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 OPENING BRIEF

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All Appellants moved to compel arbitration and to stay this litigation under the Missouri Uniform Arbitration Act ("MUAA"), sections 435.350-435.470 RSMo, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq*. On September 17, 2003, the Circuit Court of Greene County issued a letter opinion denying the motion. The Circuit Court then entered an order denying Appellants' motion for rehearing on January 22, 2005.

Under RSMo § 435.440.1(1), "an appeal may be taken from . . . an order denying an application to compel arbitration made under section 435.355." The FAA also provides that such an order denying arbitration is subject to appellate review. *See* 9 U.S.C. § 16(a)(1)(B).

Appellants filed a notice of appeal to the Missouri Court of Appeals, Southern District. On April 15, 2005, the Court of Appeals issued a unanimous decision reversing the trial court's judgment. On May 6, 2005, the Court of Appeals denied Respondents' motion for rehearing and application for transfer.

Respondents filed an application for transfer under Rule 83.02 with this Court, which was granted on June 21, 2005. Under Mo. Const. art. V, § 10, the Court has jurisdiction as if this case were being heard on original appeal.

STATEMENT OF FACTS

This case arises out of business relationships between Appellants[1] and Respondents Nitro Distributing, Inc. ("Nitro") and West Palm Convention Services, Inc. ("West Palm") (collectively "Respondents"), both owned by Ken Stewart ("Stewart"). (A0783.) As discussed below, Mr. Stewart along with four Appellants was a founder of Appellant Pro Net Global Association, Inc. ("Pro Net"), which was involved in the "tool and function" business closely related to the Amway Corporation ("Amway"). (A0684.)

Respondents filed this lawsuit alleging, in essence, that Appellants misappropriated their Amway and Pro Net-related businesses. (A0693.) Appellants maintain that this case should be sent to arbitration under any one of three agreements signed by Mr. Stewart and known as the Pro Net agreement (A0436-40), the "Transition-to-Pro Net" agreement (A0441-44) and the Amway distributorship agreement (A0453). Respondents, however, contend that they are not bound to arbitration by any of the agreements. Thus, the question before the Court is whether Respondents' claims should be arbitrated or litigated in the Circuit Court.

[1] The 18 Appellants and their relationships among each other and with Respondents are described below. References to Appellants' Legal File are denominated as "A___." For the Court's convenience, the decisions below, excerpts from the Model Arbitration Acts and relevant record material are included in the accompanying appendix.

A. The Amway System

Amway, a nonparty corporation, is a multi-level marketing business (now known as "Quixtar") that administers a worldwide network of independent distributors that sell consumer goods and products. (A0694.) These distributors (sometimes called Independent Business Owners, or "IBOs") sell Amway products directly to consumers. (A1625.) Their businesses grow through sales of Amway products and through the sponsorship of new distributors. (A0684.)

This framework is established by the Amway Rules of Conduct ("Rules of Conduct" or "Amway Rules") to which each Amway distributor must subscribe in its initial "Distributor Application." (A0433-34; A1623.) By signing this form, a distributor agrees to "comply with the Amway Sales and Marketing Plan as set forth in official Amway literature and to observe the spirit as well as the letter of the Amway Code of Ethics and Rules of Conduct." (A2933.) Amway distributorships are renewed annually and always include this agreement. (A2927.)

The Amway Rules establish "lines of sponsorship" that create a network where a distributor has a position immediately below its sponsor and above any distributors that it subsequently sponsors. (A1618.) The network above a distributor is its "upline" and the network below is its "downline." (A1616; A1622.)

B. Business Support Materials (BSMs)

Instead of directly implicating the sale of Amway products, this case relates to the "tools" and "functions" used by Amway distributors to train and motivate their downlines. (A0699.) According to Respondents, "Amway requires distributors to 'train'

and 'motivate' the downline distributors in their line of sponsorship." (*Id.*; emphasis in original.) It is "customary" for an Amway distributor to operate these motivational businesses through a corporate entity separate from the distributorship. (*Id.*)

Tools are motivational products such as audiotapes, videotapes and literature. (A0699.) Functions are motivational seminars, rallies and conventions. (A0699.) Tools and functions are often collectively referred to as business support materials, or "BSMs." (A0699; A0783.) The Amway Rules, however, address the sale and purchase of BSMs. For instance, Amway Rule 7, which is entitled "Business Support Materials," provides that Amway can review BSMs "for the determination of compliance with its Rules of Conduct and business practices and policies." (A1648.)

C. The Stewart Organization

Since 1985, Mr. Stewart has owned the successful Amway distributorship Stewart & Associates International, Inc. ("Stewart Associates").[2] (A0445-48.) Like other distributors, Mr. Stewart and Stewart Associates have agreed to comply with the Amway Rules. (A0446-48; A0451.)

Mr. Stewart is the principal of Stewart Associates as well as Respondents Nitro and West Palm. (A0783.) According to Mr. Stewart, "Stewart Associates' (as well as Nitro's and West Palm's) line of sponsorship, in ascending order, is: [Appellants] Jimmy Dunn, Bill Childers and Hal Gooch." (A0784.)

[2] Stewart Associates now operates in Florida, but until 1996 was based in Springfield, Missouri. (A0783.)

Respondents have pled that Nitro "operates in tandem with [West Palm] to build, support and enhance Stewart Associate's Amway business." (A0686.) Nitro provides tools to Stewart Associates' downline distributors (and their own tool and function businesses) and West Palm offers participation in various functions to this downline. (A0686-87.) Thus, in the vernacular, Nitro is a tool business and West Palm is a functions business. According to Respondents, Nitro, West Palm and Stewart Associates are collectively the "Stewart Organization." (A0687.)

D. Pro Net

Incorporated in February 1998, Pro Net was formed to facilitate the sales of tools by its members and the organizing of functions attended by Amway distributors. (A0691; A0719.) Among other benefits, Pro Net allowed its members to transfer the copyright in their tools to Pro Net and thereby make them available for sale to all other members. (A3274-77.)[3] Pro Net contracted with Appellant Global Support Services, Inc. ("Global") to fill these orders and provide other administrative functions. (A2711-12; A3298.)[4]

Mr. Stewart was one of Pro Net's five founders of Pro Net and a member of the Pro Net Board of Directors (where he served as Secretary) and the Pro Net Steering

[3] Appellant Pro Net Global I, Inc. ("Pro Net I") was a wholly owned subsidiary of Pro Net. (A3298.) Appellant Robert A. Blanchard ("Blanchard") was Pro Net's Chief Operating Officer and is sued here in that capacity. (A0693.)

[4] Appellant Don Brindley ("Brindley") was the principal of Global. (A2405; A3298.)

Committee. (A0432; A0720.) The other four founders (and parts of their Amway-related organizations) are all being sued in this case:

? Appellant Harold ("Hal") Gooch, Jr. ("Gooch") was Pro Net's Chief Executive Officer. (A2185.) Along with his wife, Gooch controls Appellant Gooch Support Systems, Inc. ("Gooch Systems"), which is their tool business, and Appellant Gooch Enterprises, Inc. ("Gooch Enterprises"), which is their functions business. (A3326.) Respondents pled that these Appellants together constitute "Defendant Gooch." (A0688.)

? Appellant Billy S. Childers ("Childers") was Pro Net's President. (A2185.) Along with his wife, Childers controls Appellant TNT, Inc. of North Carolina ("TNT"), which is their tool business and used to be their functions business. (A3335.) Respondents pled these Appellants as "Defendant Childers." (A0689.)

? Appellant Thomas ("Tim") D. Foley ("Foley") was Pro Net's Treasurer. (A2185.) Along with his former wife, Foley controls Appellant T&C Foley, Inc. ("T&C Foley"), which is their Amway distributorship. (A3343.) Respondents pled these Appellants as "Defendant Foley." (A0689.)

? Appellant Steven S. Woods ("Woods") was Pro Net's Vice President. (A2185.) Along with his wife, Woods controls Appellant G.F.I. International, Inc. ("G.F.I"), which is their tool and functions

portion business. (A3353.) Respondents pled these Appellants as "Defendant Woods." (A0690.)

The close working relationship of Stewart and these Appellants was documented in 1998 when Pro Net published a book entitled *Profiles: Portraits of Success* that included a montage of "[t]he [Pro Net] Board of Directors pictured clockwise from top left: Tim and Connie Foley, Steve and Annette Woods, Ken Stewart, Hal and Susan Gooch, Bill Childers." (A3788-3946; A3790-91.) Mr. Stewart, individually, was also profiled prominently. (A3927-28.)

E. The Transition-to-Pro Net Agreement

Prior to Pro Net's incorporation, Mr. Stewart and the other founders (as well as their downlines) were being supplied with tools by the "Yager Group," which included D&B Enterprises, Inc. ("D&B") and InterNet Services Corp. ("InterNet"). (A2402; A2484; A2536; A2516.) By creating Pro Net, the founders severed these ties with the Yager Group and thereby assumed more responsibilities for the training and education of their downlines. (*E.g.*, A2402.)

During this transitional period in early 1998, a "Transition-to-Pro Net" agreement was executed on behalf of (i) the Amway-related organizations of the Pro Net founders (by Foley, Gooch, Childers, Stewart and Woods), (ii) D&B Enterprises and InterNet Services (by Jeff Yager) and (iii) Global (by Paul Brown).[5] (A0441-44.) The agreement

[5] It was signed by Stewart, Foley, Childers, Woods and Yager on March 1, 1998; by Brown on April 6, 1998; and by Gooch on May 14, 1998. (A0442-44.)

stated, *inter alia*: "***The Parties hereby agree to submit . . . to final and binding arbitration with J.A.M.S./ENDISPUTE, in accordance with Rule 7 of the Amway/ADA Arbitration Rules and Procedures, 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.***" (A0441; emphasis added.)[6]

According to Respondents, in anticipation of the creation of Pro Net, "Nitro (Stewart) contributed to Global and/or Pro Net on consignment approximately $650,000 retail value of tapes and tools to stock the Pro Net warehouse in Florida. No other member of Pro Net contributed inventory or any significant cash to Pro Net's setup." (A0721.) "Following the shipment of Nitro's tapes and other tools to the Pro Net warehouse in Florida, Nitro closed its Missouri BSMs warehouse in or about August 1998." (A0722.) Thus, "with Nitro agreeing to join Pro Net," the "Stewart Organization's BSMs business" had been committed to Pro Net. (*Id.*)

F. The Pro Net Arbitration Provisions

In early 1998, the Pro Net Steering Committee, which included Mr. Stewart and the other founders (A2401-06), approved Terms and Conditions for membership that included the following two provisions:

[6] JAMS arbitration is discussed more fully below in Point III. As noted above, Amway Rule 7 addresses BSMs. Amway Rule 11 sets out procedures for alternative disputes resolution. (A1624.)

First, paragraph 3 of the Pro Net Terms and Conditions required members to adhere to the Amway Rules of Conduct. (A0439 (Terms and Conditions); A0436 (Membership Application)). As discussed below, the Amway Rules were amended after a 1997 vote of distributors, including Mr. Stewart, recommended the adoption of binding arbitration. (A2911.)

Second, the Steering Committee adopted an arbitration clause specific to Pro Net. (*E.g.*, A2538-39.) As a result, the Pro Net application (A0437) and the Pro Net Terms (A0437) provide for the use of American Arbitration Association ("AAA") arbitration procedures. Pursuant to paragraph 11 of these terms, if mediation is unsuccessful, "***[a]ny dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, controversy, or claim between one or more members of the Association or between the Association and any of its members . . . . shall be submitted to and settled by binding arbitration administered by the [AAA] under its Commercial Arbitration Rules in effect at that time.***" (A0440; emphasis added.)

G. The Stewart Organization and Pro Net

On July 2, 1998, Mr. Stewart submitted a Pro Net Global Association Membership Application in the name of "Ken Stewart/Nitro Distributing," completed the application using Nitro's federal tax identification number and signed the form as "president – Nitro Distrib." (A0438.) This form states: "The undersigned applicant agrees to abide by all Terms and Conditions of Association Membership." (*Id.*)

Every Pro Net founder except Stewart, as well Pro Net's former COO (Blanchard), say that membership in Pro Net included a distributor's entire Amway-related organization. (*E.g.*, A2404; A2567.) Similarly, nonparties testified by affidavit that they "understood that membership in Pro Net would include [their] entire organization." (*E.g.*, A3178.) A listing of Pro Net members through 2000 includes the "Stewart Organization" and other Amway-related organizations. (A2694.)

From 1998 to November 2002, the Stewart Organization purchased 1,556,325 audiotapes alone through Global and realized $6,758,842.90 in distributable profit from the sales. (A2712; A2900.) Global made Stewart's BSMs available for sale to other Pro Net members. (A2713.)

After being suspended from the Steering Committee, Mr. Stewart wrote a December 27, 1999 letter to the Pro Net Board on Stewart Associates letterhead describing the "great disservice [that] has been done to myself, as well as my organization." (A2466.)

H. Appellants' Membership in Pro Net

Like Mr. Stewart, the other founders submitted membership applications to join Pro Net: the Gooch Organization (which includes Gooch, Gooch Systems and Gooch Enterprises) (A3329), the Childers Organization (Childers and TNT) (A3328), the Foley Organization (Foley and T&C Foley) (A3347) and the Woods Organization (Woods and G.F.I.) (A3357). In addition, two Appellants joined Pro Net shortly after its creation, Jimmy V. Dunn ("Dunn") and Parker E. Grabill ("Grabill"), as well as their Amway

distributorships Grabill Enterprises, Inc. ("Grabill Enterprises") and Jimmy V. Dunn & Associates, Inc. ("Dunn Associates"). (A3367; A3376.)

I. Amway Distributor Arbitration

As noted above, in 1997, Amway incorporated an arbitration provision into its standard distributorship contract and the Amway Rules of Conduct. Under this provision, a distributor agrees, if mediation is unsuccessful, "***to submit any remaining claim or dispute arising out of or relating to [the] Amway Distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct (including any claim against another Amway distributor, or any such distributor's officers, directors, agents, or employees, or against Amway Corporation, or any of its officers, directors, agents or employees) to binding arbitration in accordance with the Amway Arbitration Rules, which are set forth in the Amway Business Compendium.***" (A0453; emphasis added.)

This provision was adopted after the unanimous recommendation of the Board of the Amway Distributors Association, which included Stewart. (A0784; A2410; A2488; A2911-29.) Amway then notified all distributors of the rule change and announced it in the September 1997 issue of its monthly magazine for distributors, *Amagram.* (A0452.) The publication noted that "[t]his change incorporates an agreement to arbitrate all distributor disputes relating to the Amway business." (*Id.*) Adjacent to this text was a photograph of Mr. Stewart in the company of Mr. Childers and Mr. Gooch. (*Id.*)

Amway also sent Mr. Stewart and other automatic renewal distributors an "Acknowledgement of Distributor Changes" to sign that acknowledged: "I HAVE READ AND AGREE TO ABIDE BY THE AGREEMENT STATED BELOW." (A0435 ¶ 19,

Ex. 7.) Mr. Stewart signed his form on November 17, 1997. (*Id.*; A2930 ¶ 13, Ex. 7.) Each year since then the Stewart Associates distributorship has renewed its arbitration commitment. (*See* A2931 ¶ 16, Ex. 3.)

J. The Florida Case (U-Can-II)

In the Florida case of *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 So. 2d 99 (Fla. Dist. Ct. App. 2003), it was held that claims similar to those here (brought by the same counsel on behalf of a different plaintiff against many of the Appellants here) were subject to arbitration under both the Pro Net agreement and the Amway Rules. (A3542-60.) U-Can-II is also a plaintiff with Nitro and West Palm in a pending action against Amway in Missouri federal court. (A3578.)

K. This Litigation and the Rulings Below

Respondents eventually filed a lawsuit alleging that Appellants sought "to misappropriate the entire Stewart Organization." (A0729.) According to Respondents, Pro Net was part of a "cleverly orchestrated scheme . . . to undermine the entire Stewart Organization, including Nitro and West Palm." (A0736.)

Appellants then moved to compel arbitration and to stay the litigation.[7] The motion was brought by all eighteen Appellants, including six individuals who had joined

[7] The Second Amended Petition (where Nitro and West Palm were the only plaintiffs) alleged that "Plaintiffs and Stewart joined the Pro Net fold and took their BSMs business to Pro Net." (A0095.) After Appellants served their motion, Respondents filed a Third

(footnote continued on next page)

Pro Net (Gooch, Childers, Foley, Woods, Grabill and Dunn) and their Amway-related organizations (Gooch Systems, Gooch Enterprises, TNT, T&C Foley, G.F.I., Grabill Enterprises and Dunn Associates). Also joining were three entities (Pro Net, Pro Net I and Global) as well as Brindley, as Global's principal, and Blanchard, as Pro Net's COO. (A0397-455.)

Respondents opposed the motion and demanded "an evidentiary hearing before a jury or, if denied, before the court." (A0466-68.) According to this demand, "[t]he jury's role would be to rule on disputed issues of fact with regard to whether [Respondents] made an agreement to arbitration and whether [Respondents'] claims are within the scope of any such agreement." (*Id.*)

The parties conducted extensive discovery (including the exchange of documents, admissions and interrogatories) that along with party and nonparty affidavits were included in two lengthy appendices of exhibits filed with the court. (A1222-2347 (Respondents); A2392-3379 (Appellants).) Extensive briefing was then conducted and several hours of oral argument were held. (*E.g.*, A1149-1221; A2348-91; A3540-96.)

(footnote continued from previous page)

Amended Petition that, *inter alia*, altered this allegation to read: "Respondent Nitro joined the Pro Net fold as a founding member and took its BSMs business to Pro Net." (A0751.) But even this pleading alleges that Appellants "induced Plaintiffs and their, principal, Ken Stewart, to support and become a member of Pro Net." (A0750.) The Third Amended Petition remains the operative petition. (A0679-779.)

On September 17, 2003, the Circuit Court issued a letter opinion denying the motion. (A3761-62.) The court observed that it had "read the comprehensive briefs of the parties" and "also studied the wonderfully detailed Opinion" in *U-Can-II.* (A3762.) The court was "inclined to say that I agree with many of the conclusions [the Florida trial court] reaches in his Findings of Fact and Conclusions of Law and I note that the arguments made there are quite similar to those made in my case." (*Id*.) Nonetheless, the court denied the motion because it found provisions of the Amway Rules to be unconscionable. (*Id*.)

Appellants' moved for rehearing arguing, among other things, that the court should have addressed the parties' separate arbitration obligation under the Pro Net agreement, which provides for use of unmodified AAA rules. (A3637-41.) Appellants also argued that the court should have addressed the arbitration requirement in the Transition-to-Pro Net agreement and had erred in finding the Amway provisions unconscionable. (*Id*.)

The Circuit Court denied the motion for rehearing, and this appeal followed. (A3765-87.) On April 15, 2005, the Missouri Court of Appeals, Southern District issued a unanimous decision holding that the Circuit Court had erred in failing to grant Appellants' motion under the Pro Net agreement. In light of this holding, the Court of Appeals did not address Appellants' other arguments.

POINTS RELIED ON

I. The Trial Court erred in denying Appellants' Motion to Compel Arbitration and to Stay Litigation Pending Arbitration, because the Court based its decision solely on the arbitration clause in the Amway Rules of Conduct but failed to address the Arbitration Clause in the Pro Net Terms and Conditions, which bound all of the parties to arbitrate all issues in this case independent of the Amway Rules of Conduct

Fru-Con Constr. Co. v. Southwestern Redev. Corp., 908 S.W.2d 741 (Mo. App. W.D. 1985)

Village of Cairo v. Bodine Contracting Co., 685 S.W.2d 253 (Mo. App. W.D. 1985)

Tractor-Trailer Supply Co. v. NCR Corp., 873 S.W.2d 627 (Mo. App. E.D. 1994)

II. The Trial Court erred in denying Appellants' Motion to Compel Arbitration and to Stay Litigation Pending Arbitration, because the Court based its decision solely on the Arbitration Clause in the Amway Rules of Conduct but failed to consider the Transition-to-Pro Net Arbitration Agreement which bound Respondents and fourteen of the eighteen Appellants to arbitrate all issues in this case

Fru-Con Constr. Co. v. Southwestern Redev. Corp., 908 S.W.2d 741 (Mo. App. W.D. 1995)

Madden v. Ellspermann, 813 S.W.2d 51 (Mo. App. W.D. 1991)

III. The Trial Court erred in denying Appellants' Motion to Compel Arbitration and to Stay Litigation Pending Arbitration, because the Court's conclusion that the Amway Arbitration Procedures were unconscionable misapplies the law in that the Amway Rules of Conduct are not as a matter of law unconscionable and all parties are bound therein to arbitrate all issues

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)

Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001)

Morrison v. Amway, 49 F. Supp. 2d 529 (S.D. Tex. 1998)

Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A., 334 F.3d 721 (8th Cir. 2003)

ARGUMENT

The question on appeal is narrow and straightforward: Did Appellants and Respondents contract to arbitrate this dispute?

In answering this question under the FAA (which all parties agree must be given substantive effect), Missouri contract principles are to be used, any doubts are to be resolved in favor of arbitration and the burden is squarely on Respondents as the resisting parties. *See, e.g., State ex rel. PaineWebber, Inc. v. Voorhees*, 891 S.W.2d 126, 128 (Mo. banc 1995). Therefore, under settled FAA and Missouri law, the Court should conduct a limited *de novo* inquiry into whether a valid agreement to arbitrate exists and, if so, whether this dispute falls within its substantive scope.

With these introductory principles in mind, we show below that ***three*** agreements provide for "any" and "all" disputes between Appellants and Respondents – including this case – to be resolved by arbitration. Thus, the argument that follows is lengthy not because the FAA inquiries are particularly difficult but because Mr. Stewart signed three separate agreements on behalf of his self-described "Stewart Organization" that includes Nitro and West Palm.

The binding arbitration agreements addressed below are the Pro Net agreement (Point I), the "Transition-to-Pro Net" agreement (Point II) and the Amway distributorship agreement (Point III). This ordering does not indicate favoritism because we believe that this case can and should be sent to arbitration under any one (or more) of these agreements. We begin our analysis with the Pro Net agreement, in part, because it

provides for standard AAA commercial arbitration and therefore does not raise any of the issues that concerned the Circuit Court.

Before addressing the agreements in detail, we should point out what this case is ***not*** about. Everyone agrees that Mr. Stewart signed the agreements and that each is in writing. No one alleges that they are too long or complex for this successful businessman to understand. Clearly, this case is not one where an inexperienced individual unwittingly committed to arbitration. Instead, through Mr. Stewart, Respondents were active in drafting agreements that Mr. Stewart knowingly signed to obtain business benefits for his organization.

Finally, Respondents claim a right to a jury trial. As we demonstrate below in Point I.E, this argument fails because Missouri procedural law, which is to be applied under the FAA, provides for a summary bench determination, not a trial, of a motion to compel arbitration, which seeks to compel specific performance of an arbitration contract. In any event, the same result occurs in this case regardless of whether the Court applies state or federal procedures. As we demonstrate throughout, the well-developed record shows that Respondents cannot show a ***genuine*** issue of ***material*** fact as to the making of any of the arbitration agreements – let alone all three.

I. The Trial Court erred in denying Appellants' Motion to Compel Arbitration and to Stay Litigation Pending Arbitration, because the Court based its decision solely on the Arbitration Clause in the Amway Rules of Conduct but failed to address the Arbitration Clause in the Pro Net Terms and Conditions, which bound all of the parties to arbitrate all issues in this case independent of the Amway Rules of Conduct

A. Standard of Review

This Court's review of the arbitrability of a dispute is *de novo*. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003).

B. The Pro Net Agreement requires arbitration of this action

As the Court explained earlier this year, 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). "In such a determination, the court proceeds summarily without regard to the justiciability of the disputes asserted for arbitration. If the court finds agreement to arbitrate, and that the dispute is encompassed, the court ***must*** order arbitration; otherwise, the parties are left to the judicial resort." *Village of Cairo v. Bodine Contr. Co.*, 685 S.W.2d 253, 258 (Mo. App. W.D. 1985) (emphasis added).

"Before a party may be compelled to arbitrate under the FAA, a court must determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the substantive scope of that agreement." *Dunn Indus. Group*, 112 S.W.3d at 427-28. The Circuit Court therefore erred when it failed to address

the Pro Net arbitration agreement because (1) the agreement is a "valid agreement to arbitrate" and (2) this dispute falls within its "substantive scope."

1. Respondents are bound by the Arbitration Clause

a. Nitro signed the Agreement

Nitro was clearly bound by the Pro Net agreement after Mr. Stewart completed and submitted the Pro Net Membership Application in which he wrote "Ken Stewart/Nitro Distributing" in the "Member Name" line and signed as "president – Nitro Distrib." (A0438.) By this signature, Nitro was bound to the Pro Net agreement that included an arbitration clause. *See Gaar v. Gaar's Inc.*, 994 S.W.2d 612, 619 (Mo. App. S.D. 1999) (holding that a corporation's president may "perform all acts of an ordinary nature which by usage or necessary are incident to his office, and may bind the corporation by contracts arising in the usual course of business").

In arguing that one of Pro Net's key figures need not arbitrate under the agreement he approved and signed, Respondents raise a host of challenges that the Court should reject.[8] Initially, we note that the court in *U-Can-II* rejected similar arguments as insufficient to preclude arbitration. (A3689.)

[8] According to Respondents, the Pro Net arbitration provision was incorporated by "Pro Net, the Pro Net founders and board (except Ken Stewart and his company)." (A0739.) Thus, Respondents suggest that all of the founders agreed to the provision except the one who actually filed suit.

Respondents, for instance, now claim Nitro was not eligible for membership in Pro Net (notwithstanding the signed Nitro application) because Pro Net was limited to companies selling Amway products. (A0742.) This argument severely strains credibility given Mr. Stewart's role in creating Pro Net, his submission of the signed application and Respondents own assertion that "Nitro joined the Pro Net fold as a founding member and tood its BSMs business to Pro Net." (A0751.) It also conflicts with Nitro's own description of Pro Net as being "in the business of facilitating" the sale of BSMs, not Amway products. (A0691.)[9]

In the alterative, Respondents have asserted that, if Nitro was a Pro Net member, then it was a "Founding Member" exempt from arbitration. But this claim of special status lacks support in Pro Net's governing documents and, even if such a distinction did exist, it was made moot when Mr. Stewart (like the other founders) signed their respective applications for regular membership. (*E.g.*, A2406.)

Respondents have even argued that Nitro is not bound by the Pro Net agreement because Pro Net never sent a proper "writing" confirming membership. But this argument finds no support in Respondents' own actions, such as their allegation that "Nitro (Stewart)" closed the Missouri warehouse in anticipation of Pro Net starting

[9] Additionally, the argument fails to explain why "Nitro (Stewart) contributed to Global and/or Pro Net on consignment approximately $650,000 retail value of tapes and tools to stock the Pro Net warehouse" and "***[n]o other member*** of Pro Net contributed inventory or any significant cash to Pro Net's startup." (A0721-22; emphasis added.)

operations (A0721-22), and their own writings, such as Mr. Stewart's December 2000 letter (on Nitro letterhead, no less) to Pro Net asking for a "prompt response" to Stewart's questions about Pro Net Board meetings. (A2468.) "The manifestation of acceptance of an offer need not be made by the spoken or written word; it may also come through the offeree's conduct in accord with the terms of the offer." *Medicine Shoppe Int'l, Inc. v. J-Pral Corp.*, 662 S.W.2d 263, 271 (Mo. App. E.D. 1983).

b. The Stewart Organization, including Nitro and West Palm, belonged to Pro Net

Pro Net's bylaws provided for "organizations" (A2424) and the other founders and nonparties have testified that a member's entire Amway-related organizations belonged to Pro Net. (*E.g.*, A2540; A3177-85.) There is no reason to believe that the Stewart Organization was any different, particularly since a listing of Pro Net members through 2000 included the "Stewart Organization" along with other organizations. (A2694.)

This is particularly true in light of the fact that Mr. Stewart and the other founders signed the "Transition-to-Pro Net" agreement that referred to "the transition of the Foley, Gooch, Childers, Stewart and Woods ***organizations*** from working with [the Yager Group] to being responsible for the training and education of their ***distributor organizations***." (A0441; emphasis added.) Similarly, in December 1999, Mr. Stewart drafted a letter to Pro Net on Stewart Associates letterhead (thus showing how the Stewart Organization viewed Pro Net membership) about how "[a] great disservice has been done to myself, as well as my ***organization***." (A2466; emphasis added.)

Moreover, an understanding that the entire Stewart Organization belonged to Pro Net is entirely consistent with Respondents' allegations that "***Plaintiffs*** and Stewart joined the Pro Net fold and took their BSMs business to Pro Net" (A0095) and Appellants "induced ***Plaintiffs*** and their, principal, Ken Stewart, to support and become a member of Pro Net." (A0750.) Similarly, Respondents allege that Appellants, through Pro Net, attempted "to ***misappropriate the entire Stewart Organization***."[10] (A0729; emphasis added.) It is also consistent with the Third Amended Petition's treatment of Appellants, such as (for example) the assertion that "'Defendant Gooch' herein shall refer to all Gooch Defendants" and thus encompass Gooch (Pro Net CEO), Gooch Systems (tools) and Gooch Enterprises (functions). (A0688.)

In short, as in *Foster v. Sears Roebuck & Co.*, 837 F. Supp. 1006, 1008 (W.D. Mo. 1993), Respondents' "instant attempts to convince this Court that [a plaintiff] should not be compelled to abide by the arbitration agreement are not consistent with their Complaint."

[10] In a complaint against Amway filed by Nitro and West Palm in the United States District Court for the Western District of Missouri, the plaintiffs allege that "***Nitro and West Palm*** were lured into Pro Net and then boycotted." (A3578; emphasis added.) An organizational chart attached to this complaint illustrates Nitro and West Palm as part of the "Pro Net System" under Stewart. (A3581.)

c. West Palm is a third-party beneficiary of the Pro Net Agreement

West Palm is also bound to arbitrate as a third-party beneficiary of the agreement signed by Nitro. "[I]n determining whether [a party] was a third-party beneficiary to the contract, the question of intent is paramount . . . [and] is to be gleaned from the four corners of the contract." *Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868, 873 (Mo. App. S.D. 2004); *see also Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630 (Mo. App. E.D. 1994).

Here, the intent to benefit West Palm is particularly clear in light of Respondents' allegation that "West Palm facilitated the rally, convention and function business for Stewart Associates and Ken Stewart, and operated in tandem with Nitro to build, support and enhance Stewart Associates' Amway business." (A0687.) The Pro Net agreement signed by Mr. Stewart after he help draft it provided that a benefit of membership was that "the Association will act to provide benefits for the undersigned application ('Member') by . . . [p]romoting, arranging and sponsoring member meetings." (A0436.) Moreover, Respondents themselves allege that Pro Net "engaged generally in the business of . . . organizing seminars, rallies and major functions attended by Amway distributors nationwide." (A0691.)

Joining Pro Net thus benefited West Palm and the rest of the Stewart Organization. (*E.g.*, A2464 (Stewart requests "policy" from the Pro Net Board regarding payment on function attendance).) The value of this benefit is seen in West Palm's damages

allegations. (*E.g.*, A0725 (allegation of being "blackballed" by certain Appellants and "[f]rom that point forward, West Palm's function business was negated").)

d. Nitro and West Palm are estopped from denying the Pro Net Agreement

"[T]he subsistence and validity of an arbitration clause is governed by the usual rules and canons of contract interpretation." *Village of Cairo*, 685 S.W.2d at 258. One these guiding principles is that "[b]y accepting benefits, a party may be estopped from questioning the existence, validity, and effect of a contract." *Dunn Indus. Group*, 112 S.W.3d at 437; *see also Silver Dollar City v. Kitsmiller Constr. Co.*, 931 S.W.2d 909 (Mo. App. S.D. 1996).

Therefore, in a leading case, Judge Calabresi, writing for a unanimous Second Circuit panel, explained that "[a] party is 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); *see also E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001). In this case, Respondents not only received and accepted benefits from Pro Net, but also build their case around the disavowed contract.

The extent of this embrace can be seen in the above discussion when, *inter alia*, (i) Mr. Stewart signed the transition agreement referencing his "organization" (A0441-44); (ii) he signed the Pro Net application (A0438) and (iii) Respondents pled that as part of the Stewart Organization they "operated in tandem" (A0687) and "joined the Pro Net fold" (A0095).

The embrace of Pro Net by "Stewart Organization's BSMs business" (A0722) is further seen in Global's business records. As discussed above, one reason for the creation of Pro Net was to address copyright issues relating to tools created by its members and to work with Global to make them available for sale to all other members. (A3274-77.) Respondents themselves allege that "***Global was created to supply BSMs to Pro Net for sale to its members*** and, ultimately, their downline distributors." (A0721; emphasis added.)

In performing this function, Global supplied the Stewart Organization with a substantial number of the BSMs over a period of years. For instance, in addition to a large number of other BSMs (books, videotapes and disks), Nitro purchased 1,556,325 audiotapes alone through Global between 1998 and November 2002. (A2711-2804.) The distributable profit for these audiotapes was $6,758,842.90. (A2900.) Global also made Mr. Stewart's BSMs available to other Pro Net members. (A2713; A2805.)

Moreover, a central theme to the Third Amended Petition is that Pro Net was the hub of Appellants' alleged "conspiracy" – "The conspiracy controls Pro Net; it is the conspiracy's instrumentality." (A0691.) Thus, for example, it is alleged that "Plaintiffs discovered that Pro Net is merely a sham and the puppet of the conspiracy to fraudulently take advantage of Plaintiffs" (A0751) and "Pro Net served as the instrumentality to gain control over the BSMs" (A0763).

This theme is particularly clear when Respondents allege that Mr. Stewart was suspended improperly from Pro Net: "The purported 'suspension' actions taken by the Pro Net board were ***not in compliance with the Pro Net Bylaws, were unauthorized,***

void and constitute ultra vires acts in every respect. Yet, the acts served to effectively damage Stewart and ***Plaintiffs***." (A0727; emphasis added.) And two pages later: "The actions taken by Pro Net at the behest of the conspiracy, ***besides being contrary to law, are also in contravention to Pro Net's own Bylaws***, particularly concerning the removal of an officer/director." (A0729; emphasis added.) But later on the Third Amended Petition changes course with the argument that "[i]nterestingly," Nitro, West Palm and several Appellants are "ineligible for membership in Pro Net" under the Bylaws because they are not companies selling Amway products – and therefore beyond the reach of arbitration. (A0742.)

But "[a] party cannot have it both ways; it cannot rely on the contract when it works to its advantage and then repute it when it works to its disadvantage." *Foster*, 837 F. Supp. at 1008 (quotation omitted). These allegations therefore do not heed the teachings of this Court that "[a] party cannot affirm a contract in part, and repudiate it in part. . . . [It] cannot play fast and loose in the matter." *Schurtz v. Cushing*, 146 S.W.2d 591, 594 (Mo. 1941) (quotation omitted). "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) (quotation omitted).

2. All Appellants are entitled to compel arbitration under the Pro Net Agreement

Thirteen of the eighteen Appellants are entitled to compel arbitration as individuals who joined Pro Net (Gooch, Childers, Foley, Woods, Grabill and Dunn) and

entities of the Amway-related organizations of these individuals (Gooch Systems, Gooch Enterprises, TNT, T&C Foley, G.F.I., Grabill Enterprises and Dunn Associates). As noted above, Respondents' pleadings treat these Appellants in the singular. (A0687-91.)[11]

Appellant Pro Net is a party to the Pro Net agreement and, therefore along with its former COO, Appellant Blanchard, is entitled to enforce the agreement. Finally, Appellants Pro Net I and Global (along with Global's principal, Brindley) can arbitrate under the agreement because the claims against them are inextricably intertwined with those against Pro Net. Respondents allege, for instance, that Pro Net I and Global work in "tandem" with Pro Net and therefore each is a "co-conspirator in the conspiracy." (A0692.) *See Madden v. Ellspermann*, 813 S.W.2d 51 (Mo. App. W.D. 1991).

Respondents cannot cherry pick among the Appellants to avoid arbitration under the Pro Net agreement. If a party "can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified." *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990) (citation omitted).

If the Court concludes that some, but not all, Appellants are covered by the Pro Net arbitration clause (which we do not believe is true), the entire intertwined action

[11] A3700 lists the parties (which did not include Dunn) that the court in *U-Can-II* held were covered by the Pro Net agreement.

should be stayed pending arbitration. *See, e.g., Fru-Con Constr. Co. v. Southwestern Redev. Corp. II*, 908 S.W.2d 741, 741-45 (Mo. App. E.D. 1995); RSMo § 435.355.4.

C. The Pro Net Arbitration Clause covers this dispute

The second element of the two-part test for arbitrability is also satisfied here because the "specific dispute falls within the substantive scope of that agreement." *Dunn Indus. Group*, 112 S.W.3d at 427-28.

As this Court has explained, "In construing arbitration clauses, courts have categorized such clauses as 'broad' or 'narrow.' A broad arbitration provision covers all disputes arising out of a contract to arbitrate; a narrow provision limits arbitration to specific types of disputes." *Id.* at 428 (quoting *McCarney v. Nearing, Staats, Prelogar & Jone*, 866 S.W.2d 881, 889 (Mo. App. W.D. 1993)).

Thus, the Pro Net arbitration clause, which covers "any dispute, controversy, or claim arising out of, relating to, or concerning . . . ." is very broad. (A0440.) *See Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (9th Cir. 1997) (an arbitration clause covering disputes "arising from" and "relating to" the provision "constitutes the broadest language the parties would reasonably use").

The *U-Can-II* court held that "the gist of [the Plaintiffs'] claims is that the Defendants used Pro Net to take [their] BSM business, a subject matter that ***clearly is within the scope of the Pro Net arbitration clause***." (A3690; emphasis added.) Respondents' claims also fall within this clause because it covers all disputes among Pro Net members *and* all issues relating to the "interpretation or performance" of the Pro Net contract." (A0440.) The allegation, for instance, that Appellants' "conspiracy" resulted

in the Mr. Stewart's "unauthorized" and "ultra vires" suspension obviously rests upon "interpretation or performance" of the Pro Net contact. (A0727.)

D. The Circuit Court's grounds for decision do not apply to the Pro Net Arbitration Clause

Although the Circuit Court's analysis of the Amway arbitration procedures is deeply flawed for reasons explained below, it has no bearing on the Pro Net agreement. The court erred by neither addressing this separate contractual obligation nor the fact that the agreement provided that "by joining the Association, Member acknowledges that, pursuant to the Terms and Conditions incorporated in this Membership Application, Member is agreeing to participate and abide by . . . use of ***American Arbitration Association arbitration procedures*** . . . ." (A0436; emphasis added.)

E. Respondents are not entitled to a jury trial as to the making of the arbitration agreements at issue

Finally, any claim of a right to a jury trial on Appellants' motion to compel arbitration must fail because the procedures embedded in the Missouri Uniform Arbitration Act ("MUAA") provide that a court, sitting without a jury, should "proceed summarily" to decide such a motion.

The Missouri procedural requirement of a summary procedure determining arbitrability is fully consistent with the federal policy set forth in the FAA that arbitrations should be conducted quickly and efficiently. The summary procedure requirement is fully consistent with the Missouri Constitution because Appellants' motion for an order compelling arbitration seeks specific performance under a contract

and thus an equitable remedy not triable to a jury. Any manufactured "right" to a jury trial on arbitrability – to determine if Respondents have a right to a jury trial on the merits – would undermine the purposes of the FAA, create conflict among states that have adopted the Uniform Arbitration Act and vitiate the right of Missouri businesses to agree to arbitrate disputes.

As we show below, even if the procedural aspects of FAA § 4 were applied to this Missouri action, there would be no right to a jury trial because there are no genuine issues of material fact regarding the making of the arbitration provisions. Any attempt to graft federal procedure into this case should nonetheless be rejected. A fundamental principle of federalism is that, except in rare situations, "[t]here has been no surrender by the states of the right to establish their own courts, to define and limit their jurisdiction and functions, and to regulate and control them in all respects." *Ex parte Gounis*, 263 S.W. 988, 990 (Mo. 1924). It is "settled constitutional law" that "Congress cannot . . . regulate or control their modes of procedure." *Id.*

Under established Missouri motions practice, it is within the discretion of a trial court to determine whether to hold an evidentiary hearing on a motion to compel arbitration. Regardless of how this issue is resolved, and indeed even if the procedures of FAA § 4 are applied, the outcome is the same under the facts of this case because Respondents cannot show a genuine issue of material fact. The motion to compel arbitration should therefore have been granted.

1. Missouri law provides that the court, without a jury, decides whether to grant specific performance compelling arbitration

a. The MUAA provides for a court to "proceed summarily"

In June 1980, Missouri enacted the MUAA as a modified version of the Uniform Arbitration Act of 1955 ("UAA"), which, in turn, was based on Congress's passage of the FAA in 1925. All three Acts are intended to allow parties to resolve their disputes in an easier and less expensive manner than by litigation. *See generally* 1 Larry E. Edmondson, *Domke on Commercial Arbitration* § 22:13, at 22-41 (3d ed. 2003).

The MUAA provides opportunities for judicial intervention at various stages of the arbitration process. Under section 435.425 (UAA § 16), all such applications to the court are to be "heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions." This provision is similar to FAA § 6, which "expedite[s] judicial treatment of matters pertaining to arbitration." *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 365-66 (2d Cir. 1965).

The first opportunity to apply to a court under the MUAA arises when disputes to arbitrability arise. *See* RSMo § 435.355.1 (UAA § 2(a)). Under this provision, "if the opposing party denies the existence of the agreement to arbitrate, the court ***shall proceed summarily to the determination of the issue so raised*** and shall order arbitration if found for the moving party; otherwise, the application shall be denied." *Id.* (emphasis added). This Court has explained that under section 435.355.1 "a court may order parties to proceed to arbitration on the application of a party showing an agreement to arbitrate as

provided in section 435.350."[12] *Murray v. Missouri Highway & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001).

Conversely, under section 435.355.2 (UAA § 2(b)), a court may stay arbitration that is either threatened or pending on a showing that there is no such agreement. "***Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried*** . . . ." *Id.* (emphasis added.) In *St. Luke's Hosp. v. Midwest Mech. Contractors, Inc.*, 681 S.W.2d 482, 486 (Mo. App. W.D. 1984), it was found as a matter of first impression that, under section 435.355.2, '***[t]he court is authorized to summarily and forthwith try the issue and render its decision upon the evidence submitted by the parties***." *Id.* at 487 (emphasis added).

Thus, in either case, when disputes regarding arbitrability arise, "upon application of a party to enforce the agreement, or alternatively to stay a proceeding, the provision is to be taken up by a court having jurisdiction[] and decided promptly." *State ex rel. Telecom Mgmt. v. O'Malley*, 965 S.W.2d 215 (Mo. App. W.D. 1998).

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[12] Under section 435.350, "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Other than its exclusion of "contracts of insurance and contracts of adhesion," this language tracks UAA § 1.

Therefore, while Missouri courts have not addressed the specific question of a party's right to a jury under section 435.355.1, the statutory language and existing case law clearly show that the section should not be read to include such a right.

Moreover, this understanding of "proceed summarily" is consistent with this Court's longstanding definition of "summary manner" as "forthwith and without regard to the established course of legal proceeding." *Birmingham Drainage District v. Chicago, B. & Q. R. Co.*, 202 S.W. 404, 408 (Mo. 1917). Citing this case, the Eastern District Court of Appeals recently noted that "***the term 'summary manner' does not envisage the use of standard discovery mechanisms or jury trials***." *In re Fabius River Drainage Dist.*, 35 S.W.3d 473, 485 (Mo. App. E.D. 2000) (emphasis added).

The *Fabius* court also cited this Court's guidance in *Semple's Estate v. Travelers Indem. Co*., 603 S.W.2d 942 (Mo. 1980), that "**trial court proceedings that include a jury trial are not conducted in a 'summary manner.'**" 35 S.W.3d at 485 (emphasis added). In Semple's Estate, the Court, while affirming a judgment under the probate code, noted that section 435.207 is "a summary procedure" and that, contrary to this section, the party's "liability was not determined in a summary manner, but in a jury trial." 603 S.W.3d at 945. In language similar to the MUAA, section 435.207 provides that "[o]n breach of the obligation of the bond of the personal representative, **the court . . . may summarily determine the damages** . . . ." (Emphasis added.) Thus, this Court's observation that summary proceedings do not include jury trials is particularly relevant here.

b. Other state supreme courts and the National Conference of Commissioners have found that a motion to compel arbitration is subject to a bench determination

Uniform construction among the states adopting the UAA is one of the primary purposes of the uniform statute, and the MUAA – in section 435.450 (UAA § 21) – provides that it "shall be so construed as to effectuate [this] general purpose." This statutory directive "gives special value to the precedents of other states on the same issue." *State ex rel. Tri-City Constr. Co. v. Marsh*, 668 S.W.2d 148, 150 (Mo. App. W.D. 1984).

It is therefore highly significant that other state supreme courts hold that proceeding "summarily" under the UAA means simply and without a jury. Most recently, on June 28, 2005, the Supreme Court of Oklahoma set out the "summary procedures" whereby a court, alone, is to decide a motion to compel arbitration under the Oklahoma Uniform Arbitration Act. *Rogers v. Dell Computer Corp.*, No. 99,991, 2005 Okla. LEXIS 49 (Ok. June 28, 2005).

This holding is consistent with high court decisions in California and Texas mandating such bench determinations. *See, e.g., Rosenthal v. Great Western Fin. Secs. Corp.*, 926 P.2d 1061, 1072 (Cal. 1996) ("A party opposing contractual arbitration of a dispute does not have the right to a jury trial of the existence or validity of the arbitration agreement."); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992) ("When Texas courts are called on to decide if disputed claims fall within the scope of an arbitration clause under the Federal Act, Texas [summary] procedure controls that determination.").

In contrast to the wealth of authority and logic supporting the notion that "summary" procedures do not include jury trials, we are not aware of *any* court holding that the UAA mandates a jury trial on a motion to compel arbitration. This understanding is reflected in the Revised Uniform Arbitration Act ("RUAA") adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 2000. *See generally* Timothy J. Heinsz, *Arbitration Law: Is There a RUAA in Missouri's Future?*, 57 Mo. B.J. 53 (2001).

While not binding in Missouri, the RUAA provides a useful lens through which to examine the MUAA. RUAA § 5, for instance, is based on UAA § 16 (section 435.425) and provides that arbitration-related applications are to be made by motion. Official Comment 1 to this section notes, in part, that "***legal actions to a court involving an arbitration matter under the RUAA will be by motion and not by trial***." (Emphasis added.) Official Comment 2 further observes: "Legal actions under both the UAA and FAA generally are conducted by motion practice and are not subject to the delays of a civil trial. This system has worked well and the intent of Section 5 is to retain it."

Perhaps most importantly, RUAA § 7 retains the language of UAA § 2(a) (section 435.355.1) providing that, if a party opposes arbitration, "the court shall proceed summarily to decide the issue . . . ." The Official Comment notes:

> ***The term "summarily" in Section 7(a) and (b) is presently in UAA Section 2(a) and (b) [and section 435.355]. It 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). In reviewing RUAA § 7, two scholars noted:

> ***Significantly, the RUAA drafters . . . reiterate[d] the UAA rule that application for judicial relief (for enforcement of the arbitration agreement or otherwise) is to be made and decided as a motion, rather than by trial as provided in the FAA.*** As a result, state actions to enforce arbitration agreements under the RUAA are not complicated by jury trial rights, as is true under the FAA.[13]

Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 Fla. L. Rev. 175, 216 (2002) (footnote omitted) (emphasis added).

[13] As discussed in detail below, even under the FAA, these "jury trial rights" attach only upon a showing that there are genuine issues of material fact regarding the making of the arbitration agreement. *See, e.g.*, *Third Millennium Techs., Inc. v. Bentley Sys., Inc.*, No. 03-1145-JTM, 2003 U.S. Dist. LEXIS 14662, at *6 (D. Kan. Aug. 21, 2003).

c. The MUAA codifies the constitutional principle that there is no right to a jury trial for the equitable remedy of specific performance

As this Court has explained, an agreement to forego the use of litigation is enforceable under the Missouri Constitution:

> Our courts have held that a party may contractually relinquish fundamental and due process rights. ***Arbitration agreements are an example where the courts have upheld the parties' right to contractually agree to relinquish substantial rights. In every arbitration agreement, the parties not only agree to waive a jury trial but also to give up their right to present their claim to any judicial tribunal deciding the case***.

Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624, 626 (Mo. banc 1997) (footnote omitted) (emphasis added).

Enforcement of an arbitration agreement does not touch upon these "substantial rights" because a court has "no business weighing the merits of the [underlying] grievance" when deciding a motion to compel arbitration. *Village of Cairo v. Bodine Contracting Co*., 685 S.W.2d 253 (Mo. App. W.D. 1985) (quoting *United Steelworkers of Am. v. Am. Manufacturing Co*., 363 U.S. 564, 567 (1960)). Indeed, section 435.355.5 (UAA § 2(e)) specifically provides that "[a]n order for arbitration shall not be refused on the ground that the claim in issue lacks merits or bona fides . . . ."

Therefore, "[a]n order compelling arbitration is in fact an order for specific performance, the duty to arbitrate arising from, and being governed by, the contract creating it." *Pettinaro Constr. Co. v. Harry C. Partridge, Jr. & Sons, Inc.*, 408 A.2d 957, 962 (Del. 1979); *see also Rosenthal*, 926 P.2d at 1070 ("A petition to compel arbitration is in essence a suit in equity to compel specific performance of a contract.") (quotation omitted).

These holdings are consistent with the long line of decisions by this Court that "[t]o decree specific performance of certain contracts has long been a function of courts of equity. It is purely an equitable remedy and therefore governed by equitable principles." *Hoover v. Wright*, 202 S.W.2d 83, 86 (Mo. 1947). As this Court explained just last year: "[L]abeling an action as equitable or legal in the modern sense typically bespeaks the type of relief being sought. Equitable remedies are coercive remedies like declaratory judgments and injunctions, the latter of which includes ***specific performance*** and some types of restitution." *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462, 470 (Mo. banc 2004) (citations omitted) (emphasis added).

After analyzing the equitable nature of specific performance, the California Supreme Court held in its leading *Rosenthal* decision: "We find no violation of state constitutional rights in the summary procedure for decision, without jury, of whether a valid arbitration agreement exists." 926 P.2d at 1070. "The plaintiff is not impermissibly denied a jury trial when the superior court decides only the facts necessary to determine specific enforceability of an arbitration agreement, an equitable question as to which no jury trial right exists." *Id.* at 1071.

The same conclusion should be reached here because "Missouri's constitutional guarantee to a jury trial has never been applied to claims seeking equitable relief." *Sherry*, 137 S.W.3d at 472; *see also State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003) ("An action that is equitable in nature, as viewed in historical perspective and with respect to the equitable remedy sought, does not come within the jury trial guarantee.").

2. The procedures of FAA § 4 do not preempt the procedures of Section 435.355.1

Although the FAA creates a substantive arbitration right applicable in state as well as federal courts, it also includes various procedural provisions. *See, e.g., Cronus Inv., Inc. v. Concierge Servs.*, 107 P.3d 217, 225-26 (Cal. 2005). This dichotomy has been noted several times by the U.S. Supreme Court, including in *Southland Corp. v. Keating*, 465 U.S. 1 (1984):

> In holding that the [FAA] preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.

Id. at 15 n.10.

Consistent with these principles, this Court should enforce the substance of the FAA while applying the appropriate Missouri procedure. "States may apply their own neutral procedural rules to federal claims, unless the rules are pre-empted by federal law." *Howlett v. Rose*, 496 U.S. 356, 372 (1990). For the reasons below, there is no such preemption here because the neutral MUAA procedures at issue are fully consistent with the FAA.

As a threshold matter, we note that a "reverse *Erie*" analysis – that is, an argument that federal procedure should displace state rules – is guided by the principle that the *lex fori* (the "law of the forum") governs procedure. This principle recognizes the "importance of state control of state judicial procedure" and the basic fact "that federal law takes the state courts as it finds them." *Id.* (citations and quotations omitted). Missouri has "great latitude to establish the structure and jurisdiction of [its] own courts," *id*., and any argument that FAA § 4 procedures supersede those of section 435.355.1 would face a high federalism hurdle.

Generally speaking, state law is preempted in three circumstances. Although these circumstances are commonly analyzed separately, each reflects that "the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotation omitted).

First, Congress can define explicitly the extent to which an enactment such as the FAA preempts state law. *See, e.g., Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 299 (1988). The FAA "contains no express pre-emptive provision." *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468, 477 (1989).

Second, "[i]n the absence of explicit statutory language . . . Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law." *Schneidewind*, 485 U.S. at 299. Such intent must be "clear and manifest" to supersede an area of law "traditionally occupied by the States." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

In *Volt*, the U.S. Supreme Court clarified that the FAA does *not* "reflect a congressional intent to occupy the entire field of arbitration." 489 U.S. at 477. To the contrary, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476.

The literal terms of FAA § 4 – the specific federal provision raised by Respondents – reflect that state authority over arbitration has not been displaced entirely. The section, for instance, addresses the "Federal Rules of Civil Procedure," which clearly do not control Missouri state actions. "By its literal language, § 4 is applicable only to United States District Courts." *United Nuclear Corp. v. Gen. Atomic Co.*, 597 P.2d 290, 308 (N.M. 1979). Indeed, the Supreme Court of New Mexico "found no authority which indicates that a party may petition a state court for an order to compel arbitration under § 4 of the Federal Arbitration Act." *Id.* (citation omitted).[14]

[14] Since *United Nuclear Corp.*, a few state courts have applied FAA § 4's procedures in state-filed actions. Most of these decisions are short and assume, without analysis, that FAA § 4 applies to the proceedings. *See, e.g.*, *England v. Dean Witter Reynolds*, 811

(footnote continued on next page)

As noted above, the U.S. Supreme Court in *Southland* expressed doubt that the mechanisms of FAA § 4 apply in state court. Similarly, the *Volt* Court found "some merit" in the argument that FAA §§ 3 and 4 do not apply to state proceedings and noted, *inter alia*, that the Court had "***never held*** that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court . . . are nonetheless applicable in state court." 489 U.S. at 477 & n. 6 (citations omitted) (emphasis added).

In *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 433 (Mo. banc 2003, this Court cited *Volt* while "also find[ing] it unnecessary to resolve" whether FAA § 3 provides a party in a state proceeding with a right of appeal from an order denying a motion to stay litigation pending arbitration. Nonetheless, we note that the Court ordered that "[o]n remand, the trial court will comply with all relevant statutory provisions, ***including section 435.355.4.***" *Id*. (emphasis added).[15]

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S.W.2d 313, 314 (Ark. 1991) (fewer than two full pages). Most importantly, these decisions do not rest on the notion that federal procedures would result in a different substantive outcome in those cases. *See, e.g.*, *id*. at 315 ("Substantively, the lower court made the correct decision.").

[15] In a July 5, 2005 opinion, the Court of Appeals held that it had jurisdiction under section 435.440.1 and cited *Dunn* and *Volt* while noting "we need not determine whether Sections 3 and 4 [of the FAA] are applicable to a circuit court in this State." *Whitney v. Alltel Comm., Inc.*, No. WD64196, 2005 Mo. App. LEXIS 1016, at *6-7 (Mo. App. W.D.

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Third, state law, of course, is preempted to the extent that it actually conflicts with federal law. Thus, as this Court has explained, "[a]ny requirement of state law which adds a burden not imposed by Congress [under the FAA] is in derogation of the Congressional power." *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 838 (Mo. banc 1985).

Section 435.355.1 is therefore preempted only if its procedures "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Volt*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Missouri procedures cannot "defeat the rights granted by Congress" under the FAA. *Strain-Japan R-16 Sch. Dist. v. Landmark Sys.*, 51 S.W.3d 916, 920 (Mo. App. E.D. 2001).

No such tension exists. The MUAA procedural rule providing for a bench determination of an equitable remedy clearly does not undermine the intent of Congress in enacting the FAA "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

Nor does this state procedure run afoul of the congressional intent "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Id.* (quotation omitted). As discussed above, Section 435.355.1 simply applies longstanding

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July 5, 2005).

equitable principles to an application for specific performance. Thus, the "same footing" requirement would be violated only if the MUAA provided for a jury to sit in equity.

Even under FAA § 4 (which itself provides that "the court shall proceed summarily to the trial thereof"), "[a] party resisting arbitration cannot obtain a jury trial merely by demanding one." *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996). FAA § 4 "requires a trial on the question of the existence of an agreement to arbitrate only if there is a genuine factual issue as to the existence of a contract." *In re McDonald's Corp. Promotional Game Litig.*, No. 02 C 1345 (MDL No. 1437), 2004 U.S. Dist. LEXIS 4471, at *6 (N.D. Ill. Mar. 22, 2004). As demonstrated throughout this brief, that is a showing that Respondents are simply unable to make.

In fact, without its summary procedures, the MUAA would raise a constitutional red flag because a "full trial" requirement for every motion to compel arbitration would undermine the policy of the FAA by, in effect, imposing exorbitant arbitration fees in the form of litigation costs. *Cf. Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 607 (Wash. Ct. App. 2002) ("If the up front costs of arbitration have the practical effect of deterring a consumer's claim, the arbitration agreement should not be enforced.").

"The function of arbitration is to be a speedy, efficient and less expensive alternative to court litigation, which is a cornerstone of both the federal and state acts." *In re Estate of Sandefur*, 898 S.W.2d 667, 669-70 (Mo. App. W.D. 1995). Because section 435.355.1 furthers these objectives, its summary nature, alone, does not violate the supremacy clause. *See, e.g., Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex.

1992) (approving summary bench procedure because, *inter alia*, "the main benefits of arbitration lie in expedited and less expensive disposition of a dispute").

In the end, then, the case for procedural preemption under FAA § 4 must rest on the slender reed that juries instead of judges should decide issues of arbitrability. But this argument itself has been rejected summarily. *See, e.g.*, *Rogers*, 2005 Okla. LEXIS 49, at *12 (finding that bench determination of a motion to compel arbitration "does not frustrate the purposes underlying the FAA"). The California Supreme Court unanimously held:

> [T]he summary procedure provided, in which the existence and validity of the arbitration agreement is decided by the court in the manner of a motion, is designed to further the use of private arbitration as a means of resolving disputes more quickly and less expensively than through litigation. Finally, having a court, instead of a jury, decide whether an arbitration agreement exists will not frequently and predictably produce different outcomes.

Rosenthal, 926 P.2d at 1069-70 (citations and footnote omitted). Indeed, having lay juries making such an essentially equitable determination would be contrary to longstanding law undermine the coherent development of arbitration, thus frustrating the strong federal policy in favor of arbitration.

There is no reason for this Court to reach a contrary conclusion from the supreme courts of California and Oklahoma. The MUAA – like the laws in California and

Oklahoma – is adopted from the UAA.[16] In this regard, the preemption analysis benefits from the extensive work done by the NCCUSL in preparing the RUAA.

The reporter to the RUAA drafting committee – late Dean Heinsz – observed that it gave particular attention to preemption concerns: "[T]he strong policy of federal preemption under the FAA acted as a backdrop to all the discussions of the Drafting Committee while it deliberated the RUAA." Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, J. Disp. Resol. 1, 5 (2001). Therefore, "[t]o avoid federal preemption problems for the RUAA, the Drafting Committee worked diligently to write provisions consistent with the FAA's pro-arbitration policy and not to treat law regarding state arbitration statutes different from the general state law of contracts." *Id.* (footnote omitted).

In light of this preemption "backdrop," it is telling that (as discussed above) the UAA/MUAA provisions at issue here emerged from the recent revision process substantively unchanged. RUAA § 7(a)(2), UAA § 2(a) *and* section 435.355.1 all provide that a "court shall proceed summarily to decide the issue . . . ." Not only did the NCCUSL find no need to alter this language, the drafting committee was comfortable adding the Official Comment quoted in full above that "[t]he term 'summarily' . . . has

[16] By contrast, one of the few MUAA provisions not found anywhere in the UAA – the notice of arbitration requirement in section 435.460 – was found to conflict with federal policy favoring arbitration. *See Bunge*, 685 S.W.2d at 838-39.

been defined to mean that ***a trial court should act expeditiously and without a jury trial*** to determine whether a valid arbitration agreement exists." (Emphasis added.)

3. The only procedural question is when a bench evidentiary hearing should be held on a Motion to Compel Arbitration

As noted above, section 435.425 (UAA § 16) specifically provides that an application under the MUAA is to be heard in the same manner and on the same notice as a motion in a civil case. *See Doyle v. Thomas*, 109 S.W.3d 215, 219 (Mo. App. E.D. 2003). These motion practices, of course, are codified in the Missouri Rules. *Cf. St. Luke's Hosp. v. Midwest Mech. Contractors, Inc.*, 681 S.W.2d 482, 487 (Mo. App. W.D. 1984) (describing how the MUAA provides for a court to "entertain an application" to stay arbitration and "[u]pon a showing that there exists such an agreement, the court merely denies the application for the stay of arbitration proceedings").

This Court has observed, "[i]t has been recognized that the decision on whether or not an evidentiary hearing is required is a matter for the trial court's discretion and only if this discretion is abused will an appellate court reverse and require an evidentiary hearing." *Senn v. Manchester Bank of St. Louis*, 583 S.W.2d 119, 133 (Mo. banc 1979) (citing *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975)) (holding trial court did not err by ruling on class certification motion without hearing). In Missouri, "Rule 55.28 codifies the normal practice of deciding motions of affidavits." *Id.* at 134.

The only question under these procedures is when, or if, an evidentiary hearing should be held by a Missouri court deciding a motion to compel arbitration. Although other jurisdictions have reached various conclusions, their general tenor was set four

decades ago when the Second Circuit held that the FAA is intended "to expedite judicial treatment of matters pertaining to arbitration." *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 365 (2d Cir. 1965). Therefore:

> ***Motions [under FAA § 6] may be decided wholly on the papers, and usually are, rather than after oral examination and cross-examination of witnesses***. . . . A district court may, in its own discretion, order a trial-like hearing . . . but under the Federal Arbitration Act it is not an abuse of discretion for a district court, as here, to decline to do so.

Id. at 365-66 (emphasis added).

Broadly speaking, state decisions approaching this issue under the UAA have taken two approaches. Some courts find that a trial court does not abuse its discretion by resolving evidentiary conflicts without a hearing. *See, e.g., United Nuclear Corp.*, 597 P.2d at 308; *Rosenthal*, 926 P.2d at 1069-70. Other courts hold that an evidentiary hearing should be held if a court finds a genuine issue of material fact. *See, e.g., Jack B. Anglin Co.*, 842 S.W.2d at 269; *Haynes v. Kuder*, 591 A.2d 1286, 1290 (D.C. App. 1991). Significantly, under none of these approaches is there a right to a jury trial.

In the most recent case, the Supreme Court of Oklahoma held: "The decision to grant a hearing will be in the discretion of the district court. However, if the existence of an agreement to arbitrate is controverted, then the better procedure is for the district court to conduct an evidentiary hearing." *Rogers*, 2005 Okla. LEXIS 49, at *14 (citations omitted). "In making its decision, the district court should be mindful of the FAA's

policies favoring arbitration; ambiguity falls on the side of the existence of an agreement to arbitrate." *Id.*

4. In any event, the same result occurs in this case under FAA or MUAA procedures

In the final analysis, the outcome of this case would not be different even if the this Court were to apply the procedures of FAA § 4 or conclude that a party is entitled to an evidentiary hearing under the MUAA.[17] *Compare Topf v. Warnaco, Inc.*, 942 F. Supp. 762, 766-67 (D. Conn. 1996) ("A party moving for a jury trial under § 4 must show the existence of a genuine issue involving the making of the arbitration agreement.") *with Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 58 (Mo. banc 2005) ("Summary judgment is only proper [under Missouri law] if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.").

As discussed above, the parties were given ample opportunity below to conduct discovery, and they created an ample record, including extensive affidavits, numerous business records and other documentary evidence. As demonstrated in detail above, this well-developed record shows that Respondents cannot show a *genuine* issue of *material* fact as to the making of the Pro Net arbitration agreement.

[17] In *Haynes*, the D.C. Court of Appeals concluded that the question of "whether a jury trial is available under the District of Columbia Uniform Arbitration Act on the issue of existence of an agreement to arbitrate" had been "moot[ed]" by its holding that "the trial judge correctly granted what amounts to summary judgment." 591 A.2d at 1290 n.7.

In the final analysis, the record shows, *inter alia*, that (i) Mr. Stewart and the other founders signed a "Transition-to-Pro Net" agreement that twice references their respective "organizations" (A0441) and Stewart later complained to the Pro Net Board about the "great disservice . . . [to] my organization" (A2466); (ii) Stewart signed a Pro Net membership application in Nitro's name (A0438) before the purchase of tapes and other tools from Global (A2711-14) and (iii) the facts established by the Third Amended Petition show that West Palm and Nitro operate in "tandem" as part of the "Stewart Organization" (A0686-88) and "Nitro joined the Pro Net fold as a founding member and took its BSMs business to Pro Net, closing its Missouri warehouse." (A0751.)

No credibility determinations are needed to hold that Nitro and West Palm are bound by the Pro Net agreement and estopped from arguing otherwise. Respondents' own pleadings, Mr. Stewart's signed agreements and undisputed business records show that there are no genuine questions of material fact as to the making of the Pro Net arbitration provision. As a result, there is no need for either an evidentiary hearing (under the MUAA) or a jury trial (under the FAA).

II. The Trial Court erred in denying Appellants' Motion to Compel Arbitration and to Stay Litigation Pending Arbitration, because the Court based its decision solely on the Arbitration Clause in the Amway Rules of Conduct but failed to consider the Transition-to-Pro Net Arbitration Agreement which bound Respondents and fourteen of the eighteen Appellants to arbitrate all issues in this case

A. Standard of Review

This Court's review of the arbitrability of a dispute is *de novo*. *Dunn Indus. Group*,112 S.W.3d at 428.

B. The Transition-to-Pro Net Agreement requires arbitration of this action

1. The Agreement is binding

It is undisputed that Mr. Stewart as well as Messrs. Gooch, Childers, Foley and Woods executed the Transition-to-Pro Net agreement. (A0441-44.) This agreement provides for submission of claims for arbitration to administered by the national organization JAMS (*see* Point III.D) and is captioned "In re: ARBITRATION AGREEMENT." (A0441.) The parties modified its standard language by crossing out "the above-captioned matter" in the first line, which begins: "The Parties hereby agree to submit . . . ." In its place is this clear handwritten provision: ". . . 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***." (*Id.*; emphasis added.)

"To determine whether a 'meeting of the minds' occurred and an agreement reached, the court looks to the intention of the parties as expressed or manifested in their words or acts." *Brand v. Boatmen's Bank of Cape Girardeau*, 824 S.W.2d 89, 91 (Mo. App. E.D. 1992).

Here, Mr. Stewart signed an arbitration agreement explicitly referencing "organizations," but Respondents, who admit to being members of the Stewart Organization, claim they are not bound to arbitrate under the agreement. Yet the petition they filed in court in lieu of arbitration constantly references the "Stewart Organization" and alleges that Appellants sought to "undermine the entire Stewart Organization, including Nitro and West Palm." (A0736.) As discussed above, Respondents should not be allowed to isolate or ignore the meaning of "organization" in an agreement they seek to avoid while seeking damages allegedly resulting to their "organization" as a result of that same agreement.

This is particularly true since the Third Amended Pleading itself shows the objective intent of the agreement. For instance, not only do Respondents say Mr. Stewart closed his Missouri warehouse after the agreement was signed, they even allege that "Nitro (Stewart)" "contributed" some $650,000 in tools "to stock the Pro Net warehouse in Florida" and was the ***only*** "member of Pro Net to contribute inventory or any significant cash to Pro Net's startup." (A0721-22.)

The Court should not permit a shell game that would allow a company to evade contracts on the grounds that their president did not mean to sign the contract on behalf of the company. *See Utley Lumber Co. v. Bank of the Bootheel*, 810 S.W.2d 610, 612 (Mo. App. S.D. 1991).

In addition, the Court should hold that fourteen of the eighteen Appellants are entitled to compel arbitration of their disputes with Respondents under the Transition-to-Pro Net agreement.[18] Four Appellants signed the Transition-to-Pro Net agreement (Appellants Gooch, Childers, Foley and Woods) on behalf of their organizations (which include Appellants Gooch Systems, Gooch Enterprises, TNT, T&C Foley and G.F.I). (A0441-444.) A tenth Appellant, Global, executed the agreement through its President, Brown. (A0444.) Appellant Brindley, as discussed above, has been sued because he was a principal of Global and is entitled to the benefit of the agreement. (A0692.)

Appellants Pro Net and its subsidiary, Pro Net I, are entitled to arbitration because the claims against them sound in the same business relationship – the formation of Pro Net from which Respondents have benefited and which Pro Net and Pro Net Global I are

[18] The four Appellants not associated with the Transition-to-Pro Net agreement are the members of the Dunn Organization (Appellants Dunn and Dunn Associates) and the Grabill Organization (Appellants Grabill and Grabill Enterprises). As discussed above, these Appellants joined Pro Net shortly after its creation. As discussed above, the intertwined claims against these Appellants should be stayed if arbitration is ordered pursuant to the transition agreement.

enmeshed. Finally, as discussed above, Appellant Blanchard has been sued solely because of his position as Chief Operating Officer of Pro Net, and therefore has the right to demand arbitration. *See, e.g.*, *Madden v. Ellspermann*, 813 S.W.2d 51, 53 (Mo. Ct. App. 1991).

2. The Agreement covers this dispute

The Transition-to-Pro Net agreement requires arbitration of "any and all" disputes arising out of the formation of, and transition to, Pro Net and the Pro Net founders' responsibility for training and educating their downlines. (A0441-44.) The clause, by its plain language, reaches "any and all issues arising out of the transition." (A0441.) The allegations here clearly relate to this provision because Respondents claim that Appellants interfered and, eventually took control of, a large part of the "Stewart Network." (*E.g.*, A0717; A0722-27.) Thus, the Third Amended Petition alleges, *inter alia*, that the conspiracy included "breaking away" from the Yager Group (which signed the agreement through Jeff Yager) and creating Pro Net. (A0718.) Respondents' repeatedly allege that Pro Net was a "sham" and Appellants' instrument to obtain control over the Stewart Organizations' BSMs business. (*E.g.*, A0715-18; A0723-24.) These allegations are encompassed by the "any and all" language of the agreement, and the Court should order arbitration pursuant to the signed agreement.

III. The Trial Court erred in denying Appellants' Motion to Compel Arbitration and to Stay Litigation Pending Arbitration, because the Court's conclusion that the Amway Arbitration Procedures were unconscionable misapplies the law in that the Amway Rules of Conduct bound all parties to Arbitrate all issues in this case

A. Standard of Review

This Court's review of the arbitrability of a dispute is *de novo*. *Dunn Indus. Group, Inc.*, 112 S.W.3d at 428.

B. The Amway Rules require arbitration of this action

1. Nitro and West Palm are bound

For the reasons discussed above, Nitro and West Palm are bound to the Amway Rules and their challenges to the Amway distributor agreement as a whole should be heard by the arbitrator. As demonstrated above, these Pro Net members agreed to arbitration under both the AAA Rules (*see* Point I) and arbitration under the Amway Rules. (A0434; A0439.) There is nothing wrong with such a "belt and suspenders" approach to arbitration. *See, e.g., Johnson Controls, Inc. v. City of Cedar Rapids, Iowa*, 713 F.2d 370, 374 (8th Cir. 1983) (giving effect to two arbitration clauses in a contract.). As the *U-Can-II* court explained in holding that a similarly situated plaintiff was bound to arbitrate under both provisions:

> Paragraph 3 of the Pro Net Terms specifically provide that "Member agrees to adhere to the Amway Corporation's Code of Ethics and Rules of Conduct for distributors. . . . By

> agreeing to comply with the Amway Rules, [plaintiff] contractually assumed the duty to arbitrate provided in those Rules.

(A3554-55.)

Leaving aside Pro Net membership, Nitro and West Palm are bound to arbitration under the Amway Rules as third-party beneficiaries of Stewart Associates' Amway distributor agreement. (A0445-48; A0451.) *See, e.g., Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868, 873 (Mo. App. S.D. 2004). This beneficial relationship has been discussed above and can be seen in Respondents' allegation that "***Nitro and West Palm have the benefit Stewart Associates' downline distributors . . . such that Nitro's and West Palm's "downline" are those downline distributors (or their related "tool" and/or function businesses) of Stewart & Associates***." (A0686; emphasis added.)

The intent to make Nitro and West Palm third-party beneficiaries can gleaned from the Amway Rules. The tools business of Nitro and the functions business of West Palm are each clear beneficiaries of such Amway Rules as Rule 4.14 (which protects downline sales of BSMs), Rule 7 (entitled "BSMs" and which regulates their contents) and Rule 7.8 (which addresses functions).[19] (A1623-24.) Moreover, the claims asserted

[19] Therefore, after an informal conciliation regarding whether this dispute was subject to the Amway Rules, Jody Victor (the Amway IBOA International Hearing Panel Chairperson) concluded that "the intent of Rule 11 [regarding ADR] was to include the kinds of disputes at issue here." (A2505-06.)

by Nitro and West Palm in this case derive from the Amway Rules and Respondents even allege that Amway requires them to "train" and "motivate" their downline distributors." (A0699.) As discussed above, Respondents cannot "have it both ways." *Foster v. Sears Roebuck & Co.*, 837 F. Supp. 1006, 1008 (W.D. Mo. 1993).

Nitro and West Palm are also bound as agents of Mr. Stewart, who personally has agreed to be bound by the Amway Rules. The documents effectuating Mr. Stewart's 1985 transfer of his Amway distributorship to Stewart Associates plainly state: "The corporation, ***and each shareholder, director, and officer*** agree that: . . . (b) They will comply with the Amway Sales and Marketing Plan and the Rules of Conduct for Amway distributors." (A2935; emphasis added.) In *U-Can-II*, the court held that this Amway form bound the individual to the Amway Rules (A3550.) The same conclusion should be reached here.

Under Missouri law, "non-signatory agents [are] bound by arbitration agreements signed by their principals." *Byrd v. Sprint Comm. Co.*, 931 S.W.2d 810, 815 (Mo. App. W.D. 1996). A principal-agent relationship exists here because, *inter alia*, Mr. Stewart is Respondents' principal (A3252; A3289), Respondents could enter into contracts regarding tools and functions (A0686-87; A0712), and Respondents allege that they worked in "tandem" to "build, support and enhance Stewart Associates' Amway business" (A0686-87).

In any event, as with the Pro Net agreement, Respondents' long connection with, embrace of, and enrichment from the Amway business estop them from avoiding the Amway arbitration procedures to which they have committed themselves.

2. Appellants are entitled to compel arbitration

Each Appellant is entitled to compel arbitration under the Amway arbitration agreement, and several have more than one basis for doing so.

As discussed above, thirteen Appellants (Gooch, Childers, Foley, Woods, Dunn, Grabill, Gooch Systems, Gooch Enterprises, Dunn Associates, T&C Foley, TNT, G.F.I. and Grabill Enterprises) are bound through their Pro Net memberships.

A fourteenth Appellant, Brindley (as well as T&C Foley, Dunn Associates and Grabill Enterprises), is a current Amway distributor bound by the arbitration provision. (A2133; A2159; A2187; A2320.) Appellants Gooch, Childers, Woods, Foley, Dunn and Grabill are also entitled to arbitration as officers of Amway distributorships (*see* A2187; A2320) because the agreement expressly provides for arbitrations against an Amway distributor's "officers, directors, agents or employees." (A1589; *see also* A1658-60.)

The remaining four Appellants – Pro Net, Pro Net I, Global and Blanchard – are entitled to arbitration because the agreement covers *any* party regarding claims "arising out of or relating to [the] Amway Distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct." These Appellants are third-party beneficiaries of the agreement and may compel arbitration of claims within its scope. *See, e.g., Spear, Leeds & Kellogg v. Cent. Life Assurance Co.*, 85 F.3d 21, 26 (2d Cir. 1996).

C. The Amway Arbitration Clause covers this dispute

The Amway arbitration clause requires distributors with Amway-related claims to use a conciliation process and then "submit ***any*** remaining claim(s) arising out of or relating to their Amway Distributorship . . . to arbitration." (A1589; A1658-60; emphasis

added.) A federal court has held that claims involving BSMs fall within this provision. *See Morrison v. Amway Corp.*, 49 F. Supp. 2d 529 (S.D. Tex. 1998).

The result should be the same here because, by their very nature, Respondents' claims "relate to" Stewart's Amway distributorship. Similarly, Respondents' claims arise out of or relate to the Amway Rules of Conduct. In *U-Can-II*, the court found that "[Plaintiff] argues that BSMs are not covered or governed by the Amway Rules of Conduct. This contention is disproven by the language of Rule 4.14, which governs the sale of non-Amway products, specifically including BSMs." (A3697.) There is no reason for this Court to find otherwise.

D. The Amway Procedures are not unconscionable

As noted, Appellants' motion to compel arbitration was denied because the Circuit Court concluded that certain Amway arbitration procedures were unconscionable. (A3762.) By contrast, the court in *Morrison* compelled arbitration after finding that the plaintiffs had not been "beguiled into entering a fundamentally outrageous contract." 49 F. Supp. 2d at 534. Similarly, as discussed above, arbitration was compelled under the Amway provisions in *U-Can-II*. (A3700.)

The specific provisions are discussed below. As an initial matter, we note that while Amway Rule 11.5 (A1658-71) establishes the arbitration framework, Amway itself does not run the arbitrations. To the contrary, under Rule 11.5.5, "[w]hen parties agree to arbitrate under the Arbitration Rules, they thereby authorize Endispute, Inc., d/b/a J.A.M.S./Endispute to administer the Arbitration." (A1661.) JAMS has made former judges and other leading attorneys available since 1979 to assist with arbitrations across

the country. (A3047-49.) In particular, JAMS has administered the Amway arbitration program since 1998. (A3048.)

According to an affidavit from a JAMS vice president, JAMS has adopted ethics guidelines for its arbitrators. (*Id.*; A3051-60.) "JAMS' panel of neutrals, from which the Amway panel is chosen, consists of former judges or attorneys. The panel of neutrals all attend a briefing, administered by JAMS . . . describing the Amway business to them." (A3048.) "Amway does not pay JAMS' neutrals any retainer or other fee to be on the Amway panel." (A3049.) "All parties to a dispute have an equal voice in the selection of a neutral for a particular case. JAMS would not otherwise administer a case." (*Id.*) Indeed, the Circuit Court observed, "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." (A3762.)

The biographies for each neutral eligible to serve for Amway-related arbitration show the excellent credentials of these highly qualified professionals. (A3064-74.) The panel includes, *inter alia*, a former member of the Oregon Supreme Court (A3071) and former trial judges in D.C., New York and Texas. (A3067; A3068; A3074.)

1. There was no individual "veto power" over arbitrator retention

The Amway procedure before the Circuit Court provided that JAMS "shall establish and maintain a Roster of Neutrals and shall appoint Arbitrators from that Roster as provided in these rules." Amway Rule 11.5.14 (A1663). These neutrals served a three-year term. (*Id.*) "At the end of this term, the Corporation and [the Board of Directors of the Independent Business Owners International Association [formerly

known as the Amway Distributors Association], through the Administrator, shall vote to retain the Arbitrator for an additional three-year term. A unanimous vote shall be necessary to retain the arbitrator for an additional three-year term." (*Id.*)

Contrary to the Circuit Court's impression (A3762), this rule never reposed "veto power" in any individual. The "unanimous vote" requirement referred to unanimity of the distributor's board and Amway, each of which had a single vote. (A3666.) Although the board (which includes some Appellants) never took a vote on any arbitrator, each of its thirty members would have been entitled to vote, with the majority vote determining the board's single vote. (*Id.*)

This process, which on its face is reasonable and aimed at fairness for all parties, is not in and of itself objectionable. Indeed, Mr. Stewart served on the ADA Board (A1504; A1507-08; A2911) and attended the January 1997 board meeting (A2913) where it was unanimously recommended by motion to amend the "Distributor Contract" to "[m]odify [the] Amway Rules of Conduct so that binding arbitration follows the conciliation process." (A2916; A2924.)

Moreover, as noted above, are there no real questions about the excellent qualifications of the former judges and other neutrals. In addition, we are not aware of any cases where joint arbitrator selection (much less retention) was found to be unconscionable, particularly one administered by AAA or JAMS. *Compare Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (noting that the president of the National Academy of Arbitrators attested that he was "certain that reputable designating agencies, such as the ***AAA and Jams/Endispute***, would refuse to administer a program so

unfair and one-sided as this one") (emphasis added) *with* A3762 (denying Appellants' motion because the Circuit Court "could not require anyone to arbitrate any of these issues under a system that is so fundamentally unfair").

Putting aside whether a joint process is commendable rather than unconscionable, it should be noted that the particular rule that troubled the Circuit Court has never been applied and no longer exists. (A3664; A3666.) The JAMS administrator has sole discretion under Rule 11.5.14 over the roster of neutrals who now each serve a five-year term. (A3676.) The issue is thus moot.

Amway and the distributor association never took a vote on whether to retain any arbitrator on the roster of arbitrators. (*Id.*) Realizing that the provision was not being used and therefore served no purpose, Amway modified the Rules of Conduct to eliminate voting on the retention of arbitrators. (*Id.*) Because any arbitration here would be under the rules in force, the "voting" rule will not be a part of any arbitration involving the parties to this action. *See* Amway Rule 11.5.1 (A1660).

2. Amway is bound

The Circuit Court also erred in concluding that the Amway procedures were unconscionable because "Amway is not bound by its own arbitration requirements." (A3762.) As a preliminarily matter, the question of whether Amway, a non-party, is bound is simply irrelevant because it does not address the mutuality of obligation of the actual parties. There is no question that Respondents and Appellants are equally bound by the Amway Rules.

The Circuit Court's conclusion is also mistaken. Amway's Director of Global Business testified in an unrefuted affidavit:

> Amway is also bound to arbitrate disputes under [the Amway Rules] as part of its contract with distributors. It has always been understood at Amway that the requirement to arbitrate is reciprocal. Amway has filed no suit against a distributor since binding arbitration was added to the Rules. Instead, when Amway has a claim against a distributor, it follows the dispute resolution procedures, including binding arbitration.

(A3663.)

Thus, to the extent any ambiguity existed, it has been cured by the parties' course of performance. *See Royal Banks of Mo. v. Fridkin*, 819 S.W.2d 359, 362 (Mo. banc 1991) (a court may consider "the practical construction the parties have placed on the contract by their acts and deeds"); *Hanford Atomic Metal Trades Council v. Rockwell Int'l Corp.*, 607 F. Supp. 19, 21 (E.D. Wash. 1984) (a court construing an arbitration clause "may look to external evidence in ascertaining meaning").

3. Confidentiality is not unconscionable

The final concern of the Circuit Court was that the Amway Rules provide confidentiality for arbitration proceedings. As a preliminary matter, the court did not explain why the Amway Rules should be an exception to the fact that parties may "prefer arbitration because of the confidentiality . . . that comes with arbitration." *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n.4 (1st Cir. 1999). Indeed,

the record shows the provision at issue is intended to protect Amway distributors' proprietary business information and to encourage appropriate claims. (A3663-64; A3667.)

More importantly, the Circuit Court did not closely examine the Amway confidentiality rule, which reads: "[T]he Arbitrator shall maintain the confidentiality of the hearings in the preceding and shall have the authority to make appropriate rulings to safeguard confidentiality, ***unless the law provides to the contrary***." Rule 11.5.31 (A1666) (emphasis added). This provision is nearly identical to its AAA counterpart, which provides: "The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." AAA Commercial Arbitration Rule 23, *available at* http://www.adr.org. Accordingly, Appellants respectfully submit that Amway Rule 11.5.31 is not unconscionable.

4. The Trial Court erred by not severing these provisions

There is no unconscionability, procedural or substantive, barring application of the above procedures. *See generally Bracey v. Monsanto Co.*, 823 S.W.2d 946, 950 (Mo. banc 1992). But even if the court was correct, it should have severed the provisions and enforced the rest of the contract. In *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001), the Eighth Circuit strongly cautioned against the "all or nothing" approach adopted below. In particular, the court warned that such an approach would "severely chill" the arbitration process and thus violate the policy favoring arbitration. *Id.* at 682. In that case, and applying Missouri law, the court found it appropriate to sever

a potentially unconscionable provision to preserve the "primary intent" of the parties to arbitrate.

Here, the primary intent of the parties – to provide for arbitration – should not be thrown out if a facet of the Amway Rules is objectionable. This is particularly true because Amway Rule 11.5.3 contains an express severability provision. (A1660.) ("If any Rule, or part thereof, is found to be invalid by a court of competent jurisdiction, these Rules will be interpreted as though the invalid portion were not part of these Rules.").

Appellants respectfully submit that the Circuit Court erred in deciding to strike down the entire arbitration process because of its concerns with select provisions. This Court should hold that the provisions in question are not unconscionable or, in the alternative, should be severed.

E. Respondents' defenses to arbitrability should be resolved by an arbitrator

Finally, Respondents raised numerous defenses below that should be decided by an arbitrator instead of a court once the dispute is determined to be arbitrable. The FAA and the agreements themselves (through incorporation of specific arbitration rules) provide that a court's analysis should be limited to whether a valid agreement to arbitrate is applicable to this dispute. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726 (8th Cir. 2003); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse and remand with instructions staying this action pending arbitration under the Pro Net agreement (pursuant to the AAA Commercial Arbitration Rules), the Transition-to-Pro Net agreement and the Amway Rules of Conduct.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the forgoing 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 **[----]**, excluding the cover page, signature block, and certificates of service and compliance.

The undersigned further certifies that the diskette filed herewith containing Appellants' Substitute Opening 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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