IN THE SUPREME COURT OF MISSOURI

NO. SC86855

NETCO, INC., ET AL.,
Respondents,

v.

JIMMY V. DUNN, ET AL.,
Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI

HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE

APPELLANTS' SUBSTITUTE REPLY BRIEF

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INTRODUCTION

Respondents' brief sweeps aside the "question of first impression" posed by their transfer application: What role, if any, does a Missouri jury have in deciding a motion to compel arbitration?

This near abandonment of the key – indeed, only – issue framed for review is a tacit acknowledgement of the highly persuasive nature of the Oklahoma Supreme Court's decision in *Rogers v. Dell Computer Corp*., No. 99,991, 2005 Okla. LEXIS 49 (Ok. June 28, 2005). Although the brief hardly mentions *Rogers*, this post-transfer decision is the latest in a series of cases setting out how the UAA's summary bench procedures – upon which the MUAA is fashioned – are applied under the FAA, without a jury, to decide a motion to compel arbitration.[1]

Instead of squaring their argument, Respondents barely stop to address the jury issue (*see* Res. Br. 22-31) in a headlong rush to throw complaints about our brief against the wall in the hope of enticing the Court to second guess the Southern District's unanimous opinion. But, of course, this Court's primary focus is establishing and clarifying statewide law and judicial policy, not making findings of fact or correcting case-specific errors of law presented to the Court of Appeals.

The churning nature of the answering brief is seen in a single early page where Respondents claim our appeal point "preserves nothing for appeal and should be dismissed" ***or*** "[a]ny discretionary review is limited to plain error" ***or*** "[a]lternatively"

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

the Court should apply a post-trial standard of review. (Res. Br. 19.) This litany lacks substance. The Southern District accepted our points under Mo. R. Civ. P. 84.04(d) (App. A12-A13), Respondents themselves say *"the case was presented on a written record without live testimony*" (Res. Br. 19; emphasis in original) and the Circuit Court made no meaningful findings of fact (App. A1-A3). Additionally, the Court, as discussed below, clearly reviews arbitrability *de novo*.

The Court of Appeals should be praised, not buried, for remanding this case for AAA arbitration under the Pro Net agreement. The colorful but overblown rhetoric in the application that "the Southern District worked a double travesty of justice" (Appl. 8) finds no support in Respondents' brief, which fails to show, *inter alia*, that it was an error to conclude that Netco joined Pro Net and received the full benefits of Pro Net membership (App. A17).

Respondents' separate arguments as to the Amway Rules are no more convincing and, in any event, do not provide escape from AAA arbitration. Their persuasive force is particularly undermined by efforts to bury *U-Can-II, Inc. v. Setzer*, No. 02-2535-CA CV-B (Fla. Cir. Ct., Apr. 23, 2003), *aff'd in pertinent part, rev'd in part,* 870 So. 2d 99 (Fla. Dist. Ct. App. 2003) (App. A61-A88).

Although the brief omits *U-Can-II* (the only case cited by the Circuit Court) from its table of authorities, it cannot hide that a Florida court, sitting without a jury, ordered Pro Net and Amway arbitration of substantially identical claims brought by the same counsel on behalf of a similarly situated plaintiff against many of the same defendants. The court's reasoning is compelling (even the Circuit Court praised the "detailed"

opinion and "agree[d] with [its] analysis on most of the issues," *see* App. A2) and we submit nothing in Respondents' brief prevents this Court from also ordering arbitration.

STATEMENT OF FACTS

Four errors of fact pervade almost every argument in Respondents' brief and require immediate correction.

First, the brief strains to deny that Amway is the glue for the parties and claims before the Court. (*E.g.*, Res. Br. 16.) Its efforts, however, are undone by two sentences in the 1998 Pro Net book where Mr. Schmitz described the operation of his Amway/BSMs organization:

> I would just give them a tape [***Amway-related BSM***] and get them to a meeting [***Amway-related function***] where they could meet other people in my [***Amway***] upline. I just kept showing the [***Amway***] plan ***and the [Amway] system did the rest***.

(A4066; emphasis added.) Indeed, Respondents themselves claim that "the Schmitz Network of downline distributors served as a lucrative market for the sale of Amway-related instructional and motivational materials." (A0561 ¶ 22.)

Second, the brief attempts to brush off its conflict with a letter on Respondents' joint letterhead sent to Amway demanding "enforcement of ***both the spirit and letter of the Rules of Conduct and Code of Ethics***." (App. A40; emphasis added.) Respondents now say it was a "*mistake*[]" that the letter invoked the Amway Rules ***eighteen*** times on

their behalf and rather remarkably suggest that facts "*predating* this litigation" are irrelevant. (Res. Br. 68-69; emphasis in original.) But the highly detailed letter, which Mr. Schmitz testified had "legal review" (A3098), was mailed less than six weeks before the petition was filed and raises the same complaints against Appellants. In short, nothing better demonstrates the governing application of the Amway Rules to this case.

Third, the brief similarly strives to disentangle itself from the original petition's embrace of the Amway Rules in favor of "unwritten rules" first described in the amended petition ***after*** arbitration was sought. (*E.g.*, Res. Br. 16, 69.) As far as we can tell, these so-called BSMs rules are identical to the Amway ones in every respect except for not requiring arbitration. Respondents, however, should not be allowed to tell an alternative version of their lengthy Amway/BSMs tenure through unwritten, parallel rules to which they clearly gave no thought until we moved for arbitration. *See, e.g.*, *Carter v. Matthey Laundry & Dry Cleaning Co.*, 350 S.W.2d 786, 791 (Mo. 1961) (holding an abandoned petition against a party because "[t]he original petition tended to show that plaintiff's claim . . . had not occurred to him until sometime after the filing of his original petition and was an afterthought").[2]

[2] "As a general rule, a party is bound by allegations or admissions of fact in his own pleadings." *Dick v. Children's Mercy Hosp.*, 140 S.W.3d 131, 141 n.5 (Mo. App. W.D. 2004) (citation omitted); *see also Voelker v. Saint Louis Mercantile Library Ass'n.*, 359 S.W.2d 689 (Mo. 1962); *Buatte v. Gencare Health Sys., Inc.*, 939 S.W.2d 440 (Mo. App. E.D. 1997).

Fourth, as to even the amended petition, the brief repeatedly runs afoul of the principle that a litigant cannot blow hot and cold and instead is bound by its pleadings. Thus, for example, the brief's claim that "the Schmitzes did not 'assign' the rights and obligations they owed to Amway as Amway distributors to Netco" (Res. Br. 32) cannot override the operative petition's clear statement: "Together, they [Mr. and Ms. Schmitz] operated the distributorship in their names until incorporating Netco and assigning their interests to Netco in 1990." (A0551 ¶ 7.) Similarly, the brief cannot disavow the "Schmitz Organization" (Res. Br. 101) because the amended petition presents this well-known grouping of "[t]he Schmitzes and Plaintiffs" as the heart of the entire case. (*E.g.*, A0550-51 ¶ 7.)

STANDARD OF REVIEW

Respondents' proposed deferential standard is contrary to the *de novo* review of arbitrability conducted by this Court, *see, e.g., Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003), and inconsistent with their various arguments analogizing this case to summary judgment. Unquestionably, appeal of summary judgment is *de novo*. *See Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, 155 S.W.3d 50, 58 (Mo. banc 2005).[3] Here, where Respondents claim not to be

[3] Similarly, besides misreading the record, Respondents misconceive *de novo* review with their various assertions that our brief advanced new arguments. *Cf. Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801, 808 n.9 (Mo. App. W.D. 2004) ("[A]ny party against whom summary judgment has been entered is entitled, even for the first time on appeal, to

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contractually bound to arbitration, this Court can and should independently evaluate the written record and legal arguments.

ARGUMENT: JURY ISSUE

Contrary to Respondents' suggestions, the use of a jury to hear a motion to compel arbitration is unknown under the UAA. Instead, its procedures, as adopted by Missouri and other states, call for a summary bench determination of the request for specific performance. *See, e.g., Rogers*, 2005 Okla. LEXIS 49, at *14; *Rosenthal v. Great Western Fin. Secs. Corp.*, 926 P.2d 1061 (Cal. 1996); *Jack B. Anglin Co. v. Tipps, Inc.*, 842 S.W.2d 266 (Tex. 1992).

Respondents do not – and cannot – identify a single instance in which a court applying the UAA has called upon a jury to resolve a motion to compel arbitration. In addition, they cannot obscure that their position, if adopted, would (i) put Missouri law in direct conflict with other jurisdictions, (ii) clash with the new RUAA, (iii) fail to give force to the MUAA instruction that it is to be "construed [so] as to effectuate" uniform construction of the UAA, *see* RSMo § 435.450, and (iv) conflict with the MUAA's explicit requirement that "an application to the court under [the MUAA] shall be by motion and shall be heard in the manner and upon notice provided by law or rule of court for the making and hearing of motions." RSMo § 435.425.

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challenge the circuit court's underlying legal conclusion . . . .").

Nonetheless, Respondents insist on a "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." (Res. Br. 30.) But their principal contentions are wrong at every turn:

1. Preliminarily, while the right to a jury trial is certainly important, it is not of such an inviolate nature that there is anything unconstitutional about an arbitration agreement. *See, e.g., Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 626 (Mo. banc 1997). Moreover, "loss of the right to jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 653 (Minn. 1990) (citation omitted).

2. Respondents do not contest that specific performance is an "equitable remedy and therefore governed by equitable principles," *see Hoover v. Wright*, 202 S.W.2d 83, 86 (Mo. 1947), or that courts have found that "[a]n order compelling arbitration is in fact an order for specific performance." *Pettinaro Constr. Co. v. Harry C. Partridge, Jr., & Sons, Inc.*, 408 A.2d 957, 962 (Del. Ch. 1979). Thus, Respondents' view of the MUAA is contrary to the fact that "Missouri's constitutional guarantee to a jury trial has never been applied to claims seeking equitable relief." *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462, 472 (Mo. banc 2004).

3. While Respondents argue that "the nature of the underlying action" should be determinative of any jury rights (Res. Br. 29-30), they do not dispute that the MUAA bars a court from assessing the validity of these claims. *See* RSMo § 435.355.5. It therefore makes little sense to allow underlying allegations to drive MUAA analysis. *Cf. Rosenthal*, 926 P.2d at 1071 (a "plaintiff is not impermissibly denied a jury trial when the

superior court decides only the facts necessary to determine specific enforceability of an arbitration agreement").

4. Conceding, as they must, that the MUAA "does not expressly authorize a jury trial," Respondents nevertheless contend that an "implicit" jury right should be found in the statute. (Res. Br. 25-27.) But their reading of the "proceed summarily" directive of RSMo § 435.355.1 fails to give it the necessary "plain and ordinary meaning." *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. banc 2005). Its clear meaning is that "a trial court should act expeditiously and without a jury trial to determine whether a valid arbitration agreement exists." Official Comment to RUAA § 7.

5. Respondents spend a great deal of energy suggesting that the MUAA does not mean what it says about applications to a court being "by motion." RSMo § 435.425. But they demonstrate no legal or policy reasons for requiring a Missouri court to treat motions under the MUAA differently than all other motions.

6. Of course, as with other motions, a trial court has discretion under the MUAA on whether to hold a hearing. But Respondents' claim that a hearing is "mandatory" (Res. Br. 28) is seriously misguided in light of *Rogers*, 2005 Okla. LEXIS 49, at *14 ("The decision to grant a hearing will be in the discretion of the district court."), and contrary to established Missouri practice:

> Rule 55.28 authorizes the court to decide motions based on affidavits which supply facts not appearing of record. ***The matter of whether an evidentiary hearing is required is a decision to be made by the trial court in the exercise of its***

> ***discretion, a decision reviewable only upon a claim that the court has abused its discretion. There is no due process right, therefore, which entitles a party . . . to notice up an evidentiary hearing.***

Gorman v. Cornwell Quality Tools, 752 S.W.2d 844, 847 (Mo. App. W.D. 1988) (emphasis added) (citation omitted).

7. Respondents raise the specter that not reading a jury right into the MUAA would "permit courts to arbitrarily choose" whether to send a case to arbitration. (Res. Br. 31.) This notion is both fanciful and fictitious. While Respondents may disagree with the Southern District, the unanimous opinion is not arbitrary.

8. Respondents' position with respect to the FAA is highly confusing. While they argue that "the question presented is not one of federal preemption" (Res. Br. 26 n.4), they also suggest that "the FAA's right to a jury trial extends to arbitrability disputes arising in state courts" (*id*. 24). Regardless, besides lacking legal support, their position is fundamentally flawed because a bench determination does not conflict with the goal of the FAA to promote arbitration. *See Jack B. Anglin Co.*, 842 S.W.2d at 268 n.2 (the UAA's procedures "encourage and facilitate the use of arbitration"). By contrast, Respondents' proposal would violate the FAA by failing to place arbitration provisions "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).[4]

[4] There is simply no basis for the bald assertion that a federal court "unquestionably"

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9. Respondents admit that the parties were allowed to create a "voluminous written record" of thousands of pages of discovery material and legal argument. (Res. Br. 18.) They are not being railroaded into arbitration.

10. In the final analysis, Respondents do not show that the ***substantive*** outcome of our motion is dependent on any specific ***procedures***. As a result, an order compelling arbitration is correct under either the MUAA or FAA and regardless of whether any hearing were held.

ARGUMENT: RESPONDING TO POINTS I, II AND III

Respondents do not deny that – as the Court of Appeals held (App. A23) – the AAA provision of the Pro Net agreement is an independent basis for ordering arbitration. We therefore address Appeal Point III before turning to the scattergun blast of Amway-related arguments aimed at Appeal Points I and II.

I. Pro Net's AAA Clause Requires Arbitration

A. Appellants Did Not "Withdraw" the Pro Net Clause

The general tenor of the brief's Pro Net arguments is established at the start when it egregiously miscites a deposition colloquy between counsel to argue incorrectly that we

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would have a jury resolve our motion. (Res. Br. 23.) To the contrary, "it is well-established [under the procedures of FAA § 4] that a party to an arbitration agreement cannot obtain a jury trial merely by demanding one." *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 710 (5th Cir. 2002).

withdrew our claim as to Pro Net arbitration. (Res. Br. 91.)[5] It is obvious from this transcript – as well as all of the pleadings and briefs – that we did not (and would not) withdraw this argument.

Contrary to the impression created by Respondents, the quoted discussion was about arbitration of claims by Mr. Schmitz's mother, a former plaintiff. Appellants' counsel stated: "I do not believe Joanne Schmitz was a member of Pro Net." (A1035.) And, when Respondents requested a stipulation ("I want you to stipulate that it [Pro Net] is not in the case or it is"), Appellants refused, saying: "[I]t may be in, then, as to others, as to Schmitz." (*Id.*) Respondents' counsel replied, "Well, we will go ahead then," and continued asking the deponent about Pro Net arbitration. (*Id.*)

B. Respondents Are Bound by the Pro Net Clause

Respondents' arguments generally distort governing principles of contract law and estoppel. For instance, while the brief cites *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003) (Res. Br. 95 n.25), it does not acknowledge that this Court reiterated the principle that "[b]y accepting benefits, a party may be estopped from questioning the existence, validity, and effect of a contract." *Id.* at 437.

In a similar vein, the brief's focus on a single, post-application telephone conversation (Res. Br. 92-93) cannot reverse Respondents' subsequent acceptance of a

[5] Respondents apparently miss the irony of relying on a stray comment at the deposition about "Mr. Schmitz" (Res. Br. 91) while taking us to task everywhere else for failing to respect "corporate distinctions" and "individual capacities" (*e.g., id.* 16).

cascade of Pro Net-related cash. As described in Mr. Schmitz's affidavit: "Global Support Services, Inc. transacted business on a monthly basis with Netco, Inc. and/or Schmitz & Associates, Inc., from October of 1998 to July 2000." (A0185 ¶ 247.) *See Medicine Shoppe Int'l, Inc. v. J-Pral Corp.*, 662 S.W.2d 263, 271 (Mo. App. E.D. 1983) ("The manifestation of acceptance of an offer . . . may also come through the offeree's conduct in accord with the terms of the offer.").

In light of these settled principles, the brief is remarkable for it does ***not*** dispute with respect to Pro Net:

- In December 1998, Mr. Schmitz as Netco's "President" submitted both a Pro Net application on behalf of "Netco, Inc. (Charlie & Kim Schmitz)"[6] and a $25 check for the "initiation fee" cashed by Pro Net. (App. A34-A35.)
- ***After*** submitting this application, the Schmitzes traveled to Vail, Colorado, to attend a Pro Net meeting on December 13-16, 1998. (A0108.)

[6] This intermixing of corporate and individual names on the application further belies assertions in the brief about distinctions within the Schmitz Organization. Similarly, Mr. Schmitz's notation on the application described how "I am not giving up ***my right*** to buy-sell or produce support materials from other suppliers or manufacturers." (App. A34; emphasis added.) In any event, the significance here is that the reservation did not attempt to alter Pro Net's arbitration requirement.

- In 2000, the Schmitzes were among the Pro Net members assigned a special login ID and password for the website www.pronetglobal.com. (A2371-72; A2381.)
- An official Pro Net listing of membership through 2000 includes the "Schmitz Organization." (A2493.)
- Between 1998 and 1999, Global's business records show that Netco purchased more than ***100,000*** Pro Net BSMs (A2517-18) and spent more than ***$260,000*** on ***107*** separate orders (A2614).

Instead of focusing on material facts, Respondents raise a veritable blizzard of arguments (Res. Br. 91-103) that fail to keep in mind that a nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (discussing summary judgment).

At bottom, Respondents' arguments are not convincing because the basic context of this case – as set out by Respondents themselves in their amended petition – renders their denials of membership implausible.

Respondents allege that "Schmitz Associates facilitated Netco's rally, convention and function business for the Schmitzes, and operated in tandem with Netco to build, support and enhance the Amway business." (A0551 ¶ 7.) The pleading then shows how Pro Net was a natural fit because it was "in the business of facilitating the sale of business support materials or 'tools' for use by Amway distributors, and of organizing

seminars, rallies, and major functions attended by Amway distributors nationwide." (A0554 ¶ 12.)[7]

Against this backdrop, Respondents present no persuasive evidence supporting their current denial of membership. For instance, the far-ranging bullet points on pages 96-97 are supported largely by Mr. Schmitz's affidavit. (A0967-82.) As with summary judgment, however, "self-serving affidavits do not amount to the type of evidence required to call the 'making of the arbitration' agreement into question." *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 710 (5th Cir. 2002) (quoting *Bhatia v. Johnston*, 818 F.2d 418, 421 (5th Cir. 1987)).

Indeed, the failures of this affidavit are evident when evaluated in light of objective business records, such as Global's catalog listing tapes by the Schmitzes for sale throughout the Pro Net system. (A2517 ¶ 9.) Global's listing included such Schmitz tapes as "Any Dead Fish Can Float Downstream" (A2631), "Lost, But Making Good Time" (A2633) and "The Discipline Factor" (A2635).

Respondents admit their principals were "featured" in the Pro Net book *Profiles: Portraits of Success*, but raise the preposterous objection that we "presented no evidence

[7] These purposes of Pro Net also undermine Respondents' various arguments about how certain parties were not "eligible" for membership. Principals, distributor corporations and Amway-related BSMs corporations were considered by Pro Net and its members to be a single organization. (*E.g.*, A2103; A2313; A2371.) Thus, Respondents miss the mark when they complain that we seek "to pierce the corporate veil." (Res. Br. 101.)

that the Schmitzes consented to the use of their likeness in that publication." (Res. Br. 98.) In fact, the profile – with its quote about the "close relationships and enduring friendships we have in our business" and happy family photos (A4065-66) – shows membership far more than identity theft. The Schmitzes were sufficiently pleased to commit in writing to buy 200 copies of the book and estimated ordering another 200 from Global. (A2662.)

Because Respondents cannot deny their large purchases, they must argue that anyone could buy Pro Net BSMs from Global. (Res. Br. 95-96.) But their argument confuses shipping and billing. As explained in an unrefuted affidavit by Global's controller: "All Diamond Pro Net members [including the Schmitzes] were direct 'ship-to's' by Global, which meant that Global would directly ship orders to Diamond-level Pro Net members. Global would also ship to a party that was in a Diamond's downline if that downline party's Diamond upline Pro Net member authorized Global to take orders and ship directly to that party." (A2516 ¶ 4.)[8]

Moreover, the suggestion of an open door is inconsistent with the allegation in the amended petition of an "illegal tying arrangement" as to Pro Net membership and the ability to profit from BSMs. (A0588 ¶ 125.) Similarly, after spending pages alleging

[8] For Respondents, "Global invoiced the Schmitz Organization's upline, [Appellants] Bill Childers and his company TNT, Inc., for the Schmitz Organization's BSMs purchases. As a Pro Net Diamond member, Global could ship the purchases directly to the Schmitz Organization, but did not bill the Schmitz Organization." (A2516 ¶ 5.)

Netco rejected membership in Pro Net, the brief spins in a dizzying manner to claim "duress" on the ground that "Netco had no option but to acquiesce to the Pro Net system." (Res. Br. 98-99.) These internally conflicting theories – Netco never joined Pro Net vs. Netco was forced to join – do not rise to a level sufficient to defeat arbitration.

C. Appellants May Enforce the Pro Net Clause

While Respondents would like the Court to find that Pro Net was an association without any members entitled to enforce its terms and conditions (*see* Res. Br. 103-07), all Appellants may compel arbitration either as Pro Net members (*e.g.*, A0109) or because of their close relationship (*e.g.*, A0554).

D. The Broad Pro Net Clause Covers this Dispute

Respondents (Res. Br. 108-09) do not evince much enthusiasm for their argument that claims in the amended petition, which asserts that the Pro Net arbitration clause itself is a tool of the alleged conspiracy (*e.g.*, A0608 ¶ 213), are outside the scope of the same clause. In particular, we note that calling *U-Can-II* "not well-reasoned" (Res. Br. 109) does not explain away its holding that very similar claims were within the "very broad arbitration clause." (App. A65.)

II. The Amway Rules Require Arbitration

A. Respondents Are Bound by the Rules

Considering that Mr. Schmitz compared his leaving Amway to Shaquille O'Neal retiring from basketball (A3094), Respondents' claims not to be bound by the Amway Rules are unconvincing:

1. Respondents' view that time has stood still and they are only bound by the pre-arbitration version of the Amway Rules, if accepted by the Court, would paralyze the law of distributor relationships since any distributor could preclude contractual changes by not reading a contract or opening the mail. *Cf. Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003) ("[A]ny rule automatically invalidating adhesion contracts would be completely unworkable.") (quotation omitted).

2. Regardless, Netco's signed Amway application states that "all Amway distributors must apply for and receive Amway Distributor Authorization yearly" and that these authorizations expire at the end of each year. (App. A30.) Thus, an Amway distributorship expires annually and cannot bound by superceded rules.

3. In addition, Netco "auto-renewed" its distributorship each year (A0106) pursuant to then existing (as opposed to historical) Amway Rules (A0063). Although Respondents raise objections to auto-renewal (Res. Br. 42-44), this process was carefully examined in both *U-Can-II* and *Morrison v. Amway Corp.*, 49 F. Supp. 2d 529 (S.D. Tex. 1998). Both courts rejected arguments that "automatic-renewal plaintiffs" were not bound by Amway arbitration. *See* A71-A72; 49 F. Supp. 2d at 533-34.

4. Although Respondents apparently acknowledge that "an assignee acquires no greater rights than the assignor," *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556 (Mo. App. W.D. 2004), they attempt to cloud how assignment here included Netco's annual renewal by contradicting not only their amended petition (A0551 ¶ 7) but also Mr. Schmitz's sworn testimony: "During 1990, Kimberly and I assigned our Amway distributorship to Netco, Inc." (A0153 ¶ 5.)

5. Respondents' attempts to carve Netco and Schmitz Associates out of the Amway Rules and deny estoppel are contradicted by Mr. Schmitz's affidavit clearly showing the fundamental links between Respondents and Amway and their embrace of Amway-related benefits:

- "Kimberly and I operated our Amway distributorship through Netco, Inc., as well as a portion of our Amway-related business support material, or 'tool' business." (A0153 ¶ 5.)
- "Netco, Inc. derived lucrative incomes from both its Amway and tool business . . . ." (A0154 ¶ 8.)
- "Schmitz & Associates, Inc. derived significant profits from the sale of tickets to functions and other Amway-related events which it sponsored from 1993 to 1998." (A0155 ¶ 13.)
- "Netco, Inc. and Schmitz & Associates, Inc. conducted business with all of the Defendants named in this lawsuit

over the course of many years in relation to both the Amway business and the 'tool' business." (*Id.* ¶ 15.)

- "Kimberly and I, and thus Netco, Inc., achieved the Diamond pin level in Amway in 1990." (A0156 ¶ 24.)
- "[M]ajor functions, sponsored by Schmitz & Associates, Inc., . . . regularly drew over 2,000 Amway distributors. . . ." (A0157 ¶ 25.)

6. Respondents' assertion that they did not know about the Amway arbitration provision (Res. Br. 38-42) does not allow them to ignore the rule. The same argument was rejected in *U-Can-II*:

> Amway made reasonable efforts to notify its distributors of the change in the Rules requiring arbitration, both through letters and the company magazine, AMAGRAM. Amway sent its distributors copies of the Rules with the new provisions in 1998. There is no evidence that the [principals of the plaintiff] were prevented from knowing the terms of their distributorship agreement. Further, the [principals] were on notice that the Rules could be amended from time to time. . . . [T]he [principals] had a duty to know and to ascertain the terms of their distributorship.

(App. A72.)

7. In any event, the claims of ignorance about Amway Rule 11 ring hollow in light of the opening line of the letter to Amway that Mr. Schmitz prepared with legal counsel on Respondents' joint letterhead (discussed *supra*): "***Pursuant to Rule 11.1.1 of the Rules of Conduct,*** please consider this letter written notice of the unreasonable and unwarranted interference with our former [distributorship] . . . ." (App. A40; emphasis added.)

B. Appellants May Enforce the Rules

Respondents deny that Appellants have been sued in an Amway-related "capacity." (Res. Br. 60.) But this assertion is little more than splitting nonexistent legal hairs in light of their earlier admissions that the BSMs business "pertains to the promotion of Amway through . .. Amway distributors" (A0003 ¶ 1) and BSMs are "an integral part of the Amway business" (A0012 ¶ 19).

Moreover, the brief makes crystal clear that Respondents engaged in creative litigation in an effort to avoid the broad scope of the Amway Rules. Indeed, it brazenly acknowledges that the decision to sue certain entities within Appellants' Amway-related organizations was driven by a desire to avoid arbitration. (Res. Br. 60 n.11.) Such cherry picking should not be rewarded. *See, e.g., Mosca v. Doctors Assocs.*, 852 F. Supp. 152, 155 (E.D.N.Y. 1993) ("This court will not permit Plaintiffs to avoid arbitration simply by naming individual agents of the party to the arbitration clause and suing them in their individual capacity.").

C. This Dispute Is Within the Scope of the Rules

Finally, when Respondents take up the issue of scope, they are in the awkward position of having to disavow their letter energetically invoking the Amway Rules and complement Amway's superior understanding. (Res. Br. 68-69.) But while singing Amway's praises for the first and last time, their brief overlooks Amway's September 26, 2000 letter explaining:

> The agreement to arbitrate is broader than disputes arising under the Rules of Conduct. Anything relating to your Amway Independent Business is covered by the agreement to conciliate/arbitrate. Therefore, because BSMs are related to your Independent Business, any dispute arising with another Amway IBO (involving BSM or otherwise) is subject to arbitration.

(A3179.)

In short, two courts – *Morrison* and *U-Can-II* – have already conducted the scope analysis and found that BSMs claims almost identical to those here fall within the Amway arbitration clause. Respondents' brief gives this Court no reason to hold otherwise.[9]

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[9] Respondents also claim the existence of a separate Business Support Materials Arbitration Agreement ("BSMAA") supports their claim that the Amway Rules do not control here. (Res. Br. 71-72.) But Mr. Schmitz's affidavit states: "Kimberly and

(footnote continued on next page)

III. The Amway Rules Are Not Unconscionable

Respondents' efforts to penalize us for the alleged sins of non-parties Amway and JAMS make it clear they would oppose arbitration under ***any*** rules. (Res. Br. 74-85.) But as the Seventh Circuit observed last year:

> The cry of "unconscionable!" just repackages the tired assertion that arbitration should be disparaged as second-class adjudication. It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms.

Carbajal v. H&R Block Tax Servs., Inc, 372 F.3d 903, 906 (7th Cir. 2004).

Regardless, Respondents' arguments fail because they cannot establish either procedural or substantive unconscionability – let alone both. *See Whitney v. Alltel Commc'ns, Inc.*, No. WD 64196, 2005 WL 1544777, at * 4 (Mo. App. W.D. July 5, 2005).

(footnote continued from previous page)

myself made the decision not to enter Netco, Inc. into a BSMAA contract with any of the Defendants in our lawsuit. We believed it was optional to do so." (A0192 ¶ 289.) Moreover, this argument already has been roundly rejected. *See Morrison*, 49 F. Supp. 2d at 535 n.5; *U-Can-II* (App. A75).

A. There Is No Procedural Unconscionability

"Procedural unconscionability arises during the contracting process and involves fine print, misrepresentation, and unequal bargaining positions." *World Enters., Inc. v. Midcoast Aviation Servs., Inc.*, 713 S.W.2d 606, 610-11 (Mo. App. E.D. 1986). On this issue, Respondents' arguments are simply variants on the themes "Amway is big" and "form contracts are bad." (Res. Br. 81-84.) *But see Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("Contract law would lose much of its meaning if unfavorable contract provisions could be challenged merely on the basis of the relative size of the contracting parties.").

Tellingly, Respondents do not cite a single case striking down or even modifying the decade-old procedures at issue. At the same time, however, they wholly ignore the holding in *U-Can-II* that the Amway arbitration clause are not procedurally unconscionable. (App. A75-A76.)

Although Respondents at least acknowledge *Morrison* is contrary to their position, they cannot explain away that the court clearly considered, but rejected, the same arguments made here, including (i) automatic renewal, (ii) Amway's "superior bargaining power," (iii) unilateral modification of the procedures, (iv) the "sophistication" of "business people who have for some time operated an Amway distributorship" and (v) any evidence suggesting that the "agreement to arbitrate itself was somehow unfair or oppressive." 49 F. Supp 2d at 533-34.

While skipping over *U-Can-II,* Respondents rely heavily on another Florida case *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 575 (Fla. Dist. Ct. App. 1999). We note that the

U-Can-II court specifically commented that the plaintiffs were "relying on" *Powertel* to show procedural unconscionability – just before it upheld the clause. (App. A75.) In any event, Respondents, who claim millions of dollars in damages, cannot credibly ground their argument in a case arising from "a complaint . . . alleging that Powertel had wrongfully billed [the plaintiff] $4.50 in long distance charges for telephone calls within the local service area." *Powertel*, 743 So. 2d at 572.

B. There Is No Substantive Unconscionability

"Substantive unconscionability involves undue harshness in the contract terms themselves." *World Enters., Inc.*, 713 S.W.2d at 611. Respondents' rhetoric on this issue is even more heated but no more persuasive:

First, their brief totally ignores the holdings in *Morrison* and *U-Can-II* that the Amway arbitration procedures are not substantively unconscionable. 49 F. Supp. 2d at 534; App. A76.

Second, Respondents fall silent about *Powertel* on this aspect of unconscionability because its holding turned on how the arbitration agreement at issue required parties "to give up other remedies." 743 So. 2d at 576. By contrast, as the *U-Can-II* court explained, "[t]he Amway Rules do not preclude legal or equitable remedies." (App. A76.) Amway Rule 11.5.48, included in our Appendix at A57-A58, provides: "The Arbitrator may grant any remedy that the Arbitrator deems just and equitable and that would have been available to the parties had the matter been heard in court."

Third, Respondents' various assertions about arbitrators being subject to "*substantive* indoctrination" (Res. Br. 75; emphasis in original) and certain Appellants

helping "hand-select all persons on the panel of arbitrators" (*id.* 76) are inflammatory and absolutely false.[10] Among other things:

- Amway Rule 11.5.14 has always provided, "The [Third-Party] Administrator shall establish and maintain a Roster of Neutrals and shall appoint Arbitrators from that Roster as provided in these rules. Neutrals appointed to this roster shall serve a three-year term." (App. A53.) The only issue has been ***retention*** and even Respondents admit this retention voting has been repealed. (Res. Br. 75-76.)
- Although Respondents cite *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (Res. Br. 76), they do not note that the Eighth Circuit relied in that case on expert testimony that "AAA and ***Jams/Endispute*** . . . would refuse to administer a program so unfair and one-sided as this one." 173 F.3d at 939 (emphasis added).

[10] Repeating an error pointed out before the Court of Appeals, Respondents' brief misquotes *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So. 2d 779 (Ala. 2002). The passage should read: "Our research has not disclosed a single case upholding a provision in an arbitration agreement in which appointment of the arbitrator is within the exclusive control of ***one of*** the parties." *Id.* at 784 (emphasis added). Respondents again omit the bolded words. (Res. Br. 76.)

? Amway Rule 11.5.1 provides: "The Rules in effect on the date of the commencement of an Arbitration will apply to that Arbitration. These Rules shall be amended only by mutual agreement between the Corporation and the IBOAI Board." (App. A49.)

Fourth, even the Circuit Court found: "I am not particularly offended by the fact that the Amway arbitrators are trained in Amway procedures and that the Amway arbitration process is confined to this group." (App. A2.)

Fifth, Respondents' suggestion that we are "favored" by Amway (Res. Br. 81) is not consistent with their assertions elsewhere about Amway not getting involved in this dispute (*id*. 71) and being "concern[ed]" about the BSMs business (A0570-71).

C. In Any Event, the Amway Rules Provide for Severance

Respondents ignore that Amway Rule 11.5.3 is an express severability provision (App. A49) and that an overbroad order holding the entire ADR process unconscionable – despite its use in other cases – is precisely the "all or nothing" approach warned against by the Eighth Circuit. *See Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682 (8th Cir. 2001).

IV. Respondents' Defenses Are for an Arbitrator

Finally, Respondents are simply wrong that their entire barrage of attacks on the Pro Net agreement and Amway Rules should be resolved by a court. "Where a contract affecting interstate commerce contains an arbitration provision and does not provide otherwise, the FAA requires the question of the contract's validity ***as a whole*** to be

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

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the forgoing brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(c). Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,916, excluding the cover page, signature block, and certificates of service and compliance.

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

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