IN THE SUPREME COURT OF MISSOURI

NO. SC86854

NITRO DISTRIBUTING, INC., ET AL.,
Respondents,

v.

JIMMY V. DUNN, ET AL.,
Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI

HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE

APPELLANTS' SUBSTITUTE REPLY BRIEF

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INTRODUCTION

Appellants and Respondents are on common ground in two respects.[1] First, the parties agree that the Court should determine whether a valid agreement to arbitrate exists between the parties and, if so, whether this dispute falls within its scope. Second, the parties agree that, in answering these questions, the Court should apply common contract principles. At this point, we part company with Respondents.

As we explained in our opening brief, use of the usual canons of contract interpretation makes this a simple case: Did the parties contract to arbitrate this dispute? We demonstrated that this case should be sent to arbitration under any one (or more) of three agreements signed by Mr. Stewart. In particular:

? The Court of Appeals correctly held that the Circuit Court erred by not compelling Respondents into AAA arbitration because Nitro's agreement with Pro Net, signed by Mr. Stewart, was clearly set up to benefit the entire Stewart Organization, including West Palm (Appeal Point I).

? The Circuit Court erred by not enforcing the fully executed "Transition-to-Pro Net" agreement expressly providing for arbitration of certain issues relating to the "Foley, Gooch, Childers, Stewart and Woods organizations" (Appeal Point II).

[1] We adopt the abbreviations and other conventions of the opening brief.

? The Circuit Court erred by finding unconscionable certain Amway Rules that, in any event, are unrelated to Pro Net arbitration under AAA rules (Appeal Point III).

In response, Respondents try, in various ways, to turn a straightforward question into a complicated morass. Below, we address why Respondents' efforts to nullify the arbitration clauses cannot survive analysis under controlling law.

As a threshold matter, Respondents' brief is remarkably divorced from their application for transfer. Nothing in the brief suggests that the case was initially framed as presenting a "question of first impression and general and utmost importance." (Res. Appl. 12.) Indeed, the brief does not even take up this issue for almost 100 pages. Even then, it sidesteps our extended discussion and recent case law. For instance, the rote assertion that Respondents "unquestionably" have right to a jury trial – repeated four times over eight pages (Res. Br. 97, 102, 103, 104) – is not a substantive response to the recent, post-transfer Oklahoma Supreme Court decision setting forth how "summary" procedures similar to the MUAA neither provide for a jury trial nor require an evidentiary hearing. *See Rogers v. Dell Computer Corp.*, No. 99,991, 2005 Okla. LEXIS 49, at *14 (Ok. June 28, 2005).

It is also surprising that Respondents' brief flips our appeal points so as to subordinate Appeal Point I (Pro Net) to a longer lead argument regarding Point III (Amway). This presentation cannot be reconciled with claims in the application that the decision below "exemplifies a disturbing trend" (Res. Appl. 7) because of "the Southern District's disregard of binding legal precedent and well-established legal principles" (*id.*

10). Indeed, the Court of Appeals expressly stated that it "***need not address Points II and III. Appellants' first point on appeal is dispositive***." (App. A28; emphasis added.)

STATEMENT OF FACTS

The Court should not allow Respondents' brief to cloud how the record tells a story of five businessmen who joined together to create a new enterprise, Pro Net. If a picture paints a thousand words, the Court need look no further than the montage of the Pro Net Board from the 1998 book published by Pro Net and included in our Appendix at A44.

In particular, the Court should not allow Respondents to tell a version of the facts inconsistent with their pleadings. Respondents filed two petitions before we moved to compel arbitration. (A0001-38; A0039-104.) After we filed our motion (A0397-99), Respondents moved for leave to file another petition that, *inter alia*, "addresses the arbitration issue at greater length after further investigation on that issue." (A0658.) As can be gleaned from even a cursory review, this "Third Amended Petition" (in actuality, the Second Amended Petition) performed radical surgery on the earlier filings and is inconsistent in many ways with Respondents' brief. (A0679-779.)

As this Court has explained, "The pleader is bound by the allegations of his petition." *M. F. A. Mut. Ins. Co. v. Hill*, 320 S.W.2d 559, 562 (Mo. 1959). Remarkably, however, Respondents offer no explanation for these inconsistencies other than to claim that reference to the earlier petitions is "improper." (Res. Br. 82 n.25.) *See Brandt v. Csaki*, 937 S.W.2d 268, 274 (Mo. App. W.D. 1996) ("Missouri courts have consistently

held that abandoned pleadings containing statements of fact are admissible as admissions against interest against the party who originally filed the pleading.").

STANDARD OF REVIEW

Strikingly, Respondents' brief, for the first time, seeks to replace or severely curtail the *de novo* standard of review with the standard applicable to a court-tried case where a trial court decision must be affirmed unless there is no substantial evidence to support it. *See Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). (Res. Br. 21-22, 70, 106.)[2] There are at least two obvious flaws with this proposal that the Court constrict its review of this case:

First, as Respondents acknowledge, this Court has clearly set forth a *de novo* standard for arbitrability issues. *See, e.g., Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). Indeed, just a few months ago, the Court

[2] Respondents also argue that various citations in our opening brief to the Third Amended Petition and motion exhibits should not be presented for this Court's *de novo* review. (*E.g.*, Res. Br. 83.) But, in truth, the three appeal *issues* and supporting legal theories presented in the opening brief were presented below and the record citations in our brief cannot reasonably be considered "new arguments." *See, e.g., Warner v. Southwestern Bell Tel. Co.*, 428 S.W.2d 596, 600 (Mo. 1968); *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801, 808 n.9 (Mo. App. W.D. 2004). Similarly, Respondents assail each appeal point even though these same points were accepted without question by the Court of Appeals (*see* App. A13) and clearly satisfy the letter and spirit of Mo. R. Civ. P. 84.04.

observed: "The question of whether [a party's] motion to compel arbitration should have been granted is one of law, to be decided by this Court *de novo* . . . . The Federal Arbitration Act (the FAA) requires courts to enforce a valid contractual agreement to arbitrate if it is contained in a contract that comes within the FAA's purview." *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. banc 2005) (citations omitted). Similarly, as a July 2005 decision makes clear, federal appellate courts "review *de novo* a district court's determination of the arbitrability of a dispute." *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005).

Second, this case is ***not*** an appeal from a court-tried case. Thus, Respondents' reliance on *Murphy* and Mo. R. Civ. P. 73.01 ("Trial Without Jury or With An Advisory Jury") is severely misplaced. Instead, as Respondents acknowledge elsewhere in their brief, the posture here is akin to summary judgment. (Res. Br. 102.) Of course, on appeal from a summary judgment, an appellate court does not defer to the trial court because review is *de novo*. *See ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993). Here, too, the Circuit Court's judgment is founded on the record submitted and the law, and this Court need not defer to the order denying our motion to compel arbitration.

ARGUMENT: JURY ISSUE

Although their brief is some 10,000 words longer than our opening brief, Respondents spend significantly less time than we did on their "question of first

impression" (Res. Appl. 12) about whether a party has a right to a jury trial on a motion to compel arbitration. (*See* Res. Br. 96-105.) Their discussion is relatively short because:

(a) Respondents do not cite any cases holding that the MUAA or UAA (from which much of the MUAA is drawn) provide for a jury trial on a motion to compel arbitration.

(b) Respondents ignore that the MUAA provides that motions to compel arbitration "shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions." RSMo § 435.425.

(c) Respondents do not cite any cases showing that motions practice in Missouri requires a jury verdict instead of a bench determination.

(d) Respondents do not demonstrate why motions to compel arbitration should be an exception to the established discretion of Missouri trial courts on whether to hold an evidentiary hearing on a motion.

(e) Respondents do not cite any cases contradicting the conclusion that, when specific performance of a binding arbitration agreement is sought, the origin of that remedy is equity for which there is no right to a jury.[3]

[3] Respondents reliance on the use of juries in declaratory judgment actions is inapposite because, *inter alia*, RSMo § 527.090 provides for a jury in declaratory actions and is without a counterpart in the MUAA. (Res. Br. 103.)

(f) Respondents ignore important decisions calling for use of state summary bench procedures to decide if claims fall within the scope of an arbitration clause under the FAA. *See, e.g., Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 268-69 (Tex. 1992).

(g) Respondents do not demonstrate why other state high courts erred in concluding that summary bench proceedings are consistent with the federal policy of favoring arbitration.

(h) Respondents do not demonstrate why they would prevail even if the Court applies the procedures of FAA § 4 or concludes that a party is entitled to an evidentiary hearing under the MUAA.

The arguments that Respondents do advance – which would greatly curtail judicial determinations of arbitrability – are not convincing or are simply wrong:

1. The brief says that Respondents "are asking this Court to hold that the FAA's right to a jury trial is substantive such that it applies in state courts" (Res. Br. 99 n.33), but it does not inform the Court how such a holding would stand alone among state and federal courts. For instance, the U.S. Supreme Court has held that arbitration is merely a change in forum; it does not affect substantive rights. *See Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991) ("'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'") (citations omitted).

2. Respondents' discussion of the "substantive" right to a jury trial confuses the issue before the Court by failing to note that the MUAA prohibits underlying claims from being evaluated by a court deciding a motion to compel arbitration. *See* RSMo § 435.355.5. In any event, the Supreme Court has made clear that there are no "sacred cows" in the enforcement of arbitration agreements. *See, e.g.*, *Gilmer*, 500 U.S. at 27 (holding civil rights claims can be ordered to arbitration).

3. Properly framed, the issue is not whether a plaintiff is being deprived of a trial on the underlying claims, but whether specific performance is warranted because a defendant is being deprived the benefits of a contract. As the Supreme Court has counseled, "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

4. While acknowledging that the MUAA "does not expressly authorize a jury trial," Respondents argue that its "ambiguities" allow for an "implicit" jury right to be read into it. (Res. Br. 99.) But this contention lacks legal or scholarly support. Nor can RSMo § 435.355.1 or the almost identically worded UAA § 2(a) fairly be described as "ambiguous."[4] For example, Respondents' effort to read a jury trial into the term

[4] UAA § 2(a) and RSMo § 435.355.1 both provide: "On application . . . the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the Court shall proceed summarily to the determination of

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"summarily" (Res. Br. 99-101) completely ignores, *inter alia*, the recent official comment of the RUAA drafting committee that ***"[t]he term 'summarily' . . . has been defined to mean that a trial court should act expeditiously and without a jury trial to determine whether a valid arbitration agreement exists***." Official Comment to RUAA § 7 (emphasis added).

ARGUMENT: RESPONDING TO POINTS I, II AND III

Before turning to why Respondents fail to meet their burden of showing that the parties did not contract to arbitrate this dispute, *see State ex rel. PaineWebber, Inc. v. Voorhees*, 891 S.W.2d 126, 128 (Mo. banc 1995), we have four general observations about how the arguments in opposition ignore legal authority and misstate legal principles:

1. The table of authorities for Respondents' brief lists nine full pages of cases but remarkably does not include the "wonderfully detailed" case – and, indeed, only case – cited in the Circuit Court's letter opinion (App. A2): *U-Can-II, Inc. v. Setzer*, No. 02-2535-CA CV-B (Fla. Cir. Ct. Apr. 23, 2003), *aff'd in pertinent part, rev'd in part*, 870

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the issue so raised and shall order arbitration if found for the moving party . . . ." (App. A30; Res. App. A8.) RUAA § 7(a)(2) provides that "if the refusing party opposes the [motion], the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." (App. A33; brackets in the original.)

So. 2d 99 (Fla. Dist. Ct. App. 2003) (A3684-3711) (App. A70-A97).[5] Similarly, Respondents have no real response for what they admit is the "contrary result" in *Morrison v. Amway Corp.*, 49 F. Supp. 2d 529 (S.D. Tex. 1998), holding that claims involving BSMs are subject to arbitration. (*E.g.*, Res. Br. 62 n.18.)

These two well-reasoned decisions allow the Court to cut through Respondents' thicket of arguments. For instance, arbitration is being opposed here on the ground that there are ***too many*** arbitration agreements. But this argument as to the Business Support Materials Arbitration Agreement ("BSMAA") was considered and rejected in both *U-Can-II* (App. A84) and *Morrison*, 49 F. Supp. 2d at 535 n.5 ("Amway's promulgation of a separate arbitration provision specifically for business materials does not impact this holding [requiring arbitration under the Amway Rules].").

2. Respondents' brief never acknowledges that for over forty years this Court has recognized that "'by accepting benefits a person may be estopped from questioning the existence, validity, and effect of a contract'" and "'[a] party will not be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations or burdens.'" *Dubail v. Med. W. Bldg. Corp.*, 372 S.W.2d 128, 132 (Mo. 1963) (citations omitted); *see also Dunn Indus. Group*, 112 S.W.3d at 437 (reiterating *Dubail*'s estoppel principle). Similarly, the brief never discusses that, as a general rule, "[a] party is

[5] When the brief does get around to *U-Can-II*, it states inaccurately that the Florida court did not order arbitration under the Amway Rules. (Res. Br. 40.)

estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (citations omitted).[6]

3. Respondents repeatedly protest we seek to hold them accountable to agreement terms unknown or misunderstood by a seemingly hapless Mr. Stewart who bears no resemblance to the dynamic figure portrayed in the Third Amended Petition (*e.g*, A0684 ¶ 2). (*E.g.*, Res. Br. 51, 72-73.) But, of course, a basic rule of contract law is that "a person is bound by the terms of a contract he signs" and "will not be heard to say he was ignorant of its contents." *Heartland Health Sys., Inc. v. Chamberlin*, 871 S.W.2d 8, 10 (Mo. App. W.D. 1993).

4. Respondents brush off the principle that the FAA provides that a court's analysis of a motion to compel arbitration should be confined to whether there is a valid agreement to arbitrate. (Res. Br. 65-69.) Contrary to these suggestions, the recent decision by the Oklahoma Supreme Court, for instance, stated: "Where a contract affecting interstate commerce contains an arbitration provision and does not provide otherwise, the FAA requires the question of the contract's validity ***as a whole*** to be

[6] Respondents ignore these estoppel principles while urging the Court to apply a three-part estoppel test more suitable for promissory estoppel. *See Van Kampen v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. S.D. 1985). Significantly, the estoppel cases Respondents cite, including *Van Kampen*, do ***not*** involve the issue of arbitration.

submitted to arbitration." *Rogers*, 2005 Okla. LEXIS 49, at *10 (emphasis added) (citations omitted).

I. The Parties Entered into Three Valid Agreements to Arbitrate this Dispute

A. The Pro Net Agreement

1. Respondents Are Estopped from Denying the Pro Net Arbitration Provision

Respondents do not dispute Mr. Stewart signed the Pro Net agreement on behalf of Nitro (Res. Br. 72) and include it in their appendix under the title "Pro Net Arbitration Provision" (Res. App. Index, A30-A33). Yet they claim the application was a "mistake" and that Nitro was not "eligible" for Pro Net membership. (Res. Br. 72-74.)

The Court should not condone these belated efforts to avoid contractual obligations. If the tables were turned, and we were before the Court claiming that the Stewart Organization was not a member of Pro Net because their application seven years ago was in Nitro's name, Respondents, as one can well imagine, would loudly argue that we were estopped from doing so.

Put simply, the argument is wrong on its face because, *inter alia*, the Pro Net Bylaws provide for membership of "[o]rganizations" (A2424), the other founders completed the same application form in a variety of ways (A1427; A1467-70),[7] Pro Net

[7] These applications for "regular" membership were completed in a variety of ways that directly contradict Respondents' alternative theory that, if Nitro was a Pro Net member, it was a "founding" member exempt from arbitration. (Res. Br. 75-76.) Nor is this

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itself listed its members by "organization" (A2694) and nonparties have testified that their organizations were members of Pro Net (*e.g.*, A3177-85).

The argument is also nonsensical because, as Respondents themselves have explained, Pro Net "engaged generally in the business of facilitating the sale of business support materials or 'tools' for use by Amway distributors, and of organizing seminars, rallies and major functions attended by Amway distributors nationwide." (A0691 ¶ 15.) Given these purposes, and the implicit requirement in the Amway Rules, as described by Respondents, that a distributorship establish separate BSMs entities (Res. Br. 27), it makes no sense that Pro Net would actively exclude Nitro or West Palm.

Furthermore, the argument cannot be squared with statements in the Third Amended Petition as to the relationship between the Stewart Organization and Pro Net. For instance, this pleading states (with emphasis added): "***Ken Stewart and his business had to be brought into Pro Net"*** (A0719 ¶ 103); "***[i]n recruiting Stewart for Pro Net***" (*id.* ¶ 106); "***the Stewart Organization's BSMs business***" (A0722 ¶ 114); "***bringing Stewart into the fold of Pro Net***" (A0729 ¶ 135); and "***Pro Net Diamond members, including Stewart***" (A0732 ¶ 155). The pleading also claims Appellants induced

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argument supported by Pro Net's Bylaws or Terms and Conditions. Nothing shows that "founding" and "regular" members were mutually exclusive, particularly after a "regular" membership was completed.

"***Plaintiffs and their principal, Ken Stewart, to support and become a member of Pro Net***" (A0750 ¶ 224) and induced "***the Stewart Organization to cease its efforts to sell and market BSMs except by and through Pro Net***" (*id.* ¶ 225).

In short, there is no question that Nitro is a tool business, West Palm is a functions business, and together with the Amway distributorship Stewart Associates, these entities are the Stewart Organization. (A0686-87 ¶¶ 7-8.)[8]

Indeed, after being suspended from Pro Net, Mr. Stewart sent a letter describing how "[a] great disservice has been done to myself, as well as my organization." (A2466.) Respondents' brief ignores this letter and, indeed, portrays Nitro and West Palm as seemingly indifferent to Pro Net because they received no membership benefits. (Res. Br. 80-89.) But, of course, millions of dollars were at stake – which is why the Stewart Organization joined Pro Net in the first place, why Mr. Stewart sent his letter and why Respondents filed this lawsuit.

Before turning to these benefits, we note Respondents have raised so many arguments they apparently lost track of them. Respondents now argue against estoppel

[8] It is rewriting of history for Respondents' brief to suggest that West Palm and Nitro only "occasionally used the word 'organization' to refer to themselves collectively." (Res. Br. 83.) The record clearly reflects that the existence and composition of this organization was understood by Mr. Stewart and Appellants and, indeed, the first paragraph of the Third Amended Petition setting out the parties to this case is careful to explain its existence. (A0686-87 ¶ 7.)

on the principal ground that the purchase and sale of BSMs were not unique benefits of Pro Net membership. (Res. Br. 87-88.) Not only does this contention conflict with the purpose underlying Pro Net's creation, it is contrary to the allegation in the Third Amended Petition that "Global was created to supply BSMs to Pro Net ***for sale to its members and, ultimately, their downline distributors***" (A0721 ¶ 111; emphasis added).[9] Nor is it consistent with an affidavit of a former Global officer submitted on behalf of Respondents alleging that "distributors in the BSM business had little choice but to join Pro Net" because "Global would not sell them tools if they were not ProNet [sic] members." (A0614 ¶ 16.)

The benefits of Pro Net membership to the Stewart Organization can easily be examined by the Court from a review of Global's sales records that do not raise any credibility issues. (*See* A2711-2901.) These materials clearly show that "Nitro and Stewart had access to the tapes of other Pro Net members that they otherwise would not have had the right to purchase and sell." (A2714.) In total, and in addition to thousands of books and compact disks, Respondents do not dispute the purchase of 1,556,325

[9] This explains why Nitro purchased its BSMs through its upline (Res. Br. 87; A0698) and how the downline of Pro Net members (or "Diamonds") purchased BSMs from Global (Res. Br. 88). Indeed, the Third Amended Petition discusses, *inter alia*, how "Pro Net and Global . . . will now ship BSMs directly to a Diamond's downline" and "Pro Net developed a consent form for members to sign permitting Pro Net to ship tools directly to their downline." (A0730 ¶¶ 137-38.)

audiotapes alone through Global between 1998 and November 2002, with a distributable profit of $6,758,842.90. (A2712; A2900.)

Moreover, the Stewart Organization profited from ***selling*** Mr. Stewart's audio tapes through Pro Net – a membership benefit that Respondents' brief completely ignores. For instance, Global listed many BSMs for sale explicitly identified as audiotapes by Mr. Stewart and these multiple listings clearly demonstrate an acceptance of membership benefits. (A2805-98.) An illustrative, but by no means exhaustive, sample includes the following listed audiotapes: "The Door Is Open, Will You Walk Through" (A2805), "Listen To A Tape Everyday" (A2811), "I've Always Been Ambitious" (A2818), "Amway – A Common Sense Business" (A2826), "How To Build An Organization" (A2827) and "I Knew Where I Was Going" (A2828). Global's listing also included a five-tape collection entitled "Stewart Unplugged." (A2825.)

These sales highlight how and why West Palm, as Mr. Stewart's functions business, benefited from Pro Net. The Third Amended Petition describes Mr. Stewart as being "in great demand as a motivational speaker at rallies, major functions and conventions." (A0697 ¶ 26; *see also* A0738 ¶ 185 (alleging "West Palm was forced to cease its efforts to sponsor major functions, as Ken Stewart had been banned and/or 'blackballed' from speaking at or hosting the same").) It is no excuse for Respondents to now deny any benefits because no functions were held in Missouri. (Res. Br. 86.)

In conclusion, under the principles espoused in *Dubail*, West Palm and Nitro accepted benefits from Pro Net and are estopped from denying the AAA arbitration provision.

2. Appellants May Enforce the Pro Net Arbitration Provision

If Respondents' brief is credited, almost ***no one*** actually belonged to Pro Net or, if they did, these scattered members were exempt from the express arbitration requirement. (Res. Br. 89-93.) The most interesting aspect of Respondents' discussion is the extent to which they admit targeting Appellants in an effort to litigate around the Pro Net arbitration clause. (Res. Br. 91.) Respondents should not be permitted to cherry pick in this manner. *Cf. Ripmaster v. Toyoda Gosei, Co., Ltd.*, 824 F. Supp. 116, 118 (E.D. Mich. 1993) ("Plaintiff cannot evade the arbitration clause by artful pleading.").

B. The Transition-to-Pro Net Agreement

The core of Respondents' argument is the untenable proposition that the five Pro Net founders signed the transition agreement in only an ***individual*** capacity (Res. Br. 109, 113) even though Respondents agree that it states:

> The Parties hereby agree to submit . . . to final and binding arbitration . . . any and all issues arising out of the transition of the ***Foley, Gooch, Childers, Stewart and Woods organizations*** from working with D&B Enterprises Inc. and InterNet Services to being responsible for the ***training and education of their distributor organizations***.

(App. A34 (emphasis added); *see also* Res. Br. 109 (quoting same).)

It is striking that Respondents never attempt to reconcile this agreement's use of "organizations" with their arguments that organizations were not eligible for membership in Pro Net. Nor does their analysis account for the teachings of this Court:

> The cardinal principle for contract interpretation is to ascertain the intention of the parties and to give effect to that intent . . . . In order to determine the intent of the parties, it is often necessary to consider not only the contract between the parties, but "subsidiary agreements, the relationship of the parties, the subject matter of the contract, the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties."

Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15, 21 (Mo. banc 1995) (citations omitted).

Although we believe that the intent of the agreement to cover organizations (and not just individuals) is clear from its face, we submit its meaning becomes crystal clear when read in the context of the parties' relationships (founders of Pro Net), the subject matter of the contract (downline training), the facts and circumstances surrounding the execution of the contract (creation of Pro Net) and the practical construction the parties themselves have placed on the contract by their acts and deeds (*e.g.*, Mr. Stewart's subsequent activities to fund Pro Net).[10]

[10] Respondents claim to be puzzled (Res. Br. 110) why our understanding draws support from Mr. Stewart's decision after signing this agreement to close the warehouse for "the

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Moreover, if Respondents' brief is correct, the agreement is virtually worthless because the signatories acted as individuals who did not bind ***any*** of the entities through which their organizations conduct business. But this suggested reading conflicts with the Third Amended Petition, which says the agreement addressed "claims brought by third parties who formerly purchased BSMs" from them (A0749 ¶ 216), and arguments elsewhere in Respondents' brief that Mr. Stewart has "separate corporations to engage in the *BSMs business*." (Res. Br. 24; emphasis in original.)

Although Respondents herald how none of the five founders completed the "For" line under their signature (App. A35-A37), the fact actually undermines Respondents' position. This uniformity demonstrates how the founders understood themselves to be signing an agreement that addressed their collective organizations. Certainly, they did not intend to exclude the very organizations that were the subject matter of the agreement itself.

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Stewart Organization's BSMs business" and become, in Respondents' own account, the only "member of Pro Net [who] contributed inventory or any significant cash to Pro Net's startup." (A0721-22 ¶¶ 112, 114.) Obviously, these decisive actions demonstrate a belief that the Stewart Organization was a party to the transition agreement and would be going forward as part of Pro Net.

C. The Amway Distributorship Agreement

1. Respondents Are Bound to the Arbitration Provision

Similar principles regarding estoppel and third-party beneficiaries bind Respondents to arbitration through the Amway distributor agreement signed by Mr. Stewart as president of Stewart Associates as bind them to AAA arbitration under the Pro Net agreement.[11]

Although Respondents' brief spends more time dancing around this issue than any other (Res. Br. 24-41), it cannot explain away how Nitro and West Palm are the result of Mr. Stewart's decision to go into the Amway business. In short, if there was no Stewart Associates (or its functional equivalent), there would be no Nitro or West Palm.

The beginning of the Third Amended Petition is devoted to an explanation about how Respondents "facilitated" Stewart Associates' downline distributors and "benefit[ed]" from this downline. (A0686-87 ¶¶ 7-8.) Clearly, Nitro and West Palm perform this function because the Stewart Organization wants to operate in a manner consistent with the Amway Rule, as described in Respondents' brief, that "prohibits an

[11] Although Respondents admit Mr. Stewart signed the "Acknowledgement of Distributor Changes" in 1997 (included in our Appendix at A50), they claim the notice was "low-key" (Res. Br. 50) without saying anything about how Mr. Stewart's own picture is next to the Amway newsletter announcement of the new arbitration requirement for "all distributor disputes." (App. A49.)

Amway distributor from operating any business other than the sale of Amway products and services." (Res. Br. 26.)

In addition, and contrary to Respondents' arguments (Res. Br. 33-35), Nitro and West Palm are bound as agents of Ken Stewart, who personally agreed to be bound by the Amway Rules. (A2935 ¶ 12(b).) In *U-Can-II*, the court held that the very same Amway form bound the signatory's agents to the Amway Rules. (A3553.)

Under Missouri law, "non-signatory agents [are] bound by arbitration agreements signed by their principals." *Byrd v. Sprint Commc'ns Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. W.D. 1996).[12] Contrary to Respondents' arguments (Res. Br. 33-35), and as shown in the opening brief, Nitro and West Palm meet all elements for showing agency under Missouri law. For instance, there is no real question that Respondents primarily act

[12] Respondents claim that *Byrd* was "implicitly overruled" in *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 436-37 (Mo. banc 2003). (Res. Br. 33.) But *Dunn* did not even involve an agency claim. In addition, Respondents' citation of *Welch v. Davis*, 114 S.W.3d 285 (Mo. App. W.D. 2003), is inaccurate. In *Welch*, the court states: "We painted with too broad a brush in *Byrd*. The issue has nothing to do with consistency but with the application of proper principles of contract and agency law. Those principles will, under the proper circumstances, permit a party to an arbitration agreement to compel an agent of the other party to arbitrate a dispute although the agent did not enter into the agreement." *Id.* at 289 n.1. The entire last sentence is conveniently absent from Respondents' brief, which quotes only the first two lines. (Res. Br. 33.)

for Mr. Stewart's benefit. The Third Amended Petition, for instance, states: "From 1980 until today, Stewart expended substantial time, resources and effort into ***building*** Stewart Associates, Nitro and West Palm, making Amway and/or the promotion of Amway ***his*** job, and relying on ***his*** Amway and BSMs income as ***his*** primary means of support." (A0710 ¶ 72; emphasis added.)

2. Appellants May Enforce the Provision

Respondents' half-hearted argument (Res. Br. 64-65) does not attempt to distinguish this case from the holding in *U-Can-II* that thirteen defendants (most of whom are also parties here) could enforce the arbitration provision in the Amway Rules. (App. A86.)

D. Respondents Cannot Avoid Arbitration by Claiming the Amway Rules Are Unconscionable

As an initial matter, the Court should have little patience for parties that boasted about Mr. Stewart's business acumen and financial success (*e.g.*, A0684 ¶ 2) now invoking cases protecting unsophisticated individuals from egregious contracts of adhesion. *See*, *e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (Res. Br. 44, 55).

"'Generally there must be both procedural and also substantive unconscionability before a contract or a clause can be voided.'" *Whitney v. Alltel Commc'ns, Inc.*, No. WD 64196, 2005 WL 1544777, at * 4 (Mo. App. W.D. July 5, 2005) (quoting *Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. W.D. 1979)). Neither exists here.

"Procedural unconscionability arises during the contracting process and involves fine print, misrepresentation, and unequal bargaining positions." *World Enters., Inc. v. Midcoast Aviation Servs., Inc.*, 713 S.W.2d 606, 610-11 (Mo. App. E.D. 1986). On these issues, Respondents claim Amway's "overwhelmingly superior bargaining power" resulted in a unilaterally imposed arbitration clause. (Res. Br. 53.) But this assertion omits how Mr. Stewart himself was part of the unanimous recommendation in 1997 that Amway adopt the arbitration requirement.[13] (A2913; A2916; A2924.) Nor does it explain inclusion of the Amway Rules (now described as "so one-sided as to shock the conscious [sic]" (Res. Br. 51)) in two contracts – Transition-to-Pro Net Agreement (App. A34) and the Pro Net agreement (*id.* A41). Mr. Stewart helped draft these two agreements that Amway had nothing to do with and, indeed, address what Respondents call the "separate BSMs business." (Res. Br. 26.)

"Substantive unconscionability involves undue harshness in the contract terms themselves." *World Enters., Inc.*, 713 S.W.2d at 611. On these issues, Respondents' overheated rhetoric is not accurate. (Res. Br. 42-50.) In the first place, Appellants do ***not*** "have the ability to pre-determine the entire panel." (Res. Br. 46.) Amway Rule 11.5.14 has always provided, "The Administrator shall establish and maintain a Roster of

[13] In their brief, Respondents admit that "by virtue of his position on the ADA/IBOAI Board in 1997" Mr. Stewart knew about the new arbitration rule (Res. Br. 50-51), but do not acknowledge his presence at the January 1997 meeting or his vote in favor of its adoption.

Neutrals and shall appoint Arbitrators from that Roster as provided in these rules. Neutrals appointed to this roster shall serve a three-year term." (App. A60.) The only issue has been the question of ***retention*** – and even Respondents admit this retention voting has been repealed. (Res. Br. 43-44.) In addition, and contrary to Respondents' suggestions, Rule 11.5.1 provides: "The Rules in effect on the date of the commencement of an Arbitration will apply to that Arbitration. These Rules shall be amended only by mutual agreement between the Corporation [Amway] and the IBOAI Board." (App. A57.)

Similarly, the Amway Rules do not call for "*substantive* indoctrination" (emphasis in original) of arbitrators comparable to "hand-picking and indoctrinating the panel of jurors before voir dire." (Res. Br. 42-43.) Even the Circuit Court rejected this characterization, noting: "I am not particularly offended by the fact that the Amway arbitrators are trained in Amway procedures and that the Amway arbitration process is confined to this group." (App. A2.)[14] Nor is it consistent with the unchallenged affidavit of a JAMS officer stating, *inter alia*, "All parties to a dispute have an equal voice in the

[14] Respondents omit the following italicized test from their quotation of *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So. 2d 779 (Ala. 2002): "Our research has not disclosed a single case upholding a provision in an arbitration agreement in which the appointment of the arbitrator is within the exclusive control of ***one of*** the parties." *Id.* at 784 (emphasis added). (Res. Br. 44.) Thus, in actuality, not only is the case not controlling, it is not relevant.

selection of a neutral for a particular case. JAMS would not otherwise administer a case."[15] (A3049 ¶ 8.)

We also note that Respondents' low regard of JAMS is not shared by independent observers, as can be seen in this ABA article:

> JAMS also is a well-respected, full-service ADR provider with more than 20 years of experience. JAMS prides itself on offering very experienced neutrals and highly trained case managers. JAMS selects its neutrals from former judges and lawyers based on their experience, reputation and proven ADR track record. According to JAMS, their neutrals have a collective resolution rate of 90 percent. In addition to its substantive expertise, JAMS touts its commitment to public service. JAMS' Web site states that the organization donates more than $1 million of its resources to various charities, outreach activities and volunteer programs.

Barbara Dawson & Michele L. Stevenson, *Getting Help with ADR: A Guide to the Main Players*, Business Law Today (Jan./Feb 2001) (Vol. 10, No. 3), *available at* http://www.abanet.org/buslaw/blt/bltjan01dawson.html.

[15] Ironically, Respondents charge our opening brief with slothfulness as to appellate procedure, but it is they who seek to inject "newly discovered evidence" from a completely different case into their argument against JAMS. (Res. Br. 42-43 n.8.)

Finally, we note that, contrary to Respondents' arguments, the FAA, Missouri contract law and the Amway Rules (App. A57) provide that concerns about the Amway arbitration program should be addressed by severability. *See, e.g., Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001). And, in any event, these arguments do not allow Respondents to evade AAA arbitration under the Pro Net agreement.

II. This Dispute Is Within the Scope of the Agreements to Arbitrate

As to the second part of the test for arbitrability, Respondents do not demonstrate that their claims are unlike those of the plaintiffs in *U-Can-II* and *Morrison* and therefore outside the scope of the broad arbitration clauses at issue here.[16] Indeed, Respondents give relatively scant attention to this last line of defense. (Res. Br. 56-58, 94-95, 111-13.) Certainly, none of their arguments acknowledge, let alone satisfy, the well-established standard reaffirmed last month by the Eighth Circuit:

> The scope of an arbitration agreement is given a liberal interpretation, with any doubts resolved in favor of

[16] For instance, and contrary to Respondents' suggestions, the claims here are not completely unrelated to the agreements at issue as in the case where a defendant unsuccessfully sought to require arbitration of tort products liability and negligence on the ground that it had a sales contract with the plaintiffs. *See Northwest Chrysler-Plymouth, Inc. v. DaimlerChrysler Corp.*, No. ED 85649, 2005 WL 1432352 (Mo. App. E.D. 2005). In addition, Respondents overlook that the majority of their counts do not even sound in tort.

> arbitration. An order compelling arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

Medcam, Inc. v. MCNC, No. 04-2572, 2005 U.S. App. LEXIS 14434, *6-7 (8th Cir. July 18, 2005) (citations omitted).

Finally, with respect to the scope of the Pro Net arbitration clause, which Respondents assert covers "only" three types of disputes, we note that it is not a substantive analysis for Respondents to argue yet again that their "claims do not fall within [the clause] because, as established above, *no contract was ever created*." (Res. Br. 94; emphasis in original.)

CONCLUSION

For the above-stated reasons, and those set forth in our opening brief, the Court should grant the relief requested in the opening brief.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(c). Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,233, excluding the cover page, signature block, and certificates of service and compliance.

The undersigned further certifies that the diskette filed herewith containing Appellants' Substitute Reply Brief in electronic form complies with Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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