**The Government continues to mischaracterize I2G’s Business Model and Securities Law**

 As discussed in both Appellant and Appellee’s briefs, courts in the Sixth Circuit must apply the *Howey* test, which can only be satisfied by showing that there was an (1) investment (2) in a common venture (3) premised on a reasonable expectation of profits where (4) the profits are generated by the entrepreneurial or managerial efforts of others. *Union Planters Nat’l Bank v. Commercial Credit Business Loans, Inc.*, 651 F.2d 1174, 1181 (6th Cir. 1981). In its brief, the government supports the erroneous finding that the Emperor packages were securities by mischaracterizing the I2G business model, ignoring the reasoning in published cases, and relying on select witnesses' conflicting and subjective motivations. However, the overwhelming proof at trial demonstrated that the Emperor packages cannot be categorized as investment contracts as a matter of law.

 The determination of whether an individual has purchased an investment contract and, therefore, a security lies in the context of economic realities underlying the transaction. R691:#9680; *Tcherepin v. Knight*, 398 U.S. 332, 336 (1967). This determination is an objective inquiry into the expectations of a reasonable investor under the circumstances. *Union Planters Nat’l Bank*,651 F.2d at 1181; *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 1981). The economic reality of I2G was that it was a multi-level marketing company where, as in any legitimate MLM, the distributors' success relied on their own efforts to sell products and drive customers to the casino. I2G’s business plan, marketing materials, conference calls, distributor contracts, and testimony all reflect this fact. When viewed objectively, the evidence overwhelmingly shows that Emperor packages were not investment contracts but MLM distributor packages that were based primarily on individual sales performance and the value of the products that I2G was offering.

**I. Investment**

 The Government contends that the Emperor Packages were an “investment” because they gave up “tangible and definable consideration in return for an interest that had substantially the characteristics of a security.” *Int’l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979). However, as discussed further *infra* the Emperor packages lacked key characteristics of an investment contract. Moreover, as discussed at trial, they lacked the hallmark characteristics of a security: (1) they were not papered; (2) they were bundled with real products with intrinsic value for personal use; (3) they included sublicenses with resale rights of the products; (4) they included commissions directly tied to their own efforts to drive customers to the casino and other products; (5) they required signed acknowledgment of the business model; (6) they had a refund policy; and (7) the profit share component was conditional on whether actual casino profits occurred. R691:#9684-9689. Finally, the portion of the Emperor packages that supposedly resembles a security is not definable and is not substantial enough to find that the Emperor packages were securities.

 The government relies heavily on the distinguishing facts of Daniel, but the case’s reasoning shows that the purchase of Emperor packages was not an investment in a security. In *Daniel*, the Court wrote that determining whether a purchase with security and non-security characteristics is a security requires evaluating whether the “interest obtained had to a very substantial degree elements of investment contracts.” *Id.* (internal quotations omitted). Additionally, the Court has found that an investment contract does not exist when purchasers are “motivated by a desire to use or consume the item purchased. *United Housing Fund, Inc. v. Forman*, 421 U.S. 837, 852-853 (1975).

 Evaluating the Emperor Packages in this light, it is clear that purchasing an Emperor Package did not constitute investment. As I2G’s advertisements of its packages reflect, the share of casino profits was not a sufficient portion of the Emperor packages to classify the Emperor packages as securities. I2G packages offered seven product lines, which were at their most lucrative when a participant purchased an Emperor package. Ex. 106a at 3. *See also* Ex. 107b at 10, 15-23; Ex. 106b. I2G’s marketing materials revealed that the earning potential was almost exclusively derived from product lines other than the non-guaranteed casino revenue share. Ex. 107b at 10, 15-23; Ex. 106a; Ex. 106b. Because so much of the earning potential from the Emperor packages came as a result of commission incentives and other earning opportunities, the Emperor packages were not substantial investment contracts.

 The government argues that Emperors only purchased multiple packages in order to obtain a larger share of casino revenues. *Appellee’s Br.* at 45. However, at trial numerous witnesses testified that the Emperor package’s appeal was not due to Casino revenues, and the purchase of multiple Emperor packages was often to transfer these packages to other members of their sales structure. Colonel Logan, for instance, stated that he was drawn to the Emperor package’s grant of a master license for all current and future products, and purchased multiple packages in order to structure his sales organization. R701:#10889, 10923-24, 10943. Catrina Dugger described her interest in making money off of the fantasy sports component and other online products. R690:#9466. Wiksten was excited about the sports betting Steven Barnes explained that he was drawn to the I2G products because he believed that I2G would help his other businesses with their online marketing efforts. R689:#9287-9289. Anzalone, the government’s key witness, discussed at length the value he saw in the fantasy sports, songstagram, G1E and I2G Touch products. R505:#4583, 4591, 4600, 4686-94. Mark Logue testified that he purchased an Emperor package to get access to all of the different products and revenue, and participants understood the marketing driven incentive structure. R505:#6954-55. In all, overwhelming evidence at trial showed that the casino revenue did not make up a “very substantial” portion of the Emperor package’s value.

 The portion of the Emperor packages which could be construed as a security were also not readily definable. The percentage of casino revenues that an Emperor received for purchasing a package varied based on a variety of factors, including the individual’s attainment of specified sales goals. Ex. 107b at 21; Ex. 106a; Ex. 106b. As a result, the share of casino revenue – and the share of the $5000 purchase that purchased that revenue share – is not definable based solely on the initial investment. As the defendants’ expert witness Manning Warren observed, there was no allocation of the funds that were considered the “investment.” R691:#9687. Because the portion of the Emperor packages that supposedly qualified as a “security” was not definable or very substantial, the Emperor packages cannot be considered a security as a matter of law.

**II. Horizontal Commonality**

 The Government mistakenly asserts that the Emperor packages pass this circuit’s horizontal commonality test because they shared in the pro-rata profits and losses of the casino. This assertion is factually incorrect. I2G documents and the government’s key witness all acknowledge that the income from Emperor packages was treated as revenue by I2G, not pooled in the casino. Additionally, because casino revenue shares were directly tied to an Emperor’s business volume (BV), which was acquired by sending customers to play at the casino and fantasy sports platforms, each Emperor could take home a different cut of casino revenue based on their marketing performance.  Finally, the casino’s losses never reached the Emperors. As a matter of law, the revenue-sharing agreement did not demonstrate horizontal commonality.

 Despite the government’s assertions that the money from the proceeds was pooled, I2G did not pool the Emperor funds. This Court has explained that horizontal commonality requires a sharing or pooling of funds which ties the fortunes of each investor to the success of the overall venture. *Union Planters Nat’l Bank.*, 651 F.2d at 1183. However, as the government’s key witness acknowledged, I2G never pooled its funds in the casino. R505:#4733. The funds were instead used to pay administrative costs and to develop future products. Ex*.* 503c; Ex. 106a.

 Additionally, As evidenced in I2G marketing materials and its business plan, the Emperor packages’ returns were not pro-rata because individual Emperors were able to change their revenue share through their own efforts. The Emperor packages included numerous sales bonuses, including the opportunity to receive an increased percentage of casino revenues based on the BV generated by sending customers to the casino and I2G’s fantasy sports  Ex. 107bat 21; Ex. 106a at 6; Ex. 106b at 7. *See also* Ex. 103; Ex. 104; Ex. 158; Ex. 101a; Ex. 101b. These opportunities to receive additional shares of casino revenue are evidence that the casino revenues were not shared on a pro-rata basis – they were distributed based on a number of factors other than the initial $5,000 Emperor package payment.

 Finally, the Emperor package did not create a sharing of losses between I2G and the Emperors. Because I2G had made the initial investment in setting up the casino, I2G and its investors bore the sole risk of losses if the casino failed to operate at a profit. Ex. 503c. While the amount of casino revenue might be lower for the Emperor package purchasers if the casino performed poorly, an individual Emperor could still earn money through sales performance, which required I2G to pay commissions even as I2G operated at a loss. Ex. 106a. These economic realities of the I2G model and the Emperor packages clearly demonstrate that there was no “pooling” of funds and no sharing of pro-rata profits and losses. Therefore the profits and losses did not “flow uniformly,” there was no horizontal commonality and, hence, no security. *Union Planters Nat’l Bank*, 651 F.2d at 1183.

**III. Profits**

 The Government states that the casino revenues that Emperors received were profits because they were income based on the increased value of their investment. *Appellee’s Br.* at 47. However, this argument fails for two reasons. First, the government confuses the development of investor capital, which is required under securities law’s definition of profits, and the purchase of a revenue stream, which does not meet this definition. Second, I2G’s business model demonstrates that I2G intended to treat Emperor package sales as revenue to grow the company and develop future products, not as casino investments. These sales were, therefore, unrelated to casino profitability.

 As the Supreme Court made clear in *Edwards*, profits are derived from the development of an investor’s capital in an initial investment or a participation in earnings resulting from the use of an investor’s funds. *Union Planters Nat’l Bank*, 651 F.2d at 1184; *SEC v. Edwards*, 540 U.S. 389, 394 (2004). This principle is not applicable to I2G. I2G had already invested in the I2G casino and planned to generate revenue by developing a marketing force and selling product licensing and revenue rights to the Emperors. Ex*.* 503c; Ex. 106a; R505:#4733. Portions of the Emperor's money were used to pay operational expenses, but were not used to develop casino profits.

 The government’s account of the Emperor package sales misstates the role of this money in I2G’s business model. The record shows that the money from the Emperor packages was understood to be pure sales revenue for I2G, and was never invested in the development of the casino. Ex. 503b at 1-2, Ex. 503c (Showing that I2G anticipated paying its start-up costs with equity proceeds, not Emperor package purchases). While it is true that portions of the Emperor package sales revenue were used to pay administrative fees, the use of funds for operating expenses is distinguishable from capital development under securities law. *Kansas State Bank v. Citizens Bank of Windsor*, 737 F.2d 1490, 1495 (8th Cir. 1984).

 In *Kansas State Bank*, the court explicitly rejected the idea that the loans provided were investments for profits on the basis that (1) the defendant intended to “use the proceeds as operating funds and not for capital improvement” and (2) there was “no prospect of capital appreciation.” *Id.* The circumstances are similar to I2G’s in that Emperor package sales were used as revenue and operating funds, but there not for capital appreciation. The economic realities of the I2G business model support this conclusion. Ex. 503b at 3.

**IV. Efforts of Others**

 The Government’s brief mischaracterizes I2G’s role in the casino as managerial or entrepreneurial, when in fact I2G’s casino responsibilities were strictly administrative. Additionally, I2G’s marketing materials made it clear that the success of the casino was dependent on the marketing efforts of the Emperors. Both the government’s and the Appellant’s experts testified that if a product relies on the efforts of the “investor” to drive revenue of their “investment,” that product cannot be a security. As an MLM business model, I2G relied on the efforts of Emperors to generate revenues and, therefore cannot be a security as a matter of law.

 The government’s evidence overwhelmingly demonstrated that casino revenues were operationally tied to distributor efforts. Government witness Jerry Reynolds affirmed in testimony that both member and non-member casino customer transactions generated BV, which was payable as commissions to Emperors. R497:#4049. William Keep and Richard Anzalone also stated that casino profits were tied to BV generated by distributor marketing. R487:#3859, 3870; R505:#4222, #4551-4554. As securities expert Manning Warren explained, the investment was only passive “in the sense that some investors decided among themselves not to do anything and other investors tried to drive gamblers to the site[,]” but not in the sense that the investment was reliant on the managerial or entrepreneurial efforts of I2G to create returns. R691:#9702-9705.

 These economic realities were consistent with I2G’s business model.  The efforts of the Emperors were incentivized through sales bonuses and casino commissions they could earn based on their customers’ casino or fantasy sports usage.  Ex. 145; Ex. 158.  The commissions earned from BV could only be accessed through distributor efforts. Ex. 107b at 15; Ex. 107a at 15 (referring to revenue from worldwide gambling as “commissions”). I2G’s role in the process was to manage the administrative and clerical side of the business while the network marketing arrangement that it had created attempted to grow the casino business. Ex. 503b at 2.

 In its brief, the government proves the Appellant’s point by referencing marketing materials showing that I2G offered Emperors the opportunity to get paid every time someone placed a bet worldwide. *Appellee’s Br.* at 49. I2G’s slides and materials demonstrate that profits from worldwide bets were not only pitched as a part of the revenue-sharing agreement but also as a part of an Emperor’s BV, which entitles Emperors to incentive bonuses. Ex. 107b at 19. It is clear that these materials, viewed objectively, sought to steer Emperors towards driving users to the casino and recruiting other I2G network marketers to do likewise.

 The government’s repeated use of a few seconds of Jason Syn’s message to Emperors likewise demonstrates that I2G made it clear that their efforts were what mattered to their success in I2G. In that hour-long video, I2G promoters repeatedly told their audience that hard work, decisiveness, and a strong marketing structure were the keys to making significant earnings from their emperor packages. Ex. 145 (11:30-12:36; 30:23; 55:55).

 Finally, the government points to its chosen witnesses’ testimony to prove that the Emperor packages were a passive endeavor, but these witnesses’ misunderstanding of the I2G business model cannot be the basis for a finding that the Emperor packages were an investment contract. In its brief, the government writes that its witnesses understood the Emperor package and its corresponding revenue-sharing agreement to be passive income. *Appellee’s Br.* at 50. However, the determination of whether a purchase constitutes a security is a purely objective inquiry, and “the investors’ subjective motivations are immaterial.” *SEC v. Xia*, Case No. 21-CV-5350, 2022 U.S. Dist. LEXIS 221555 at \*51 (E.D.N.Y. Dec. 8, 2022) (citing *SEC v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577, 584 (2d Cir. 1982) (“courts are to examine the offering from an objective perspective”). While it is true that I2G members discussed the ability to earn casino revenues without doing recruitment as an Emperor, they did not refer to the Emperor package as an investment, but rather as a business opportunity that was contingent on the success of the casino, and hence the sales efforts of the whole organization. R. 667:#6785; R. 669:#6995. There were 5000 Emperor packages marketed – the fact that a handful of purchasers subjectively believed that the packages were a way to earn passive income is not an indication that I2G marketed the Emperor packages as a passive investment.

 Appellants maintain that the ability of participants to act independently in a business arrangement “cuts sharply against” a finding that the enterprise relied on the efforts of others. *Kerrigan v. Visalus* 112 F. Supp. 3d 580, 599 (E.D. Mich. 2015). While *Visalus* did not make a final decision on the existence of an investment contract, its reasoning was sound in this regard and is applicable to this case. Here, Emperors had opportunities to make money from their purchases in numerous ways and, because I2G’s business model relied on their entrepreneurship, were empowered by the company to do so. The I2G’s business model and its representations clearly demonstrate that I2G was not looking to sell its Emperors the opportunity to earn income “solely on the efforts of others.”

 The evidence presented at trial, even when portrayed in the light most favorable to the prosecution, clearly demonstrated that the Emperor's packages were not securities as a matter of law.