (2011); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The existence of "a single issue common to all members of the class" suffices. *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079.

- A claim meets the *typicality* prerequisite if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class

[2] **Exhibits E, F, and G,** declarations of Andrew Kochanowski, Edward Wallace, and Mathew Prebeg, support the adequacy prong.

members, and if his or her claims are based on the same legal theory." *In re Am Med. Sys., Inc.*, 75 F.3d at 1082.

- Two additional prerequisites must be satisfied under the *predominance* inquiry. Common questions must "predominate over any questions affecting only individual members," and class resolution must be "superior to other available methods for fairly and efficiently adjudicating the controversy. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) "The predominance requirement is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) (citing *Amgen*).

MOVING PLAINTIFFS' CLAIMS ARE COMMON AND TYPICAL, AND GENERALIZED PROOFS SUPPORTING THE CLAIMS PREDOMINATE

To defeat certification in a case where each proposed class member suffered the same injury in the same fashion in the operation of the same scheme, defendants would need to identify (1) a serious issue, (2) on which individual evidentiary presentations are necessary for (3) a meaningful set of plaintiffs, that (4) outweighs the critical common questions here. *See Tyson Foods*, 136 S. Ct. at 1045; *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). They cannot. Moving Plaintiffs were recruited into the scheme and lost money in exactly

the same way as the other IPs who were recruited and lost money. Evidence of a common motive, a common application of the compensation scheme, a common recruiting program, resulting in a common inherent fraud, and damages suffered in the same way by each money-losing IP gives rise to no individualized issues, much less *predominant* issues that prevent certification. The common evidence is summarized below:

1. COMMON EVIDENCE RELATING TO ENTERPRISE AND MOTIVATION

ViSalus always operated out of Troy, Michigan, it's so-called "nerve center." (**Ex. H** at 24). It has been run by three so-called Founders: Ryan Blair ("Blair"), the Chief Executive Officer, Nick Sarnicola ("Sarnicola"), and Blake Mallen ("Mallen"), the Chief Marketing officer largely responsible for day-to-day affairs. Both Sarnicola and Mallen had been representatives in an MLM company when, in 2005, Blair obtained $1.5 million in investment money from Ropart Asset Management ("RAM"). RAM is a private equity investment vehicle for family trusts owned in large part by Robert Goergen, Sr. ("Goergen Sr."), the CEO of a then publicly-traded company, Blyth, Inc. ("Blyth"), and managed by Todd Goergen ("Goergen"), his son. These investors purchased about 25% interest in ViSalus with the rest split between Blair, Sarnicola, and Mallen. In 2008, Goergen, Sr. orchestrated an equity purchase agreement (called MIPA) between Blyth and the ViSalus shareholders. Over a staged series of four closings, Blyth was to buy

ViSalus's interest for a price pegged to the company's EBITDA: the more the company showed on paper the better the deal was for the sellers. ViSalus's earning in 2011 and 2012 were astonishingly high, which allowed the Founders and Ropart to make a killing out of the deal. Blyth paid its own CEO Goergen, Sr., his son, and Blair, Sarnicola, and Mallen, over *$140 million* at Blyth's shareholders' expense. The MIPA deal provided all the motivation in the world to pump up the scheme and generate paper earnings for the five corporate insider defendants.

2. COMMON EVIDENCE REGARDING THE UNIFORM APPLICATION OF THE COMPENSATION PLAN TO ALL IPS

ViSalus began as a seller of vitamins and supplements. These were the ostensible product being sold, although what was actually offered was the "business opportunity" to sell the right to sell the vitamins to other people.[3] (Zorica Bosev Dep., **Ex. C** at 18:10-19:4). Later, in about 2008, ViSalus also began offering bags of meal-replacement shakes as a product that its IPs could sell. (**Ex. C** at 26:7-22). The shakes were pitched as a weight-loss product. They became the basis for a so-

[3] Until 2009, the compensation plan used to pay the IPs is described in a "Career Path and Bonus Structures," (**Ex. L**) associated with a document called "Welcome Letter From ViSalus Management," (**Ex. B**) A later plan summary document, "ViSalus Sciences Compensation Plan Summary," (**Ex. M**), is part of the "Compensation Plan: Your Guide to Prosperity" in use between 2009 and 2014. (**Ex. K**). Under either version the compensation plan, with minor tweaks, remained the same throughout the years. (**Ex. C** at 24:15-24).

called "Challenge Party" concept, in which the IP distributors would offer to sell the shakes and the "business opportunity" to roomfuls of people. None of these products were ever retailed in stores and none could be purchased from anyone but an IP. (**Ex. C** at 48:16-25).

Every IP, first in the US and later in Canada, signed up online through the ViSalus website maintained in the United States. Payments were made by credit card, and processed in the US. (**Ex. I,** ViSalus 30(b)(6) Dep., at 47:12-49:7). Before the sign-up, each US or Canadian IP had to fill out a paper or online application. Each person was shown a document called "Policies and Procedures" and agreed, as a condition of getting rights to sell and obtain commissions under the compensation plan, to the terms and conditions expressed in each document. **(**See **Exhs. J** and **N).** Each such agreement, in whatever combination of varying policies, terms or application, included the following language:

> In the event a dispute arises as to the respective rights, duties and obligations under this Agreement, Compensation Plan or the Policies and Procedures of VISALUS, it is agreed that such disputes shall be exclusively resolved in the Circuit Court for Oakland County, State of Michigan, or Federal Court located in Detroit, Michigan. Michigan law shall apply to the resolution of all disputes.

All IPs agreed to these terms. ((**Ex. I** at 241:2-243:4).

ViSalus used a relational database called Exigo to control and log all transactions between IPs, "customers," and the company. (**Ex. L**; **Ex. O**). The Exigo database enables the Moving Plaintiffs to identify the IPs in the system, track the

payment of every commission, identify which IPs made or lost money, and, for notice requirements, to generate contact information. (**Ex. D**, Preliminary Report of Paul Taylor, using Exigo database reports to examine US IP data).

The new IPs could earn at least eight different tiers of bonuses. (*See, e.g.*, the system set out in ViSalus Fusion Academy training presentation, **Ex. TT**). The bonuses increased as the IP moved "higher" in "ranks." As the IP progressed "up" the "ranks" the IP who is "higher" got more "depth" (that is got to dip lower into his or her downline to get a piece of the sales made to each new recruit and customer), and got hefty cash awards upon attaining each "rank."

Each upward "rank" required the new IP to develop three "legs" below him or her, with each "leg" headed by a newly-recruited IP. (**Ex. K** at 577). With the exception of a "personal customer bonus," each and every commission is triggered by or based on recruitment of additional IPs below the new IP.[4] "Rank" advancement

[4] The ranking system and some of its features are described in the Court's initial opinion, Dkt. # 54. Defendants continually sought to couch the recruiting rewards built into the plan by characterizing the bonuses in terms of monthly product volume. But this is plain misdirection. Before the new "Associate" gets $1 in commissions from the sale of product (which the associate is forbidden from retailing by the policies and procedures) he or she must sell over $200 to a third-party customer, each and every month. (**Ex. I** at 121:4-124:12; **Ex. K**). And to qualify each month, the new IP must stay "active" by buying $125 worth of product or maintaining a $200 "personal qualifications volume." (**Ex. C** at 60:12-17). Once an IP fails to buy monthly product or does not pay his or her "renewal" fee, he is "purged" from the system and turned into a "customer." (**Ex.** I at 62:24-64:5). This fluid promoter/customer identification masks the lack of retail sales.

brought extra bonuses of $25K, $100K, $250K or $500K per "rank" along with other "team," and other bonuses. (**Ex. TT** at pp. 38-39).

The new IP was assigned in the "downline" of the IP who recruited him or her, who in turn was in the "downline" of the next level up, and so on. The top spot in the chain was held down by Nick Sarnicola. The "legs" under any IP extended down from personally-recruited IPs, but the particular people within the legs could be moved via the "waiting room" feature, either by the company or by agreement between promoters provided they had enough clout. (**Ex. CC**, Nelson Decl. at ¶5; **Ex. JJ**, Robbins Decl. at ¶7). As new IPs anywhere were recruited, they would be placed within someone's downline regardless of the IPs location. Thus, Canadian IPs were continually mixed with US IPs, and transactions in the US would be simultaneously commissioned across US and Canadian IPs. (**Ex. I** at 96:1-16; 242:3-17).

3. COMMON EVIDENCE RELATING TO PAYING FOR RECRUITING

The activity used to compensate the IPs becomes an inherently unlawful pyramid scheme when they: (1) pay the company for the right to serve as salespeople and recruit others into the scheme; and (2) the rewards for recruitment dominate

those from sales. *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975), followed by *US v. Gold Unlimited*, 177 F.3d 472 (6th Cir. 1999).[5]

The central question thus common to all class members under every claim at issue is: *what exactly were they paid commissions for having done*? The common evidence is that the compensation system was geared, designed, and implemented to pay for recruiting other IPs over retailing vitamins and weight-loss shakes. The economic incentives built into the plan, and the restrictions built into what the IPs could sell and how they could sell the product, inevitably pushed only one activity, the recruitment of others into the system, to the virtual exclusion of meaningful product sales to third-parties. In the absence of the legal or practical ability to retail the ViSalus products (which competed with a multitude of other vitamins and weight loss shakes in the market), IPs recruited IPs who recruited IPs. Each bought a few hundred dollars of weight loss shakes, and their Executive Success System ("ESS") starter kit, got none or a few dollars of commission, and lost money. The few that took up recruiting in earnest, victimizing others, made money. The more recruiting,

[5] This is because the compensation structure creates an inevitable trap, as "[t]he promise of lucrative rewards for recruiting others tends to induce participants to focus on the recruitment side of the business at the expense of their retail marketing efforts" *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 884 (9th Cir. 2014). The market will eventually saturate and there will be no one left to recruit. *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 781 (9th Cir. 1996).

the more people victimized, the more money made. That's how the system works, that's how this system worked, and that's why it is "inherently fraudulent."

The ViSalus compensation plan rewarded IPs almost exclusively for recruiting. The most obvious *per capita* recruitment payment occurs when an IP gets someone new to buy the $499 ESS kit and become an IP. Each such transaction results in a straight up payment to the enrolling IP of up to $185 with, depending on rank, an additional override of up to $40. (**Ex. K** at 588; **Ex. TT** at pp. 27-29, Fusion Academy training presentation, "Paid on Product within ESS"). Then, a so-called "New Business Bonus" gets paid when that newly-recruited IP purchases additional product. As the example presented shows, when the new IP buys a $299 product kit in addition to the $499 ESS kit, the recruiting IP gets (in addition to the $185-$225 for the ESS kit transaction) $59.80 out of the next $299. Additional tiered payments go upline to the "sponsoring" IPs, all the way up to the "Ambassadors" and the like holding the top spots. (**Ex. K**. at 589; **Ex. TT**). As the Fusion Academy exhorted: "Refer 3 & Get Your Next Month Free…Then Duplicate!" Recruit eight levels, and you're at $72,324 per month! (**Ex. TT** at VS063799). In contrast, getting the equal amount of bonus through straight selling of ViSalus product was almost impossible, see fn.4, *supra*.

ViSalus never made any bones about the fact that it knew the new IP's role was to find other IPs to fill the slots below him or her, and so on and so on. As John

Tolmie, the former CFO, put it, "The only way to get a sales organization is to recruit somebody." (John Tolmie Dep., **Ex. U** at 94:3-8). And indeed, the company's margin per IP was ***11X*** greater than its margin per "customer." (**Ex. WW**, 2012 management Compensation Plan overview, p. 11, $676 vs. $60).

Common evidence shows that all of the key people who set up the scheme (the Founders and the Goergens, together with ViSalus management responsible for running the company) intended for the compensation plan to pay more for recruiting than for the ostensible third-party customer sales. A Q&A prepared by senior management candidly acknowledged this exact point:

> [Q] What is the incentive for a leader to sign up a new promoter versus simply selling product to that person?
>
> [A] By having more Promoters within your organization "downline" you improve your opportunity to increase your commission since you therefore have a larger sales force working for you… *In addition, depending on your enroller's rank, they may earn more from a Fast Start Bonus triggered by the sale of an ESS versus having that same person buy a similar amount of product…Finally, any initial product orders trigger yet another bonus that is more lucrative to the enroller that that which is generated by a personally enrolled customer's order.*

(**Ex. P**, emphasis added). This was no management "duh" moment. Candid emails openly discuss a "(recruiting focused) culture of activity," (**Ex. Q**) and tweaks to the compensation plan made "in order to drive recruiting." (**Ex. R**).[6] But the most

[6] Internal admissions to defendants' having and knowing about a "recruiting culture" abound and are continuous. See, e.g., **Ex. S,** at VS57296; **Ex. T.**

compelling common evidence is not the words but the actions. At the board level ViSalus top management *themselves* called and tracked which of the many weekly and monthly performance bonuses were paid for the act of recruiting versus for retail sales. (**Ex. U** at 109:23-113:3; **Ex. V,** Tab 1).[7] Not surprisingly, the "personal customer commissions," the only real bonus paid out for product sales to non-IPs, amounted to a paltry 9%. Every bit of the remaining 91% depended on recruiting others into "teams" in "downlines" to create "volume." (**Ex. WW**, management's 2012 Compensation Plan Overview, p. 6).

4. COMMON EVIDENCE RELATING TO PROMOTION AND SUCCESS OF THE SCHEME

The other key question needed to resolve the common pyramid scheme claims is *how* the defendants pitched the "business opportunity." Management candidly recognized that "Promoters stay because of the Biz Opp." (**Ex. FF**). Whether the opportunity was presented as a way to make lots of money, if it emphasized rewards, if it made false expectations of success, and if it masked the very large failure rates, are all questions relevant to the claims and answerable only by common evidence. As again described by the Court in its opinion at Dkt. # 54, the defendants created a huge array of promotional materials designed to get a potential distributor in the door

[7] Tolmie acknowledged that management categorized Fast Start Bonuses, sales of the ESS kits and IP product packages purchased in the first thirty days as bonuses tied directly to recruiting. (**Ex. U** at 109:23-113:3).

and exposed to the "business opportunity," signed up, and then hustled to buy the weight loss shakes and to build "teams" under them. They did so three main ways:

First, ViSalus and a number of ostensibly "independent" representatives colluded to spread the "word" by acting like "typical" reps to make the "if I can do it so can you" financial pitch. But, unlike the class members who lost money, many or most of the pros had a variety of undisclosed payments and inducements to get them started and to keep them in place. Beginning with the influx of the Blyth money in 2008, and accelerating greatly in 2010, the company began buying professional marketers from other MLM companies. (**Ex. W**; **Ex. X**). The company budgeted large sums of money, well over $1 million a year, to pay these promoters so-called "advances," and entered into a series of contracts with successful, professional recruiters for other marginal MLM companies. (**Ex. Y** is one such contract and email about using these to "build the business"). The company gave Nick Sarnicola a $1 million a year deal to be in the "field" in addition to his take as the top member of the Exigo "upline" (**Ex. Z**). Another deal gave promoter defendant Jason O'Toole a company American Express card for his operational expenses. (**Ex. U** at 143:25-144:13). Sarnicola sub-contracted with many others, like defendant Kyle Pacetti (a prominent defendant recruiter) (**Ex. AA**). Other high-level promoters did the same. Wealthbuilders Int'l, a Canadian d/b/a/ for promoter Tanis McDonald (not a defendant), paid "signing bonuses" of hundreds of thousands $CAN to dozens of

promoters in order to build "legs" and sales volume under her. (**Ex. BB**). Tara Wilson, another defendant, offered a new recruit $10,000 if she could get to "Ambassador" within a short period of time. (**Ex. CC,** par.4). Sarnicola, together with several other promoters, paid a notorious marketer named Robert Dean $350,000 to pitch ViSalus. (**Ex. DD**; **Ex. EE**). And a number of early promoters were given equity in ViSalus in an Equity Incentive Plan, later cashed out for over $26 million during the Blyth stock purchase in 2011. Even now, high-level insider promoters have been given equity in yet another Blair, Sarnicola, Mallen and Ropart spinoff company, HashTagOne, LLC. (**Ex. GG**). Those agreements were never disclosed to the people who were going to get recruited and continue to be withheld from the newest rounds of people getting recruited today.

Using these pros, the company sponsored local, regional, and national meetings and conventions in public spaces, where the potential targets would listen to the message, the newly-recruited IPs would be told how to recruit others, the check-waving ceremony would entice and presentations like "Who Wants To Be A Vi Millionaire?" would dangle the riches to recruits. (**Ex. HH**; **Ex. CC,** par. 11; **Ex. II,** par. 16; **Ex. JJ,** par. 5; **Ex. H** at p. 3, showing 20,000 people at "Vitality July, 2012"; **Ex. TT**, Fusion Academy presentation at p. 7, "Promote the Challenge- Get Paid!"). These were combined with an incessant array of videos that flooded YouTube and other sites in which these conventions would be shot, endorsements

of the "top" recruiters made, and so on. (**Ex. NN**, partial list of videos and Web materials available from the Web).

Second, the company created a "3 For Free" "Challenge Party" pitch that combined the "business presentation" with a gateway for a potential recruit to start as an ostensible "customer," but then be presented with a continuing opportunity to become a promoter. These slogans were combined with a "if I can do it so can you" come-ons picturing a handful of "top" promoters, who were actually the insiders getting special deals. (**Ex. KK**). All promoters would be encouraged to immediately hold "Challenge Parties" for their circle of acquaintances where samples of the product (contained in or coming from the newly-purchased ESS kit) would be shared before the real point of the party was made: listen to the opportunity to make money. (**Ex. LL**). The parties were little more than a scripted recruiting pitch. (**Ex. CC**, pars. 8-10; **Ex II**, pars 20-21; **Ex. JJ,** par. 8). All purchases made at these events, whether to someone called a "customer" or new promoter, were a means to get the customer to become a promoter. (**Ex II**, par. 22).

Third, the company organized systematic meetings and calls between its management and the top-level recruiters (primarily the defendant promoters and their immediate downline recruits) to push the message of "recruit, recruit, recruit" (**Ex. CC,** par. 18). The below the waterline message spread by the company, Sarnicola, and the top insider promoters, was to push the ESS kits and lock recruits

into place with the "free" BMW bonus. (**Ex. II,** pars. 8-12). Company "training" materials were not about the product, but about what it takes to get up in the ranks and make the big bucks. (For example, **Ex. MM; Ex. TT,** ViSalus Fusion Academy presentation).[8] The company assured the recruits (those who were enticed into building "teams" and who rose up in the ranks) that everything was legal and legitimate. The company told the recruits that it was compliant because there were customers and products sold. (**Ex. II,** par. 20; **Ex. JJ,** par. 11).[9] Special "training" events for the higher level promoters taught how to "distort reality" for new recruits who may have an objection to joining. (**Ex. JJ,** par. 9). In turn, the "top" promoters would hold their own meetings and create their own presentations and pay people below them—and threaten and cajole those who wanted to leave, all to continue the recruiting. They would produce and post their own videos and do "interviews" to be

[8] **Ex. MM** slide presentation was only shown after someone signed up and wanted to learn how to build a "team," *i.e.*, recruit others, shows in stark terms how much recruiting needs to be done to get the money. The average number of personally recruited promoters ranged from 1 for the lowest level to *109* for the "Royal Ambassador" level (p. SK11708). **Ex. WW**, the 2012 overview, indicates it "takes 12 Cars," presumably the BMWs pitched as a bonus, "to become Ambassador" (p. 12).

[9] This was just a way to placate people asking if what they were doing was OK. No court or the FTC ever deemed an MLM legal because it sold products and had customers. *Every* pyramid scheme case litigated involved products and customers. See, e.g., *FTC v. BurnLounge, Inc.*, 753 F.3d 878; *Omnitrition Int'l, Inc.*, 79 F.3d 776.

posted on the Web that emphasized the money to be made by being a ViSalus promoter. (Many Web interviews listed among materials listed in **Ex. NN**).

The recruiting zoo described by the former "Ambassador" promoters, was wildly successful but of course concealed from the new recruits sitting through the "business opportunity" presentation. ViSalus had modest sales in '06 of $1.3 million, $8.6 million, and $14.1 million in '07. Between '08 and '09, sales dropped from $23 million to $13 million, and started rising to $33 million, after the advance commission agreements were made with professional recruiters, in 2010. Between 2011 and 2012 sales jumped from $33 to $230 million and then to $623 million when they peaked, and the unsuccessful IPO push occurred. By mid-2012, management was reviewing successful "market penetration" of all 50 states 6 Canadian provinces, and looking at international expansion. (**Ex. H** at pp. 5, 7). All pyramid schemes saturate, however, and this one was no different. It started plummeting at the end of 2012. (**Ex. U** at 43:20-45:24).

5. THE MOVING PLAINTIFFS WERE RECRUITED IN THE SAME WAY AND AS RESULT OF THE SAME PROMOTION AS EVERY OTHER MONEY-LOSING IP

The Moving Plaintiffs joined the opportunity when it was on its downward slide in 2013—but the contraction was not on the promotion agenda. Timothy Kerrigan was initially recruited to ViSalus after attending an event in San Diego. (Timothy Kerrigan Dep., **Ex. OO** at 24:10-25:21). He was involved with ViSalus as

a promoter for approximately three to six months the first time he signed up and later quit and was refunded his money. (*Id.,* 29:23-30:5). Kerrigan believed that the company was different a few years later, and purchased a second $499 EPS kit after being recruited by his work boss and attending a ViSalus event in Orlando. (*Id.*, 32:12-40:8). The Orlando event consisted of two eight-hour days of weight loss presentations and prosperity (BMWs and large cardboard checks) (*Id.,* 33:10-35:1). Kerrigan cancelled his distributorship three to four months after joining the second time when he realized nothing had changed and he still had to recruit people in order to make money. (*Id.,* 82:21-83:10; 85:16-19).

Lori Mikovich and Ryan Valli were recruited to ViSalus by Kerrigan, who, before figuring out how an IP really had to make money, encouraged them to attend a ViSalus event in Romulus, Michigan. (Lori Mikovich Dep., **Ex. PP** at 18:10-19:1; 23:20-24:17; Ryan Valli Dep., **Ex. QQ** at 21:1-6; 50:13-52:16). Both Mikovich and Valli purchased the $499 EPS kit (**Ex. PP** at 92:8-14; **Ex. QQ** at 28:8-12). Both saw ViSalus traipsing "millionaires" on stage with cardboard checks at the Romulus event. (**Ex.** PP at 39:11-41:12; **Ex. QQ** at 50:16-25). Mikovich realized the business was not about selling shakes, but about recruiting people and cancelled her enrollment a couple months after the Romulus meeting. (**Ex. PP** at 74:13-75:1; 90:11-91:13). Valli cancelled his enrollment two months after the Romulus event

when he also realized he could not make money selling the product, but had to recruit people as promoters to recoup his money or make any. (**Ex. QQ** at 55:10-61:12).

6. DEFENDANTS KNEW ABOUT THE LOSSES AND CONTINUED TO RECRUIT AND ATTRACT NEW IPS EVEN AS THE EXPECTED SATURATION AND COLLAPSE OCCURRED

The company's management closely tracked the metrics associated with the sales made through the Exigo system. (**Ex. U** at 84:10-23). The company knew who remained "active" and for how long. The company's top management and Ropart, knew in real time exactly how much each promoter was making, how much each promoter was generating in net sales, how many ostensible "customers" were associated with each promoter, how much each "customer" and IP was buying, and how quickly the company "churned" through each IP and "customer." This common evidence (which goes to scienter, conspiracy, enterprise and other elements of the various counts) shows a depressing amount of intent to cause the fraud.

First and foremost, defendants knew—and the plan depended on—that most of the new IPs buying a kit, ordering a month or two worth of product, and dropping out. "The majority of Distributors have short ViSalus lives." (**Ex. ZZ**). A whopping 98.3% of the the buyers of the "business opportunity" did not "qualify for the first earned position in the marketing plan." (**Ex. XX**, by defendant Mike Craig, a former

employee-turned-high level promoter at VS26595).[10] Those who set up their "downline" legs and sold the "business opportunity" got paid. In 2009 the company paid out 45% of total net sales in commissions to the promoters who were most successful in recruiting others, the amount rising by 2012. (**Ex. U** at 154:1-9; **Ex. WW**, a 2012 strategy presentation, shows 49% of all sales, p. 3). The others, not so much: "[our] research shows [IPs] left because they were not getting the $$ as easily as we promoted." (**Ex. AAA**). Those who had set up three "legs" by recruiting IPs below them, were paid a commission equal to *100%* of their sales activity. (**Ex. U** at 193:2-195:8; **Ex. V** at Tab 4, p. 17). The truly tiny number of "ranked" people above them—which includes the inner circle promoter defendants—were paid increasingly high amounts, ending up with seven figure payments to a handful at the top.[11]

[10] In another metric, the 2012 overwiew document done at the very height of the scheme's success, management tracked that 59% of the sales volume was from "new" IPs, most of whom purchased less than $125 of product (see chart on p. 30, **Ex. WW**). Since these people ended up not recruiting, later not "active," and later "purged" and turned into "customers," and above all not owed commissions, the large part of the 49% of net sales that the company *did* pay went to the very top of the pyramid, the few hundred "Ambassadors" and the like.

[11] The top promoters developed "downlines" numbering in the tens ar hundreds of thousands of names. Approximately 40 promoters were paid over $1 million, with Sarnicola getting about $10 million as a promoter, and defendants Pacetti and O'Toole $7 to $8 million. (**Ex. YY**, Excel spreadsheets showing payments and names). And virtually all of the millions in commissions paid to the upper "ranks" were from bonuses and pools the categories paid for recruiting. (**Ex. WW**, distribution chart, p. 31).

The defendants understood how badly ViSalus "churned" IPs. They kept track of retention rates and shared them among themselves at board and monthly meetings. (**Ex. V at Tab 4,** p. 57). The defendants thus knew that the average "customer "was "active" for less than three months, and the average distributor less than five months, leaving the IPs churned out at a rate of over *200%* per year. (**Ex. U** at 183:12-186:20, **Ex. V,** Tab 4, p.3; **Ex. WW**, 2012 overwiew lists 2 months, p. 4; **Ex. BBB**, ViSalus Retention 2010-2012).

By far the most damning metric that the defendants knew about—and the one they sought to shield from public view the most, since it showed the lie about the company selling to real customers—was the customer/promoter ratio. There were no appreciable numbers of real customers, people who wanted ViSalus shakes and vitamins at the fake "retail" price it set, *and everyone inside knew it*. In a board presentation in 2011, management and Ropart and Blyth all knew that the ratio was *less than one customer per promoter* in 2009. (**Ex. V,** Tab 6, p. 12). Even in the midst of 2011's huge increase, the ratio was 2:1 (**Ex. WW**, p. 33). And even those "customers," worth $60 in profit vs $676 per IP, were disappearing. (*Id.*, p. 32, "88% increase in lost customers since 1/12").

The recruiting drive succeeded in recruiting *237,000* new IPs in 2012 alone. (**Ex. U** at 219:6-24). All pyramid schemes saturate, however, and this one was no different. By 2012, the company knew it saturating the North American and

Canadian markets, and looked outward to international markets. (**Ex. H**, 2012 strategy presentation looked to "reduce impact/speed of saturation" in 2012 even as the company was scaling up to $600 million in sales, p. 28). It started plummeting at the end of 2012. (**Ex. U** at 43:20-45:24). A year earlier, Ryan Blair writing to Robert Goergen, Jr., predicted the obvious upcoming saturation and what it would do:

> [A]s an industry in the US and Canada recruiting is up and sales are down. ViSalus is taking advantage of this timing in that we are recruiting leaders from our retracting competitors with a more efficient business model, one that is consumer oriented and focused, yet which rewards the leaders richly. We will continue this momentum until we hit the "North American Wall"…The "North American Wall" is somewhere between $700M and 1 billion. This is based on market saturation, leader recruitment, and my in depth studies… I lose sleep at night about how to jump the "North American Wall."

(**Ex. RR**). Blair never jumped that wall because it's built into every scheme like his.

Defendants cannot claim they were oblivious to what was going to happen and why. Sophisticated analysts as early as 2011 believed and in documents tracked by the company explained how the rapid rise was evidence of a pyramid scheme. (**Ex. VV**). When it attempted to go public in 2012, underwriters raised concerns about its legality, and the IPO went nowhere. (**Ex. UU**). Still, Blyth owed the corporate defendants $143 million more for their depreciating stock, which was good enough reason to keep going. During its operation, the FTC shut down an almost identical

MLM, Fortune Hi-Tech.[12] After the slide began, this Court published an opinion explaining why Plaintiffs described a plausible pyramid scheme. No matter, ViSalus is still selling the same "business opportunity" today, now down to maybe 10,000 active promoters worldwide. (**Ex. C** at 148:16-18).

7. COMMON EVIDENCE RELATING TO LOSSES SUFFERED BY THE CLASS

Each of the claims at issue seeks damages on behalf of the moving class as a result of money lost after investing in the "business opportunity." Moving Plaintiffs employed Plante & Moran, a prominent accounting firm, to preliminarily review various reports run from data kept by the Exigo system. (**Ex. D**). The purpose of the assignment was to ascertain whether the data kept by Exigo could be compiled for the class members and effectively examined, and whether class losses could be calculated in a common way if the Court certifies the class. The answer to this is yes.

[12] Just like 85 % of ViSalus IPs, 88% of the people investing in FHT lost more than they paid. The FTC loudly promoted the case. "This is a 'wake up and smell the coffee' moment for any promoters of illegal pyramid schemes trying to hide behind labels like multilevel marketing," said Jessica Rich, director of the FTC's Bureau of Consumer Protection. "The FTC wants consumers to know that eventually, all pyramid schemes collapse, and nearly everyone who signs up with the companies loses his or her money." http://www.kentucky.com/news/politics-government/article44488860.html. In 2015, the FTC shut down another identical MLM shake company, Vemma. https://www.ftc.gov/news-events/press-releases/2015/08/ftc-acts-halt-vemma-alleged-pyramid-scheme.

ARGUMENT

A. PLAINTIFFS' RICO AND SECURITIES CLAIMS ARE APPROPRIATE FOR U.S. AND CANADIAN IP CLASS CERTIFICATION BECAUSE EACH CLASS MEMBER HAS COMMON AND TYPICAL CLAIMS WHICH PREDOMINATE OVER ANY INDIVIDUAL INQUIRY

1. RICO (Counts I and II)

The Court has ruled that the SAC pleads a RICO Section 1962(c) against ViSalus and the Founders, [Dkt. # 75, at 13-15], because their actions have a "substantial" and "forseeable" cause of the injuries, *i.e.*, loss of money from buying into the scheme. The Section 1962(d) claim stands (as to all defendants) on the basis of there being an "illicit agreement" between them. (*Id*. at 26). Since the Supreme Court held in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), that reliance is not an element of RICO, the essential elements to prove RICO fraud cases are, (1) a scheme to defraud (which encompasses the issues of intent, enterprise and the like), and (2) a proximate cause showing that plaintiffs were injured "by reason of" that scheme (how much loss plaintiffs suffered). Each moving class member has a common claim with no individualized inquiry predominating over the remaining

claims. It is appropriate to certify the RICO claims class composed of all US and Canadian IPs.[13]

The pyramid scheme was an inherent RICO fraud because "the operation of such plan [which] *due to its very structure* precludes the realization of [substantial] rewards to most of those who invest therein." *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, *59 (1975) (emphasis added). There are no causation issues that require particularized inquiry and prevent class adjudication, and certainly no such issues which *predominate*. The issue of liability is all resolved by common evidence. The question of proximate causation will be resolved as a matter of law by a showing that defendants operated an illegal pyramid scheme.

A case almost identical to this one is a perfect roadmap for the Court. In *Torres v. S.G.E. Mgmt, LLC*, 838 F.3d 629 (5th Cir. 2016), the Fifth Circuit sitting *en banc* court affirmed the district court's certification of approximately 160,000 "Independent Associates" ("IAs") of Stream Energy, an MLM. *Torres v. SGE*

[13] The losses all occurred in the US, thus all proposed class members from the US, Canada are an appropriate class under the RICO claims. The Supreme Court in *RJR Nabisco, Inc. v. EU, et al.*, 136 S. Ct. 2090 (2016), decided that Section 1964(c) requires a civil plaintiff "to allege and prove a domestic injury to business or property." The Court did not decide what constitutes a "foreign" or "domestic" injury. Here, the facts are that every non-US resident IP was placed in a "downline" of someone in the US, and whose sales and resulting commissions were paid from the US and occurred in the US. (**Ex. YY**, example of US promoter downline report showing both in single downline).

Mgnt, LLC, 2014 U.S. Dist. LEXIS 3741 (January 13, 2014, S.D. Texas). The class in *Torres* is composed of distributors who each paid approximately $300 for the right to distribute monthly energy to customers and to recruit others to do the same. Under the convoluted compensation plan followed by Stream, the distributors make a very small sum by selling energy to customers—of whom there are precious few outside the distributor and two or three people he can convince to sign up—but quite large sums if the distributor recruits others. Any factual differences between Stream and ViSalus is immaterial.

Defendants asserted in *Torres* that "questions affecting individual class members will predominate over common questions," *id.* at *19, citing different possible motivations that an individual could have about joining the program and insisting that defendants needed to question each member about those motivations.

The district court disagreed:

> Although the litany of reasons any individual class member signed up to become an IA may vary, *common sense compels the conclusion that every IA believed they were joining a lawful venture*. That the defendants' business opportunity is allegedly an unlawful pyramid scheme in which the vast majority of participants are sure to lose money, gives rise to an inference that the only reason the class members paid the $329 sign-up fee (and possibly other fees) is because the true nature of the "opportunity" was disguised as something it was not. As such, establishing proximate cause would not be an individualized inquiry; rather, it could be determined as to all the class members at once. *Because it can rationally be assumed (at least without any contravening evidence) that the legality of the Ignite program was a bedrock assumption of every class member, a showing that the program was actually a facially illegal pyramid scheme would*

> *provide the necessary proximate cause*. [*28] The defendants' knowing misrepresentations about the scheme directly resulted in the losses incurred by the defrauded class members. (emphasis added).

Stream initially found support for its view in a panel opinion, 805 F.3d 145, but plaintiffs obtained *en banc* review. This resulted in an 11-4 ruling vacating the panel decision and affirming the district court. Framing the issue as "whether Plaintiffs may prove RICO causation through common proof such that individualized issues will not predominate at trial"—the correct formulation under all Rule 23(b) authority—the court first acknowledged the obvious, that first party reliance is not an element of RICO under *Bridge*. The court looked to other circuits, including the Sixth Circuit's *Wallace v. Midwest Fin. $ Mortg. Servs., Inc.*, 714 F. 3d 414 (6th Cir. 2013), to frame how reliance intersected with causation in fraud-based RICO claims. The court then affirmed the certification on two separate grounds: (1) that *Bridge* proximate causation was necessarily present due to the inherent nature of pyramid schemes and would be met upon a showing that there was a pyramid scheme, and (2) under the inference-based theory of causation. The court found that it is "reasonable to infer that individuals do not knowingly join pyramid schemes because (1) pyramid schemes are inherently deceptive and operate only by concealing their fraudulent nature, and (2) knowingly joining a pyramid scheme requires the individual to choose to become either a victim or a fraudster." *Id.* at 643. The fact that, just as ViSalus does here, Stream held itself out

as a legitimate MLM program "gives rise to a reasonable inference that that misrepresentation induced [the class] paying to join as IAs and caused their losses." *Id.* at 641. There is no daylight between the case here and *Torres*, and the RICO class should be certified for the same reasons.

2. 5 U.S.C. § 78j(b) [Section 10B] and 17 C.F.R. § 240.10b-5 [Section 10b-5] (Count III)

In Count III, Moving Plaintiffs plead Section 10b-5(a), (b), and (c) fraud arising from the same common conduct as alleged in the RICO counts.[14] [See Dkt. # 75 at 31 with respect to 10b-5(b)). As with the claims under RICO, a scheme in which participants are induced to "invest" (to use securities terminology) in an "opportunity" also rests on the bedrock representation that what they are investing in is not an illegal scheme. (See *id.*, at p. 37, 39 with respect to 10b-5(a) and (c)).

As *Torres* recognized, looking at a variety of fraud cases, plaintiffs seeking class certification under Rule 23(b)(3) can show a common method of proving reliance on a class-wide basis by: (1) a rebuttable presumption; and (2)

[14] Since every purchase of the "business opportunity" was made by payment to Troy, Michigan, where the compensation plan was enforced, *i.e.*, in a "domestic transaction," the proper class includes the U.S. and Canadian IPs. *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010); *In re Petrobras Sec. Litig.* 312 F.R.D. 354, 359 (S.D.N.Y. 2016) (certifying worldwide investor class in securities litigation after *Morrison*). Plaintiffs seek class certification of their securities law claims in the alternative and without prejudice to their position that class certification should be granted for their RICO claims.

circumstantial evidence. Each 10b-5 claim here can likewise be proven by common inference of reliance on a material omission that the compensation plan was a "legal" MLM.[15] The omission was both universal and resulted in over 400,000 people recruited in the same way. This circumstantial evidence suffices for reliance and proximate cause without need of a particularized inquiry.[16]

The Supreme Court recognized, in *Basic Inc. v. Levinson*, that "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones."485 U.S.

[15] If the Moving Plaintiffs prove by common evidence that the ViSalus program was an inherently deceptive scheme, they will prove a *material* failure to disclose Section 10b-5 violation. "Common sense alone dictates that most consumers would not have joined Five Star had Defendants disclosed that due to the very structure of the scheme, the vast majority of participants would [not] receive substantial income," and "[f]urther evidence of *the materiality of this omission* is provided by Defendants repeated assurances to consumers that Five Star was [not] a pyramid scheme." *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 592, 532-33 (S.D. N.Y. 2000) (emphasis added).

[16] As the Sixth Circuit explained, once materiality of the failure to disclose is proven, reliance need not be shown. *Zaluski v. United A. Healthcare Corp.*, 527 F.3d 564, 571-72 (6th Cir. 2008). And whether there are even issues of reliance should not be addressed at the class certification stage. In *In re Revco Sec. Litig.*, 142 F.R.D. 659, 665 (N.D. Ohio 1992) ("[w]hether defendants can refute a presumption of reliance is speculative, goes to the merits of the litigation, and does not defeat class certification."); *see also Dodona I, LLC v. Goldman, Sachs & Co.*, 296 F.R.D. 261, 270 (S.D.N.Y. 2014) ("[t]he Court declines to rule on the merits of the reliance issue at the stage of class certification.").

224, 242 (1988); *see also Wal-Mart*, 131 S. Ct. at 2552 n.6."In the case of omission or nondisclosure of material facts, the element of reliance on the part of the plaintiffs may be presumed." *Molecular Technology Corp. v. Valentine,* 925 F.2d 910, 918 (6th Cir. 1991); see also *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 268 (6th Cir. 1998), citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54, 31 L. Ed. 2d 741, 92 S. Ct. 1456 (1972) ("positive proof of reliance is not a prerequisite to recovery [in a failure-to-disclose case]. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision."). The presumption "is a pragmatic one," because when a defendant's fraud consists primarily of omissions, it is nearly impossible to prove reliance. *In re Smith Barney Transfer Agent Litig.*, 290 F.R.D. 42, 47-49 (S.D.N.Y. 2013) (applying the presumption and finding predominance satisfied). "[T]he common inference … is that members of the plaintiff class relied upon the purported legitimacy of the defendant with which they transacted." *Minter v. Wells Fargo Bank, N.A.*, 274 F.R.D. 525, 546 (D. Md. 2011).[17] A classwide

[17] See *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 119-120 (2d Cir. 2013) (court upheld class certification because payment of the invoices could "constitute circumstantial proof of reliance" since there is a "reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed"); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004) (same reasoning); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D. 590, 611-12 (C.D. Cal. 2012) (proof of common reliance possible where "the jury in this case could reasonably infer that class members would have acted differently" if not

presumption of reliance can only be rebutted if there is evidence that can be properly generalized to the class as a whole. *Plascencia v. Lending 1st Mortg.*, 2011 U.S. Dist. LEXIS 136078, at *7-8 (N.D. Cal. Nov. 28, 2011); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 523 (S.D.N.Y. 1996). There is not even an inkling as to how such generalized rebuttal could exist in this situation.

3. Class Certification Is Proper Under 15 U.S.C. § 77l (a)(2) [Section 12(2)] In Count IV

Count IV under Section 12(2) of the Securities Act alleges the same common conduct. (See Doc. 75 at p. 43). Unlike 10b-5, however, Plaintiffs need not prove individual or class reliance under a Section 12(2) claim. *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531, 536 (N.D. Cal. 2009). If the plaintiffs' liability claim stands as to any IP —if the compensation plan is found to be a fraudulent pyramid scheme-- it will stand as to all IP's. Courts commonly certify claims brought under Section 12(2). *See, e.g., In re MetLife Demutualization Litig.*, 229 F.R.D. 369, 379-80 (E.D.N.Y. 2005) (court found that common questions predominated, because only MetLife had knowledge of the omitted facts *In re Charles Schwab*, 264 F.R.D.

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for alleged misrepresentations); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 560 (E.D. Va. 2000) (collecting many cases in which courts apply an inference of reliance "where it is logical to do so"); *Peterson v. H & R. Block Tax Services, Inc.*, 174 F.R.D. 78 (N.D. Ill. 1997), (classwide reliance was obvious where no other logical explanation would support the class members' behavior); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-66 (9th Cir.2004) ("reliance can be shown where it provides the 'common sense' or 'logical explanation' for the behavior of plaintiffs and the members of the class").

at 536-37 (court rejected defendants' argument that a Section 12(2) claim involved significant individualized issues, because the plaintiffs limited the Section 12(2) class to investors harmed by false statements in written prospectuses); *Hicks v. Morgan Stanley & Co.*, 2003 U.S. Dist. LEXIS 11972, at *23 (S.D.N.Y. July 16, 2003).

B. PLAINTIFFS' COMMON LAW AND STATE STATUTORY CLAIMS ARE ALSO APPROPRIATE FOR CLASS CERTIFICATION

1. Because ViSalus Insisted That Michigan Law Apply In The Event Of Dispute Between It And US And Canadian IPs, The Court Should Certify The Common Law And Statutory Claims Based On Michigan Law

Where proposed class members are not all resident of the forum state, the court should perform a choice of law analysis to determine the applicable law. Here, the Moving Plaintiffs on behalf of every US and Canadian class member, *and* Visalus *and* the defendant promoters each expressly agreed to be bound by Michigan law in the event of a dispute that "arises as to the respective rights, duties and obligations under this Agreement, Compensation Plan or the Policies and Procedures." (See **Exs. J**, **N** showing both US and Canadian applications). That choice of law provision binds all parties to Michigan law and provides the basis for the Court to certify the Michigan common law and statutory claims remaining in the SAC.

In Michigan, a choice of law provision is presumed valid unless either: (1) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or (2) application of the law of the chosen state would be contrary to a fundamental policy of the state which has a materially greater interest. *Banek Inc. v. Yogurt Ventures U.S.A., Inc.*, 6 F.3d 357, 360-361 (6th Cir. 1993).

ViSalus is headquartered in Troy, Michigan, where it maintains its global headquarters and several hundred employees. All of the events that led to this scheme were based in, or occurred in Michigan. The transactions maintained by Exigo were managed from Troy. The Moving Plaintiffs each are Michigan residents who were recruited and lost money in this state. The only way each and every one of the putative class members, regardless if they are U.S. or Canadian, could have become a promoter was to make payment to this Michigan headquartered company. (**Ex. C** at 48:13-49:7). Any argument by Defendants to the contrary is undermined by the fact that ViSalus itself has previously brought claims against out-of-state class members under this very clause in the IP agreement.[18] As the Parties have contractually agreed to the universal application of Michigan law, Michigan law—

[18] *See, e.g., Visalus Inc. v. Bohn*, 2013 U.S. Dist. LEXIS 58511, 2013 WL 1759420 (E.D. Mich. Apr. 24, 2013); *Visalus, Inc. v. Smith*, 2013 U.S. Dist. LEXIS 70226, 2013 WL 2156031 (E.D. Mich. May 17, 2013).

whether statutory or common law based—can and should be uniformly applied to all US and Canadian class members' claims.

2. In The Alternative, Even Without The Choice Of Law Provision, Moving Plaintiffs' Unjust Enrichment Claim Is Sufficiently Uniform To Warrant A Nationwide US Class

Even if the choice of law provision did not impose Michigan law, a nationwide (US IP only)[19] class on Plaintiffs' unjust enrichment and civil conspiracy claims is appropriate.[20] The scheme operated in all states, and IPs in each state were intermingled with each other in the downlines of the promoters and Sarnicola. The wrong here is whether the defendants improperly obtained a benefit they should not have obtained. If the unjust enrichment claim stands as to one IP it will stand without variation as to all. Common issues not only predominate, they are unanimous. The

[19] Moving Plaintiffs do not seek joinder of the Canadian IPs in the event the Court does not certify under the choice of law provision. To the extent necessary, sub-classes could be created to account for any such variances in state law. Indeed, appellate courts have agreed that, for purposes of litigation classes, "if the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards," then certification of subgroups "embracing each of the dominant legal standards can be appropriate." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004). The Sixth Circuit did precisely that in a recent consumer fraud case. *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 518 (6th Cir. 2015).

[20] Should this Court hold that Michigan common law cannot be applied to all class members' claims on the basis of the choice of law provision in the IP agreement, moving Plaintiffs do not seek certification of a nationwide class for their civil conspiracy and conversion claims.

relevant allegations are unaffected by any particularized conduct of individual class members, as liability would be demonstrated through common proofs of defendants' wrongful conduct. If ViSalus is adjudicated to not be the legitimate, MLM business it claims, and is instead determined to be an illegal pyramid scheme, then Defendants have been unjustly enriched through the payments they received from the class members. Those inequitably-obtained moneys and the issues associated with their recovery present no individual issues.

Each of the fifty states recognizes recovery for unjust enrichment. The law of unjust enrichment is sufficiently uniform throughout the fifty states to justify certification of a nationwide unjust enrichment class.[21] (**Ex. SS,** survey of 50 states law**)**. While the unjust enrichment test may be articulated in different ways, the basic elements are the same — the receipt of a benefit by the defendant from the plaintiff that is unjust for the defendant to retain. *See e.g.*, *Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 568 (E.D. Mich. 2009) (Lawson, J.)(finding "few real differences" between state laws on unjust enrichment). As another court has explained: "[i]n

[21] Even if there were variances between state laws, "variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance." *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516 (3d Cir. 2004). This is so because "'a finding of commonality does not require that all class members share identical claims,'" and predominance is not considered deficient merely "because claims were subject to the [varying] laws of fifty states." *Id*.; *see also*, *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D.S.D. 2004).

looking at claims for unjust enrichment, we must keep in mind the very nature of such claims requires a focus on the gains of the defendants, not the losses of the plaintiffs. That is a universal thread throughout all common law causes of action for unjust enrichment." *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D. S.D. 2004).

While some states require a showing that a defendant committed some wrongdoing, and others do not, this difference is immaterial because the element of wrongdoing is present for all claims—*i.e*. defendants' unlawful promotion and sale of distributorships in a pyramid scheme. As this Court explained in *Lauber v. Belford High Sch*., No. 09-cv-14345, 2012 U.S. Dist. LEXIS 165780, at *29 (E.D. Mich. Jan. 23, 2012) (Goldsmith, J.):

> The Court acknowledges [defendant's] argument [that the predominance requirement is unsatisfied because state law differs with regard to common law claims, including unjust enrichment]; however, as Plaintiffs note, the alleged conduct of [defendant] is "so egregious as to meet any definition of breach of contract or unjust enrichment." In essence, Plaintiffs allege in their complaint that [defendant] is liable for breach of contract or (alternatively) unjust enrichment because it sold each of the class members a fake and worthless diploma. If this allegation is proven, the Court cannot imagine a situation in which [defendant] would be liable under one state's laws but not under another state's laws.

Similarly, here, the scope and depth of defendants' misconduct with regard to ViSalus' illegal pyramid scheme is so egregious as to meet the most stringent

definition of unjust enrichment. As such, class certification is appropriate for Plaintiffs' common law unjust enrichment claims.

3. Alternatively, Even In The Absence Of The Choice Of Law Provision, Claims Under The Michigan Consumer Protection Act, Michigan Franchise Investment Law, and Remaining Civil Conspiracy and Conversion Claims, Should Be Certified As To All Michigan IPs

There are approximately 20,000-30,000 Michigan IP's who may be class members. The remaining statutory claims in this case involve the Michigan Consumer Protection Act ("MCPA"), and the Michigan Franchise Investment Law ("MFIL"), and with one exception are pleaded solely against ViSalus. The MCPA and the MFIL give rise to a class composed of every IP resident of Michigan. Liability under the MCPA and MFIL has no greater or additional proofs necessary than that under 10b-5 or 12(2) fraud claims. The damages available under the act include exactly the same type of actual or rescission damages available to the class under the federal claims at issue. Similarily, the Court has construed both conspiracy and conversion claims, and neither involves individualized proofs.

Moving Plaintiffs ask the Court to hold these alternative claims for certification in abeyance. Each of these would be subsumed into the national classes brought under the other courts and argument made above.

CONCLUSION

For the above reasons, Moving Plaintiff ask this Court for class certification with respect to each claim set forth as follows:

Counts I and II under RICO: certification of all US and Canadian IPs' claims.

Counts II and IV under Section 10b-5 and Section 12(2) of federal securities laws: certification of all US and Canadian IPs' claims.

Counts V-XI under the MCPA, MFIL, unjust enrichment, civil conspiracy and conversion: certification of all US IPs' claims on the basis that the parties chose Michigan law to determine their dispute.

Count VII under unjust enrichment: certification of all US IPs' claims on the basis that there are immaterial variances between the laws of the states with respect to the unjust enrichment claim.

Counts V-XI under MCPA, MFIL, unjust enrichment, conversion and civil conspiracy certification of all Michigan IP's (in the alternative, to be held in abeyance pending resolution of national/Canadian class).

Plaintiffs also seek the appointment of counsel consistent with the accompanying Motion.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Pursuant to LR 7.1, I certify that I made contact with Edward Salanga and Barry Rosenbaum via email on January 6, 2017, who opposed this motion.

s/ Sarah L. Rickard
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Sommers Schwartz, P.C.

CERTIFICATE OF SERVICE

I certify that on January 6, 2017, I electronically filed the forgoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record on the ECF Service List.

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