NO. SC86854

IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

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

vs.

JIMMY V. DUNN, ET AL.,
Defendants-Appellants

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
Thirty-First Judicial Circuit
The Honorable J. Miles Sweeney

Case No. 101CC4530

RESPONDENTS' SUBSTITUTE BRIEF

R. Dan Boulware Missouri Bar #24289
R. Todd Ehlert Missouri Bar #51853
Sharon Kennedy Missouri Bar #40431
SHUGHART THOMSON & KILROY, P.C.
3101 Frederick Avenue
P. O. Box 6217
St. Joseph, Missouri 64506-0217
Telephone: (816) 364-2117
Facsimile: (816) 279-3977

John C. Holstein Missouri Bar # 21539
SHUGHART THOMSON & KILROY, P.C.
901 St. Louis Avenue, Suite 1200
Springfield, Missouri 65806
Telephone: (417) 869-3353
Facsimile: (417) 869-9943

William Francis Missouri Bar #26530
PLACZEK & FRANCIS
1722 South Glenstone, Suite J
Springfield, Missouri 65804
Telephone: (417) 883-4000
Facsimile: (417) 887-1503

Warren S. Stafford Missouri Bar #16848
TAYLOR, STAFFORD, CLITHERO,
FITZGERALD & HARRIS, LLP
3315E. Ridgeview, Suite 1000
Springfield, MO 65804
Telephone: (417) 887-2020
Facsimile: (417) 887-8431

ATTORNEYS FOR RESPONDENTS

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JURISDICTIONAL STATEMENT

Plaintiffs adopt Defendants' Jurisdictional Statement with the correction that the trial court entered judgment denying Defendants' Motion to Compel Arbitration on January 22, **2004**. App. A3.[1]

STATEMENT OF FACTS

I. INTRODUCTION

In this case, Defendants/Appellants sought to compel Plaintiffs/Respondents Nitro Distributing, Inc. ("Nitro") and West Palm Convention Services, Inc. ("West Palm") to arbitrate their claims under *three* arbitration provisions: the "Amway Arbitration Provision," the "Pro Net Arbitration Provision," and the so-called "Transition to Pro Net" Arbitration Agreement. The trial court denied that motion upon consideration of a voluminous written record, consisting of affidavit and deposition testimony. No live testimony was presented. Although the judgment did not give the court's reasoning, an earlier letter ruling reflects that the court ruled as a matter of law, basing its decision in part on its finding that the Amway Arbitration Provision is unconscionable. A3597-98.

The Southern District Court of Appeals reversed the trial court's judgment in part, holding that Plaintiffs were bound to arbitrate under the Pro Net Arbitration Provision. In order to do so, the Southern District made factual findings, relying almost exclusively on

[1] Documents in Appellants' Legal File are numbered with the prefix "A" -- the same prefix required for the Appendix per Rule 84.04(h). Accordingly, references to "Axxx" are to Appellants' Legal File; references to Respondents' Appendix are cited as "App."

facts taken from Defendants' affidavits, and ignoring Plaintiffs' contrary affidavits and deposition testimony. App. A42-67.

This Court can and should affirm the trial court's judgment as a matter of law because Defendants failed to sustain their burden of showing a valid and enforceable agreement to arbitrate and because Plaintiffs' claims are not within the scope of arbitration. Alternatively, if Defendants' evidence was sufficient to make a prima facie showing of arbitrability, Plaintiffs controverted those facts with substantial, competent evidence. The Southern District, in making findings on disputed facts, denied Plaintiffs their right to a trial on those fact issues as guaranteed by the Federal Arbitration Act and/or Missouri state law. Plaintiffs respectfully urge this Court to remand this case for trial of such disputed facts should it determine that it cannot affirm as a matter of law.

II. OBJECTIONS TO DEFENDANTS' STATEMENT OF FACTS

Defendants' Statement of Facts does not comply with Mo. R. Civ. P. 84.04(c) in that it omits *numerous* facts supportive of the trial court's decision and adverse to Defendants' theories. *See* *Gillham v. LaRue*, 136 S.W.3d 852, 857-58 (Mo. App. S.D. 2004). Further, it contains factual inaccuracies. For example, Defendants state that Plaintiffs are alleging that Defendants misappropriated their *Amway* businesses, citing Plaintiffs' Petition at A0693. Appellants' Brief, p. 14. That is blatantly false. Plaintiffs are not and have never been Amway distributors (A1686-87), and thus have no Amway business to be misappropriated. Amway's name appears *nowhere* at A0693. There, Plaintiffs clearly and unambiguously state Defendants and their co-conspirators conspired to "monopolize, control and manipulate the *tool and function business*, ignore and

circumvent the essential 'lines of sponsorship in the BSMs business, ..." A0693 (underline in original; italics added). To be perfectly clear, Plaintiffs make no claim for any damage to any Amway business, or for breach of any Amway agreement or rule. The claims in this case relate *solely* to the *BSMs* industry and is between participants therein.

Defendants' Statement of Facts also includes mischaracterizations of the evidence. For example, they refer to the parties' BSMs businesses as "Amway-related corporations" implying that they are somehow closely connected to Amway. In fact, they are distinct corporate entities engaged in completely different businesses not governed by Amway. Indeed, Amway, which is also a competitor in the BSMs industry, acknowledged that were it to govern BSMs disputes, it would face serious antitrust risks. A1421. As another example, Defendants ignore corporate distinctions, using the word "Organization" to lump together as a single entity an individual and the two or three corporations in which he is an officer, director and/or shareholder, suggesting that the act of one is the act of all. Defendants also improperly cite allegations from Plaintiffs' abandoned petition.

Notwithstanding these objections, Defendants' Statement of Facts suffices as an introduction to the case. Therefore, rather than supplementing the many omitted facts, and correcting each falsehood and/or mischaracterization here, Plaintiffs will instead do so as the fact becomes pertinent in the argument portion of this Brief.

POINTS RELIED ON

I. RESPONSE TO POINT III

Byrd v. Sprint Communications Co. L.P., 931 S.W.2d 810 (Mo. App. W.D. 1996)

Dunn Indus. Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003)

Greenwood v. Sherfield, 895 S.W.2d 169 (Mo. App. S.D. 1995)

Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999)

9 U.S.C. § 4 (1994)

RSMo § 435.355 (2000)

II. RESPONSE TO POINT I

Brown v. State Farm Mutual Automobile Ins. Co., 776 S.W.2d 384 (Mo. banc 1989)

Byrd v. Sprint Communications Co. L.P., 931 S.W.2d 810 (Mo. App. W.D. 1996)

Prickett v. Lucy Lee Hosp., Inc., 986 S.W.2d 947 (Mo. App. S.D. 1999)

66, Inc. v. Crestwood Commons Redevelopment Corp., 998 S.W.2d 32 (Mo. banc 1999).

III. RESPONSE TO POINT II

Byrd v. Sprint Communications Co. L.P., 931 S.W.2d 810 (Mo. App. W.D. 1996)

Dunn Indus. Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003)

Hamlin v. Abell, 25 S.W. 516 (Mo. 1893)

Triarch Indus., Inc. v. Crabtree, 158 S.W.3d 772 (Mo. banc 2005)

ARGUMENT

Defendants seek to bind Plaintiffs Nitro and West Palm to *three* purported arbitration agreements – the "Amway Arbitration Provision," the "Pro Net Arbitration Provision," and the "Transition to Pro Net" Agreement. But Defendants cannot overcome a fundamental fatal flaw: they are, with one exception, seeking to bind Plaintiffs to agreements made by *non-parties,* Ken Stewart and/or Stewart & Associates International, Inc. (Stewart Associates) – not by Plaintiffs Nitro or West Palm. The one document that Nitro did sign (a Pro Net membership application) does not contain an arbitration agreement on its face, nor can the Pro Net Arbitration Provision reasonably be construed as applying to Nitro.

The length of this brief is dictated in large part by Defendants' resort to an assortment of strained legal theories, including a quasi-alter ego theory, agency, third-party beneficiary and estoppel in their effort to avoid the inevitable: the Plaintiffs in this case, Nitro and West Palm, did not make an agreement to arbitrate, nor are their claims within the scope of any arbitration provision. The weakness of Defendants' arguments is apparent in that, for every theory that Defendants assert, there are a *host* of reasons why it fails: (1) Defendants did not preserve the issue at trial and/or on appeal; (2) they either do not identify their legal theory or it is not a recognized one; (3) if they do rely on a recognized theory, they do not discuss its elements; (4) their "evidence" is insufficient to satisfy the theory; (5) their "evidence," if any, in support of their theory is false and/or mischaracterized; and/or (6) the additional evidence Defendants neglect to mention controverts their "facts" or belies their theory.

Because the Amway Arbitration Provision's unconscionability is dispositive of Defendants' Points II (the "Transition to Pro Net" Agreement) and III (The Amway Arbitration Provision), and part of Point I (the Pro Net Arbitration Provision), Plaintiffs will address Defendants' Points out of order, taking Point III (the Amway Arbitration Provision) first, then Points I and II in that order.

I. RESPONSE TO POINT III

A. Standard of Review

Defendants' Point III fails to comply with Mo. R. Civ. P. 84.04(d). As framed, Point III asserts that the Amway Arbitration Provision is not unconscionable because the parties made an arbitration agreement. That is nonsensical. Asserting simply that the Plaintiffs are bound does not explain why the provision is not unconscionable. *Stelts v. Stelts*, 126 S.W.3d 499, 504 (Mo. App. S.D. 2004) ("'It is not sufficient to merely set out what the alleged errors are without stating why.'").

Defendants' Argument actually addresses four separate issues: (1) whether the parties agreed to arbitrate, (2) if so, whether it is unconscionable, (3) whether the unconscionable portions should be severed; and (4) whether the claims are within the scope of the arbitration provision. Because these issues are not framed, or not properly framed, in their Point, it preserves nothing for appeal, and should be dismissed. *Lusher v. Gerald Harris Construction, Inc.*, 993 S.W.2d 537, 544 (Mo. App. W.D. 1999) ("Issues raised only in the argument portion of the brief are not [preserved] for review."). Review, if any, is limited to plain error. Mo. R. Civ. P. 84.13(c). Such relief, however, is

rarely applied in civil cases. *Cooper v. Bluff City Mobile Home Sales, Inc.*, 78 S.W.3d 157, 167 (Mo. App. S.D. 2002).

Alternatively, in *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003), this Court stated that review of an arbitrability dispute is "de novo." But in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), this Court stated that "use of the words 'de novo' . . . is no longer appropriate in appellate review of cases under Rule 73.01." Relying on this statement from *Murphy*, the Western District held that, *in reviewing a trial court's judgment in a case presented on a written record without live testimony* – as was the case here – a court must apply the *Murphy v. Carron* standard. *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 868 S.W.2d 118, 120 (Mo. App. W.D. 1993).

Plaintiffs suggest that the seeming inconsistency between *Murphy* and *Dunn* can easily be reconciled. In stating that the standard of review is *de novo*, the *Dunn* Court cited *Fru-Con Constr. Co. v. Southwestern Redev. Corp. II*, 908 S.W.2d 741 (Mo. App. E.D. 1995), which dealt with a pure legal conclusion – the interpretation of an arbitration clause to determine whether the claim is within its *scope*. *Id.* at 744 n.1. *Fru-Con* did not involve the *making* of an arbitration agreement, as here. *See also Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. banc 2005) (holding that standard of review is *de novo*, where the only issue was one of law -- interpretation of the scope of an arbitration clause). In this case, the question of the making of an arbitration agreement involves the *sufficiency* of the evidence. Specifically, Plaintiffs asserted that Defendants' evidence was insufficient to satisfy the essential elements of the theories upon which they rely,

e.g., third-party beneficiary, agency, and estoppel. (Plaintiffs alternatively argued that Defendants' evidence was controverted).

Therefore, to the extent the trial court made determinations on a written record as to the sufficiency of the evidence, the case is reviewed under *Murphy*, *i.e.*, whether "there is substantial evidence to support the judgment of the trial court and whether the judgment is against the weight of the evidence. If there is substantial evidence to support the judgment and it is not against the weight of the evidence, the judgment is to be affirmed unless it erroneously declares the law." *Aviation Supply*, 868 S.W.2d at 120. "In determining the sufficiency of the evidence, an appellate court accepts as true the evidence and inferences favorable to the trial court's judgment, disregarding all contrary evidence." *Id.* "[A]ll controverted facts are taken in accordance with the result reached at trial." *Id.* "'The mere existence of evidence from which another conclusion might have been reached is not enough'" to demonstrate that the trial court's holding is against the weight of the evidence. *Evans v. Stirewalt*, 158 S.W.3d 910, 912 (Mo. App. S.D. 2005).

B. Argument

1. Principles Governing Determination of Motions to Compel Arbitration

In reviewing a motion to compel arbitration, it is the function of a court – not an arbitrator -- to determine (1) whether the parties made a valid and enforceable arbitration agreement and (2) whether the daims are within the scope of that arbitration clause. *Dunn*, 112 S.W.3d at 427-28.

Importantly, the first element is not limited to simply whether a party signed an arbitration agreement. Rather, the court must apply *state contract law* to determine whether the purported arbitration agreement is *valid and enforceable*, including *whether an arbitration contract binds a party who did not sign it* (*Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 592 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924 (1995); *Dunn*, 112 S.W.3d at 428); or whether an arbitration provision is *unconscionable*. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656 (1996) (courts may invalidate an arbitration agreement under any "*generally applicable contract defenses*, such as fraud, duress, or *unconscionability*.").

In determining whether the parties ***made*** an arbitration agreement the court must ***not***, as Defendants and some courts incorrectly assert, apply the federal policy favoring arbitration. That federal policy applies ***only*** in determining whether the claims are within the ***scope*** of arbitration. *Korte Constr. Co. v. Deaconness Manor Ass'n*, 927 S.W.2d 395, 398 (Mo. App. E.D. 1996) ("it scarcely need be said that such a preference only applies where a valid arbitration agreement exists."); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S.1, 24-25 (1983) ("any doubts concerning *the scope* of arbitrable issues should be resolved in favor of arbitration") (emphasis added). This is consistent with the first principle of arbitration – that arbitration is strictly a matter of contract; "a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418 (1986). Indeed, arbitration "is a matter of consent,

not coercion." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 764 (2002). Thus, there is no presumption that a party *made* an arbitration agreement, and courts must apply generally applicable state contract law to determine whether an arbitration agreement exists.

2. Plaintiffs Did Not Make An Agreement to Arbitrate

Despite Defendants' insistence that the Amway Arbitration Provision applies, Amway is not a party in this action, nor is this suit about the Amway business or between Amway distributors. *See* p. 36, n.5, *infra*. Plaintiffs Nitro and West Palm are engaged *solely* in the "business support materials" (*"BSMs"*) business, and their claims relate thereto. A1686-87.

The BSMs industry spawned from the Amway business, but is entirely separate from Amway. *See* § B.5, *infra*. High-level Amway distributors realized that huge profits could be made by sponsoring motivational rallies and seminars ("functions"), and then selling audio/videotapes of the speakers at those rallies, and other *non-Amway produced* motivational tapes, books, etc. ("tools) to Amway distributors. Because Amway Rule 3.14.2 prohibits Amway distributors from conducting any other business under the Amway distributorship's name, distributors in the BSMs industry, like most of the parties here, form separate corporations to operate their "tools" and "functions" businesses.

Accordingly, non-party Ken Stewart owns an Amway distributorship, non-party Stewart & Associates International, Inc. ("Stewart Associates"), as well as separate corporations to engage in the *BSMs business:* Nitro (a "tools" company) and West Palm (a "functions" company). *See* A1686-87.

In seeking to compel Amway arbitration, Defendants do not contend that Nitro or West Palm are signatories to the Amway Arbitration Provision. Instead, Defendants resort to contrived legal theories in their quest to bind these non-signatories to an Amway arbitration agreement signed by Ken Stewart *on behalf of Stewart Associates*. The trial court properly rejected those arguments as a matter of law.

a. Plaintiffs are Not Bound as Third-Party Beneficiaries

Defendants contend that Plaintiffs are bound to arbitrate under Stewart Associates' Amway Distributorship Agreement as "third-party beneficiaries" thereof. Two elements are required to compel arbitration under a third-party beneficiary theory: (1) Plaintiffs must, in fact, be third-party beneficiaries; and (2) they must seek to enforce the agreement. *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630-31 (Mo. App. E.D. 1994); *Flink v. Carlson*, 856 F.2d 44, 46, 46 n.3 (8th Cir. 1988). Defendants' "evidence" is insufficient to satisfy these elements.

(1) Plaintiffs Are Not Third-Party Beneficiaries

A person is not a third-party beneficiary unless the "contract terms 'clearly express' an intent to benefit either that party or an identifiable class of which the party is a member." *Peters v. Employers Mutual Casualty Co.*, 853 S.W.2d 300, 301 (Mo. banc 1993). "In the absence of such an express declaration, there is a strong presumption that the parties contracted only for themselves and not for the benefit of others." *Byrd v. Sprint Communications Co. L.P.*, 931 S.W.2d 810, 814 (Mo. App. W.D. 1996).

Importantly, it is not enough that a person may receive some incidental benefit from another person's contract. *Id.* (although respondents "certainly benefited" from the

contract, they were not third-party beneficiaries); *OFW Corp. v. City of Columbia*, 893 S.W.2d 876, 879 (Mo. App. W.D. 1995) (an incidental beneficiary – one "who will be benefited by performance of a promise but who is neither a promisee nor an intended beneficiary" – has no enforceable rights under a contract.). In order to be a third-party beneficiary, "[i]t must be shown that the benefit to the third party was the *cause of the creation* of the contract." *OFW*, 893 S.W.2d at 879 (emphasis added).

The terms of the Amway distributorship agreement do not evince an intent to benefit Plaintiffs – who are in the separate BSMs business – nor were Plaintiffs the cause of the creation of the Amway distributorship agreement between Amway and Stewart Associates. Indeed, Amway Rule of Conduct 1 expressly states that the intended beneficiaries of the Amway distributorship agreement are "IBOs" *i.e.*, persons or businesses who sell Amway products and services. A1625 ("The Rules are designed to preserve the benefits available to all IBOs under the IBO Plan."). Plaintiffs are not and have never been "IBOs." *See* § III.B.3.b, *infra*.

Moreover, Amway Rule 3.14.2 prohibits an Amway distributor from operating any business other than the sale of Amway products and services. A1627; A1339, at 21:12-18. This rule further supports the fact that the Amway distributorship is intended to benefit solely those engaged in the sale of Amway products and services – not participants in the separate BSMs industry, such as Nitro and West Palm.

Notwithstanding the foregoing, Defendants argue that Amway Rules 4.14 and 7 evince an intent to benefit Plaintiffs. Although those rules govern an *IBO's* conduct in a very limited respect regarding the sale of BSMs, they do not purport to govern *BSMs*

distributors' conduct.[2] BSMs distributors are entirely separate and distinct corporations governed by their own separate rules of conduct. *See* § B.5.b, *infra*. Indeed, Amway – which itself sells BSMs -- *cannot* govern what its competitors do because such would violate antitrust laws, as Amway recognized. *See* A1421.

Defendants assert that because Nitro and West Palm sell BSMs to persons in Stewart Associates' downline (or to the downline's tool and/or functions businesses), they benefit from Stewart Associates' Amway distributorship agreement. But that is not accurate. Stewart Associates' *Amway* line of sponsorship is *not* the same as Nitro and West Palm's *BSMs* line of sponsorship. The latter have their own line of sponsorship consisting of different entities. Because Amway prohibits its distributors from using their Amway corporation to conduct any business other than the sale of Amway products and services (Rule 3.14.2 (A1627)), and because BSMs distributors form separate corporations to engage in the BSMs business, an Amway distributor's line of sponsorship consists *solely* of *Amway* distributors, whereas a BSMs distributor's line of sponsorship consists of other BSMs corporations. For example, Defendant Billy Childers owns two separate corporations, Childers & Associates (his Amway business) and

[2] It is not surprising that, as Defendants assert, Jody Victor would conclude otherwise. *See* Appellants' Brief, p. 70 n.19. He and his company are *named defendants* in *Morrison v. Amway*, 49 F.Supp.2d 529 (S. D. Tex. 1998), which involves a suit by Amway distributors also challenging the scope of the Amway Arbitration Provision and which is still ongoing.

Defendant TNT (his BSMs business). Childers & Associates is in the Amway line of sponsorship, but is not in the BSMs line of sponsorship. Conversely, TNT is in the BSMs line of sponsorship, but not the Amway line of sponsorship. A1403, at 336:18-338:11.

In any event, the mere fact that Stewart Associates and Plaintiffs have a mutually beneficial relationship does not make them third-party beneficiaries of the rights and obligations under any agreement between Amway and Stewart Associates. The benefit of an Amway distributorship agreement is the right to sell *Amway* products and services and to recruit others to do the same. *See* Rules 3.1 (describing the process "to become a duly authorized IBO capable of merchandising the Corporation's products and services and registering other IBOs . . .") (A1626-27); 3.14.2 ("The incorporated IB may conduct no other business [than the sale of Amway products and services].") (*id*). It is uncontroverted that Plaintiffs did not and do not do so. A1686-87.

At best, Defendants' "beneficial relationship" argument reflects only an *incidental* benefit. Accordingly, Plaintiffs have no enforceable rights under Stewart Associates' Amway distributorship agreement and thus are not third-party beneficiaries. *Byrd*, 931 S.W.2d at 814; *OFW Corp.*, 893 S.W.2d at 879.

(2) Plaintiffs Do Not Seek to Enforce an Amway Distributorship Agreement

Even assuming Plaintiffs were third-party beneficiaries, Defendants cannot establish the second element – that Plaintiffs are seeking to enforce an Amway

distributorship agreement. *See* *Tractor-Trailer Supply*, 873 S.W.2d at 630-31; *Flink*, 856 F.2d at 46 n.3.

Plaintiffs' claims do not, as Defendants' contend, "derive" from some vague, unspecified "Amway Rule." *See* Appellants' Brief, p. 71. Plaintiffs do not seek to enforce Amway's Rules 4 or 7, or otherwise allege that any party violated any Amway Rule. The only specific allegation Defendants cite is Plaintiffs' *purported* allegation that Amway requires them to train and motivate their downline distributors, citing A0699. That is a blatant mischaracterization. Reading the cited page *in context*, when Plaintiffs alleged that Amway requires "distributors" to train and motivate, Plaintiffs were speaking of *Amway* distributors. They clearly were *not* saying that Amway required *these Plaintiffs* -- or any other *BSMs* distributor -- to train and motivate anyone.

In Reply, Defendants may contend, as they did in the courts below, that Plaintiffs are seeking to enforce Amway's line of sponsorship rules.[3] To the contrary, Plaintiffs did

[3] Throughout their Brief, Defendants rely on different arguments than those they asserted in the courts below, sometimes arguing new facts in support of a theory, and seemingly abandoning other facts/theories. In some instances, Defendants have made only cursory, unsupported conclusions, as with their estoppel argument here where they do not identify the specific Amway rule(s) that Plaintiffs are allegedly seeking to enforce. Plaintiffs fear that, if history is any indication, Defendants will flesh out their arguments or resurrect old arguments in their Reply, in which case Plaintiffs will have no opportunity to respond. As a result, Plaintiffs feel compelled to anticipate and discuss some of those arguments.

not have the benefit of Stewart Associates' downline by virtue of Amway's line of sponsorship rule, but rather by virtue of the separate, unwritten rules governing the BSMs industry. It is those separate, unwritten BSMs rules that Plaintiffs are seeking to seeking to enforce – not Amway's Rules. *See* A700-704. Indeed, Amway admitted its Rules do not apply here: "I wish to reiterate that the Corporation's rules do not cover such issues as who buys tools from whom or how much money Independent Business Owners pay for, or profit from such tools." A1285. It is the BSMs kingpins who dictated who could sell tools to whom and for how much or who could sponsor functions – not Amway. *See* Paul Brown's deposition testimony. A1393-94, 290:3-291:5 ("the flow of payments [in] the BSM business is based upon who is . . . the power of that organization.").

Since Plaintiffs do not claim to be third-party beneficiaries and are not asserting any rights under the Amway distributorship agreement, they cannot be bound by that agreement. *See Byrd*, 931 S.W.2d at 814 ("If they disavow the benefits, they should not suffer from the obligations."); *Flink*, 856 F.2d at 46 n.3.

b. Plaintiffs Are Not Bound Under Agency Principles

Defendants argue that because non-party Ken Stewart is bound to arbitrate *as an officer, director and shareholder of non-party Stewart Associates*, it follows that his separate corporations, Nitro and West Palm, are also bound to arbitrate as his agents. Such an argument not only turns agency-principal law and basic corporate principles on its head, but even if Plaintiffs were agents, *non-signatory* agents cannot, as a matter of law, be compelled to arbitrate.

(1) Non-signatory Agents Cannot be Compelled to Arbitrate

Defendants argue that a non-signatory agent is "bound" by an arbitration agreement signed by its principal, citing *Byrd v. Sprint Communications Co. L.P.*, 931 S.W.2d 810, 815 (Mo. App. W.D. 1996). Although *Byrd* and other courts have so stated, it is an inartful characterization that has unfortunately been repeated without reasoned analysis. If one traces the authority for that statement, she would find that in reality the cited courts permitted the agent to *enforce* an arbitration agreement against a *signatory* who had agreed to arbitrate claims against the agent's principal. *See* *Madden v. Ellspermann*, 813 S.W.2d 51, 53-54 (Mo. App. W.D. 1991); *Nesslage v. York Sec., Inc.*, 823 F.2d 231 (8th Cir. 1987); and *Qubty v. Nagda*, 817 So.2d 952, 957 (Fla. 5th DCA 2002) ("[A] number of courts have held that agents must be afforded the same benefits of arbitration agreements made by their principals, *at least to the extent that the principal's liability and the agent's liability are based on the same set of facts*." (emphasis added)). None compel a *non-signatory* agent to arbitrate simply because the agent's principal signed an arbitration agreement.

Numerous courts have recognized that while a non-signatory may compel a *signatory* to arbitrate, that rule does not operate in the inverse – where a signatory is seeking to compel a *non-signatory* to arbitrate. *See, e.g.*, *Dunn Industrial Group, Inc. v. City of Sugar Creek, Missouri*, 112 S.W.3d 421, 436 (Mo. en banc 2003); *Merrill-Lynch Investment Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2nd Cir. 2003) (citing 3rd, 4th, 7th, and 11th Circuit cases); *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d

773, 779 (2d Cir. 1995); *E.I. Dupont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates*, 269 F.3d 187, 202 (3rd Cir. 2001); *Ericsson, Inc. v. ComScape Holding, Inc.*, 2000 WL 708917, *4 (N. D. Tex. 2000); *Liberty Communications v. MCI Telecommunications Corp.*, 733 So.2d 571, 574 (Fla. 5th DCA 1999). This is because it would violate the first principle of arbitration – since "[a]rbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so." *Thomson*, 64 F.3d at 779 (citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 1352-53 (1960)). The Second Circuit's decision in *Thomson* on this issue was expressly cited with approval by this Court in *Dunn*. *See* *Dunn*, 112 S.W.3d at 436.

Byrd is an aberration in holding that a *non-signatory* may be compelled to arbitrate under *agency* principles and is not well-reasoned. *Byrd* cited no authority for its holding or engaged in any analysis of the issue. It simply held that "[b]ecause this court has permitted agents to take advantage of arbitration agreements which they were not a party to, consistency would dictate we hold non-signatory agents bound by arbitration agreements signed by their principals." *Byrd*, 931 S.W.2d 810, 815. *Byrd* is contrary to generally applicable contract principles, and violates various United States Supreme Court arbitration principles, most notably that Courts have no authority to mandate that parties arbitrate if they have not made an agreement to do so, and that an arbitration agreement must be based on generally applicable state contract law. *United Steelworkers*, 363 U.S. at 582, 80 S.Ct. at 1352-53; *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656 (1996).

Indeed, the Western District later so recognized in *Welch v. Davis*, 114 S.W.3d 285, 289 n.1 (Mo. App. W.D. 2003), where the court stated: "We painted with too broad a brush in *Byrd*. The issue has nothing to do with consistency but with the application of proper principles of contract and agency law." And, *Byrd* was implicitly overruled on this point by this Court in *Dunn*, which held that a non-signatory cannot be compelled to arbitrate – even if his claims are intertwined with an agreement containing an arbitration clause. *See* *Dunn*, 112 S.W.3d at 436.

(2) Plaintiffs are Not Agents of Stewart

Even assuming non-signatory agents could be compelled to arbitrate, Defendants' argument fails because Plaintiffs are not, in fact, agents of Stewart.

Defendants do not even mention the three elements required to establish an agency, let alone apply the facts of this case to those elements, namely: (1) the agent must hold the "power to alter legal relations between the principal and the third persons and between the principal and himself," (2) the agent must be a fiduciary with respect to matters within the scope of his agency; and (3) the principal must have the "right to control the conduct of the agent with respect to the matters entrusted to him." *Byrd*, 931 S.W.2d at 815. Defendants bear the burden of proving all three elements. *Corrington Park Assoc., L.L.C. v. Barefoot, Inc.*, 983 S.W.2d 210, 213 (Mo. App. W.D. 1999). "The absence any one of these three characteristics defeats the purported agency relationship." *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo banc 2002). "An agency is not presumed by virtue of a third-party's assumption that it exists . . . . " *Stenger v.*

Great Southern Savings and Loan Ass'n, 677 S.W.2d 376 (Mo. App. S.D. 1984). Defendants fail to meet their burden.

Defendants apparently attempt to satisfy the first element – the agent's ability to alter the principal's legal relationships – with the lone allegation that Nitro and West Palm "could enter into contracts regarding tools and functions." Importantly, they do not cite any contracts made by either Plaintiff that purportedly bind Ken Stewart, individually. *See* *State ex rel. Bunting v. Koehr*, 865 S.W.2d 351, 354 (Mo. banc 1993) (dealers who sold manufacturer's products were not agents of manufacturer because dealers had no power to alter the legal relationship between the manufacturer and purchaser). The allegation that Plaintiffs entered into contracts reflects nothing more than that they entered into contracts *for their own benefit*.

Defendants apparently attempt to support the second element – a fiduciary relationship – with the allegation that Plaintiffs worked "in tandem" to "build, support and enhance Stewart Associates' Amway business." But "the existence of a business relationship does not give rise to a fiduciary relationship or to a presumption of such a relationship." *Lucas v. Enkvetchakul*, 812 S.W.2d 256, 261 (Mo. App. S.D. 1991). And, even if a mutually beneficial relationship was sufficient to constitute an agency – which it is not[4] – Plaintiffs, being separate corporate entities, conduct business primarily for their

[4] *See* *Ford*, 63 S.W.2d at 642 (Ford Motor Credit is not an agent of Ford Motor Company (even though they have a mutually beneficial relationship)); *see also* *Byrd*, 931 S.W.2d at 812 (delegation of training responsibilities does not give the power to alter legal

own profit, not that of Mr. Stewart individually, or for Stewart Associates' benefit. *See* *State ex rel. Domino's Pizza, Inc. v. Dowd*, 941 S.W.2d 663, 666 (Mo. App. E.D. 1997).

The final element of agency is the principal's right to control the agent's conduct. Defendants apparently seek to establish this element with the absurd argument that "Mr. Stewart is Respondents' principal." A holding that a corporation is the agent of its officers and directors would completely eviscerate the corporate distinction of every closely held corporation in this State.

Defendants' evidence is wholly insufficient to establish the three requisite elements of agency. Accordingly, the trial court's judgment should be affirmed as a matter of law. Alternatively, Plaintiffs are entitled to a trial of any factual issues, for the reasons discussed in Point I, § B.2.g., *infra*.

c. Plaintiffs Are Not Equitably Estopped

Defendants' final, half-hearted effort to bind these non-signatory Plaintiffs to Stewart Associates' Amway distributorship agreement consists of *one* sentence *with absolutely no factual support*: Plaintiffs are estopped to deny arbitration because of their "long connection with, embrace of, and enrichment from the Amway business."

Consistent with their pattern, Defendants wholly ignore the elements of their asserted theory. Equitable estoppel requires proof of "(1) an admission, statement or act

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relations); *Blackwell Printing Co. v. Blackwell-Wielandy Co.*, 440 S.W.2d 433, 436-37 (Mo. 1969) ("the identity of officers of one [corporation] with officers of another, are not alone sufficient to create . . . [a] fiduciary relationship between the two.").

inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party, resulting from allowing the first party to contract or repudiate the admission, statement, or act." *Brown v. State Farm Mutual Automobile Ins. Co.*, 776 S.W.2d 384, 388 (Mo. banc 1989). Each element must be proven by "clear and satisfactory evidence." *Van Kampen v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. S.D. 1985). Plaintiffs have not sustained their burden. In particular, Defendants do not explain how *they* – who are *BSMs* distributors[5] -- relied to their detriment on Plaintiffs' purported acceptance of the benefits of an *Amway* distributorship agreement.

[5] Gooch Support and TNT are tools companies. Gooch Enterprises is a functions company. Those three entities do not engage in the Amway business. *See* Appellants' Brief, pp. 17-19; A1734-36; A2157-60, ¶¶ 1-8; A2241 ¶ 5; A2187, ¶ 3; A2342 ¶ 1. The individual defendants were sued in their individual capacity and as officers and directors of their respective *BSMs* corporations. As they pled in their Petition, Plaintiffs intended to sue only BSMs companies in this suit. *See* A0687-691. During discovery, however, Plaintiffs learned that Jimmy V. Dunn & Associates is both an Amway distributorship and a tool company; Grabill Enterprises is an Amway distributorship, tools and functions company; T&C Foley is an Amway distributorship; GFI was formerly an Amway distributorship. As a result, Plaintiffs moved to dismiss GFI and Grabill Enterprises, and to substitute Foley & Co. and C&C Convention Services (which are BSMs companies) for T&C Foley and Dunn Associates, respectively, but the trial court never ruled on that

In the trial court, Defendants argued that Plaintiffs were estopped because they are seeking to enforce Stewart Associates' line of sponsorship. *See* A0421. Not true. Plaintiffs do not contend that Amway's line of sponsorship rules apply to the BSMs industry. The BSMs industry is governed by its own, unwritten rules established pursuant to a long-standing course of dealing. *See* A1862-65; A1872-75; A1880-83; A1889-92; A1898-1901; A1905-07; A1914-17; A1920-23; A1930-32; A1938-41; A1948-51.

To the extent Defendants are arguing that Plaintiffs have the "benefit" of Stewart Associates' downline, that argument fails for the same reasons as it does with respect to their third-party beneficiary theory. Not only is Defendants' premise *factually inaccurate* because Plaintiffs' line of sponsorship consists of different entities than Stewart Associates', but, like a third-party beneficiary theory, estoppel also requires that the non-signatory have received "*direct*" benefit from the contract it is seeking to avoid. *See Dunn*, 112 S.W.3d at 436-37; *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 779 (2nd Cir. 1995).

Defendants' arguments are insufficient to establish a *direct* benefit. Again, the direct benefit of an Amway distributorship agreement is the right to sell *Amway* products

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motion, apparently believing it was unnecessary to do so in light of its ruling on other dispositive issues (*e.g.*, that Plaintiffs did not make a valid and enforceable arbitration agreement and the claims are not within the scope). A1144.

and services and to recruit others to do the same. *See* Rules 3.1; 3.14.2 (A1626-27). Plaintiffs have never engaged in the sale of Amway products or services. A1686, ¶¶ 3-4.

Moreover, Plaintiffs' sale of BSMs products and service to their customers impose *different obligations* than Stewart Associates' obligations to its customers with respect to the *sale of Amway products* under the Amway distributorship agreement. Thus, they are, at best, *collateral* to Stewart Associates' Amway distributorship agreement. *See Dunn*, 112 S.W.3d at 436-37 (estoppel does not lie with respect to a *collateral* agreement that "imposes different responsibilities" than the contract the party is seeking to avoid).

Because Plaintiffs did not receive a direct benefit from or attempt to enforce Stewart Associates' Amway distributorship agreement, they are not estopped to deny Amway arbitration. *See Thomson*, 64 F.3d 773 (non-signatory who did not receive a direct benefit from nor attempt to enforce contract is not estopped); *E.I. Dupont de Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates*, 269 F.3d 187, 200 (3rd Cir. 2001).

Equitable estoppel is viewed with disfavor "and will not be invoked lightly." *Thompson v. Chase Manhattan Mortgage Corp.*, 90 S.W.3d 194, 208 (Mo. App. S.D. 2002). "The party asserting estoppel bears the burden of proving it" by "clear and satisfactory evidence." *Van Kampen*, 685 S.W.2d at 625. Defendants have failed to present sufficient evidence to satisfy their burden of showing estoppel, and thus the trial court's judgment should be affirmed.

d. Plaintiffs Did Not Agree to Amway Arbitration Via Pro Net

Defendants alternatively argue that Respondents agreed to arbitrate under Amway's Rules of Conduct by submitting a Pro Net membership application, which contained an agreement to abide by Amway's Rules of Conduct. This argument fails for three reasons: (1) Plaintiffs did not make a valid and enforceable agreement to arbitrate under the Pro Net Arbitration Provision, for the reasons discussed in Point I, *infra;* (2) even if they did, the Amway Arbitration Provision is unconscionable and therefore unenforceable (*see* § 3 immediately following this section); and (3) the Pro Net agreement requires arbitration under the American Arbitration Association's (AAA) Commercial Rules, not under the Amway Arbitration Provision. Because the first two issues are addressed elsewhere, Plaintiffs address only the third here.

Defendants argue that Plaintiffs, in purportedly becoming Pro Net members, are bound to arbitrate under the Amway Arbitration provision because the Pro Net "Membership Application Terms and Conditions" contains an agreement to abide by Amway's Rules of Conduct. *See* A1423. Those Rules of Conduct, in turn, contain, among many other things, an arbitration provision requiring arbitration before JAMS/Endispute, Inc. under the rules set forth in Amway Rule 11.5. *See* A1658-57.

But the same Pro Net document also contains an *express* arbitration clause requiring arbitration before the AAA under the AAA rules. A1424. It is well-settled that where a contract contains a provision that deals with an issue generally and another that deals with the same issue more specifically, the specific provision trumps the general.

A&L Holding Co. v. Southern Pacific Bank, 34 S.W.3d 415, 418-19 (Mo. App. W.D. 2000). Therefore, arbitration -- assuming it were proper, which for the reasons set forth in succeeding sections it is not -- could only be compelled before the AAA under its Commercial Rules – not before JAMS/Endispute under Amway's Rules of Conduct. Defendants' attempt to bootstrap Amway arbitration via Pro Net was properly rejected by the trial court.

The *Johnson* case cited by Defendants is inapposite. *Johnson* did not give effect to two *conflicting* arbitration provisions, as the AAA and JAMS arbitration clauses are. In *Johnson Controls, Inc. v. City of Cedar Rapids, Iowa*, 713 F.2d 370 (8th Cir. 1983), the parties' contract contained both a mandatory and a voluntary arbitration provision. Construing the two clauses, the court held that they could be harmonized: the mandatory clause covered all disputes arising out of the contract, whereas the voluntary clause covers only those disputes that did *not* arise from the contract, if both parties agreed to resolve them by arbitration. *Id.* at 374. In contrast, the AAA and JAMS arbitration clauses patently conflict. They require disputes to be resolved before *different arbitration service providers* and under *different rules*.

Additionally, the *U-Can-II* decision cited by Defendants is not well-reasoned and the trial court wisely chose not to follow it. In any event, the *U-Can-II* court compelled arbitration before the AAA, not under the Amway Rules as Defendants are urging here. A3700.

Even if the Court finds that Plaintiffs agreed to arbitrate under Amway's rules via the Pro Net Arbitration Provision or via Stewart Associates' Amway distributorship

agreement, Plaintiffs still could not be compelled to arbitrate because the Amway Arbitration Provision is unconscionable, for the reasons discussed in the section immediately following.

3. The Amway Arbitration Provision is Unconscionable

In its letter ruling, the trial court expressly found that the Amway Arbitration Provision is unconscionable and therefore unenforceable. A3597-98. In particular, the trial court expressly singled out three substantive aspects as being particularly "offensive." A3748-49. Defendants specifically address those issues in Point III, but ignore the wealth of additional evidence presented establishing both procedural and substantive unconscionability. Under any standard of review,[6] the trial court's judgment should be affirmed.

There are two components to a court's consideration of whether a contract is unconscionable: substantive and procedural unconscionability. *Funding Systems Leasing Corp. v. King Louie International, Inc.*, 597 S.W.2d 624, 634 (Mo. App. W.D. 1979). Substantive unconscionability refers to "undue harshness in the contract terms themselves." *Id.* Procedural unconscionability involves "the contract formation process,

[6] Unconscionability involves fact issues and thus should be reviewed under the *Murphy* standard. *See Chapman v. King Motor Co. of South Florida*, 833 So.2d 820 (Fla. 4th DCA 2003). *But see Dardick v. Dardick*, 948 S.W.2d 268 (Mo. App. E.D. 1997), holding that unconscionability is a question of law under California law, in which case review would be *de novo*.

and focuses on high pressure exerted on the parties, fine print of contract, misrepresentation or unequal bargaining position." *Id.* "If there exists gross procedural unconscionability then not much be needed by way of substantive unconscionability, and . . . the same 'sliding scale' [is] applied if there be great substantive unconscionability but little procedural unconscionability." *Id.*

a. Substantive Unconscionability

Amway has admitted that its dispute resolution process was specifically "designed to afford Amway and the [IBOAI Board[7]] a means to exercise influence and control over the process." A1505. One of the ways in which it achieves that goal is through its rule providing that the only arbitrators eligible to hear a dispute are those not only ***hand-selected*** in advance, but also ***trained*** by Amway and the IBOAI Board -- which includes ***four named defendants*** in this lawsuit (Gooch, Childers, Woods and Foley). Rule 11.5.14 (A1663), A1505; A1519, ¶ 9. The training is not limited to a review of Amway's procedures, but includes *substantive* indoctrination.[8] *See* A1505. This process ensures a

[7] The IBOAI Board (f/k/a ADA) is a board purportedly organized to represent the interests of Amway distributors. A2928, ¶ 8.

[8] Since the trial court's judgment, Plaintiffs have obtained additional evidence in a similar lawsuit now pending in federal court, including the depositions of Amway/Quixtar, the IBOAI and JAMS, demonstrating Amway's and the IBOAI's overriding influence over JAMS and the arbitration process. Should this Court determine that the trial court's

biased arbitration panel favorable to Defendants at the outset. Certainly, courts would not countenance one party to a civil lawsuit hand-picking and indoctrinating the panel of jurors before voir dire, leaving the other party to strike and rank from those jurors who have previously been culled for their pre-disposition to his opponent.

This biased process is compounded by the fact that, at the time the case was submitted to the trial court, the rules included a ***retention vote***, which provided that arbitrators will be retained on that panel after an initial three year term *only* if Amway and the IBOAI Board vote *unanimously* in favor of retention. Rule 11.5.14 (*id.*). In other words, if an arbitrator did not rule favorably to Amway's or the IBOAI's interests, the single vote of either could effectively remove the arbitrator from the panel.

Amazingly, because the trial court based its ruling of unconscionability in part on this rule, Amway promptly and unilaterally amended its Rules of Conduct *in the middle of an existing contract term* to remove the retention vote provision. *See* A3597-98; A3650, A3655. The fact that Amway not only has the ***unilateral and unfettered right to change or rescind*** its rules at any time, but does not hesitate to exercise that right at its whim, is alone sufficient evidence not only of substantive unconscionability, but also that the arbitration provision is unenforceable because it is ***illusory***.[9] Indeed, this Court

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decision cannot be affirmed as a matter of law, Plaintiffs respectfully request this case be remanded for trial so that this newly discovered evidence can be presented.

[9] In Rule 1 (A1625), Amway reserves the right to amend *or rescind* any or all its Rules of Conduct at any time at its whim. As such, it is illusory and unenforceable. *Michaels v.*

recently stated that an arbitration clause that "purports to give one party sole authority to set whatever terms it wishes" "raise[s] serious concerns" about its enforceability and conscionability. *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772 (Mo. 2005). If Plaintiffs are compelled to arbitrate, nothing prevents Amway from thereafter changing its rules, including in the middle of arbitration, as it did in response to the trial court's ruling.

In any event, removal of retention voting does not cure the problem that Amway and the IBOAI Board -- which includes Defendants Gooch, Childers, Woods and Foley (A1519, ¶9) -- hand-select all persons on the panel of arbitrators. As one court stated: "Our research has not disclosed a single case upholding a provision in an arbitration agreement in which the appointment of the arbitrator is within the exclusive control of the parties." *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So.2d 779 (Ala. 2002); *see also Murray v. United Food and Commercial Workers International Union*, 289 F.3d 297, 303 (4th Cir. 2002); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

Amway Corp., 522 N.W.2d 703, 706 (Mich. App. 1994) (stating with respect to Amway Rule 1, "a reservation to change any rule at will case by case would essentially render plaintiffs' rights under the [Rules of Conduct] illusory."); *Cooper v. Jensen*, 448 S.W.2d 308, 314 (Mo. App. W.D. 1969); *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002).

Defendants suggest that the involvement of the IBOAI Board and JAMS – purportedly neutral parties – saves arbitration from unconscionability. But ***four named defendants in this lawsuit have powerful influence over both the IBOAI and the ADR process,*** as the following establishes.

The Amway ADR process was specifically designed to give Amway and the IBOAI Board – which consists of only the most powerful and influential distributors (A1504, ¶¶ 6-7) and whose interests are thus aligned with Amway – control over the dispute resolution process. A1505. Amway and its most powerful distributors ensured that they would maintain control over the Board by making it self-perpetuating and denying a majority of members the right to vote. Half of the IBOAI members are elected by existing Board members. *Id.* Although the other half is elected by Association members eligible to vote, a vast majority of Amway distributors never attain the pin level required to be eligible to vote. *Id.* Although the IBOAI may make recommendations to Amway regarding rule changes, those recommendations are not binding on Amway. A1504, ¶8. With respect to the rule change mandating arbitration, specifically, the IBOAI Board never advised its members of the proposed arbitration requirement before voting to recommend its adoption. A1690, ¶ 17. This is not surprising given that many Board members were targets of high-profile lawsuits. A1505, ¶ 10.

Under its ADR rules, Amway can order a distributor into conciliation. *See* A1505. The IBOAI Board is vested with authority not only to conduct the conciliation and mediation process, but also to select the conciliators. *Id.* Amway and the IBOAI also

have the right to intervene in any dispute (including arbitration). *Id.* These rules enable Amway and the IBOAI Board to "exert further influence" on distributors. *Id.*

This influence is apparent in this very case. Defendants cite an "opinion" letter from IBOAI Board member Jody Victor as conclusive "evidence" that Plaintiffs are bound by the Amway Arbitration Agreement, A2505-06. Recall that Victor is a named defendant in the *Morrison* lawsuit. *See* p.27, n.2, *supra*. Over Stewart Associates' protests, Amway ordered Ken Stewart to appear for mandatory conciliation under its ADR rules, even though Plaintiffs are not Amway distributors. Shockingly, that conciliation was precipitated by Childers' demand to Amway that it "force" Stewart to participate in the ADR process. A1716. Victor then presided over that conciliation despite his *clear* bias. Contrary to his statements during conciliation that Amway's Rules were never intended to apply to BSMs disputes (A1506), Victor subsequently issued his "opinion" that Plaintiffs *are* subject to Amway arbitration. It is outrageous that Defendants would not only publicize, but rely upon, these confidential settlement negotiations in their efforts to force arbitration in this matter. Defendants' citation to Victor's letter is clearly improper under Missouri law, and a sterling example of Amway's and these Defendants' attempted influence over the entire ADR process.

It is against this backdrop that we turn to how four named defendants in this case, specifically, are involved in Amway's ADR process. Defendants Gooch, Childers, Woods and Foley serve on the IBOAI Board that selects the panel of "neutrals" that would arbitrate this matter if it were compelled. A1519. Thus, they (and not Plaintiffs) have the ability to pre-determine the entire panel. Childers serves on the IBOAI's

Executive Committee, which selects the three persons who constitute the "Hearing Panel," which administers Amway's dispute resolution procedure (which includes arbitration). *Id.*; Rule 11.3.1(A1659-58); Rule 11.1.4 (A1658). Childers and Woods also serve on the Hearing and Disputes Committee, which also participates in the Amway dispute resolution process. A1520, ¶ 10. These Defendants, by virtue of their positions on the IBOAI Board, have the right to issue its recommendations for resolving the dispute, including whether to refer the matter to arbitration. A1519; Rule 11.3.2 (A1659-58).[10] Undoubtedly, given the chance to refer the matter to arbitration, they would, as a fait accompli.

As the foregoing demonstrates, these four defendants are so enmeshed in Amway's ADR process as to deny Plaintiffs a fair hearing.

Nor does JAMS' involvement save Amway's Arbitration Provision from unconscionability. At least one court has, quite perceptively, questioned the neutrality of JAMS because its "neutrals," who, unlike AAA neutrals, are owners of JAMS, have a direct financial interest in its success:

> It merits mention that J*A*M*S/Endispute, Inc. is an entity owned by the very arbitrators who adjudicate disputes between the borrower and the very lender who assigns the disputes to J*A*M*S. Thus the arbitrators, in their role as owners, must seek to promote the goodwill of the lenders so as to develop and maintain a volume of business, namely cases for adjudication.

[10] Note the pages were transposed in the Legal File.

> CitiFinancial is a supplier of cases, even, perhaps, a major source of business for J*A*M*S. It matters little whether it was Aesop or Confucius who counseled that *one should not bite the hand that feeds*, since the message is an apt reminder of the quite valid perception of a conflict of interest in the arbitration process.

Lytle v. CitiFinancial Services, Inc., 810 A.2d 643, 651 n.5 (Pa. Super. 2002).

Another way in which Amway achieves its goal of controlling disputes is by cloaking the proceedings – and evidence of its wrongdoing -- with ***confidentiality***. Defendants argue that the confidentiality clause does not render the arbitration provision unconscionable. However, whether proceedings are "shrouded in secrecy so as to conceal illegal, oppressive or wrongful business practices" is a factor supporting unconscionability. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8 (Mont. 2002). This is particularly troubling since, although arbitrators are required to disclose prior arbitrations involving a party, they are prohibited from disclosing the results of that arbitration, so that a claimant would never know how many times the arbitrator has ruled in favor of the respondent. A1663 (Rule 11.5.17).

Another aspect of substantive unconscionability is that ***Amway did not bind itself to arbitrate***. A one-sided arbitration provision is unconscionable. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 692 (Cal. 2000) ("[a]lthough parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, . . . the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party

without accepting that forum for itself."); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002); *Ticknor v. Choice Hotels International, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001); *Bellsouth Mobility LLC v. Christopher*, 819 So.2d 171, 172 (Fla. 4th DCA 2002); *see also* *Triarch*, 158 S.W.3d at 774-75 (expressing "serious concern" about the conscionability of one-sided agreements, among other things).

Defendants attempt to controvert this fact with the self-serving affidavit of an Amway officer (submitted after the trial court's ruling in their Motion for Rehearing) stating that Amway is bound. But Amway's understanding does not comport with the express language of the Arbitration Provision, which states that only "IBOs" are required to submit their claims to arbitration. Rule 11.5 ("*IBOs* shall give notice in writing of any claim or dispute . . .") (emphasis added) (A1658-59). Nowhere does the arbitration provision state that *Amway* must submit any dispute to arbitration.

Defendants argue that courts may consider the practical construction the parties place on a contract, citing *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. banc 1991). However, that case did not involve construction of an arbitration provision. Arbitration agreements must be *in writing*. 9 U.S.C. § 2 (1994). Since the Amway Arbitration Provision does not expressly bind Amway, if Amway decided to pursue a claim in a judicial forum, it would be free to do so.[11]

[11] Defendants argue that this is a red herring because Amway is not a party here. But the issue is not whether Amway is bound; it is whether Amway's Arbitration Provision is unconscionable.

Additional unconscionable aspects of the Amway Arbitration Provision include a provision imposing exorbitant fees that would not be incurred in a judicial forum,[12] and a loser pays provision,[13] which allows Amway and its favored distributors to shift their exorbitant legal fees to unsuspecting claimants who pursue their claims in sham arbitration. *See* *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (1998); *Kloss*, 54 P.3d at 8.

b. Procedural Unconscionability

The Amway Arbitration Provision is also procedurally unconscionable in numerous respects. In 1997, Amway unilaterally amended its Rules to impose mandatory arbitration, effective January 1, 1998. A1706-08; A1505, ¶ 9. Although Amway claims to have given distributors notice of this critical amendment, that notice was wholly deficient. While Mr. Stewart, by virtue of his position on the ADA/IBOAI Board in 1997 (A1504), was generally aware that an arbitration provision was going to be included in the Amway rules, other distributors were not so fortunate because Amway wanted to "low-key" notice of the same. A1505. Indeed, *many* distributors denied receiving *any* notice or even knowing about the arbitration provision until the pendency of this lawsuit. A1806, A1812-13; A1862, A1870; A1880, A1887; A1898, A1904; A1905, A1912;

[12] Rule 11.5.56, 11.5.25, 11.5.57, 11.5.58 (A1665, A1670-71); A1959, ¶ 9 (costs of *Morrison* arbitration was extremely excessive and many times higher than they would have been in federal court).

[13] Rule 11.5.48 (A1347-48).

A1920, A1928; A1930, A1936; A1938, A1945. Lack of notice is a hallmark of procedural unconscionability. *See* *Powertel, Inc. v. Bexley*, 743 So.2d 570, 575 (Fla. 1st DCA 1999).

Moreover, although Mr. Stewart was aware of the existence of an arbitration provision, even he did not know that the rules actually promulgated when he was no longer on the Board[14] would be so one-sided as to shock the conscious. The actual arbitration rules were not distributed to IBOs (including Stewart Associates) until December 1998 -- *more than one year after Amway deemed them to have accepted arbitration by renewing their distributorships*. (A1745, 1748, ¶ 15). "Courts have voided arbitration agreements where the plaintiff was not given a copy of the agreement or the governing rules and procedures." *Dumais v. American Golf Corp.*, 150 F.Supp.2d 1182, 1192 (D. N.M. 2001); *Burch v. Second Judicial Court of State of Nevada*, 49 P.3d 647, 650 (Nev. 2002).

Additionally, when the arbitration rules were finally circulated to IBOs, they were buried in a *three-fourths-inches thick* manual.[15] An arbitration clause is unconscionable where it is "'*hidden in a maze of fine print . . . .*'" *See* *Powertel*, 743 So.2d at 574 (emphasis added); *cf.* *World Enterprises, Inc. v. Midcoast Aviation Services, Inc.*, 713

[14] Mr. Stewart served on the IBOAI in 1997. A1504. The rules were not distributed to IBOs under December 1998. (A1745, A1748, ¶ 15).

[15] A1518, ¶ 3.

S.W.2d 606, 611 (Mo. App. E.D. 1986) (no unconscionability where provision is not hidden in fine print).

Even if they had been given adequate notice, distributors had no opportunity to negotiate the terms of the provision, or, even more importantly, an opportunity to opt out of arbitration. Indeed, Mr. Stewart signed the "Acknowledgement of Distributor Changes" form (containing the agreement to arbitrate under Amway's Rules) on behalf of *non-party* Stewart Associates because he did not believe he had a choice. A1688. In fact, the letter accompanying that Acknowledgement form stated: "The Amway rules now provide for mandatory binding arbitration; and by renewing your distributorship this year you have agreed to every term in the distributorship contract, including the dispute resolution and arbitration provisions. *These are the ONLY terms on which you or anyone else are authorized to continue as a distributor*." A2962-63.

It is critical to understand that this is not a situation in which, for example, if Amway distributors did not wish to arbitrate with a credit card company, they could simply switch companies. Distributors invested *years* building their Amway business. Given Amway's admonishment that its rules, including arbitration are the "only" terms on which a distributor could continue operating his business, distributors could not refuse arbitration without giving up their business.

In *Powertel* – a case the Western District Court of Appeals called "compelling"[16] – the court found a unilaterally imposed arbitration clause unconscionable because the customer had no economically feasible alternative. *Powertel*, 743 So.2d at 575. The *Whitney* court held that with arbitration contracts, as with any other contract, courts are to enforce the objectively reasonable expectations of the parties. *Whitney*, 2005 WL 1544777 at *6. No person could reasonably anticipate or would ever agree that one party could unilaterally impose terms after a two decade-long business relationship that would force him to choose between his Constitutional rights or giving up his successful livelihood.

Additionally, the "inequality of bargaining power" between Amway and its distributors is also a factor evincing unconscionability. *See Funding Systems*, 597 S.W.2d at 635. Indeed, a person may be highly sophisticated, but if an entity such as Amway has overwhelmingly superior bargaining power such that it can impose its will on a non-negotiable basis, sophistication does not save him from oppression. *See Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171-72 (Cal. 1981) ("whatever his asserted prominence in the industry, [plaintiff] was required by the realities of his business" to sign the form contract as presented to him, "with the nonnegotiable option of accepting such contracts [as is] or not at all.").

[16] *See Whitney v. Alltel Communications, Inc.*, 2005 WL 1544777, *9 (Mo. App. W.D. July 5, 2005).

Defendants argue that the decision in *Morrison v. Amway*, 49 F.Supp.2d 529 (S.D. Tex. 1998), holding that the Amway Arbitration Provision is not unconscionable, controls. Defendants' argument is, in effect, an attempt to collaterally estop Plaintiffs from litigating the issue of unconscionability, even though they were not parties to or in privy with the parties in *Morrison*, and have not had a full and fair opportunity to litigate this issue. *See James v. Paul*, 49 S.W.3d 678, 682-83 (Mo. banc 2001) (elements of collateral estoppel).

More importantly, *Morrison* should not be followed because there was a ***wealth*** of evidence presented to the trial court here that was never presented to the *Morrison* court. The *Morrison* court was presented with just two arguments: that the Amway distributorship agreement is a contract of adhesion, and that the arbitration provision had been unilaterally imposed. *See id.* at 553-54. The *Morrison* court never considered any evidence demonstrating the biased arbitrator selection process, the influence of named defendants over the dispute resolution procedure and JAMS, the fact that Amway's unilateral right to rescind its rules at any time renders it illusory, the one-sidedness of the agreement, the exorbitant fees, loser pays provision, or Amway's failure to provide notice of the arbitration rules. *See Morrison*, 49 F.Supp.2d at 533-34; Akers Aff. (attorney for the *Morrison* plaintiffs), ¶ 6 (A1958-60). Indeed, the *Morrison* court has recently issued an order re-opening the issue of Amway's biased arbitration program by allowing the plaintiffs an opportunity to conduct discovery into the issue of the evident partiality/corruption of the *Morrison* arbitrator and the precise the relationship between JAMS and Amway. *See* Order Granting Plaintiffs' Request for Discovery, May 20,

2005, Dkt. 127, *Morrison v. Amway*, Case No. 4:98-cv-00352, United States District Court, Southern District of Texas.

Finally, the court in *U-Can-II* blindly followed *Morrison*, and therefore its decision is unpersuasive. In contrast, the trial court here properly based its judgment on the totality of the evidence presented to it rather than summarily following the decision of a court with less than all of the facts necessary to make a well-reasoned decision.

The Amway Arbitration Provision contains so many unconscionable terms that it must be invalidtated. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 (8th Cir. 2001) (where contract contains "so many invalid provisions" it may undermine the validity of the entire agreement.); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) ("The Hooters rules *when taken as a whole* . . . are so one-sided that their only possible purpose is to undermine the neutrality of the proceeding.").

4. Severability

Defendants argue that the trial court should have severed the objectionable portions of the arbitration provision, citing *Gannon*. However, *Gannon* involved a single, isolated punitive damages clause. In this case, the unconscionable aspects of Amway arbitration permeate the entire arbitration provision, making piecemeal severance impractical. For example, if the trial court excised the biased arbitrator selection rules, the parties would be faced with even more litigation over how to select an arbitrator, who is eligible to serve, etc.

Courts will refuse to sever unconscionable provisions when to do so would require them to essentially re-write the parties' contract, or when the arbitration provision

"contains so many invalid provisions that it effectively creates a sham system." *See* *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 787-88 (9th Cir. 2002); *Faber v. Menard*, 367 F.3d 1048, 1054 (8th Cir. 2004). Not only was the Amway Arbitration Provision specifically *designed* to give Amway control over the process (A1505, ¶ 10), the multiple defects in the Amway Arbitration Provision "indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to [Amway's] advantage." *Ferguson*, 298 F.3d at 287-88. As such, the trial court did not abuse its discretion in refusing to sever the unconscionable provisions.

For the foregoing reasons, the trial court's judgment finding the Amway Arbitration Provision unconscionable was supported by substantial, competent evidence and should be affirmed. Failing that, Plaintiffs are entitled to a trial on any fact issues. *See* *Chapman v. King Motor Co. of South Florida*, 833 So.2d 820 (Fla. 4th DCA 2003) ("Appellants' allegations of procedural unconscionability also raise issues of fact requiring an evidentiary hearing); *but see* *Dardick v. Dardick*, 948 S.W.2d 268 (Mo. App. E.D. 1997) (unconscionability is a question of law under California law).

5. Plaintiffs' Claims Are Not Within the Scope of Arbitration

Even if a court finds that a party made a valid and enforceable arbitration agreement, arbitration still cannot be compelled unless the parties' dispute is within the scope of the arbitration clause. *Dunn*, 112 S.W.3d at 427-28. Plaintiffs' claims are not within the scope of the Amway Arbitration Provision.

The scope of the Amway Arbitration Provision covers only an "IBO's" dispute arising out of or relating to (1) "their" Independent Business, (2) the Independent

Business Ownership Plan or (3) Amway's Rules of Conduct. A1658. The claims in this lawsuit are not brought by an "IBO" nor do they arise out of or relate to the Amway Rules of Conduct. Defendants do not contend that the dispute falls within category (2). There is no ambiguity. The plain and ordinary language of the Amway Arbitration Provision does not encompass disputes between *BSMs* distributors regarding the *BSMs* industry, as here. Thus, Plaintiffs' claims in this lawsuit do not fall within its scope and are not arbitrable. *See* *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 777 (Mo. banc 2005).

a. Plaintiffs are Not IBOs

Plaintiffs' claims are not within the scope of the arbitration clause because it requires arbitration only of claims brought by an "*IBO*." Plaintiffs, by definition, are not and have never been "IBOs."

Under Amway's Rules of Conduct, an "IBO" ("Independent Business Owner") is defined as "the *individual(s)* operating an IB pursuant to a contractual relationship with either Amway Corporation and/or Quixtar, Inc., unless otherwise specified." Rule 2.3 (A1625) (emphasis added). An "IB" ("Independent Business") is defined as "an IBO entity operated as either an Amway or Quixtar business . . . ." Rule 2.2 (*id.*). In other words, an IBO is the individual who owns an Amway distributorship and an IB is the corporation, partnership or other entity that operates as an Amway distributorship. For example, Mr. Stewart is an "IBO" and Stewart Associates is his "IB."

Neither Nitro nor West Palm are "IBOs" as that term is defined in the Amway Rules of Conduct. Nitro is a *corporate* entity engaged in the *tools* business. A1686-87.

West Palm is a *corporate* entity engaged in the *functions* business. *Id.* Thus, they are not "individuals" who own an Amway distributorship and thus cannot be "IBOs." *See* Rule 2.3 (A1625).

Because Plaintiffs are not IBOs, they are not within the class of persons that are required to submit their claims to arbitration under the express language of the Amway Rules of Conduct.

b. BSMs Disputes are Not Governed by Amway's Rules of Conduct

Defendants first make the outrageous suggestion that the Amway Arbitration Provision requires Plaintiffs to submit "any claim" to arbitration, wholly ignoring the remainder of the sentence, which limits the scope to "any claim or dispute *arising out of or relating to* their Independent business or the Independent Business Ownership Plan or Rules of Conduct." A1658 (emphasis).

Just as outrageously, Defendants alternatively argue that Plaintiffs' disputes arise out of or relate to non-party Stewart Associates' Amway distributorship. Again, Defendants ignore the express language of the Rule which states than "IBO's" are required to submit any claim arising out of or relating to "*their* Independent Business." *Id.* (emphasis added). Plaintiffs are not IBOs and have no "Independent Business" (*i.e.*, Amway business) as defined in Amway's Rules. A1625.

Lastly, Defendants contend that Plaintiffs' claims arise out of or relate to the Amway Rules of Conduct because Amway Rule 4.14 purportedly governs the sale of BSMs. The fundamental fatal flaw of this argument is that Plaintiffs do not allege any

violation of that rule or any other Amway Rule of Conduct. Indeed, Defendants cite no allegation in Plaintiffs' Third Amended Petition where they even arguably allege a violation of Amway's Rules of Conduct. To the contrary, Plaintiffs allege that Defendants violated the *separate, unwritten* rules governing the *BSMs* industry.

All three appellate district courts in this State have held that for a plaintiff's claims to be within the scope of an arbitration clause, they "must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the [contract]." *Estate of Athon v. Conseco Fin. Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. W.D. 2002); *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995); *Northwest Chrysler-Plymouth, Inc. v. DaimlerChrysler Corp.*, 2005 WL 1432352 (Mo. App. E.D. June 21, 2005). A claim is not within the scope of an arbitration provision simply because the dispute would not have arisen absent the existence of the contract between the parties. *Greenwood*, 895 S.W.2d at 174. The federal policy favoring arbitration "is not enough to extend the application of an arbitration clause far beyond its intended scope." *Id.* Even with a broad arbitration clause, if the tort claim does not raise some issue that requires the court to refer to or construe the contract, the claim is not within the scope of arbitration. *Id.*

As alleged in Plaintiffs' Third Amended Petition, their claims are based on violations of the separate, unwritten BSMs rules as dictated by the kingpins in the BSMs industry and pursuant to a long-standing course of dealing. A0700-05; 1862-65; A1872-75; A1880-83; A1889-92; A1898-1901; A1905-07; A1914-17; A1920-23; A1930-32; A1938-41; A1948-51. It is those rules that a court must construe and apply, not

Amway's Rules. Since resolution of Plaintiffs' claims do not require interpretation of or reference to Amway's rules, their claims are not within the scope of the Amway Arbitration Provision. The Florida court's decision in *U-Can-II* that BSMs disputes are governed by the Amway Rules of Conduct is contrary to Missouri law, not well-reasoned, and should not be followed.

Only if there is an ambiguity may a court look outside the four corners of the document to determine the parties' intent. *Triarch*, 158 S.W.2d at 777. To the extent there is any ambiguity in the scope of the Amway Arbitration Provision such that the court may look outside the four corners of the document, the *overwhelming weight* of the evidence presented to the trial court in this case establishes that BSMs disputes are not governed by Amway arbitration.

By Amway's own admissions, the BSMs industry is independent of Amway. *See* A1722 ("[S]ome distributors produce and distribute Business Support Materials and support services *independently of Amway Corporation* (independently produced Business Support materials or BSMs).") (emphasis added); *Id.* ¶ 6 ("Independently produced Business Support Materials are offered *independently of Amway Corporation* and have not been endorsed or approved by Amway Corporation. . . . Distributors who choose to sell Business Support Materials must make it clear to their customers that such materials are produced and sold independently of Amway.") (emphasis in original); *see also* Affidavits of Paul Brown, Ken Stewart and numerous other distributors involved in both

the Amway and BSMs businesses who testified that Amway considers the BSMs industry to be separate from the Amway business.[17]

The reason Amway maintains its separation from the BSMs industry and why its Rules of Conduct do not govern BSMs disputes is explained in Amway's "Antitrust Primer." There, Amway admonished BSMs distributors from seeking Amway's assistance in enforcing its Rules of Conduct because of antitrust concerns:

> Producers and resellers of BSM should not ask Amway to enforce their agreements about BSM distribution and sales. *It would be a mistake for distributors to try to invoke Amway's rule against cross-line solicitation* to solve problems in the BSM business. Amway is not the supplier of BSM resold in independent "systems"; *it is a competitor*, selling its own books, tapes and functions. Distributors who ask Amway to enforce lines of sponsorship in non-Amway BSM "systems" are in effect asking their competitor to help them allocate customers. If Amway complied with such a request, it would expose the requesting distributor as well as Amway to *serious antitrust risks*.

A1421 (emphasis added); *see also* A1506, ¶ 11.

Further, Amway's associate legal counsel, Sharon Grider, stated in an April 24, 2000, letter, addressing similar complaints against some of the same Defendants in this

[17] A1339, at 21:12-21; A1429, ¶ 6; A1503, 1506-08, ¶¶ 11-13, 15-17; A1688-89, ¶¶ 10, 15; A1855, A1857, ¶ 10; A1862, 1870, ¶¶ 3, 33; A1872, ¶ 3; A1880, A1887, ¶¶ 25, 27; A1889, ¶ 3; A1914, ¶ 3; A1930, 1937, ¶ 33; A1938, 1945, ¶¶ 3, 28; A1948, ¶ 3.

lawsuit that the Amway Rules of Conduct do not apply to BSMs disputes: "we remain puzzled as to why you believe that Amway has the legal responsibility to resolve these private disputes, *which do not appear to be covered by our Rules of Conduct*, *or by [your] Amway distributorship contract*." A1712 (emphasis added).

Still further, the fact that the Amway Arbitration Provision does not cover BSMs disputes is established by Amway's promulgation of the voluntary Business Support Materials Arbitration Agreement ("BSMAA"). *See* A1722. Unlike the Amway Arbitration Provision, the BSMAA *expressly* covers BSMs disputes. The BSMAA requires arbitration of any dispute that "arises out of or relates to Business Support Materials" "including any claim a party to this Agreement may make against any publisher, author, speaker, distributor, manufacturer, seller, reseller or marketer of Business Support Materials, or against Amway Corporation or any of its officers, directors, agents or employees." *Id.*

Ken Stewart, who was on the IBOAI Board when the BSMAA was promulgated, testified that it was adopted because ***Amway and the IBOAI Board recognized that the Amway arbitration provision did not govern disputes relating to independently produced BSMs***. A1507-08, ¶¶ 15-17. Indeed, an arbitration provision specifically directed to disputes concerning BSMs would be superfluous if the Amway Arbitration Provision were intended to cover disputes concerning independently produced BSMs.[18]

[18] Plaintiffs recognize that a contrary result was reached in *Morrison v. Amway Corp.*, 49 F.Supp.2d 529 (S.D. Tex. 1998). However, the *Morrison* court did not have the benefit

See *id*. ¶ 16. The fact that Defendants Gooch, Childers, Foley, Woods and Dunn each signed a BSMAA[19] at the very least creates a jury question as to whether those parties believed that BSMs disputes were covered by Amway Rules of Conduct. If they truly believed that the Amway Arbitration Provision governed BSM disputes, there would have been no reason to sign a BSMAA.

Amway also expressly recognized the differing scopes of the Amway Arbitration Provision versus the BSMAA in its Business Compendium (rev. June 99):

> The IBOAI Board asked that Amway provide IBOs with the opportunity to sign a Business Support Materials Arbitration Agreement. *The same arbitration procedures that will be used with disputes relating to the Amway business will be used with disputes involving BSM-related issues, provided the disputing parties have signed a BSMAA. . . . .*

A1614 (emphasis added).

In other words, the Amway Arbitration Provision applies only to disputes relating to the *Amway business* (*i.e.*, the sale of Amway-produced products), whereas disputes relating to independently produced BSMs are covered by the BSMAA – *if* the parties

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of Plaintiffs' evidence in this case, in particular, Ken Stewart's testimony that Amway and the IBOAI Board adopted the BSMAA specifically because they recognized that the Amway arbitration provision did not apply to BSMs disputes. *See* A1507-08, ¶¶ 15-17.

[19] A1722-31.

signed a BSMAA. Neither Ken Stewart, Stewart Associates, Nitro nor West Palm ever signed a BSMAA. A1688, ¶ 11.

Moreover, on June 11, 2002, Amway/Quixtar stated in a letter to the parties in this case that "it is not clear based on the information available to [Quixtar] whether or not Nitro or West Palm are required to resolve their claims in accordance with the Quixtar Rules of Conduct." A1509. Instead, Amway/Quixtar stated that it would defer to the ruling of the trial court. *See id.*

Defendants' construction of the Amway Arbitration Provision to include disputes between BSMs distributors relating to the BSMs industry – which is governed by entirely separate and different rules -- patently conflicts with the plain and ordinary language of the arbitration provision, as well as Amway's position, as repeatedly expressed to its distributors. For these reasons, Plaintiffs' claims are not within the scope of the Amway Arbitration Provision.

6. Defendants Are Not Entitled to Compel Arbitration

Because Plaintiffs did not make an arbitration agreement, this Court need not reach the issue of whether Defendants, or any of them, are entitled to enforce the Amway Arbitration Provision. Should this Court nevertheless reach this issue, Plaintiffs submit the following:

Defendants argue that six of them are entitled to arbitrate because they are officers of Amway distributorships. But they are not being sued in their capacities as officers of an *Amway* distributorship. Rather, they are sued individually and/or as officers of their separate *BSMs* corporations. Defendants' argument ignores corporate distinctions and

elementary contract law. There is a presumption of separateness between two or more corporations – even where the corporations share the same officers. *See* *Blackwell Printing Co. v. Blackwell-Wielandy Co.*, 440 S.W.2d 433, 436-37 (Mo. 1969). Thus, the fact that one corporation is entitled to arbitrate does not mean that a separate corporation is also entitled to arbitrate, even if they share the same officer. *See* *National City Bank of St. Louis v. Carleton Dry Goods Co.*, 67 S.W.2d 69, 73 (Mo. 1933). It follows that, for example, when Defendant Gooch is wearing his hat as an officer of Gooch Support and Gooch Enterprises (his BSMs corporations) is not entitled to arbitrate under an arbitration provision entered into when he was wearing his hat as an owner of an Amway distributorship.

Defendants also contend that thirteen of them are entitled to enforce the Amway Rules of Conduct via their purported Pro Net memberships. That argument is dispelled in Point I § B.2.d. and e., *infra*. The thirteen are not Pro Net members; indeed, they are not even *eligible* for Pro Net membership.

7. Plaintiffs' Defenses are for Courts to Resolve

Defendants argue that Plaintiffs' defenses are for the arbitrator, not a court, to resolve. To the contrary, it is for a court, not an arbitrator, to decide, under state contract law, whether a party made a valid and enforceable contract. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924 (1995); *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003).

In Reply, Defendants may argue (as they did in the court below) that under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), defenses that go to the

contract as a whole, rather than the arbitration provision itself, are for the arbitrator to resolve. First, a number of Plaintiffs' defenses *unquestionably* go to the arbitration clause itself, such as unconscionability; Amway's unilateral right to rescind its arbitration rules renders them illusory; and Plaintiffs' claims are not within the scope of the arbitration provision. Therefore, there can be no question that they must be resolved by the court. The remaining issues go to assent which, for the following reasons, are properly resolved by courts.

Second, the United States Supreme Court itself has rejected the broad interpretation of *Prima Paint* that every issue relating to the contract as a whole is for the arbitrator to decide. For example, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588 (2002), the Supreme Court expressly stated that *it is the function of the court to decide whether an arbitration contract binds parties who did not sign the agreement. Id.* at 592. Obviously, such a defense goes to the validity of the agreement as a whole, not solely to the arbitration clause itself. This is *precisely* the issue presented in this case – whether the Amway and Pro Net Arbitration Provisions bind Plaintiffs, who are non-signatories. Under Supreme Court precedent, these are issues for a court to resolve.

Numerous federal courts, including the Third, Seventh, Eighth, Ninth and Eleventh Circuits, as well as Missouri state courts,[20] have likewise rejected the broad

[20] *See Dunn*, 112 S.W.3d at 436-37 (estoppel); *Abrams v. Four Seasons Lakesites*, 925 S.W.2d 932 (Mo. App. S.D. 1996) (lack of assent); *Hitcom Corp. v. Flex Financial*

interpretation of *Prima Paint* urged by Defendants, resolving various issues even though they go to the contract as a whole. Specifically, many of these courts recognized that *Prima Paint's* holding was limited to defenses that the contract is *voidable*;[21] it did not address situations where the contract is void *ab initio*. *See* Sandvik, 220 F.3d at 105.

In adopting the void/voidable distinction, the Ninth Circuit reasoned that "[t]o require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the 'first principle' of arbitration that 'a party cannot be

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Corp., 4 S.W.3d 618 (Mo. App. E.D. 1999) (lack of authority to execute); *Estate of Burford v. Edward D. Jones & Co., L.P.*, 83 S.W.3d 589 (Mo. App. W.D. 2002) (same); *Sandvik AB v. Advent International Corp.*, 220 F.3d 99, 105 (3rd Cir. 2000) (same); *Sphere Drake Ins. Ltd v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (lack of consideration; lack of authority); *N & D Fashions, Inc. v. DJH Indus., Inc.*, 548 F.2d 722, 728-29 (8th Cir. 1976) (lack of authority); *I. S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986) (where agreement to arbitrate turned on the validity of a third-party's assignment of the contract to plaintiffs, issue was for the court); *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1142 (9th Cir. 1991) (agency, alter ego, estoppel); *Cancanon v. Smith, Barney, Harris, Upham & Co.*, 805 F.2d 998 (11th Cir. 1986) (lack of assent); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002) (same).

[21] *Prima Paint* involved the defense that the contract as a whole was induced by fraud. *Prima Paint*, 388 U.S. 395.

required to submit [to arbitration] any dispute which he has not agreed so to submit.'" *Three Valleys*, 925 F.2d at 1142 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418 (1986)). The court held:

> If the dispute is within the scope of an arbitration agreement, an arbitrator may properly decide whether a contract is "voidable" because the parties have agreed to arbitrate that dispute. But, because an "arbitrator's jurisdiction is rooted in the agreement of the parties," . . . a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate. Only a court can make that decision."

Id. at 1140-41 (emphasis in original).

Although the Eleventh Circuit disagreed with the void/voidable distinction, it agreed that issues of assent are for courts to resolve. *Bess*, 294 F.3d at 1305.

The defenses asserted in this case involve whether the non-signatory Plaintiffs ever assented to arbitration or otherwise made a valid and enforceable agreement, and whether their claims are within the scope of arbitration, and thus are issues for the court under any authority.

Lastly, Defendants may argue in Reply (as they did below) that per both the Amway Rules of Conduct and JAMS/Endispute arbitration rules, "disputes over the existence, validity, interpretation or scope" over the arbitration agreement "may be submitted to and ruled on by the Arbitrator." A1340. But this begs the question. Since Plaintiffs never agreed to Amway's Arbitration Rules, they never agreed to allow an

arbitrator to decide those questions. Further, use of the word "may" indicates that it is permissive rather than mandatory. Plaintiffs do not agree to submit these issues to an arbitrator.

This Court may and should affirm the trial court's judgment as a matter of law because Defendants failed to satisfy their burden of showing an agreement to arbitrate and that Plaintiffs' claims are in the scope of the Amway Arbitration Provision. Should this Court believe that there are genuine issues of fact as to arbitrability, Plaintiffs respectfully request this Court to remand this case for trial, for the reasons set forth in Point I, § B.3., *infra*, which is incorporated herein by reference.

II. RESPONSE TO POINT I

A. Standard of Review

Defendants' Point I fails to comply with Mo. R. Civ. P. 84.04(d). Point I asserts that the trial court erred in failing to "address" Pro Net arbitration, but they do not state why it is error for a court not to address an issue in its judgment, either in the Point or in the Argument. *See* Rule 84.04(d)(1)(C); *Stelts v. Stelts*, 126 S.W.3d 499, 504 (Mo. App. S.D. 2004) ("'It is not sufficient to merely set out what the alleged errors are without stating why.'"); *Cooper v. Bluff City Mobile Home Sales, Inc.*, 78 S.W.3d 157, 167 (Mo. App. S.D. 2002) (Issue unmentioned in argument portion of brief is abandoned. "It is not within the province of this court to decide an argument that is merely asserted but not developed.").

In the argument portion of their Brief, instead of arguing that the trial court failed to *address* Pro Net arbitration, Defendants instead argue that the trial court erred in

failing to *find that Plaintiffs are bound* thereby. Even if the Point were construed consistently with their argument, again Defendants do not explain why the court erred. In essence, the Point asserts that the trial court erred in failing to find that Plaintiffs are bound to arbitrate under the Pro Net Arbitration Provision because they are bound. Thus, that issue, too, is not preserved for appeal. *Lusher v. Gerald Harris Construction, Inc.*, 993 S.W.2d 537, 544 (Mo. App. W.D. 1999) ("Issues raised only in the argument portion of the brief are not presented for review."); *see also Swearingen v. Dryden*, 42 S.W.3d 741, 746-47 (Mo. App. W.D. 2001).

"[A]llegations of error not briefed or not properly briefed shall not be considered in any civil appeal . . . ." Mo. R. Civ. P. Rule 84.13(a); Accordingly, this Point should be dismissed. *See Freeman v. Basso*, 128 S.W.3d 138, 141 (Mo. App. S.D. 2004). Any discretionary review is limited to plain error. Mo. R. Civ. P. 84.13(c). Such relief, however, is rarely applied in civil cases, and the circumstances of this case do not call for such extraordinary relief. *Cooper*, 78 S.W.3d at 167.

Alternatively, the standard of review is that set forth in Point III above: *de novo* for conclusions of law (*e.g.*, contract interpretation), and that set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), for issues involving the sufficiency of evidence. *See Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. banc 2005); *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 868 S.W.2d 118, 120 (Mo. App. W.D. 1993).

B. Argument

1. The Trial Court Did Not Err in Failing to "Address" the Pro Net Arbitration Provision

The error framed in Point I is that the trial court's judgment did not address Pro Net Arbitration. But the judgment did not address *any* of the three arbitration provisions at issue. It stated only that Defendants' motions were overruled. *See* A3765. Defendants are really complaining about the trial court's September 17, 2003, letter ruling, which addressed only the Amway Arbitration Provision (A3597-98). But that letter ruling has no legal effect.

More importantly, Defendants cannot seriously contend that the trial court failed to consider the Pro Net Arbitration Provision since that "omission" was the primary focus of their Motion for Rehearing. *See* A3637. Therefore, when the trial court issued its judgment on January 22, 2004, overruling both Defendants' Motion to Compel Arbitration and their Motion for Rehearing, it implicitly rejected Defendants' contentions that Plaintiffs are bound by the Pro Net Arbitration Provision. Defendants cite no authority that a trial court commits reversible error in failing to address all issues in its judgment. Indeed, courts routinely omit discussion of issues in their judgments, in which case the issue is deemed to have been impliedly overruled. *See, e.g.*, *State ex rel. Washington Fidelity Nat'l Ins. Co. v. Hostetter*, 117 S.W.2d 1083, 1085 (Mo. 1938); *Williams v. Kaestner*, 332 S.W.2d 21, 25 (Mo. App. S.D. 1960).

2. The Trial Court Did Not Err in Finding that Plaintiffs are Not Bound to Arbitrate Under the Pro Net Arbitration Provision

a. Nitro is Not Bound to Arbitrate

Defendants strenuously argue that Ken Stewart was a "key figure" in creating Pro Net and therefore cannot be excused from arbitration under the Pro Net Arbitration Provision. But Ken Stewart is not a party here. The question presented to this Court is whether *these Plaintiffs*, Nitro and West Palm, were members, and for the reasons that follow, they were not.

(1) Nitro Is Entitled to Rescission or Reformation to Correct the Unilateral Mistake on its Pro Net Membership Application

Defendants contend that Nitro is subject to arbitration under the Pro Net Arbitration Provision because Ken Stewart signed a "Pro Net Global Association Membership Application Information" form on behalf of Nitro. A1701 (App. A34). But Mr. Stewart testified that he only did so because he was under the mistaken impression that the *then-existing* draft Pro Net Bylaws provided that the member of Pro Net would be a BSMs corporation, as had been represented to him by Defendants Gooch and Childers, and their attorney, Gaspare Bono. A1691.

Indeed, initial drafts of the Pro Net Bylaws provided that the members would be the tool and/or function (BSMs) company of Amway independent business owners ("IBOs"). A1428, ¶ 5; A1475, at § II.A.1. However, unbeknownst to Mr. Stewart until discovery in this case, the draft Bylaws were revised at attorney Bono's express direction

to provide that the members would be Amway distributorships ("IBs"). A1428, ¶ 5; A1691. The purpose of this change was to maintain the impression that the common link between Pro Net members was the Amway business and not the BSMs business, and to attempt to avoid perceived antitrust risks. *Id.* at ¶¶ 5, 8.

Mr. Stewart had repeatedly requested Pro Net to provide him a copy of the final Bylaws but Pro Net *refused* to do so -- until discovery in this litigation. A1691. Had Mr. Stewart known that the only corporations eligible for Pro Net members were Amway businesses, he would not have submitted an application in Nitro's name. A1692.

Mr. Stewart's testimony establishes that Nitro's application was submitted as a result of a unilateral mistake – one of which Defendants had superior knowledge and deliberately tried to conceal. Accordingly, the application is void for lack of meeting of the minds, it would be inequitable to enforce the agreement, or at the very least it should be reformed to comport with the parties' intent, as determined from Mr. Stewart's and Mr. Brown's testimonies and the express provisions of the Pro Net Bylaws. *See Silver Dollar City, Inc. v. Kittsmiller Constr. Co., Inc.*, 931 S.W.2d 909, 915 (Mo. App. S.D. 1996); *Rainey v. Foland*, 555 S.W.2d 88, 91 (Mo. App. W.D. 1977). Since there was no meeting of the minds, a contract never came into existence. *See Abrams v. Four Seasons Lakesites*, 925 S.W.2d 932, 937 (Mo. App. S.D. 1996) (meeting of the minds is an essential element of a contract). Alternatively, with respect to reformation, not only does equity require correction of the mistake, but such is required to comport with the express requirements of Pro Net's Bylaws.

(2) Nitro is Ineligible for Pro Net Membership

Notwithstanding the name that appeared on the application form, Nitro was not and ***could not*** be a "member" of Pro Net. Pro Net's Bylaws expressly state that only a company or business "engaged in distributing Amway products or services" is eligible for membership. Bylaws, Art. II, § 1-2 (A1446-47); A1413, ¶ 11; A1428-30 ¶¶ 5, 8, 10; A1691-92, ¶¶ 21-23, 25. Nitro has never engaged in distributing Amway products or services. A1687-88. Accordingly, it is *ineligible* for membership in Pro Net and thus is not bound by the Pro Net Arbitration Provision.

Moreover, Pro Net itself considered Ken Stewart's Amway business, Stewart Associates – rather than Nitro – to be the member of Pro Net. As Paul Brown, Pro Net's own agent, testified, Pro Net considered the members to be Amway businesses. A1429-30. This is further corroborated by the fact that Pro Net addressed its correspondence to non-party Stewart Associates – not Plaintiffs Nitro or West Palm. A1693, ¶ 27. Additionally, Pro Net's "Member Benefits" states that one of the benefits is "periodic information helpful in developing the members' *Amway* business." *See* A1425 (emphasis added). And, as Defendants have argued, Pro Net's membership application requires its members to abide by *Amway's* Rules of Conduct. This language reflects Pro Net's intent that the member was an Amway IB/IBO, *not* BSMs businesses.

The foregoing facts alone are sufficient for this Court to affirm the trial court's judgment. At the very least, this evidence creates a genuine issue of material fact as to whether Plaintiffs are Pro Net members.

(3) The Pro Net Arbitration Provision Does Not Apply to Founding Members

Assuming, *arguendo*, that Nitro was eligible for membership in Pro Net, Plaintiffs were "founding" members. The Pro Net Arbitration Provision does not apply to founding members. *See* A1430-31, ¶ 11;

The Pro Net Bylaws establish two distinct classes of membership: "founding" members and "regular" members. Bylaws, § 1 (A1446-47). Only those companies that joined Pro Net at the time it was formed are eligible to be "founding" members. *Id.* at § 1.1.

Defendants contend that notwithstanding the name that appeared on the Pro Net membership application, Pro Net considered a person's entire "organization" to be members. "Organization" is a term of convenience to refer collectively to an individual, his Amway distributorship and his BSMs companies -- just as attorneys use "Defendants" to refer collectively to distinct persons sued in a lawsuit. "Organization" has ***no legal significance*** and certainly does not destroy corporate distinctions. Indeed, much more is required in order to pierce the corporate veil, including domination and use of the corporation for fraud. *See* *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999).

It is telling that although Defendants contend that the entire "organization" was a member, when they submitted their *own* Pro Net application forms, they did so as *individuals* and/or on behalf of their Amway distributorships, as suggested by the "ADA" (Amway Distributor Association) number listed – not in the name of their BSM s

corporations. *See* A1467-70. This is entirely consistent with *Plaintiffs'* position and Pro Net's own Bylaws that the member of Pro Net is the Amway business. It is quite interesting that the only party who submitted an application on behalf of a BSMs corporation was Ken Stewart – who was unaware that the Bylaws had changed.[22]

In any event, accepting as true Defendants' position that Ken Stewart, Stewart Associates, Nitro and West Palm are *all* founding members,[23] founding members are not subject to the Pro Net Arbitration Provision Indeed, Pro Net's own agent, Paul Brown, as well as Mr. Stewart, both testified that the Pro Net Arbitration Provision was intended to apply only to "regular," not "founding" members. A1430-31, ¶ 11; A1691, ¶ 21. Their testimony is corroborated by the plain and express language of the pertinent Pro Net documents. *See* A1425 ("This Membership Application must be completed by all applicants . . . for *regular* membership in Pro Net Global Association . . . .") (emphasis added); A1423 ("This is an application for *non-voting* membership . . . .") (emphasis added). Indeed, as stated by Gaspare Bono, attorney for Defendants, during Paul Brown's deposition: "I'll state for the record that the membership application expressly said that it was for non-voting members." A1364, 145:1-3.

[22] Defendant Foley submitted a Pro Net application on behalf of an entity, but there is nothing in the record indicating the nature of that entity's business.

[23] *See* A2185, ¶ 1; A2222, ¶ 1; A2232, ¶ 15; A2243 ¶ 16; A2253, ¶ 16; A2263, ¶ 16; A2274, ¶ 16; A2315, ¶ 16.

Importantly, the *one-page* application form that Stewart signed did not contain an arbitration provision on its face. A1415-16, ¶ 19. In fact, it was well known that Ken Stewart adamantly *opposed* arbitration at that time and would not have assented to the same because of his ongoing disputes with Defendant Hal Gooch. A1415, ¶ 18.

There was no document presented to the trial court that purports to be an arbitration agreement applicable to founding members. An agreement to arbitrate must be in writing. *See* 9 U.S.C. § 2; *Dobbins v. Hawk's Enterprises*, 198 F.3d 715, 717 (8th Cir. 1999) (to be enforceable, arbitration provision must be part of a written . . . contract evidencing a commercial transaction . . .") (emphasis added). Since Ken Stewart, Stewart Associates, Nitro and West Palm are, according to Defendants, "founding" members, and the terms and conditions of Pro Net membership – including the arbitration clause – apply only to "regular" members, Plaintiffs cannot be compelled to arbitrate.

Defendants argue that the founding members signed the same application form as regular members and are therefore both founding *and* regular members. However, in sworn interrogatory responses, both Defendants and Pro Net identified Gooch, Gooch Support, Gooch Enterprises, Childers, and TNT as being *only* "founding members." *See* A2282-83, ¶ 1(b), (d); *see also* A1430, ¶ 10; A2123-24, ¶ 5; A2135, ¶ 5; A1740, ¶ 15; Supp. L.F. A5. Further, Defendants' agent, Paul Brown, testified that Gooch, Childers, Foley and Woods never referred to themselves as other than "founding" members. A1430. Only *after* Plaintiffs raised the issue that founding members are not subject to arbitration, did Defendants change their position and claim to also be "regular" members.

More importantly, their argument ignores the express language of the two documents, which state that the terms and conditions therein are applicable only to "regular" or "non-voting" members, and is controverted by Paul Brown's and Ken Stewart's testimony that notwithstanding the name that appeared on the application, Pro Net considered the member to be the Amway corporation. A1429-30; A1691, ¶ 23.

This Court may affirm the trial court's judgment by holding that founding members are not, as a matter of law, bound by the Pro Net Arbitration Provision. Failing that, the foregoing evidence creates a genuine issue of material fact that requires a trial.

b. West Palm is Not a Third-Party Beneficiary

Because West Palm is not a signatory to the Pro Net Arbitration Provision, Defendants seek to bind it under a third-party beneficiary theory. To bind a non-signatory to arbitrate under a third-party beneficiary theory, the non-signatory must both (1) in fact be a third-party beneficiary; ***and*** (2) seek to enforce the contract containing an arbitration clause. *See* *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630-31 (Mo. App. E. D. 1994); *Flink v. Carlson*, 856 F.2d 44, 46, 46 n.3 (8th Cir. 1988). A person is not a third-party beneficiary unless the "contract terms 'clearly express' an intent to benefit either that party or an identifiable class of which the party is a member." *Peters v. Employers Mutual Casualty Co.*, 853 S.W.2d 300, 301 (Mo. banc 1993). "In the absence of such an express declaration, there is a strong presumption that the parties contracted only for themselves and not for the benefit of others." *Byrd v. Sprint Communications Co. L.P.*, 931 S.W.2d 810, 814 (Mo. App. W.D. 1996). And "[i]t must be shown that the benefit to the third party was the *cause of the creation* of the contract."

OFW, 893 S.W.2d at 879 (emphasis added). As Defendants correctly note, the intent to create a third-party beneficiary status is to be determined from the four corners of the document. *Greenpoint, L.L.C. v. Reynolds*, 151 S.W.3d 868, 873 (Mo. App. S.D. 2004). Defendants fail on all counts.

Defendants contend that the Pro Net agreement evinces an intent to benefit West Palm because among its purported benefits is to "promot[e], arrang[e] and sponsor[] member meetings." A0436. But "member meetings" obviously refers to *Pro Net member* meetings. West Palm does not facilitate Pro Net member meetings. As alleged in Plaintiff's Third Amended Petition, "West Palm facilitated the rally, convention and function business for *Stewart Associates and Ken Stewart . . . .*" – not Pro Net members. A0687 (emphasis added). Thus, on its face, the Pro Net agreement does not clearly express an intent to benefit West Palm. *See Peters*, 853 S.W.2d at 301.

Defendants also argue that West Palm is a third-party beneficiary because "[j]oining Pro Net . . . benefited West Palm" as evidenced by the fact that when Ken Stewart was blackballed from speaking, West Palm business plummeted. This is a new argument that was not raised in the trial court and thus is not preserved. *Ibarra v. Missouri Poster & Sign Co., Inc.*, 838 S.W.2d 35, 40-41 (Mo. App. W.D. 1992). In any event, this purported fact is wholly insufficient to establish that West Palm accepted a "direct" benefit of Pro Net membership, as required for third-party beneficiary status. *See Byrd*, 931 S.W.2d at 814; *OFW Corp.*, 893 S.W.2d at 879.

Even if West Pam were a "third-party beneficiary" of the Pro Net agreement, it cannot be bound to arbitrate unless it also seeks to enforce that agreement. *See Byrd*, 931

S.W.2d at 813-14; *Flink v. Carlson*, 856 F.2d 44, 46, 46 n.3 (8th Cir. 1988). Defendants have produced no evidence or argument establishing that West Palm is seeking or has ever sought to enforce the Pro Net Arbitration Agreement. Indeed, nowhere in Plaintiffs' Third Amended Petition do they contend that West Palm had any rights (or obligations) under the Pro Net Agreement which it is seeking to enforce. Nor do West Palm's causes of action, Counts I through XIV, assert a claim against Pro Net for breaching its Bylaws or for breaching any other contractual obligation under the Pro Net Agreement. *See* A750-74. Rather, Plaintiffs' claims against Pro Net are for its *participation* in the conspiracy. *See*, *e.g.*, Count XII (A0771-72).

Since West Palm does not claim to be a third-party beneficiary and is not relying upon or asserting any rights under the Pro Net agreement, the trial court's judgment that it is not bound thereby should be affirmed. *See Byrd*, 931 S.W.2d at 814 ("If they disavow the benefits, they should not suffer from the obligations."); *Flink*, 856 F.2d at 46 n.3.

c. Plaintiffs are Not Estopped to Deny Arbitration

Defendants next argue that Plaintiffs are estopped to deny arbitration because they accepted the "benefits" of Pro Net membership. In making that argument Defendants once again obfuscate the true facts by ignoring corporate distinctions, referring to Nitro, West. Palm, and non-party Ken Stewart, individually, interchangeably, and suggesting that the act of one binds all. When one examines Defendants' "evidence" of estoppel closely, and *separately*, the fallacies become clear.

Before turning to Defendants' specific "evidence," it should be noted that once again Defendants fail to mention, let alone address, the essential elements of their claim. Equitable estoppel requires "clear and satisfactory" proof of "(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party, resulting from allowing the first party to contract or repudiate the admission, statement, or act." *Brown v. State Farm Mutual Automobile Ins. Co.*, 776 S.W.2d 384, 388 (Mo. banc 1989); *Van Kampen v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. S.D. 1985). Defendants do not even attempt to fit the facts of this case into these elements. In particular, Defendants do not explain how *they* relied on Nitro's purported acceptance of the benefits of Pro Net to their detriment. "One cannot set up another's act or conduct as the ground for an estoppel unless the one claiming it be misled or deceived by such act or conduct . . . ." *Van Kampen*, 685 S.W.2d at 625. Having failed to establish the elements by clear and satisfactory evidence, the trial court properly rejected Defendants' estoppel argument, and that judgment can and should be affirmed as a matter of law.

Additionally, Defendants raise several arguments as a basis for estoppel that were not presented to the trial court. Four of those arguments were not preserved with respect to *either* Plaintiff: (1) that "Mr. Stewart signed the transition agreement referencing his

'organization,'"[24] (2) that Plaintiffs pled that they "joined the Pro Net fold;"[25] (3) that Plaintiffs' theme was that "Pro Net was the hub of Appellants' alleged 'conspiracy;'"[26] (4) that Plaintiffs alleged that Pro Net's conduct is contrary to law and contravened its Bylaws.[27] Compare Appellants' Brief, p. 38-40, with A0410-11; A2368-69; A2373-74. Thus, these arguments are not preserved for appeal. *Ibarra*, 838 S.W.2d at 40-41.

(1) West Palm is Not Estopped

Defendants first argue that West Palm is estopped because "Mr. Stewart signed the Pro Net application." Appellants' Brief, p. 38. However, Defendants concede that West Palm is not a signatory to that document. Apparently, they are seeking to bind West Palm to an agreement that Mr. Stewart made on behalf of another corporation because

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[24] The "Transition to Pro Net" Agreement is the subject of Point II, *infra*, and discussed in more detail there. Even if it were signed on behalf of these Plaintiffs – which it was not – it does not create membership in Pro Net or grant any benefits therefrom.

[25] This allegation is taken from an *abandoned* pleading and thus improper. *See Evans v. Eno*, 903 S.W.2d 258, 260 (Mo. App. W.D. 1995),

[26] This allegation reflects nothing more than that Pro Net was a participant in the conspiracy -- not that Plaintiffs accepted any benefits of Pro Net membership.

[27] This allegation was in the context of demonstrating how Appellants used Pro Net to facilitate their unlawful conspiracy to violate antitrust laws. Plaintiffs do not make any claims against Pro Net for violation of its Bylaws or rules or breach of any obligation owed to Plaintiffs.

both corporations share the same officer. This is contrary to Missouri law. There is a presumption of separateness between two or more corporations – even where the corporations share the same officers. *See* *Blackwell Printing Co. v. Blackwell-Wielandy Co.*, 440 S.W.2d 433, 436-37 (Mo. 1969); *Hefner v. Dausmann*, 996 S.W.2d 660, 664 (Mo. App. S.D. 1999). The fact that one person is an officer, director and shareholder of two corporations does not render corporation A liable for the business transactions of corporation B. *See* *National City Bank of St. Louis v. Carleton Dry Goods Co.*, 67 S.W.2d 69, 73 (Mo. 1933).

Defendants next argue that West Palm is estopped because "Global supplied the 'Stewart Organization' with a substantial number of BSMs . . . ." There are several problems with this argument:

First, Defendants did not preserve this issue with respect to West Palm as it was not an argument presented to the trial court. At the trial court level, Defendants argued that West Palm was estopped because (1) it is asserting claims under the Pro Net membership agreement (A0425); (2) it acts "in tandem" with Nitro (*id*); and (3) its claims are "predicated upon Stewart's relationship with Pro Net." *See* A2381-83. Accordingly, the argument that *West Palm* purchased BSMs from Global is not preserved for appeal. *Ibarra*, 838 S.W.2d at 40-41.

Second, Defendants' attempt to tie West Palm to purported conduct of Nitro with nothing more than that they occasionally used the word "organization" to refer to themselves collectively and that they operate "in tandem" is apparently an attempt to create some new heretofore unrecognized quasi-alter ego theory. Plaintiffs' use of the

term "organization" to refer collectively to separate entities is wholly insufficient to demonstrate the domination and use of a corporation for fraud that is required to pierce West Palm's corporate veil and hold it liable for any purported acts of Nitro. *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999).

Likewise, the fact that Plaintiffs operate "in tandem" does not pierce their corporate veils. The fact that two separate corporations have a symbiotic relationship does not bind one to the contract of another. See *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo banc 2002), where this Court held that Ford Motor Credit was not an agent of Ford Motor Company -- even though they obviously have a mutually beneficial relationship.

Moreover, Defendants' alter ego-like theory does not stand up under the facts. Nitro and West Palm, and, for that matter, Stewart Associates, are all operated *separately* from each other with *distinct* business missions and purposes. *See* A1686-87. Each corporation has its own assets, maintains separate bank accounts and records, and pays its own expenses. *Id*. The corporations are not under-capitalized; they do business with corporations other than each other and comply with corporate formalities. *Id*. And, contrary to the Southern District's finding that Plaintiffs operated out of the same office, they, in fact, operated from two different *states*: Nitro's offices are located in

Springfield, Missouri, whereas West Palm's offices are in Tequesta, Florida.[28] *See* App. A61.

Nor does Defendants' estoppel theory stand up under Plaintiffs' overwhelming evidence establishing that West Palm did not accept any benefits of Pro Net membership. Defendants' suggestion that West Palm purchased tools from Global is wrong. Global did not sell tools to West Palm. West Palm facilitates functions; it does not buy or sell tools. *See* A1686-87, ¶ 4.

In addition, Plaintiffs presented substantial, competent evidence directly controverting acceptance of ***each and every*** other purported benefit of Pro Net (A1425), as well as evidence of other facts establishing that they did not accept any benefits of Pro Net membership:

- Pro Net identified the following items as being BSMs and other print or electronic literature made available for purchase by Pro Net members: (1) Pro Net website; (2) EasyTel; (3) Go-Print.com; (4) ToolsCart.com; (5) MedJet; and (6) Financial Passport. A2288, ¶ 8.

[28] Plaintiffs could not have anticipated that there would be a contention that they used the same phone and fax number, and therefore did not directly controvert this fact, but it logically follows that they did not share the same numbers by virtue of their location in *different states.*

- As already established, West Palm did not purchase any BSMs from Global, and therefore did not obtain the benefit of the Master Supply Agreement between Pro Net and Global.
    - West Palm did not participate in any activities associated with "EasyTel," "Go-Print.com," "ToolsCart.com," or "McCoy Services." A1696, ¶ 35.
    - West Palm never subscribed to, utilized, or ordered any products through the Pro Net website (controverting the Southern District's finding, at App. A63). *Id.*
    - West Palm did not subscribe to or utilize Pro Net's "personal web office." *Id.*
    - West Palm did not participate in "recognition updates" for members of its downline that were offered through the website. *Id.*
- West Palm was not a Pro Net member, it was not invited nor even eligible to attend Pro Net events.
- Pro Net did not provide, promote, arrange or sponsor any meetings or forums in the State of Missouri. A2290, ¶ 10, 11.
- West Palm never received "periodic information helpful in developing the members' Amway business." A1696, ¶ 35.
- West Palm did not vote in any nominal Pro Net "elections." *Id.*
- West Palm did not serve on any Pro Net committees. *Id.*

- West Palm did not pay any annual dues as required by Pro Net. *Id.*

The foregoing overwhelmingly establishes that West Palm was not a member of Pro Net, is not seeking to enforce a Pro Net contract, and did not receive any benefits available only to members of Pro Net. As a result, the trial court's judgment that West Palm is not estopped from denying arbitration under the Pro Net Arbitration Provision should be affirmed as a matter of law. Alternatively, Plaintiffs have controverted Defendants' evidence and thus are entitled to a trial to resolve the factual disputes.

(2) Nitro is Not Estopped

Defendants assert two arguments as to why Nitro is estopped to deny Pro Net arbitration: (1) Mr. Stewart signed the Pro Net application; and (2) Global sold BSMs to Nitro. Mr. Stewart's execution of the Pro Net Application has already been addressed at § 2.a., *supra*.

Defendants' primary argument in support of estoppel is that Nitro is estopped from denying arbitration because it purchased BSMs from Global, including other distributors' copyrighted tapes, which is a benefit available only to Pro Net members. This fact was controverted by Defendants' own admissions that Nitro did not purchase BSMs from Global.

Defendant Don Brindley, President of Global, admitted in a letter to *Nitro* that Nitro was *not* a customer of Global's. A1705. Instead, as Defendants themselves admitted, Nitro purchased BSMs from *Defendant TNT* – not Global. *See* A2899-2900, ¶¶ 3-4. Indeed, TNT set the purchase price that Nitro paid for its BSMs, and invoiced Nitro for those purchases. *Id.*

And, crucially, the ability to purchase BSMs originating from Global – including BSMs on which Pro Net members have a copyright – is ***not*** a benefit available only to Pro Net members as Defendants claim (and the Southern District incorrectly and improperly found). ***Eight*** non-Pro Net members – and non-parties hereto – submitted affidavits, each testifying that they purchased BSMs through Global notwithstanding the fact that they were not members of, or even eligible to be members of, Pro Net.[29] Those purchases included audio and videotapes of Pro Net members' speeches, directly controverting Defendants' contention that such is a benefit made available only to Pro Net members. A1501, ¶ 7. Moreover, Global sold BSMs that were not even associated with Pro Net or its members, such as books, Amway-produced BSMs, generic office products, and audio/videotapes of non-Pro Net speakers (*id.*), which supports the fact that it sold products to non-Pro Net members. Thus, the fact that Global supplied the BSMs that Nitro purchased from TNT does not establish Plaintiffs' acceptance of any benefit of Pro Net membership.

[29] Pro Net membership was limited to Diamonds. *See* A1695, ¶¶ 31-33; A1299-1301, ¶¶ 41-42, 46; A1323, ¶¶ 39-40; A1501, ¶¶ 6-7; A1432, ¶ 13; A1411, ¶ 3; A1413, ¶ 12. The following eight distributors, who had not attained Diamond level, nevertheless purchased BSMs through Global: A1930, 1933-35, ¶¶ 2, 15, 19, 22; A1862, 1866, ¶¶ 2, 16; A1872, 1876, ¶¶ 2, 16; A1880, 1883, ¶¶ 2, 14; A1889, 1893, ¶¶ 2, 16; A1898, 1902, ¶¶ 2, 17; A1920, 1924, ¶¶ 2, 16; A1938, 1942, ¶¶ 2, 15.

The foregoing establishes that the benefits that Defendants contend Plaintiffs accepted not only did not come from Pro Net, but were available to persons who were not Pro Net members. In *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003), the Missouri Supreme Court held that estoppel does not lie with respect to a collateral agreement that "imposes different responsibilities" than the contract the party is seeking to avoid. *Dunn*, 112 S.W.3d at 436-37. The transactions from which Defendants claim Nitro received benefits were between Nitro and TNT, not Pro Net. Therefore, under *Dunn*, the agreement is collateral to Pro Net and estoppel does not lie.

d. Defendants are Not Entitled to Enforce Arbitration

Since Plaintiffs are not bound to arbitrate, it matters not whether Defendants are entitled to enforce the Pro Net Arbitration Provision, and the trial court's judgment must be affirmed. Should this Court reach this issue, Defendants are not entitled to enforce the Pro Net Arbitration Provision for the following reasons.

(1) Defendants are Ineligible for Pro Net Membership

Defendants admit that Pro Net Global I, Global Support Services, Blanchard, Brindley and, of course, Pro Net itself, are not Pro Net members. *See* Appellants' Brief, pp. 40-41. Plaintiffs agree that Blanchard, who is being sued in his capacity as an officer of Pro Net, has the same rights, *if any*, as Pro Net to enforce the Pro Net Arbitration Provision.

However, Pro Net I, Global and Global's principal, Brindley, are not parties to the Pro Net Arbitration Provision and thus are not entitled to enforce it. Defendants nevertheless argue that the three are entitled to arbitrate because they are named as co-

conspirators and the claims against them are "inextricably intertwined" with those against Pro Net, citing *Madden v. Ellspermann*, 813 S.W.2d 51 (Mo. App. W.D. 1991). First, Defendants did not raise the "intertwining" doctrine to the trial court and thus it is not preserved. *See* A2383-84. In any event, *Madden* did not adopt an "intertwining" doctrine, nor did it hold that a "co-conspirator in the conspiracy" is entitled to enforce arbitration *Madden* was correctly decided on agency principles, *i.e.*, a non-signatory agent who is sued for acts taken within the course of his employment is entitled to the benefit of his employer's arbitration agreement with the plaintiff. *Id.* Missouri courts have properly rejected an "intertwining" doctrine as being inconsistent with ordinary contract principles. *See Byrd v. Sprint Communications Co. L.P.*, 931 S.W.2d 810, 814 (Mo. App. W.D. 1996) (rejecting intertwining, a/k/a "community of interest, doctrine of *Pritzker v. Merrill Lynch*, 7 F.3d 1110, 1122 (3rd Cir. 1993)); *see also Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 436 (Mo. banc 2003). Accordingly, the trial court's judgment that Pro Net I, Global, Blanchard are not entitled to compel arbitration should be affirmed as a matter of law.

Defendants argue that the remaining thirteen Defendants are members of Pro Net and thus entitled to enforce arbitration. However, those thirteen Defendants were never members because they are *ineligible* for Pro Net membership.

Again, pursuant to Pro Net's Bylaws, only companies or businesses that engage in the distribution of *Amway products and services* are eligible for Pro Net membership. A1446-47; A1413, ¶ 11; A1428-30, ¶¶ 5, 8, 10. Gooch Support, Gooch Enterprises, and TNT do not engage in distributing Amway products or services. *See* A1734; A2157-60,

¶¶ 1-8; A2241 ¶ 5; A2187, ¶ 3. Gooch is being sued individually and in his capacity as an officer and director of Gooch Support and Gooch Enterprises. Since neither corporate entity is a member of Pro Net, Gooch is not entitled to enforce arbitration. Likewise, Childers is being sued in his individual capacity and as an officer and director of TNT, which also is not a Pro Net member. Therefore, neither Childers nor TNT is entitled to enforce arbitration.

As explained at p. 36, n.5, *supra*, Jimmy V. Dunn & Associates, T&C Foley, GFI, and Grabill Enterprises were named as defendants as a result of a misnomer. *See* A0687-691; A1144. To the extent this is an issue, Plaintiffs request this Court to remand for dismissal and/or substitution. Regardless, these Defendants are not entitled to enforce arbitration because Plaintiffs did not make an arbitration agreement and their claims are not within the scope of the Pro Net arbitration clause. And, with respect to G.F.I. and Grabill Enterprises, they additionally are not entitled to enforce arbitration because they claim to be founding members, and the arbitration provision only applies to "regular" members.

In addition, none of the individual Defendants -- Dunn, Gooch, Childers, Foley, Woods, Grabill, Brindley and Blanchard -- are "companies" or "businesses" and therefore they do not fall within the definition of persons eligible for Pro Net membership. Since these Defendants are not Amway distributorships, they cannot, under Pro Net's Bylaws, be members of Pro Net and are therefore not entitled to enforce Pro Net arbitration. *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947, 948 (Mo. App. S.D.

1999) (one not a party to a contract cannot enforce it); *Lake Ozark Constr. Indus., Inc. v. North Port Assoc.*, 859 S.W.2d 710, 714 (Mo. App. W.D. 1993).

(2) Founding Members are Not Entitled to Enforce Arbitration

As discussed in Section I.B.2.b(2) above, the Pro Net Arbitration Provision expressly applies only to "regular" members and was never intended to apply to founding members. Nine of the thirteen Defendants whom Defendants claim are members of Pro Net – Gooch; Gooch Support; Gooch Enterprises; Childers; TNT; Foley; T&C Foley; Woods; and G.F.I. – are, according to Defendants, "founding" members of Pro Net.[30] Therefore, those nine Defendants have no right to enforce Pro Net arbitration.

These nine Defendants may argue that even though they are founding members, they signed the same application form as regular members and are therefore bound by the arbitration provision therein. That argument was dispelled in § 2.a(3), *supra*.

Because these nine Defendants are not parties to the Pro Net Arbitration Provision, they have no right to enforce it. *See Prickett*, 986 S.W.2d at 948; *Lake Ozark*, 859 S.W.2d at 714.

Defendants contend that if this Court finds that some claims are arbitrable and others are not, this Court should stay the litigation pending arbitration. It is within the *trial court's* sound discretion *on remand* whether to stay claims that are not subject to

[30] A2185, ¶ 1; A2244-45, ¶¶ 17-18; A2254, ¶ 18; A2263-64, ¶¶ 17-18; A2275, ¶¶ 17-18; A2315-16, ¶¶ 17-18.

arbitration pending arbitration of arbitrable claims. *Fru-Con Constr. Co. v. Southwestern Redev. Corp. II*, 908 S.W.2d 741, 746 (Mo. App. E.D. 1995).

For the foregoing reasons, the trial court's judgment that the Plaintiffs did not make a valid and enforceable agreement to arbitrate under the Pro Net Arbitration Provision should be affirmed as a matter of law by this Court. In the alternative, Plaintiffs respectfully request remand for a trial of any factual disputes for the reasons set forth in § 3, *supra*.

e. The Trial Court Did Not Reject Pro Net Arbitration on the Basis of the Amway Arbitration Provision's Unconscionability

Defendants suggest that the trial court based its ruling that Plaintiffs were not subject to Pro Net arbitration on the fact that the Amway Arbitration Provision is unconscionable. Since, they argue, Pro Net requires arbitration under the AAA, the unconscionability of Amway's arbitration provision does not invalidate arbitration under the AAA. However, as shown above, there are many other reasons upon which the trial court properly rejected Pro Net arbitration.

Additionally, to the extent Defendants contend that Plaintiffs are bound to arbitrate under Amway's Rules via a Pro Net agreement, such agreement is unconscionable for the reasons discussed in Point III, *supra*.

f. Plaintiffs Claims Are Not Within the Scope of Pro Net Arbitration

Because, for all of the foregoing reasons, Plaintiffs did not make a valid and enforceable agreement to arbitrate under the Pro Net Arbitration Provision, this Court need not reach the question of whether their claims are within the scope of arbitration. Should this Court nevertheless address that question, Plaintiffs' claims are not within the scope of Pro Net arbitration.

The Pro Net Arbitration Provision applies to only three types of disputes: those "arising out of, relating to, or concerning" (1) "the interpretation or performance of *the contract created by acceptance of the Membership Application*, or the breach thereof;" (2) disputes between "members" of Pro Net; and (3) disputes between Pro Net and any of its "members." A1424 (emphasis added). Plaintiffs' claims do not fall within any of these three categories.

A plaintiff's claims are not within the scope of an arbitration clause – even a broad one -- unless they "raise some issue the resolution of which requires a reference to or construction of some portion of the [contract]." *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995). Plaintiffs are not seeking an interpretation or performance of the Pro Net agreement, nor do they allege a breach of it. Pro Net is being sued as a *participant* in the conspiracy, not for breach of any contract term. Thus, Plaintiffs' disputes are not, as a matter of law, within the scope of Pro Net arbitration.

Further, Nitro's claims do not fall within the first category because, as established above, *no contract was ever created*. With respect to Nitro, there was no meeting of the

minds; equity requires the application to be reformed; Nitro is not eligible for membership; and the arbitration provision applies only to "regular" – not "founding" members. West Palm is admittedly not a signatory to any Pro Net application, nor is it bound under *any* theory.

Plaintiffs' claims do not fall within the second or third categories because, as established above, neither Defendants nor Plaintiffs are "members" of Pro Net.

Defendants argue that this issue is one to be decided by an arbitrator rather than the court because the parties agreed to arbitrate under the AAA arbitration rules, which states the arbitrator has the power to decide "any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Rule 8(a). This argument begs the question. Since Plaintiffs never agreed to arbitrate in the first instance, they never agreed that the AAA rules would apply.

Finally, the *U-Can-II* decision cited by Defendants is not consistent with Missouri law. Specifically, all three appellate district courts in this State have held that for a plaintiff's claims to be within the scope of an arbitration clause, they "must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the [contract]." *Greenwood*, 895 S.W.2d at 174; *Estate of Athon v. Conseco Fin. Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. W.D. 2002); *Northwest Chrysler-Plymouth, Inc. v. DaimlerChrysler Corp.*, 2005 WL 1432352 (Mo. App. E.D. June 21, 2005). Accordingly, *U-Can-II* should not be followed.

3. Plaintiffs' Alternative Right to a Jury Trial

As established in succeeding sections of this Brief, Defendants failed to sustain their threshold burden of showing that Plaintiffs made an agreement to arbitrate[31] and that Plaintiffs' claims are within the scope of arbitration. Therefore, the trial court's judgment should be affirmed as a matter of law. To the extent this Court finds that it cannot affirm as a matter of law, Plaintiffs are undeniably entitled to either a jury or bench trial to resolve the factual disputes, as they requested. *See* A0466-68.

Incredibly, after years of litigation over arbitrability, Defendants now for the first time concede, as they must, that Plaintiffs are entitled to a bench trial if there are genuine issues of material fact – although they erroneously contend such right is discretionary rather than mandatory. *See* Appellants' Substitute Brief, § 3 ("The only procedural question presented is when should a bench evidentiary hearing be held on a motion to compel arbitration"); *id*. p. 55 (citing with approval *Rogers v. Dell Computer Corp.*, 2005 WL 1519233 (Okla. 2005) ("if the existence of an agreement to arbitrate is controverted, then the better procedure is for the district court to conduct an evidentiary hearing.")). Defendants continue, however, to dispute Plaintiffs' right to a trial by jury. Plaintiffs submit that they are entitled to a jury trial, or at the very least, a bench trial as a matter of right and not discretion to resolve disputed facts issues on arbitrability.

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[31] *See* RSMo § 435.355.1 (providing the procedure "[o]n application of a party *showing an [arbitration] agreement* . . . ." (emphasis added)); *Klocek v. Gateway, Inc.*, 104 F. Supp.2d 1332, 1336 (D. Kan. 2000) (citing cases).

Had this case been brought in federal court, Plaintiffs would unquestionably be entitled to a jury trial to resolve factual disputes as to whether they made an arbitration agreement, as the Federal Arbitration Act, 9 U.S.C. § 4 (1994), expressly so provides. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980); *Interocean Shipping Co. v. Nat'l Shipping and Trading Corp.*, 462 F.2d 673, 676 (2d Cir. 1972); *Medtronic, Inc. v. Advanced Cardiovascular Systems, Inc.*, 221 F.3d 1343 (8th Cir. 2000) (unpublished).

Although neither the United States Supreme Court[32] nor any Missouri court has yet considered this issue, several states have held that the FAA's right to a jury trial extends to arbitrability disputes arising in state courts. *See Premiere Automotive Group, Inc. v. Welch*, 794 So.2d 1078, 1083 (Ala. 2001); *Allied-Bruce Terminix Co., Inc. v. Dobson*, 684 So.2d 102, 108 (Ala. 1995); *England v. Dean Witter Reynolds*, 811 S.W.2d

[32] Defendants argue that the U.S. Supreme Court has intimated that §4 of the FAA, which contains the right to a jury trial, is not applicable in state courts. However, the *Southland* Court merely noted the obvious – that the Federal Rules of Civil Procedure mentioned in §4 do not apply in state court; it expressly stated it was not deciding whether any other provision of § 4 applied in state courts. *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.10, 104 S.Ct . 852 (1984). Nor did the Court in *Volt* consider whether the specific right at issue here – § 4's right to a jury trial – is applicable in state courts. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6, 109 S.Ct. 1248 (1989).

313, 314 (Ark. 1991); *Adler v. Rimes*, 545 So.2d 421, 422 (Fl. App. 1989). Other courts have held that the FAA's right to a jury trial does not apply in state courts, reasoning that only the FAA's substantive law applies in state courts, its procedural rules, such as the right to a jury trial, do not. *See* *Rosenthal v. Great Western Fin. Sec. Corp.*, 926 P.2d 1061, 1066 (Cal. 1996); *United Nuclear Corp. v. General Atomic Co.*, 597 P.2d 290, 308 (N.M. 1979).

Missouri courts recognize that while the FAA's *substantive* law applies in state court actions, "the procedural provisions of the Federal Arbitration Act are not binding on state courts . . . provided applicable state procedures do not defeat the rights granted by Congress." *McClellan v. Barrath Constr. Co.*, 725 S.W.2d 656, 658 (Mo. App. E.D. 1987). The issue is thus whether, under Missouri law, the right to a jury trial is substantive or procedural and, if procedural, whether it defeats a right granted by Congress.

Courts in other jurisdictions have reached differing conclusions on this question. Compare *Soler v. Evans, St. Clair & Kelsy*, 763 N.E.2d 1169, 1174 (Ohio 2002); *State v. Chapman*, 814 P.2d 449, 451 (Kan. App. 1991); *Goodman v. State*, 644 P.2d 1240, 1242 (Wy. 1982) with *Commonwealth v. Wharton*, 435 A.2d 158, 160 (Pa. 1981). The reason for the confusion is because it is *both* substantive and procedural. As aptly stated by one court, "The right to trial by jury is a substantive right guaranteed by the constitution of the state of Michigan. . . The manner in which this right is perfected is procedural . . . ." *Bachor v. City of Detroit*, 212 N.W.2d 302, 304 (Mich. App. 1973).

Like Michigan, Missouri's Constitution expressly guarantees the right to a jury trial in civil actions, thus establishing that it is a substantive right. Mo. Const. Art. 1, §§ 10, 22(a); *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. banc 2004) ("The right to a trial by jury has become a fundamental element of our judicial system"); *see also* RSMo § 510.190 (2000) (the right to a jury trial is "inviolate"); Mo. R. Civ. P. 69.01 (same). But the manner in which the jury trial is conducted (*e.g.*, the number of persons to summon for the venire, the conduct of voir dire, whether to allow note-taking, the form of jury instructions, etc.) would be a procedural issue.

Even if the FAA's right to a jury trial is procedural such that it does not apply in state courts, Plaintiffs have the right to a jury trial, or at the least a bench trial, under the Missouri Uniform Arbitration Act ("MAA"), RSMo § 435.355 (2000). Although the Act does not expressly authorize a jury trial, the right to a trial in some form is at least implicit, if not explicit, in the language of the Act.[33]

Subsection 1 of the MAA states that if a party denies the making of an arbitration agreement, "the court shall proceed summarily to the determination of the issue so raised

[33] Contrary to Defendants' suggestion, the question presented is not one of federal pre-emption. Plaintiffs are asking this Court to hold that the FAA's right to a jury trial is substantive such that it applies in state courts or, alternatively, that the ambiguities in the MAA with respect to the right to a trial can and should be construed *consistently* with the FAA.

. . . ." *Id.* § 435.355.1. Subsection 2 of the MAA[34] clearly contemplates a trial in some form, as it directs that a "substantial and bona fide dispute" as to whether an agreement to arbitrate exists shall be "summarily *tried*." § 435.355.2 (emphasis added). The legislature's use of the word, "tried," a derivation of "trial," evidences its intent to grant the right to a trial. *See St. Luke's Hosp. v. Midwest Mech. Contractors, Inc.*, 681 S.W.2d 482 (Mo. App. W.D. 1984) (construing subsection 2).

Defendants argue that a jury trial is inconsistent with the MAA's mandate that courts determine arbitrability "summarily." But the FAA likewise directs courts to resolve arbitrability disputes "summarily." 9 U.S.C. § 4 ("if the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof."). Yet Congress granted not the right to a *bench* trial, but a trial *by jury*, to resolve disputed issues of fact. This is a strong indication that Congress, in balancing the competing interests of summary resolution of an arbitrability dispute versus the risk of wrongly depriving a party of his constitutional right to a jury trial on the merits, determined that the balance tips in favor of giving the party the full panoply of rights associated with a jury trial. State substantive or procedural law may not operate in derogation of federal law. *See Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839 (Mo. banc 1985).

[34] Subsection 1 applies to arbitrability disputes generally, while subsection 2 grants courts authority to stay pending or threatened arbitration proceedings.

The cases cited by Defendants involving "summary" proceedings are inapposite and, in fact, support the right to a jury trial even in summary proceedings. *Birmingham Drainage Dist v. Chicago B&Q R. Co.*, 202 S.W. 404 (Mo. 1917), addressed a statutory scheme that necessitated the court performing both legislative and judicial functions. The Court noted that summary proceedings without trial are proper when a court is performing a *legislative* function (*e.g.*, approving incorporation of a drainage district), but a party is entitled to a *jury* trial for *judicial* determinations (*e.g.*, damages for property condemned). *Id.* at 407-08 (damages for property taken "involved, under the Constitution, a judicial question as to the public use, as well as a trial by jury . . . ."); *id.* at 408. *In re Fabius River Drainage Dist.*, 35 S.W.3d 473 (Mo. App. E.D. 2000), also involved *legislative* determinations and, notably, the trial court conducted a bench trial notwithstanding the "summary" nature of the proceeding. *See id.* at 476. Under these authorities, a "summary" proceeding does not preclude a jury or bench trial.

Not only would a construction of the MAA as providing the right to a jury trial on disputed issues of fact as to arbitrability be consistent with federal substantive law and policy, it would be consistent with Missouri state law and policy. As this Court recently recognized, Missouri has a "historical preference" for trial by jury, and it is a "fundamental element of our judicial system." *Leonardi*, 137 S.W.3d at 472-73. And, the right to a trial to resolve issues of credibility and genuine issues of material fact is so firmly established in this State that it is necessarily implicit in the MAA.

It is well-settled that issues of credibility are for the trial court – not an appellate court – to resolve. *In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984). But

even a trial court is not authorized to make credibility determinations on conflicting affidavits. *See* *Horne v. Ebert*, 108 S.W.3d 142, 147 (Mo. App. W.D. 2003). Rather, the court must conduct a trial – whether by jury or full evidentiary hearing – to assess the witnesses' respective credibility, as it does when there are genuine issues of material fact in a summary judgment motion. Indeed, a motion to compel arbitration has been likened to summary judgment. *See* *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980); *Owen v. MBPXL Corp.*, 173 F.Supp.2d 905, 922 n.9 (N.D. Iowa 2001) (citing cases). Because the right to a trial to resolve disputed fact issues is so firmly entrenched in our judicial system, it must be presumed that the legislature, in enacting the MAA, contemplated that trial courts would conduct a trial to resolve arbitrability disputes.

Given the foregoing principles and fundamental rights involved, the right to a jury or bench trial is not merely discretionary as Defendants argue, but *mandatory*, where there are genuine issues of material fact on arbitrability. The *St. Luke's* court held that a substantial and bona fide dispute entitling a party to a trial exists "merely upon the opposing contentions of the parties that an agreement does or does not exist," suggesting a lesser standard than that required in a summary judgment proceeding. *St. Luke's*, 681 S.W.2d at 487. Nevertheless, as established in the succeeding sections, should this Court determine that it canot affirm as a matter of law, Plaintiffs have demonstrated genuine issues of material fact unquestionably satisfying summary judgment standards. It is preposterous for Defendants to suggest that there is no genuine issue of material fact given that the trial court and the Southern District reached polar opposite conclusions

from the same record. Indeed, the hallmark of the existence of a disputed fact issue is where reasonable minds could differ.

Defendants argue that Plaintiffs cannot be entitled to a jury trial because a motion to compel arbitration is akin to specific performance, a claim for equitable relief and, historically, parties are not entitled to a jury trial of equitable claims. Plaintiffs adamantly disagree. Importantly, a traditional specific performance case (*e.g.,* real estate sale contract) does not carry the threat of depriving a party of his right to a jury trial on his *legal* claims. Unquestionably, Plaintiffs' lawsuit asserts legal claims that are triable to a jury. Defendants cannot convert the nature of Plaintiffs' suit from legal to equitable by filing what is in essence either a motion challenging the court's jurisdiction (*i.e.*, that jurisdiction to resolve the dispute was vested in an arbitrator) or seeking declaratory judgment of the parties' rights and obligations as to arbitration.

Indeed, this Court has previously held that, in determining a party's right to a jury trial, the nature of the *underlying* action controls. In *K.D.R. v. D.E.S.*, 637 S.W.2d 691 (Mo. banc 1982), this Court recognized that where a declaratory judgment action arises from an action at law, the parties are entitled to a jury trial of the factual issues. *See id.* at 694 ("[s]ince determination of the issues involves determination of facts in a law case all parties were entitled to such determination by jury."). "It was not intended that the action for declaratory judgment should interfere with the existing right of a trial of the facts by jury." *Id.*

The same holds true with respect to a motion to compel arbitration. It cannot interfere with Plaintiffs' right to have a jury determine disputed factual issues as to whether they waived their right to a jury trial on the merits of their legal claims.

Even if a motion to compel arbitration can be considered an equitable action, it does not preclude a jury trial. It has long been settled that even in equitable actions, a court has discretion to refer fact issues to an advisory jury. *See* *Johnston v. Bank of Poplar Bluff*, 294 S.W. 111, 114 (Mo. App. 1927); *Snell v. Harrison*, 1884 WL 9088, *3 (Mo. 1884). And, it cannot override the rule that where there are disputed issues of fact, a party is at least entitled to a bench trial so that the judge can determine the witnesses' credibility. *See* *Leonardi*, 137 S.W.3d at 474 (equitable issues "shall still be tried to the court.").

In any other contract dispute, Plaintiffs would unquestionably be entitled to a trial on disputed issues of whether they made an agreement or are estopped to deny it. *See* *Peerless Supply Co. v. Industrial Plumbing & Heating Co.*, 460 S.W.2d 651, 666 (Mo. 1970) (estoppel must be proven by "clear and satisfactory" evidence). As evident on the face of its Opinion, the Southern District based its estoppel and other holdings solely on the affidavits of Defendants, despite contrary affidavits and/or deposition testimony of Plaintiffs and many non-parties, including Defendants' own agent, Paul Brown. When a court weighs conflicting affidavits in order to compel a party to arbitrate, it not only contravenes well-established state law (*Horne*, 108 S.W.3d at 147), it violates fundamental arbitration principles as mandated by the United States Supreme Court. The federal policy favoring arbitration does not authorize courts to depart from the law and

procedures they would use with respect to any other type of contract dispute, and give arbitration agreements favored treatment. *See* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647 (1991) (The FAA places contracts on *equal* footing with other contracts). The rights at stake – a party's Constitutional right to a jury trial – are far too important to permit courts to arbitrarily choose which of two contradictory affidavits to believe, without affording the non-moving party his Constitutional rights to cross-examine the witnesses and/or to have a jury determine factual disputes.

For the foregoing reasons, this Court can and should affirm the trial court's judgment that Plaintiffs are not bound to arbitrate under the Pro Net Arbitration Provision. In the alternative, Plaintiffs respectfully request a trial of any disputed fact issues for the reasons set forth above.

III. RESPONSE TO POINT II

A. Standard of Review

Defendants' Point II fails to comply with Mo. R. Civ. P. 84.04(d). Point II asserts that the trial court erred in failing to "consider" the "Transition to Pro Net" agreement, but they do not state why it is error for a court not to address an issue in its judgment, either in the Point or in the Argument. *See* Rule 84.04(d)(1)(C); *Stelts v. Stelts*, 126 S.W.3d 499, 504 (Mo. App. S.D. 2004) ("'It is not sufficient to merely set out what the alleged errors are without stating why.'"); *Cooper v. Bluff City Mobile Home Sales, Inc.*, 78 S.W.3d 157, 167 (Mo. App. S.D. 2002) (Issue unmentioned in argument portion of brief is abandoned. "It is not within the province of this court to decide an argument that is merely asserted but not developed.").

Instead of arguing that the trial court failed to *consider* Pro Net arbitration, Defendants instead argue that the trial court erred in failing to *find that Plaintiffs are bound* thereby. Since this argument is not framed in Point II, and Defendants again do not explain why the court erred, that issue, too, is not preserved for appeal. *Lusher v. Gerald Harris Construction, Inc.*, 993 S.W.2d 537, 544 (Mo. App. W.D. 1999) ("A reviewing court is obliged to determine only those questions stated in the points relied on. Issues raised only in the argument portion of the brief are not presented for review."); *see also Swearingen v. Dryden*, 42 S.W.3d 741, 746-47 (Mo. App. W.D. 2001) (point dismissed where Defendant argued different issue than that asserted in point relied on).

Allegations of error not briefed or not properly briefed shall not be considered in any civil appeal . . . ." Mo. R. Civ. P. Rule 84.13(a); Accordingly, this Point should be dismissed. *See Freeman v. Basso*, 128 S.W.3d 138, 141 (Mo. App. S.D. 2004). Any discretionary review is limited to plain error. Mo. R. Civ. P. 84.13(c). Such relief, however, is rarely applied in civil cases, and the circumstances of this case do not call for such extraordinary relief. *Cooper*, 78 S.W.3d at 167.

Alternatively, the standard of review is that set forth in Point III above: *de novo* for conclusions of law (*e.g.*, contract interpretation), and that set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), for issues involving the sufficiency of evidence. *See Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. banc 2005); *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 868 S.W.2d 118, 120 (Mo. App. W.D. 1993).

B. Argument

1. The Trial Court Did Not Err in Failing to Consider the "Transition to Pro Net" Arbitration Provision

Defendants contend that the trial court erred in *failing to* ***consider*** the "Transition to Pro Net" Arbitration Provision in its judgment. But the fact that the trial court did not mention it in its judgment does not mean that the court did not consider the argument. Indeed, that argument was expressly asserted in Defendants' Motion for Rehearing. A3637. Defendants cite no authority that a trial court commits reversible error in failing to address all issues in its judgment. Indeed, courts routinely omit discussion of issues in their judgments, in which case the issue is deemed to have been impliedly overruled. *See, e.g.*, *State ex rel. Washington Fidelity Nat'l Ins. Co. v. Hostetter*, 117 S.W.2d 1083, 1085 (Mo. 1938); *Williams v. Kaestner*, 332 S.W.2d 21, 25 (Mo. App. S.D. 1960).

2. The "Transition to Pro Net" Arbitration Provision Does Not Bind Nitro or West Palm

Defendants contend alternatively that Nitro and West Palm are bound to arbitrate under the so-called "Transition to Pro Net" Arbitration Provision. It should be noted the name "Transition to Pro Net" is a self-serving title first denominated by Appellants. Indeed, "Pro Net" does not appear anywhere on the document, nor is Pro Net even a signatory. *See* A0441-44. In any event, the trial court's implicit ruling that the "Transition to Pro Net" Agreement Provision does not bind Nitro or West Palm should be affirmed as a matter of law for the following reasons:

a. The "Transition to Pro Net" Agreement is Unconscionable

The "Transition to Pro Net Agreement" requires arbitration under Amway's Rules of Conduct. As overwhelmingly established in Point III above, those rules are unconscionable. Because the "Transition to Pro Net" Agreement is unenforceable for that reason, this Court need not reach the issues Defendants asserted in Point II.

b. Plaintiffs are Not Signatories

Defendants contend that Nitro and West Palm are bound under the "Transition to Pro Net" Arbitration Provision because non-party Ken Stewart signed the agreement on behalf of his "organization," which includes Plaintiffs. To the contrary, as shown on the face of the document, Stewart signed in his *individual* capacity, not on behalf of Plaintiffs.

The signature block of the "Transition to Pro Net" agreement contains three fill-in-the-blank lines: "By", "Dated" and "For." On the "By" line, Ken Stewart signed his name above the pre-printed words, "Ken Stewart ('Stewart')." *See* A0441-44 (App. A35-38). The "For" line was left blank, indicating that he was not signing on behalf of any other person or entity – unlike other signatories who *did* indicate the corporate capacity in which they were signing. *See id.* In the absence of any indication on the face of the document that Ken Stewart signed on behalf of any corporate entity, he must be presumed to have signed in his individual capacity only. *Hamlin v. Abell*, 25 S.W. 516, 518 (Mo. 1893).

Defendants nevertheless argue that Stewart signed the agreement on behalf of his "organization," including Nitro and West Palm, because Paragraph 1 of the agreement references "organizations:"

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

A0441 (emphasis added).

The fallacy of Defendants' argument is that this paragraph defines the *scope* of arbitrable claims, not the *parties* to it. As the italicized language reflects, contrary to Defendant's argument, Stewart did not agree to submit the *Stewart Organization*'s claims to arbitration, but rather only those claims that he, *Stewart* (the signatory), may have arising from or relating to the *split* between the five named organizations and D&B and InterNet Services.

In construing a contract, a court may not look outside the four corners of the document to determine intent unless the contract is ambiguous. *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 777 (Mo. 2005). The "Transition to Pro Net" Agreement is not ambiguous. The signature line – as presented to Mr. Stewart by *Defendants* – is for an individual's signature and Stewart signed his individual name. Likewise, all of the Defendants here who were parties to that agreement (other than Paul Brown who signed on behalf of Global), signed solely in their individual names, even though there was a

specific place designated for them to indicate if they were signing in another capacity. *See* A0441-44.

Should this Court find it necessary to consider parol evidence, Defendants argue, on the issue of intent, that a company cannot evade a contract on the grounds that [its] president did not mean to sign the contract on behalf of the company," citing *Utley Lumber Co. v. Bank of Bootheel*, 810 S.W.2d 610, 612 (Mo. App. S.D. 1991). However, they presented no evidence that Ken Stewart intended to sign the agreement on behalf of anyone other than himself. To the contrary, Stewart testified that Plaintiffs were never parties nor intended to be parties to that agreement. A1698, ¶ 41. Further, *Utley* is wholly inapposite. It did not involve an officer's execution of a contract on behalf of an entity. It involved apparent authority by conduct.

And, quite frankly, Plaintiffs fail to see the logic or point in Defendants' contention that because "Nitro(Stewart)" contributed $650,000 in tools to stock Pro Net's warehouse and was the only person to do so, it thereby evinces that when Ken Stewart signed his individual name, he really intended to bind his entire "organization." In any event, this was not a basis urged to the trial court and is not preserved.

Since Ken Stewart signed in his individual capacity, neither Nitro nor West Palm are parties to that agreement and cannot be compelled to arbitrate. *See AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418 (1986).

c. Plaintiffs' Claims Are Not Within the Scope

Defendants contend that Plaintiffs' claims are within the scope of the "Transition to Pro Net" Arbitration Provision because their claims relate in some remote sense to Pro Net. But Pro Net is not even mentioned *anywhere* in the "Transition to Pro Net" Agreement. A0441-44. Thus, the agreement on its face cannot reasonably be interpreted as evincing an intent by the parties to submit any and all claims relating to Pro Net to arbitration.

The arbitration clause in this Agreement is a *narrow* – not a broad -- one. A broad arbitration clause is one that contains not only the language "arising from" but also "relating to." *Fleet Tire Service of North Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997); *Lebanon Chemical Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1101 (8th Cir. 1999) (clause containing "arising from" language was not broad in absence of phrase "relating to."). The express language of the arbitration provision is limited to only those claims "arising from" the *transition* from D&B and InterNet (in other words, *arising from the termination* of the parties' relationship with D&B and InterNet). It does not include all claims "relating to" that transition, let alone claims relating to Pro Net. *See Farm Bureau Mutual Ins. Co. v. American Internat'l Group, Inc.*, 2003 WL 21976034, *2 (S. D. Iowa 2003) (arbitration clause covering all disputes "arising out of the *interpretation* of" the Reinsurance Facilities agreement is narrow and not broad enough to cover all claims arising from that agreement).

Plaintiffs' claims do not arise from the transition from D&B and InterNet to Pro Net. Stewart explained that "Transition to Pro Net" Agreement came about at the request

of Dexter Yager. Prior to the formation of Pro Net, Yager's corporations, InterNet and D&B, supplied BSMs in the Gooch line of sponsorship. A1697. In or about 1997, Gooch, Childers, Foley and Woods decided to "break away" from Yager so that they could seize greater control over the sale of BSMs in the Gooch line of affiliation. *See* A1406, at 350:8-351:4; A1411, ¶ 4; A1417, ¶ 24. Yager was concerned that his companies "might be sued by either Pro Net Steering Committee members or Gooch downline distributors after the transition from [InterNet/D&B to Pro Net]." A1697. The "Transition to Pro Net" Agreement was intended to protect Yager from such suits. *Id.* It was *not* intended or understood by the Pro Net Steering Committee Members to require arbitration amongst themselves or their Amway or BSMs corporations after the transition from InterNet/D&B to Pro Net was accomplished. *Id.*

That transition was fully accomplished in 1998 when Pro Net was formed. A1411, ¶ 3. Plaintiffs' claims in this suit are for wrongful conduct *post-dating* the transition, *i.e.*, Defendants' subsequent use of Pro Net in their conspiracy to violate antitrust laws. *See* A0722-729, ¶¶ 115-135. Plaintiffs' claims have nothing to do with the termination of the parties' prior relationship with D&B and InterNet.

Defendants contend that the alleged conspiracy included "breaking away" from the Yager Group, and therefore fall within the scope. This is a new argument urged for the first time in this Court and thus not preserved. In any event, the scope of this arbitration clause is a very narrow one. It includes only those claims *arising from* the transition from InterNet/D&B to Pro Net – not anything that may tangentially relate to that transition. The wrong is not the breaking away itself, but rather the tortious manner

in which Defendants' *used* the control that they acquired over the BSMs industry when they broke away from InterNet/D&B. "Arise from" could go back ad infinitum. Like the concept of foreseeability in proximate cause, there has to be a limit. In this case, Plaintiffs make no claim regarding any wrongful conduct in transitioning from InterNet/D&B to Pro Net. Thus, their claims are not within the scope. *See* *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995).

d. Defendants are Not Entitled to Enforce Arbitration

Defendants admit that Dunn, Dunn Associates, Grabill and Grabill Enterprises are not signatories to, and thus are not entitled to arbitrate under, the Transition to Pro Net Arbitration Provision. Defendants' Brief, p. 67 n.18.

As for the remaining Defendants, they contend that Foley, Gooch, Childers and Woods executed the agreement on behalf of their respective corporations, T&C Foley, Inc., Gooch Support, Gooch Enterprises, TNT and G.F.I., and thus all nine persons/entities are entitled to compel arbitration. For the same reasons discussed above with respect to Plaintiffs, this argument is belied by the face of the document. Foley, Gooch, Childers and Woods signed the agreement in their *individual* capacities. *See* A0442-44. Nothing in the respective signatures indicates that they signed on behalf of any corporate entity. Indeed, the "For" line was left blank by all of them. Thus, the individual Defendants are presumed to have executed the contract on their own behalf only. *Hamlin*, 25 S.W. at 518.

Admittedly, Global is a signatory to the "Transition to Pro Net" Agreement, and Brindley, as an agent of Global, likewise would be entitled to the benefit of that

agreement. But that fact is of no moment because Nitro and West Palm are not parties, nor are their claims within the scope of the "Transition to Pro Net" Arbitration Provision, and it is unenforceable due to its unconscionability.

With respect to Pro Net, Pro Net I, and Blanchard (COO of Pro Net), they are not signatories to the Transition to Pro Net Agreement. Defendants nevertheless argue that they are entitled to enforce the agreement because "the claims against them sound in the same business relationship – the formation of Pro Net . . . ." With all due respect, Plaintiffs have no idea what recognized legal theory this is meant to invoke. In the absence of a recognized contract theory (*e.g.*, agency or alter ego), a non-signatory is not entitled to enforce a contract to which he is not a party. *See* *Byrd v. Sprint Communications Co. L.P.*, 931 S.W.2d 810, 813 (Mo. App. W.D. 1996) (general contract and agency principles determine whether a party agreed to arbitrate).

To the extent Defendants are invoking an "intertwining" or "community of interest" doctrine as they argued elsewhere, such has been soundly and properly rejected by the courts in this State. *See* *Byrd*, 931 S.W.2d at 814; *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 436 (Mo. banc 2003). A close business relationship with a signatory is not sufficient to entitle the non-signatory to the benefits of an arbitration provision. *See, e.g.*, *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947, 948 (Mo. App. S.D. 1999) (parent-subsidiary relationship insufficient).

Defendants next argue that Defendant Blanchard is entitled to enforce arbitration as COO of Pro Net. But Pro Net is not a signatory to the so-called "Transition to Pro Net" agreement. The *Madden* case cited by Defendants held that a non-signatory agent is

entitled to enforce his principal's arbitration agreement. *Madden v. Ellspermann*, 813 S.W.2d 51, 53 (Mo. App. W.D. 1991). But since Pro Net is not a signatory, there is nothing for *either* Pro Net or Blanchard to enforce. *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947, 948 (Mo. App. S.D. 1999) (one not a party to a contract cannot enforce it); *Lake Ozark Constr. Indus., Inc. v. North Port Assoc.*, 859 S.W.2d 710, 714 (Mo. App. W.D. 1993).

Plaintiffs did not agree to arbitrate any claims with any of the Defendants and therefore cannot be compelled to do so. *See AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418 (1986) ("[A] party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit."); *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995) (same).

For the foregoing reasons, Plaintiffs did not make an agreement to arbitrate under the "Transition to Pro Net" Agreement, it is unconscionable, and Plaintiffs' claims do not fall within the scope of arbitration. Accordingly, the trial court's judgment should be affirmed. To the extent it cannot be affirmed as a matter of law, Plaintiffs respectfully request this case be remanded for trial of any factual disputes for the reasons set forth in Point I, § B.3, *supra*.

CONCLUSION

Defendants have failed to properly preserve any issues for appeal, and therefore this appeal should be dismissed. Should this Court nevertheless review the issues, for the reasons discussed above, the trial court did not err in denying Defendants' Motion to Compel Arbitration and to Stay Litigation. Plaintiffs respectfully request this Court to affirm the trial court's decision. Alternatively, Plaintiffs request that this case be remanded to the trial court for a trial of any disputed fact issues.

Respectfully submitted,

SHUGHART THOMSON & KILROY, P.C.

By_____

R. Dan Boulware Missouri Bar #24289
R. Todd Ehlert Missouri Bar #51853
Sharon Kennedy Missouri Bar #40431
3101 Frederick Avenue
P. O. Box 6217
St. Joseph, Missouri 64506-0217
Telephone: (816) 364-2117
Facsimile: (816) 279-3977

John C. Holstein Missouri Bar #21539
SHUGHART THOMSON & KILROY, P.C.
901 St. Louis Avenue, Suite 1200
Springfield, Missouri 65806
Telephone: (417) 869-3353
Facsimile: (417) 869-9943

William Francis Missouri Bar #26530
PLACZEK & FRANCIS
1722 South Glenstone, Suite J
Springfield, Missouri 65804
Telephone: (417) 883-4000
Facsimile: (417) 887-1503

Warren S. Stafford Missouri Bar #16848
TAYLOR, STAFFORD, CLITHERO,
FITZGERALD & HARRIS, LLP
3315E. Ridgeview, Suite 1000
Springfield, MO 65804
Telephone: (417) 887-2020
Facsimile: (417) 887-8431

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that I did on this _____ day of July, 2005, cause a copy of the foregoing RESPONDENTS' SUBSTITUTE BRIEF, with a copy on disk, to be served via overnight mail, postage prepaid, to:

Gaspare J. Bono
Daniel G. Jarcho
McKenna Long & Aldridge LLP
1900 K Street, NW
Washington, DC 20006

Larry K. Bratvold
Bratvold Law Firm, P.C.
1200 East Woodhurst Dr.
Building H, Suite 400
Springfield, MO 65814-0080

Michael K. Cully
Lowther Johnson
901 St. Louis Street, 20th Floor
Springfield, MO 65806

ATTORNEYS FOR ALL APPELLANTS

_____
ATTORNEY FOR RESPONDENTS

RULE 84.06(c) AND (g) CERTIFICATES

I hereby certify that RESPONDENTS' SUBSTITUTE BRIEF includes the information required by Rule 55.03, and that the brief complies with the limitations contained in Rule 84.06(b). Respondents' Substitute Brief consists of 27,203 words, exclusive of the cover, certificate of service, certificate required by Rule 84.06(g), signature block and appendix, as determined by the word count of the Microsoft Word word-processing system.

I hereby certify that the floppy disk filed by Respondents in this matter has been scanned for viruses and that it is virus free.

BY _____
ATTORNEY FOR RESPONDENTS