NO. SC86855

IN THE
MISSOURI SUPREME COURT

NETCO, 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. 101CC0075

RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

Defendants' Statement of Facts violates Rule 84.04(c) in that it does not fairly present the facts and is argumentative. Glaringly absent are 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). Most notably, Defendants omit the fact that Pro Net's own agent unequivocally admitted he *expressly rejected* Netco's Pro Net membership application. *See* A1051, 179:18-21 ("I was instructed to tell Charlie Schmitz that his membership application had been rejected, and I did."); A1035, 104:21-105:2; A1096, ¶ 22; *see also* Plaintiffs' Exhibit 2 (audiotape of Pro Net's actual rejection of Netco's application), in the Court's record. This is a *critical* fact supporting the trial court's conclusion that no Pro Net arbitration agreement was ever formed.

And Defendants' Statement of Facts is replete with factual inaccuracies, exaggerations and contortions. As one example, the opening line of Defendants' Statement of Facts states that the dispute in this action arises from the parties' business relationships

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[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 Plaintiffs' Appendix are cited as "App."

in the sale of *Amway* products. It absolutely does *not*. This suit is between participants in the business support materials (*"BSMs"*) industry, and is solely related to that BSMs industry, which Amway, itself, has *repeatedly* admitted is "independent" of Amway. *See* A0562-66; A598-618; Point I, §B.6., *infra*. As Amway recognized, were it to govern BSMs disputes, it would face serious antitrust risks. A1101. Although the individual defendants happen to also be Amway distributors, they are not being sued in their capacity as such, and this suit has absolutely nothing to do with the Amway business. Plaintiffs' Petition alleges no breach of any Amway distributorship agreement or any Amway Rule. *See* A0569, ¶48 ("**This action is not predicated upon the Amway Rules (since the BSMs industry is not a part of the Amway business), nor does it seek the enforcement of any such Rules."** (emphasis in original)); *see also* A0551, ¶7 ("**Netco, Inc. brings no claim relating to its Amway distributorship business.**" (emphasis in original)). Defendants' persistent characterizations otherwise are misleading and reflect their total disregard for corporate distinctions, and corporate versus individual capacities.

Further, when citing Plaintiffs' allegations, Defendants improperly cite to Plaintiffs' *abandoned* petition, rather than Plaintiffs' First Amended Petition.

Rather than present a wholesale re-write of the Statement of Facts, or attempt here to supply the many omitted facts, controvert each inaccuracy, and/or explain why a statement is a mischaracterization – which would be disjointed and confusing – Plaintiffs will instead do so in their Argument as they become pertinent.

POINTS RELIED ON

I. RESPONSE TO POINT I

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, 174 (Mo. App. S.D. 1995)

PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C., 225 F.3d 974 (8th Cir. 2000)

Van Kampen v. Kauffman, 658 S.W.2d 619 (Mo. App. S.D. 1985)

9 U.S.C. § 4 (1994)

Mo. Const. Art. 1, §§ 10, 22(a)

RSMo § 510.190 (2000)

RSMo § 435.355 (2000)

II. RESPONSE TO POINT II

Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778 (9th Cir. 2002)

Funding Systems Leasing Corp. v. King Louie International, Inc., 597 S.W.2d 624 (Mo. App. W.D. 1979)

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

Powertel, Inc. v. Bexley, 743 So.2d 570 (Fla. 1st DCA 1999)

III. RESPONSE TO POINT III

Abrams v. Four Seasons Lakesites, 925 S.W.2d 932 (Mo. App. S.D. 1996)

Coleman v. Crescent Insulated Wire & Cable Co., 168 S.W.2d 1060 (Mo. 1943)

Flink v. Carlson, 856 F.2d 44 (8th Cir. 1988)

Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773 (2nd Cir. 1995)

ARGUMENT

In this case, Defendants/Appellants sought to compel Plaintiffs/Respondents Netco, Inc. ("Netco") and Schmitz & Associates, Inc. ("Schmitz Associates") to arbitrate their claims under *two* arbitration provisions: the "Amway Arbitration Provision," and "Pro Net Arbitration Provision." 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.

The Southern District Court of Appeals reversed the trial court's judgment, 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 facts taken from Defendants' affidavits, and ignoring Plaintiffs' contrary affidavits and deposition testimony.

As established herein, 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 an agreement to arbitrate and because Plaintiffs' claims are not within the scope of either agreement.

Alternatively, should this Court nevertheless find that Defendants' evidence was sufficient to make a prima facie showing of arbitrability, Plaintiffs controverted Defendants' evidence with substantial, competent evidence. The Southern District, in making findings on those 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 any such disputed facts.

I. RESPONSE TO POINT I

A. Standard of Review

Defendants' Point I fails to comply with Mo. R. Civ. P. 84.04(d)(1)(C). It does not explain why, in the context of the case, the legal errors support reversible error. Accordingly, it preserves nothing for appeal and should be dismissed. *See* *Freeman v. Basso*, 128 S.W.3d 138, 141 (Mo. App. S.D. 2004); *Stelts v. Stelts*, 126 S.W.3d 499, 504 (Mo. App. S.D. 2004). Any discretionary review is limited to plain error. Mo. R. Civ. P. 84.13(c).

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 the 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." "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." *Aviation Supply*, 868 S.W.2d at 120. "[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 to determine (1) whether the parties made a valid and enforceable arbitration agreement and (2) whether the claims are within the scope of that arbitration clause. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-28 (Mo. banc 2003).

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' Alternative Entitlement to a Trial on Arbitrability

As established in succeeding sections of this Brief, Defendants failed to sustain their threshold burden of showing that Plaintiffs made an agreement to arbitrate[2] 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* A0476.

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[2] *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).

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.

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[3] 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 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, but 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

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[3] 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 § 4's right to a jury trial applies 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).

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.*, 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.[4]

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 . . . ." *Id.* § 435.355.1. Subsection 2 of the MAA 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 the right to a trial *by jury* to resolve disputed fact issues. This is a strong indication that Congress, in balancing the competing interests of summary resolution of an

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[4] 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.

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).

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. *In re Fabius River Drainage Dist.*, 35 S.W.3d 473 (Mo. App. E.D. 2001), also involved *legislative* determinations and, notably, the trial court conducted a bench trial notwithstanding the "summary" nature of the proceeding. *See* *id*. at 476. Thus, 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 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, should this Court determine that it cannot 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.

3. Netco Did Not Make an Agreement to Arbitrate

It is uncontroverted that Netco never signed any writing agreeing to arbitrate under the Amway Arbitration Provision. In an attempt to circumvent this fatal problem, Defendants argue that Netco agreed in 1991 to abide by Amway's Rules of Conduct "as amended from time to time," and that it thereafter became bound to arbitrate by renewing its distributorship after Amway unilaterally amended its Rules to include an arbitration provision *seven years* later. To the contrary, neither document upon which Defendants rely state that Netco agreed to abide by any rules that may be promulgated in the future. Nor can Netco be deemed to have assented to arbitration by renewing its distributorship.

a. Netco Did Not Agree to Future Amendments of Amway's Rules

In support of their contention that Netco agreed to abide by Amway's Rules of Conduct "as amended from time to time," Defendants cite Amway's affidavit at A0062-63. There, the affiant stated only that Netco signed an application to become an Amway distributor in which it agreed to "comply with the . . . Rules of Conduct for Amway

Distributors." *Id.* at ¶ 3. Neither the affiant nor, importantly, the application itself, stated that Netco agreed to rules "as amended from time to time." *See* A0067-71.

When Netco signed the application on April 24, 1991, Amway's Rules of Conduct did not include an arbitration provision. Amway did not amend its Rules to require mandatory arbitration until *seven years* later, effective January 1, 1998. A0063-64, ¶ 6. Because the application did not contain any language stating that the signatory agreed to abide by the rules as amended from time to time, under general contract construction principles, it must be construed as an agreement only to abide by the Rules as they existed in 1991, which did not include arbitration.

Defendants alternatively argue that Netco is the "assignee" of an Amway distributorship operated by Charlie Schmitz and, therefore, bound by Mr. Schmitz's 1985 agreement to abide by Amway's Rules as amended from time to time. Although Defendants mentioned to the trial court that Mr. Schmitz "transferred" his distributorship to Netco (A2041, A2051), they never argued that the transfer had the legal effect of an "assignment"or urged it as a basis for binding Netco to Mr. Schmitzes' agreement. Thus, this argument preserves nothing for appeal. *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. banc 2000).

Regardless, in 1985, when Charlie Schmitz operated an Amway distributorship as a sole proprietorship, he signed an Amway distributorship agreement *in his individual capacity*, in which he agreed to abide by Amway's Rules of Conduct as amended from time to time. *See* A0985. But the Schmitzes did not "assign" the rights and obligations they owed to Amway as Amway distributors to Netco, and no assignment appears in the

record.[5] Instead, Netco signed its *own* Amway distributorship agreement in 1991, forming its *own* contractual relationship with Amway. A0986-90. The terms of Netco's agreement with Amway thus superseded and nullified any agreement that the Schmitzes, as general partners of an Amway distributorship, had with Amway.

Even if Netco were deemed to have agreed to future amendments, such agreement would be unenforceable with respect to the unilateral imposition of an arbitration agreement in which a party is given the Hobson's choice of either waiving his Constitutional rights or walking away from his lucrative business and livelihood.

The implied obligation of good faith and fair dealing imposed in every contract limits one party's ability to unilaterally amend a contract. Even when a person agrees that another may amend the contract from time to time, he only grants the other party the right to amend the contract in a manner *reasonably contemplated by the parties at the time of contracting*. *Missouri Consolidated Health Care Plan v. Community Health Plan*, 81 S.W.3d 34, 45 n.3 (Mo. App. W.D. 2002); *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999); *Badie v. Bank of America*, 79 Cal. Rptr.2d 273, 284 (Cal. App. 1998). It does not give the other party the unfettered right to make material and substantive changes, such as a waiver of a person's constitutional right to a jury trial. *See*

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[5] The Southern District stated that the Schmitzes "assigned" their Amway distributorship to Netco via Netco's "Application for Amway Distributor Authorization (Corporate)," but that document does not contain language of assignment; rather, it is an independent application by Netco. *See* App. A46, n.3.

§ (1)(a), below. As stated in *Badie*, if a party exercises his discretion to "'recapture opportunities foregone'" – such as "by adding an entirely new term which has no bearing on any subject, issue, right, or obligation addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into" – it violates the duty of good faith and fair dealing. *Badie*, 79 Cal. Rptr. at 284. This proposition is particularly applicable to the unilateral amendment of a contract to include arbitration – a "new term [that] deprives the other party of the right to a jury trial and the right to select a judicial forum for dispute resolution." *Id*.

Mr. Schmitz testified that he never contemplated that Amway could unilaterally amend Netco's contract to waive its constitutional right to a jury trial:

> I was not agreeing to giving [Amway] just a blanket right, that no matter what they did, period, I would be forced to abide by everything that they did. I in no way was agreeing that they could turn the world upside down, that they could charge me a hundred thousand to renew my distributorship.
>
> Never in a million years would I have signed – but I had worked years building this business. Now, of course, I'm going to renew it. But I did not agree to sign my rights away.
>
> * * *
>
> John, at that time, I agreed based upon the parameters that we were opting at that time, but I did not necessarily agree to give [Amway] carte blanc complete freedom to change every single rule that they wanted to change and I have to abide by it with no rights whatsoever.

* * *

I did not agree to future changes on something I signed back in '85 and prior. A0921, at 49:15-25; 50:11-16; 52:23-25.

As discussed more fully in Point II (Unconscionability), this is not a situation in which a person can simply switch credit card companies if he does not wish to arbitrate. This case involves acceptance of a sham arbitration process or handing over the keys to the business that the Schmitzes spent sixteen years building. The inequity of this situation is so shocking to the conscience that Amway and anyone else relying on the Amway Arbitration Provision should be estopped from seeking to enforce it.

Courts have refused to imply an agreement to arbitrate where it has been unilaterally thrust upon a party, applying various legal theories: *See, e.g.*, *Smith v. Chrysler Financial Corp.*, 101 F.Supp.2d 534 (E. D. Mich. 2000) (lack of mutuality and assent); *Southern Energy Homes, Inc. v. Hennis*, 776 So.2d 105 (Ala. 2000) (lack of assent); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (lack of good faith and fair dealing); *Gourley v. Yellow Transp., LLC*, 178 F. Supp.2d 1196, 1202-03 (D. Col. 2001) (illusory contract); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 575 (Fla. 1st DCA 1999) (unconscionability).

Moreover, Amway's Rule 1 (A1304), in which it reserves the right to amend or rescind any or all its Rules of Conduct at any time at its whim, is illusory and unenforceable. *Michaels v. 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); *see also Triarch*, 158 S.W.3d at 775 (an arbitration clause that gives one party sole authority to set whatever terms it wishes "raise[s] serious concerns" about its enforceability and conscionability).

b. Netco Did Not Assent to Arbitration By Renewing its Distributorship

There being no written agreement to arbitrate, Defendants assert the amorphous theory that Netco agreed to arbitrate by renewing its Amway distributorship in 1998 after being "informed" that the Rules had been amended to include an arbitration provision. It is unclear whether Defendants are asserting an *implied in fact contract* theory, or an *estoppel* theory.

(1) No Implied-in-Fact Contract Exists

"An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *Hercules, Inc. v. United States*, 516 U.S. 417, 424, 116 S.Ct. 981 (1996) (citation omitted); *Roper v. Clanton*, 258 S.W.2d 283, 288-89 (Mo. App. S.D. 1953) ("It has been said that *such a contract must contain all the elements of an express contract . . . .*") (unpublished) (citing 17 C.J.S., Contracts, § 4, p. 318) (emphasis added).

(a) No Implied Waiver of the Constitutional Right to a Jury Trial

Defendants' burden of showing an implied-in-fact agreement to arbitrate is a high one. Plaintiffs cannot be deprived of their constitutional right to a jury trial in a civil matter unless they knowingly, voluntarily and intelligently waived it. *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. banc 1997); *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985). Generally, a right can be waived either by contract or by conduct.

"To effectively waive a jury trial by 'contract,' *clear, unambiguous, unmistakable, and conspicuous* language is required. ***Such a waiver provision will never be implied*** but must be clearly and explicitly stated." *Malan*, 953 S.W.2d at 627 (emphasis added). In determining whether a party has waived his right to a jury trial by contract, courts must examine "the negotiability of the contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision." *Id.* (citation omitted); *see also Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S.Ct. 1983, 2002 (1972) (in order to find a waiver, there must be some evidence that the party bargained for the arbitration provision, and knowingly and intentionally waived its right to a jury trial). In this case, not only did Netco not sign an arbitration agreement, the arbitration provision was not negotiable; Amway had overwhelmingly superior bargaining power; the Schmitzes had no notice of the arbitration provision; it was hidden in a three-fourths inch thick manual, and a copy of the rules were not provided before it

purportedly became binding. *See* Point II, § B.1 (Unconscionability). Under these facts, there was no clear and explicit waiver by contract.

To imply a waiver by conduct "'there must be a clear, unequivocal, and decisive act of [the] party showing such purpose, and so consistent with intention to waive that no other reasonable explanation is possible.'" *Keltner v. Sowell*, 926 S.W.2d 528, 531 (Mo. App. S.D. 1996) (citation omitted). Where a fundamental right is involved, even in civil cases courts must "'indulge every reasonable presumption against waiver,'" and do not "presume acquiescence in the loss of fundamental rights." *Fuentes*, 407 U.S. at 95 n.31, 92 S.Ct. at 2002 n.31; *Adamson v. Ricketts*, 789 F.2d 722 (9th Cir. 1986); *McDonald v. Steward*, 132 F.3d 225, 229 (5th Cir. 1998). In determining whether a party has waived a right, his intent is the controlling factor. *Keltner*, 926 S.W.2d at 531; *Grebing v. First National Bank of Cape Girardeau*, 613 S.W.2d 872, 875 (Mo. App. E.D. 1981). Netco testified that it never intended to relinquish its constitutional right to a jury trial when its distributorship was automatically renewed. A0973, ¶ 22. Nor can such intent be inferred under the circumstances, since it had no notice of the arbitration provision.

(b) Netco Had No Notice of Arbitration Prior to Renewal

Defendants' implied contract theory rests on the *erroneous* premise that Netco was aware of the arbitration provision when its distributorship was renewed and thus consented to the same. As a threshold matter, Defendants failed their summary judgment-like burden of showing, with substantial and competent evidence, that Netco actually had notice of the new arbitration provision when it renewed its distributorship for the calendar years

1998 and 1999. Therefore, Plaintiffs are entitled to judgment as a matter of law. *See* *Campbell v. General Dynamics Gov't Systems Corp.*, 407 F.3d 546, 556-59 (1st Cir. 2005) (invalidating an arbitration agreement as a matter of law on the grounds of insufficient notice).

To show that Netco had notice of the arbitration provision, Defendants rely on three notices that were purportedly sent by Amway to its distributors advising of the amendment. A0064-65, ¶¶ 10-12. But all three are *form* letters; none are addressed to Netco personally nor was there a proper foundation laid that any of them were actually mailed to Netco. Defendants' affiant did not state that he personally placed the letters in the mail correctly addressed to Netco or that it was his responsibility to do so, nor did he testify as to Amway's customary office mailing practice. He did not even produce a mailing list purporting to show the persons to whom such letters were sent. As a result, his affidavit is wholly insufficient "to make the question of receipt a debatable one." *See* *Abel v. Wyrick*, 574 S.W.2d 411, 414 (Mo. 1978); *Insurance Placements, Inc. v. Utica Mutual Ins. Co.*, 917 S.W.2d 592, 595-96 (Mo. App. E.D. 1996).

Even assuming that the letters were competent evidence, none establish that Netco had notice *before* its distributorship was renewed in October 1997. The first "notice" is a "sample" letter dated September 1997. A0100-101. The letter does not alert automatic renewal distributors, such as Netco (A970, ¶ 11), of a change affecting them, let alone that Amway's Rules of Conduct had been amended to require arbitration. The pertinent portion of the letter is Paragraph C, titled: "ITC Change: Arbitration Provision." A0100. "ITC" stands for "Intent to Continue." *See* A0063, ¶ 5. As explained in Amway's Affidavit, two

of the ways in which a distributor may renew his Amway distributorship are by signing and returning an Intent to Continue ("ITC") form, or by automatic renewal. *Id.* Because the "notice" referenced a change affecting only "ITCs," – those who signed a renewal form every year – it did not apprise distributors whose distributorships were *automatically* renewed, like Netco, of a change affecting them. Moreover, the letter does not even state that Amway amended its Rules of Conduct to include mandatory arbitration. *See Campbell*, 407 F.3d at 557 (invalidating arbitration where notice failed to apprise recipient of contractual significance of new policy).

More importantly, attached to the September 1997 letter is an "Acknowledgment of Distributor Changes," which contains an express arbitration agreement. A0101. This document stated that it must be signed and returned to Amway by October 3, 1997. *Id.* It is uncontroverted that Netco did not sign that agreement (A0972-73, ¶ 19; A0996-97, ¶ 19), thus evidencing either that it did not receive the letter, or that it did not assent to arbitration.

The second purported notice of arbitration is the letter at A0102. Not only is there no evidence that it was ever mailed to or received by Netco, there is no competent evidence that it was sent *before* Netco's Amway distributorship was renewed. Amway testified that it was mailed "sometime after September 1997 but before December 1998." A0065, ¶ 11. Importantly, distributorships were renewed in October 1997,[6] for the calendar year 1998.

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[6] *See* A0101 (Amway form stating that "Your credit card will be billed [for annual renewal charges] in October."); A0969, ¶ 8; A1492, ¶ 25.

Thus, Amway cannot prove that Netco received this letter *before* its distributorship was automatically renewed in October 1997 (or even before it was renewed in October 1998 for 1999).

The third "notice" from Amway purportedly advising distributors of the amendment to the Amway's Rules is a letter dated December **1998**. A0104. Even if mailed to Netco, it was sent more than a year after Netco's distributorship was renewed for 1998, two months after its distributorship was renewed for 1999, and *a year* after the arbitration provision became effective. Therefore, it cannot establish that Netco was informed of arbitration *before* its distributorship was *ever* renewed.

Lastly, Defendants contend Netco had notice of the new arbitration provision because such was published in the September 1997 edition of the *Amagram*, an official Amway publication. That "notice," buried on page 43 of the magazine, contained the same "ITC Change" language as in the September 1997 letter, which, as discussed above did not apprise automatic renewal distributors, such as Netco, of any change affecting them. Nor did it state that the Rules of Conduct had been amended to include arbitration. A0096-97.

Even if the three mailings and Amagram were sufficient to make a prima facie showing of notice, whether Netco actually received any such notice is a disputed fact. Netco, *as well as many other Amway distributors*, testified that they never received any notice that Amway had amended its Rules of Conduct to include arbitration, and that they did not know about the arbitration provision until the pendency of this and other lawsuits in 2000. *See* A0934-35, at 103:22-104:4, 105:23-107:3-10; A0972-73, ¶¶ 18-21; A1492-94,

¶¶ 26, 33; A1549, ¶ 32; A1566, ¶ 25; A1585, ¶ 29; A1594, ¶ 28; A1610, ¶ 28; A1618, ¶ 32; A1627, ¶ 27.

Defendants argue that it is "indisputable" that Netco received the arbitration provision because it produced the same during discovery in this lawsuit. Obviously lacking is any evidence of where – and more importantly, *when* – Netco obtained it, as it is equally plausible that it was obtained from other sources *after* the final renewal of Netco's distributorship (*e.g.*, during investigation of this case).

Defendants also argue that there is a presumption that Netco was aware of the contract terms and accepted them because a person is "presumed to know the contents of a contract *which they sign*." But this is not a situation where Netco failed to read a contract before signing it; Netco never *signed* any writing containing an arbitration agreement. Netco had a *pre-existing* agreement with Amway per the terms of its April 1991 Application for Distributorship Authorization that did not include arbitration. It is the terms of *that* 1991 contract that Netco is deemed to have assented to by renewing, not terms *unilaterally* imposed without its knowledge or consent.

(c) Netco's Renewal Does Not Signify Assent

Netco's renewal of its distributorship cannot reasonably be construed as a knowing agreement to an arbitral forum in lieu of a jury trial. Amway's automatic renewal process was a *paperless* transaction; Netco took no affirmative action to renew its distributorship. A969, ¶ 8. Amway simply debited Netco's distributorship account for the renewal fee in the fall of each year. *Id.* When its distributorship was automatically renewed for 1998 and

1999, Netco, like many other distributors, had no notice of the mandatory arbitration provision.

Moreover, Netco's renewal of its distributorship in Fall 1997 cannot signify assent to arbitration because there was no arbitration provision then in effect. *See* A0063-64, ¶ 6. And, Netco's distributorship was renewed *more than a year before* Amway ever circulated the actual arbitration rules to any of its distributors. A0065. Thus, Netco could not possibly have knowingly and intelligently waived its constitutional right to a jury trial.

Nor did Netco signify its assent to arbitration by renewing its distributorship for 1999. The Eighth Circuit rejected a similar implied contract theory in *PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C.*, 225 F.3d 974 (8th Cir. 2000). There, PCS ordered some goods from Christy. Christy responded with a "Customer Acknowledgement Form" that included an arbitration provision. PCS never objected to the arbitration provision. When a dispute arose, Christy moved to compel arbitration, arguing that an implied agreement arose when it sent multiple customer acknowledgement forms to PCS, PCS never objected to those forms, and PCS accepted delivery of the goods. The court held that "the parties' conduct did not constitute a course of dealing sufficient to integrate the arbitration provision into the parties' contract." *Id.* at 981. It noted that PCS had received only one Customer Acknowledgment Form prior to the transaction at issue, and that two transactions "hardly establishes a prior course of dealing sufficient to allow Christy to unilaterally include the arbitration provision in the contract. . . . [Christy's] multiple forms merely demonstrated Christy's *desire* to include the arbitration clause as a term of the contract." *Id.* (citations omitted) (emphasis added).

Similarly, Netco's distributorship was automatically renewed just once (for the year 1999) after the arbitration clause took effect on January 1, 1998. The Schmitzes sold Netco's Amway distributorship business seven months later in July 1999. A0967, ¶ 3. Under *PCS*, one automatic renewal – especially when coupled with the fact that Netco had no notice of the amendment – is wholly insufficient to constitute a course of dealing sufficient to imply a waiver of its constitutional right to a jury trial.

If the Court is going to apply estoppel, it must do so even-handly. Defendants' assent-by-renewal argument applies equally to estop *them* from enforcing arbitration. Defendants argue that Netco signified its assent to arbitration by renewing. Yet Amway ***twice*** renewed Netco's distributorship without obtaining its signature on the "Acknowledgement of Distributor Changes" form containing the arbitration provision – even though it purportedly sent it demanding that it be signed and returned. A0101. Amway's failure to insist on a signed arbitration agreement signifies its assent to Netco's *declination* of the arbitration provision. If Amway did not insist on Netco signing an arbitration agreement, then it is estopped from enforcing it. And Defendants, who are asserting rights though Amway's arbitration provision, are likewise estopped.

(2) Netco is Not Equitably Estopped

Defendants' argument that Netco is bound to arbitrate because it accepted the benefits of the Amway distributorship agreement suggests an estoppel theory. But Defendants failed to mention, let alone establish, the elements of equitable estoppel.

Equitable estoppel requires 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). Defendants do not even attempt to fit the facts of this case into these elements. In particular, Defendants – who are engaged in the *BSMs* business -- do not explain how *they* relied on Netco's purported acceptance of the benefits of the *Amway* distributorship agreement 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 v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. S.D. 1985).

Defendants also do not explain how they relied to their detriment on the fact that Netco "invoked the Rules of Conduct in demanding relief from Amway" for complaints about other distributors. In any event, such fact cannot establish estoppel because Amway *rebuffed* Netco's requests for assistance, responding that its rules do not apply to BSMs disputes. A2827-28. Moreover, Netco is not seeking to enforce Amway's Rules in this lawsuit. A0569, ¶ 48.

Further, a party who has accepted benefits of a contract is not estopped from denying arbitration where, as here, arbitration is unilaterally thrust upon that party with no economically feasible opportunity to opt out of the contract. *See Powertel*, 743 So.2d at 575. In *Powertel*, the court rejected a telephone service provider's argument that its customers could have avoided arbitration by simply canceling their phone service within ten days, holding that the opportunity to opt out was not "economically feasible:"

> The fallacy of that argument, however, is that switching providers would result in a loss of the investment the customers have in the agreements they made with Powertel. They purchased equipment that works only with the Powertel service and they have obtained telephone numbers that cannot be transferred to a new provider. It is reasonable to assume that some customers may suffer a great deal of inconvenience and expense to obtain and publish a new telephone number. Hence it is no answer to say that the customers can simply switch providers. Many customers may have continued their service with Powertel despite their objection to the arbitration clause simply because they had no economically feasible alternative.

Id. at 575.

Likewise, Netco was never given an opportunity to opt out, let alone an economically feasible one. As Amway stated in one of its purported mass mailings, which Plaintiffs never received: "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*." A0103 (emphasis added).

Netco's Amway distributorship was ***automatically*** renewed without notice that Amway's Rules had been amended to include arbitration, let alone notice that renewal would be deemed to be acceptance of arbitration regardless of whether it signed an arbitration agreement. The Schmitzes spent approximately 16 years building an extremely successful Amway distributorship, generating hundreds of thousands of dollars annually

from their Amway distributorship alone. A0967, ¶ 4. Indeed, they built a domestic network of over 8,000 downline distributors, achieving the coveted "Diamond" status in Amway. *Id.* They had no economically feasible option but to renew their Amway distributorship, in which case Amway deemed them to have accepted its wholly one-sided and biased arbitration provision in lieu of their constitutional right to a jury trial, or not renew, in which case the business they had spent sixteen years building and the means by which they earned a living would be immediately terminated. *See* A0103 ("These are the ONLY terms on which you or anyone else are authorized to continue as a distributor.")

"The party asserting estoppel bears the burden of proving it" by "clear and satisfactory evidence." *Van Kampen*, 685 S.W.2d at 625. Having failed to do so, Defendants' estoppel argument must be rejected. 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). Under these facts, the trial court correctly determined that the equities do not lie in favor of compelling Netco to arbitrate and its judgment in that respect should be affirmed as a matter of law.

4. Schmitz Associates Did Not Make an Agreement to Arbitrate

Defendants admit that Schmitz Associates is not a signatory to the Amway Arbitration Provision. Appellants' Brief, p. 64. They therefore seek to bind this non-signatory to arbitrate under third-party beneficiary, estoppel and agency theories.

None of those theories were asserted to the trial court. *See* A0049-123; A2038-78; A3771-3785. As to why Schmitz Associates is bound to arbitrate under the Amway Arbitration Provision, Defendants argued only:

> Plaintiff Schmitz Associates is associated with Netco, is owned and operated by the principals of Netco, and operates from the same location as Netco. According to the Plaintiffs, Schmitz Associates "facilitated the Amway-related rally, convention and function business for Charlie and Kim Schmitz (Netco), and operated in tandem with Netco to build, support and enhance the Amway business.

A0050. These facts are wholly insufficient to establish the elements of a third-party beneficiary, agency or estoppel theory, had they been mentioned.

An appellant may not raise a new argument on appeal that was never presented to or decided by the trial court. *Nixon*, 34 S.W.3d at 129. As a result, **Defendants have not preserved any argument that Schmitz Associates is bound to arbitrate under the Amway Arbitration Provision under third-party beneficiary, agency or estoppel theories,**[7] and the trial court's judgment should be affirmed. Should this Court determine that those issues were preserved, Plaintiffs submit the following.

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[7] Defendants may argue that these issues were discussed in Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration and thus considered by the trial court. However, it should be noted that the parties briefed arbitrability in 2000. After transfer and an opportunity for discovery on arbitrability issues, the trial court directed both Plaintiffs and Defendants to file supplemental briefs on the same day (March 21, 2003). As a result, Plaintiffs did not know what arguments Defendants would actually assert and therefore addressed third-party beneficiary, agency, alter ego and estoppel in anticipation of what Defendants *might* argue. In their supplemental brief, Defendants did not, in fact,

a. Schmitz Associates is Not A Third-Party Beneficiary

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). Defendants failed to establish either of these elements.

Under Missouri law, 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

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urge any of these theories with respect to Schmitz Associates. Therefore, these issues were rendered moot.

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).

Schmitz Associates was not the cause of the creation of the Amway distributorship agreement. That agreement expressly states that the intended beneficiaries are Amway distributors. *See* A1304 ("The Rules are designed to preserve the benefits available to all IBOs under the IBO Plan.") "IBOs" are persons who sell Amway products and services. *Id.* It is uncontroverted that Schmitz Associates is not and has never been an "IBO." A0967, ¶ 2.

In attempting to show that Schmitz Associates is a third-party beneficiary of Netco's Amway distributorship, Defendants rely exclusively on allegations in Plaintiffs' original petition, made before Plaintiffs had an opportunity to conduct discovery, and even though that pleading was superseded by Plaintiffs' First Amended Petition. Such use is improper. As held in *Evans v. Eno*, 903 S.W.2d 258, 260 (Mo. App. W.D. 1995), "[w]hen an amended petition has been filed, the original petition is thereby abandoned and it may not be considered for any purpose."

Defendants contend that Plaintiffs' allegations are admissions against interest. But an admission against interest "must be an assertion of fact, not a conclusion of law." *Riley v. Union Pacific R.R.*, 904 S.W.2d 437, 442-43 (Mo. App. W.D. 1995). Most of the allegations cited by Defendants are conclusions, not facts. Additionally, a prior inconsistent statement is not admissible unless Plaintiffs first make a statement at trial that is inconsistent with a prior statement. *See* *Cain v. Orscheln Bros. Truck Lines, Inc.*, 450

S.W.2d 474, 478 (Mo. App. W.D. 1970). Defendants do not point to any inconsistent statements; only to allegations omitted from subsequent pleadings.

Regardless, Defendants' "evidence" is wholly insufficient to establish that Schmitz Associates is a "third-party beneficiary." In essence, Defendants argue that Schmitz Associates benefits from Netco's Amway distributorship because many of Schmitz Associates' customers are derived from Netco's Amway business such that Schmitz Associates is dependent upon Netco's relationship with Amway for its business success.

However, Schmitz Associates also organized functions for persons not associated with Amway. A0923, at 58:7-13; A0925, at 65:24-66:15. Additionally, the mere fact that Schmitz Associates and Netco have a mutually beneficial relationship does not make Schmitz Associates a third-party beneficiary of the Amway distributorship agreement. 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 . . ."); 3.14.2 ("The incorporated IB may conduct no other business [than the sale of Amway products and services]." A1305-06. It is uncontroverted that Schmitz Associates did not and does not do so. A967, ¶2. At best, Defendants' argument reflects only an *incidental* benefit. Schmitz Associates has no enforceable rights under an Amway distributorship agreement and thus is not a third-party beneficiary. *Byrd*, 931 S.W.2d at 814; *OFW Corp.*, 893 S.W.2d at 879.

Even if Schmitz Associates were a "third-party beneficiary" of Netco's Amway distributorship 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*, 856 F.2d at 46 n.3. Defendants argue that this prong is satisfied because Plaintiffs are seeking to enforce Amway's line of sponsorship rules. Appellants' Brief, p. 65. This is a blatant misrepresentation. The allegation that Defendants contend establishes that Plaintiffs are seeking to enforce Amway's line of sponsorship rules alleges merely that the line of sponsorship rules governing the *BSMs* industry were *modeled after* Amway's line of sponsorship rules. *See* A0014, ¶22. Indeed, Plaintiffs unambiguously stated in their First Amended Petition that they are ***not*** seeking to enforce any Amway Rule of Conduct: "**This action is not predicated upon the Amway Rules (since the BSMs industry is not a part of the Amway business), nor does it seek the enforcement of any such Rules."** A0569, ¶48 (emphasis in original).

Even assuming that this issue had been preserved for appeal, since Schmitz Associates does not claim to be a third-party beneficiary and is not relying upon or asserting any rights under the Amway distributorship agreement, it 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. Schmitz Associates is Not Estopped to Deny Arbitration

Defendants next argue that Schmitz Associates is estopped to deny arbitration, arguing simply that it "cannot assert rights under an agreement but disavow the obligations that the agreement imposes." Appellants' Brief, p. 68. Again, this unsupported contention is contrary to the allegations of Plaintiffs' Petition, which establish that Schmitz Associates

is ***not*** seeking to enforce any Amway Rule of Conduct or any other benefit of Netco's Amway distributorship agreement. A0569, ¶ 48.

Defendants did not even address the elements of equitable estoppel (set forth at pages 44-55, *supra*), let alone prove them with clear and satisfactory evidence. See *Brown*, 776 S.W.2d at 388; *Van Kampen*, 685 S.W.2d at 625. In particular, Defendants do not explain how they, being in the *BSMs* business, relied to their detriment on Schmitz Associates' purported acceptance of benefits of the *Amway* distributorship agreement.

Moreover, for estoppel to lie against a non-signatory such as Schmitz Associates, it must have received a *direct* benefit from the contract it is seeking to avoid. *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 779 (2nd Cir. 1995). It is not enough to argue that the dispute would not have arisen in the absence of a third-party's contract. *See Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003).

Even if, as Defendants argue elsewhere, Schmitz Associates benefited from Netco's line of sponsorship, it did not receive a *direct* benefit of the Amway distributorship agreement. Again, the benefit of an Amway distributorship agreement is the right to sell *Amway* products; Schmitz Associates did not do so. And Schmitz Associates' provision of *services* to Netco in organizing a seminar for Netco's customers imposes *different obligations* than Netco's obligations to its customers with respect to the *sale of Amway products* under the Amway distributorship agreement. Thus, the contract formed when a person agrees to attend a function organized by Schmitz Associates is an agreement that is, at best, *collateral* to Netco's 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).

Accordingly, Schmitz Associates is not estopped to deny arbitration.

a. Schmitz Associates is Not an Agent of the Schmitzes

Defendants' agency argument theorizes that Schmitz Associates is bound to arbitrate as an agent, *not of Netco*, but of its officers and directors, Charlie and Kim Schmitz. Such an argument turns agency-principal and corporate distinction principles on their heads. And, 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 may be "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) and *Nesslage v. York Sec., Inc.*, 823 F.2d 231 (8th Cir. 1987). Although some courts like *Nesslage* 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 the cited courts permitted an agent to *enforce* an arbitration agreement against a signatory who had agreed to arbitrate claims against the agent's principal, reasoning that if the agent's acts on behalf of his principal form the basis of the claims, the agent should be entitled to the benefit of principal's agreement. *See, e.g.*, *Madden v. Ellspermann*, 813 S.W.2d 51, 53-54 (Mo. App. W.D. 1991); *Qubty v. Nagda*, 817 So.2d 952, 957 (Fla. 5th DCA 2002). Importantly, in

those cases, a non-signatory is compelling a *signatory* to arbitrate. Here, Appellants are seeking to compel a *non-signatory* to arbitrate.

But 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*, 112 S.W.3d at 436; *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 Intermediaries*, 269 F.3d 187, 202 (3d 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. *Thomson* was expressly cited with approval by this Court in *Dunn*. *Dunn*, 112 S.W.3d at 436.

Byrd is an aberration in holding that a non-signatory agent can be compelled to arbitrate under principles of *agency*, 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 of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1352-53 (1960); *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) Schmitz Associates is Not an Agent

Even assuming that non-signatory agents could be compelled to arbitrate, Schmitz Associates is not an agent of the Schmitzes.

As Defendants correctly note, three elements are required to establish an agency. *See 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 "defeats the purported agency relationship." *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.2d 641, 642 (Mo banc 2002).

With respect to the first element, Defendants argue that Schmitz Associates has the power to alter the Schmitzes' legal relationships because "Schmitz Associates developed

and operated the tool and function business for the Schmitz Organization, selling BSMs to Netco's enormous downline distributors." Aside from the factual inaccuracy – Schmitz Associates organized "functions;" it did not sell tools[8] – even assuming Schmitz Associates sold products to *Netco's* customers, that fact does not establish that it has the power to bind the *Schmitzes personally* to any contract or otherwise alter the Schmitzes' legal relationships with Netco's customers. *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). Defendants cite no contracts wherein Schmitz Associates bound the Schmitzes personally to any obligation. Defendants' argument reflects nothing more than that Schmitz Associates enters into contracts in its own name to further its own business purposes.

Second, Schmitz Associates is not a fiduciary of the Schmitzes. The Schmitzes, as officers and directors of Schmitz Associates, are fiduciaries of Schmitz Associates, not *vice versa*. Defendants argue that this element is satisfied because "[t]he very purpose of Schmitz Associates' existence" was to facilitate the Schmitzes'/Netco's functions business. This is a disputed fact. Although Schmitz Associates facilitated functions which Netco's downline attended, it also facilitated motivational seminars for persons not associated with Amway, featuring speakers who were of interest to the general public. A0923, at 58:7-13; A0925, at 65:24-66:15.

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8 A0923, at 58:7-13; A0925, at 65:24-66:15; A0949, 166:21.

Moreover, "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[9] – Schmitz Associates, being a separate corporate entity, conducts business primarily for its own profit, not that of the Schmitzes individually, or for Netco's 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 absurdly argue that the Schmitzes "control Schmitz Associates through their sole ownership." That is true of any closely held corporation. A holding that a corporation is the agent of its officers and directors would completely eviscerate the corporate distinction of every closely held corporation.

Defendants also argue that the Schmitzes' control over Schmitz Associates is evidenced by the fact that Schmitz Associates is a shell corporation, paying Netco's employees to conduct its operations, and sharing Netco's "officers, office space, stationary,

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[9] *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 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.").

telephone and fax numbers, and its e-mail address," citing A3032; A3068. Aside from the fact that Schmitz Associates' relationship with *Netco* does not prove an agency relationship between Schmitz Associates and the *Schmitzes* (which is what Defendants are trying to prove here), the cited record does not support any sharing of stationary or an e-mail address.[10] Moreover, sharing offices and equipment is not equivalent to exercising control over another's conduct. The fact that Schmitz Associates paid Netco a management fee *supports* that it is *not* a sham, as does other evidence that Defendants neglected to mention: each corporation owns its own assets, maintains separate bank accounts and records, and pays its own expenses; Schmitz Associates is not undercapitalized, it does business with corporations other than Netco and complies with corporate formalities. A0971.

Defendants failed to preserve the issues of third-party beneficiary, estoppel, or agency or establish the essential elements thereof, and therefore the trial court's judgment should be affirmed. Alternatively, there are genuine issues of fact that require a trial.

5. Defendants are Not Entitled to Enforce Arbitration

Since, as established above, Plaintiffs are not bound to arbitrate, it matters not whether Defendants are entitled to enforce Amway's Arbitration Provision. Should this Court, however, reach the question of whether Defendants are entitled to arbitrate, the answer is resoundingly "no."

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[10] Netco for a time shared an e-mail address with *Schmitz and Company* (the Amway business owned by former plaintiff Joanne Schmitz) – not *Schmitz Associates*. *See* A3067-68, 11:5-14:13.

a. Defendants Are Not Entitled to Enforce Amway Arbitration

Defendants argue that nine of the eleven Defendants are either Amway distributors, or officers or agents of Amway distributors, and thus entitled to enforce the Amway arbitration clause. To the contrary, Gooch Support, Gooch Enterprises, TNT and Evans Associates are BSMs businesses – not Amway businesses. A1411; A1766, 1769, ¶¶ 2, 3; A1766, 1771-72, ¶¶ 8, 9; A1837, 1843, ¶ 11; A1824, ¶ 3.

Although Hal Gooch, Billy Childers and Jim Evans happen to also be officers/directors of Amway distributorships, they are not being sued in their capacity as such. Rather, they are sued in their individual capacity and/or in their capacity as officers and agents of their respective BSMs corporations which are defendants herein.[11] A552-53.

Defendants apparently contend – for the first time on appeal -- that even if they are not being sued in their capacity as Amway distributors, they are nevertheless entitled to enforce arbitration because the Amway Arbitration Provision requires arbitration of *any* claim against an Amway distributor or "any officer, director, agent or employee" thereof -- even if it does not arise from or relate to the claimant's Amway distributorship, the Amway

[11] With respect to Jimmy Dunn, Plaintiffs learned during discovery that he operates both an Amway business and tools business under the name "Jimmy V. Dunn & Associates." Plaintiffs intended to sue only BSMs businesses. A2034. Dunn Associates is sued only in its capacity as a tools business, not as an Amway distributorship. A0551.

Sales and Marketing Plan, or the Amway Rules of Conduct. *See* A1339. A plain reading of the arbitration clause, and Missouri law, dictate otherwise.

The parenthetical phrase, "including any claim against another Amway Distributor, or any such distributor's officers, directors, agents, or employees," is clearly intended to clarify the language preceding it, not to expand the scope of arbitrable disputes. In other words, it simply means that if a claimant has a dispute arising from the Amway Rules of Conduct, the claimant is required to arbitrate it, regardless of whether it is against Amway or another Amway distributor or an officer, director, agent or employee thereof.

If Defendants' interpretation were accepted, it would mean that if two people who happen to be Amway distributors were involved in an automobile accident, they would be required to arbitrate their tort claims even though it had absolutely nothing to do with Amway. This would be contrary to Missouri law, which holds that, even with a broad arbitration clause, a claim is not within the scope of arbitration unless it requires reference to or construction of the contract. *Estate of Athon v. Conseco Fin. Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. W.D. 2002). The claims in this action do not require a court to refer to or construe the Amway distributorship agreement and thus they are not within the scope. *See* § 6, *infra*.

To the extent Defendants are arguing that because the individual Defendants also own Amway distributorships, they and their BSMs corporations are parties to and thus entitled to enforce the Amway Arbitration Provision, such 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); *Hefner v. Dausmann*, 996 S.W.2d 660, 664 (Mo. App. S.D. 1999). 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).

b. Pro Net Members Are Not Entitled to Enforce the Amway Arbitration Provision

Defendants alternatively argue that five of them – Jimmy Dunn; Dunn Associates; Gooch Support; Gooch Enterprises and TNT – are Pro Net members and that because, under the Pro Net membership agreement, Pro Net members agree to abide by Amway's Rules of Conduct, they are entitled to enforce the Amway Arbitration Provision. Again, this argument was not presented to the trial court and thus **not preserved for appeal**. *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. banc 2000).

Even assuming the five are Pro Net members – which is expressly denied for reasons discussed in Point III, *infra* – any membership in Pro Net does not entitle a Pro Net member to arbitrate under *Amway's* arbitration rules. Rather, Pro Net arbitration would be under the *American Arbitration Association* (AAA) rules.

Pro Net's "Terms and Conditions" contain an agreement to abide by Amway's Rules of Conduct, and those Rules include an arbitration clause requiring arbitration before JAMS/Endispute, Inc. *See* A1103; A1340. But, importantly, the same document also contains an *express* arbitration clause requiring arbitration before the AAA under its rules. A1104.

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, if it were compelled, would be before the AAA under its own Commercial Rules – not before JAMS under Amway's Rules of Conduct. Defendants' attempt to backdoor Amway arbitration via Pro Net was properly rejected by the trial court, which implicitly and correctly found the *U-Can-II* decision holding otherwise contrary to Missouri law and unpersuasive.

c. Pro Net and Global Are Not Entitled to Arbitrate

The remaining defendants, Pro Net and Global, are not signatories to the Amway Arbitration Provision (nor do Defendants contend that they are) and thus clearly are not entitled to enforce it. *See Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947, 948 (Mo. App. S.D. 1999).

Defendants argue that Pro Net and Global are entitled to enforce the Amway Arbitration Provision as "third-party beneficiaries" thereof – despite the fact that they are not Amway businesses (A1845). And, Defendants provide no evidence establishing that purported status.[12] Thus, that unsupported claim fails as a matter of law.

[12] Third-party beneficiary status requires proof that the third-party is the cause of the creation of the contract, seeks to enforce it, and received a direct benefit from it. *See Tractor-Trailer*, 873 S.W.2d at 630-31; *OFW*, 893 S.W.2d at 879.

Alternatively, Defendants argue that Pro Net's and Global's alleged conduct is "intimately involved" in "Amway-related" claims that are within the scope of the arbitration provision. Defendants' factual arguments in support of this theory are blatantly false or, at best, misleading, and their legal arguments are without basis.

In support, Defendants misleadingly suggest that Plaintiffs' claims are based on actions Gooch and Childers took while acting as "principals of their respective Amway distributorships." *See id.* Although Gooch and Childers own Amway distributorships, those distributorships are not parties hereto, and Gooch and Childers are not being sued in their capacity as officers or agents of those distributorships. They are being sued for their conduct as officers and agents of their *BSMs* corporations, and individually.

Defendants' assertion that "Respondents specifically allege that [Appellants'] actions violated the Amway Rules of Conduct" is ***blatantly*** false. Nowhere in Plaintiffs' Petition do they assert any claim based on violation of any Amway Rule of Conduct. *See* A0569, ¶ 48.

Defendants also attempt to show "intimate involvement" with arbitrable claims by arguing that Netco, by virtue of its Pro Net membership, ordered and sold BSMs through Global. Apart from the factual inaccuracies of that statement which are addressed in Point III, Defendants' argument fails as a matter of law. Their argument is based on *Pritzker v. Merrill Lynch*, 7 F.3d 1110, 1122 (3rd Cir. 1993), which held that a non-signatory may enforce arbitration if his interests are "directly related to, if not predicated upon, [the signatory's] conduct." *Pritzker* was expressly rejected in *Byrd v. Sprint Communications Co. L.P.*, 931 S.W.2d 810, 814 (Mo. App. W.D. 1996), as being inconsistent with Missouri

law. And, a similar "intertwining" argument was rejected by this Court, which held that a non-signatory cannot be compelled to arbitrate even if his claims are "intertwined" with an agreement signed by a signatory. *Dunn*, 112 S.W.3d at 436.

For the foregoing reasons, the trial court correctly determined that Plaintiffs made no valid and enforceable agreement to arbitrate under the Amway Arbitration Provision as a matter of law, and this Court should affirm that judgment. Alternatively, Plaintiffs controverted Defendants' evidence, creating genuine issues of material fact that require remand for trial.

6. 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 the (1) Amway Distributorship, (2) the Independent Business Ownership Plan or (3) Amway's Rules of Conduct. A1338-39. 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 categories (1) or (2)). There is no ambiguity. The plain and ordinary language of the Amway Arbitration Provision does not cover *BSMs* disputes, and thus Plaintiffs' BSMs disputes 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" 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 (A1304) (emphasis added). An "IB" 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, the Schmitzes are "IBOs" and Netco is their "IB."

Netco is not an "IBO" as that term is defined in the Amway Rules of Conduct. As a "corporate" entity, it is not an "individual" who owns an Amway distributorship and thus cannot be an "IBO." *See* Rule 2.3 (A1304). Instead, it is an "IB" – an entity operated as an Amway business. *See* Rule 2.2 (*id.*).

Schmitz Associates is a functions business. A0967, ¶ 2. It has never been operated as an Amway distributorship, nor has it ever owned an Amway Distributorship. *Id.* Therefore, it is neither an IBO nor an IB. 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. Plaintiffs' Claims Do Not Relate to the Amway Rules of Conduct

Defendants argue that Plaintiffs' claims are within the scope of the Amway Arbitration Provision because Plaintiffs are alleging that Defendants violated Amway's line of sponsorship rules. To the contrary, Plaintiffs do not allege that Defendants violated those rules or *any other* Amway Rule. Indeed, Plaintiffs expressly stated in their Petition: "**This action is not predicated upon the Amway Rules (since the BSMs industry is not a party of the Amway business), nor does it seek the enforcement of any such Rules."** A0569, ¶ 48 (emphasis in original). Rather, Plaintiffs allege that Defendants violated the *separate, unwritten* rules governing the *BSMs* industry. *See* A0562-66; A598-618.

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' 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. A0562-66; A598-618. Eleven distributors submitted affidavits in this case, describing those BSMs rules. *See* A1541-44; A1551-55; A1559-62; A1569-73; A1578-81; A1587-90; A1596-98; A1602-06; A1612-15; A1620-23; A1630-34. It is those rules that a court must construe and apply, not Amway's Rules. Since resolution of Plaintiffs' claims does not require interpretation of or reference to Amway's rules, their claims are not within the scope of the Amway Arbitration Provision.

Defendants base their argument that Plaintiffs are seeking to enforce Amway's Rules of Conduct on three letters that Charlie Schmitz wrote to Amway – all *predating* this litigation – alleging that Defendants' conduct violated Amway's Rules. There are three problems with this argument. First, 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. There is no ambiguity. The plain and ordinary language of the Amway Arbitration Provision does not evince an intent to cover BSMs disputes.

Second, the issue presented is whether Plaintiffs' claims *in this lawsuit* are within the scope of the Amway Arbitration Provision. Obviously, the only pertinent inquiry is what is alleged *in their Petition*, not what other arguments Plaintiffs may or may not have made prior to filing suit.

Third, as Amway repeatedly made clear in response to his complaints, Charlie Schmitz was *mistaken* in his belief that the Amway Rules governed his claims. *See* A2827 ("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."). Unlike Amway's rules, the BSMs rules – unwritten rules promulgated and taught by high level BSMs distributors and established by course of dealing -- *do* prohibit both sales and solicitation of BSMs to persons not in a person's line of sponsorship, and it is those BSMs rules that Plaintiffs are seeking to enforce in this lawsuit. *See* A1541-44; A1551-55; A1559-62; A1569-73; A1578-81; A1587-90; A1596-98; A1602-06; A1612-15; A1620-23; A1630-34.

Should this Court determine that Amway Arbitration Provision is ambiguous, it must be construed against the drafter. *Triarch*, 158 S.W.3d at 777. Moreover, the record in this case is *replete* with evidence that the BSMs industry is separate from Amway, and that Amway itself does not consider BSMs disputes to be governed by Amway's Rules of Conduct.

By Amway's own admissions, the BSMs industry is independent of Amway. *See* A1198, ¶ 5; A1361, A1532 ("[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.") (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.[13]

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 the *Amway* 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*.

A1101 (emphasis added).

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[13] A1019, at 21:12-21; A1109, ¶ 6; A1186-88, ¶¶ 11-13, 15-17; A1367-68, ¶¶ 10, 15; A1492-96, ¶¶ 26-38; A1536, ¶ 10; A1541, 1549, ¶¶ 3, 33; A1551, ¶ 3; A1566, ¶¶ 25, 27; A1569, ¶ 3; A1586, ¶ 30; A1594, ¶ 29; A1596, ¶ 3; A1602, ¶ 3; A1619, ¶ 33; A1620, 1627, ¶¶ 3, 28; A1630, ¶ 3.

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 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*. . . . ." A1531 (emphasis added); *see also* A1390, ¶¶ 6-7.

Still further, the fact that the Amway Arbitration Provision does not cover BSMs disputes is established by Amway's promulgation of the Business Support Materials Arbitration Agreement ("BSMAA"). *See* A1198, ¶ 5; A1361. Unlike the Amway Arbitration Provision, the voluntary 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 ***the Board and Amway recognized that the Amway arbitration provision did not govern disputes relating to independently produced BSMs***. A1187-88, ¶ 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.[14] *See id.* ¶ 16. To the extent there is any ambiguity in the Amway Arbitration Provision, the fact that Defendants Gooch, Childers, and Dunn each signed a BSMAA[15] 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 those Defendants 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. . . . .*

A1293 (emphasis added).

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[14] 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 of Plaintiffs' evidence in this case, in particular, 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* A1187-88, ¶¶ 15-17.

[15] A1401-10.

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 in the BSMAA – *if* the parties signed a BSMAA. Neither Netco, Schmitz Associates nor the Schmitzes ever signed a BSMAA. A0974, ¶25. Defendants' construction of the Amway Arbitration Provision to include disputes concerning BSMs patently conflicts with the plain and ordinary language of the arbitration provision, as well as Amway's position, as repeatedly expressed to its distributors, and even Defendants Gooch's, Childers' and Dunn's conduct in executing BSMAAs.

The trial court properly construed the Amway Arbitration Provision as a matter of law as not covering BSMs disputes, and its judgment should be affirmed. To the extent, there is any ambiguity such that a court may look outside the four corners of the contract, there are factual disputes requiring a trial.

For all of the foregoing reasons, this Court should affirm, as a matter of law, the trial court's judgment that Plaintiffs did not make a valid and enforceable agreement to arbitrate under the Amway Arbitration Provision and that their claims are not within the scope of that arbitration. Alternatively, should this Court find that there are genuine issues of fact, Plaintiffs request this case be remanded for a trial.

II. RESPONSE TO POINT II

A. Standard of Review

The standard of review is the same as that set forth in Point I, which is incorporated herein by reference. Specifically, Point II does not comply with Rule 84.04(d)(1)(C) in

that it does not explain why the trial court's holding that the Amway Arbitration Provision is unconscionable and its refusal to sever the unconscionable provisions are erroneous. Accordingly, Point II is not preserved for review.

B. Argument

1. The Amway Arbitration Provision is Unconscionable

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, 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.*

In finding the Amway Arbitration Provision unconscionable, the trial court expressly singled out three substantive aspects as being particularly "offensive." A3748-49. Defendants address those issues in Point II, but ignore the *wealth* of additional evidence presented establishing both procedural and substantive unconscionability.

a. Substantive Unconscionability

Amway has admitted that its dispute resolution process was specifically "designed to afford Amway and the [IBOAI Board] a means to exercise influence and control over

the process." A1185, ¶ 10. 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 Defendants Gooch and Childers). Appellants' Brief, p. 55; A1198, ¶¶ 8-9.. The training is not limited to a review of Amway's procedures, but includes *substantive* indoctrination. *See* A1185. This process ensures a biased arbitration panel favorable to Defendants at the outset. Certainly, trial 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 (A1342). 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* A3815, ¶ 2, A3813, ¶ 5. 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 uenforceable because it is ***illusory***.[16] *See Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 775 (Mo. 2005). If Plaintiffs are compelled to arbitrate, nothing prevents Amway from changing its rules in the middle of arbitration.

In any event, removal of retention voting does not cure the problem that Amway and the IBOAI Board (which includes Defendants Gooch and Childers[17]) 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).

Defendants suggest that the involvement of the IBOAI Board and JAMS – purportedly neutral parties – saves arbitration from unconscionability. But ***two 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 (A1184-85, ¶¶ 6-7) and whose interests are thus aligned with Amway – "control" over the dispute resolution process. A1184-85, ¶ 10. Amway and its most powerful distributors ensured

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16 *See* Point I, § 3.a.

17 *See* A1198, ¶¶ 8-9.

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.* And, the IBOAI's recommendations to Amway regarding rule changes are not binding on Amway. A1184-85, ¶ 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. A1369, ¶ 17. This is not surprising given that many Board members were targets of high-profile lawsuits. A1184-85, ¶ 10.

Under its ADR rules, Amway can order a distributor into conciliation. *See* A1184-85. The IBOAI Board was 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 enabled Amway and the IBOAI Board to "exert further influence" on distributors. *Id*.

It is against this backdrop that we turn to how two named defendants in this case, specifically, are involved in Amway's ADR process. Defendants Gooch and Childers serve on the IBOAI Board that selects the panel of "neutrals" that would arbitrate this matter if compelled. A1198. Thus, they 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 (including arbitration). A1198, ¶ 6-7; Rule 11.3.1(A1337); Rule 11.1.4 (A1336). Childers

also serves on the Hearing and Disputes Committee, which also participates in the Amway dispute resolution process. A1199, ¶ 10. Additionally, Defendants Gooch and Childers, by virtue of their positions on the IBOAI Board, have the right to issue recommendations for resolving the dispute, including whether to refer the matter to arbitration. A1198, ¶ 9; Rule 11.3.2 (A1337). Undoubtedly, given the chance to refer the matter to arbitration, they would.

As the foregoing demonstrates, these two 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. 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 opponent. A1342 (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, *inter alia*, the conscionability of one-sided agreements).

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 belated posturing 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) (A1338-39). 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.[18]

Additional unconscionable aspects of the Amway Arbitration Provision include a provision imposing exorbitant fees that would not be incurred in a judicial forum,[19] and a

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[18] Defendants argue that this is a red herring because Amway is not a party. But the issue is not whether Amway is bound; it is whether the underlying arbitration clause is unconscionable.

[19] Rule 11.5.56, 11.5.25, 11.5.57, 11.5.58 (A1334, A1349-50); Akers Aff. ¶9 (costs of *Morrison* arbitration was extremely excessive and many times higher than they would have been in federal court).

loser pays provision,[20] which allows Amway and its favored distributors to shift their exorbitant legal fees to unsuspecting claimants who pursue their claims in sham arbitration. *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. As discussed in Section B.3(b), *supra*, when Amway unilaterally amended its Rules to impose mandatory arbitration, distributors were given insufficient notice of the amendment. Lack of notice is a hallmark of procedural unconscionability. *See Powertel, Inc. v. Bexley*, 743 So.2d 570, 575 (Fla. 1st DCA 1999).

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. *See* A0103 (Amway's rules, including arbitration, "are the ONLY terms on which you or anyone else are authorized to continue as a distributor." This is not a situation in which, for example, Plaintiffs can simply switch credit card companies. The Schmitzes could not refuse arbitration without giving up the business they invested 16 years building.

In *Powertel* – a case the Western District Court of Appeals called "compelling"[21] – the court found a unilaterally imposed arbitration clause unconscionable because the

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[20] Rule 11.5.48 (A1347-48).

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

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 on a sixteen-year relationship that would force him to choose between his Constitutional rights or giving up his successful livelihood.

Another factor establishing procedural unconscionability is that the actual arbitration rules were not distributed to IBOs until December 1998 -- *more than one year after their distributorships were renewed*. A0065. "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.[22] 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 S.W.2d 606, 611 (Mo. App. E.D. 1986) (no unconscionability where provision is not hidden in fine print).

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[22] A0065, ¶ 12; A1197, ¶ 3; A0918-19.

Defendants argue that Plaintiffs are successful, sophisticated parties and therefore unconscionability cannot be established. However, it is the element of "inequality of bargaining power" that is of greater importance than the parties' sophistication. *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.").

Defendants additionally 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 in *Morrison*. 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 (A1640-41). 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. App. A65-66. The trial court here properly based its judgment on the totality of the evidence presented to it rather than blindly 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 invalidated. *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.").

2. 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 contrast, 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 (A1185, ¶ 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 properly refused to sever the unconscionable provisions.

3. 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).

Defendants argue 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. But, 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.

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,[23] have likewise rejected the broad 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*;[24] 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

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[23] *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 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); *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).

[24] *Prima Paint* involved the defense of fraud-in-the-inducement. *Prima Paint*, 388 U.S. 395.

be inconsistent with the 'first principle' of arbitration that 'a party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit.'" *Three Valleys*, 925 F.2d at 1142. 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. In particular, duress (an issue addressed in Point III), is an issue of assent – an essential element to form a contract. *See Abrams*, 925 S.W.2d at 937. Indeed, in *Coleman v. Crescent Insulated Wire & Cable Co.*, 168 S.W.2d 1060 (Mo. 1943), the Court stated that a person under duress is "bereft of the quality of mind *essential to the making of a contract*."

Lastly, Defendants argue 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.

For these reasons, this Court can and should affirm the trial court's finding that the Amway Arbitration Provision is unconscionable. Should this Court determine that there are factual disputes precluding judgment as a matter of law, Plaintiffs request a trial of those issues for the reasons set forth in Point I, § B.2., which is incorporated herein by reference.

III. RESPONSE TO POINT III

A. Standard of Review

The standard of review is the same as set forth in Point I, which is incorporated herein by reference. Specifically, Point III does not comply with Rule 84.04(d) because Defendants complain in Point III only that the trial court erred in *failing to* ***address*** the Pro Net Arbitration Provision in its judgment. But in their Argument, they instead argue that the court erred in *failing to* ***find*** *that Plaintiffs are bound* thereby. Nor do Defendants explain why the court's judgment is erroneous. Neither issue is properly preserved and the point must be dismissed. Mo. R. Civ. P. Rule 84.13(a); *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."); *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.'").

B. Argument

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

The issue specifically raised in Point III fails because courts have no duty to address in the judgment every issue a party has asserted. 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). In fact, the judgment ultimately entered in this case did not specifically address *either* arbitration provision; it simply overruled Defendants' Motion to Compel. *See* A3914.

Moreover, Defendants cannot seriously argue that the trial court failed to consider the Pro Net Arbitration Provision since that "omission" was the primary focus of Defendants' Motion for Rehearing. *See* A3788. Thus, the trial court implicitly rejected Defendants' arguments that Plaintiffs are bound by the Pro Net Arbitration Provision when it entered its judgment.

2. The Trial Court Did Not Err in Finding that Plaintiffs are Not Bound to Arbitrate

Although the issue of whether the trial erred in failing to find that Plaintiffs are bound under the Pro Net Arbitration Provision was not framed in Point III, Plaintiffs address it should the Court review for plain error.

a. Defendants Withdrew Pro Net Arbitration As an Issue

The trial court's decision that Plaintiffs are not bound under the Pro Net Arbitration Provision must be affirmed because Defendants expressly withdrew it as an issue in this case. During Paul Brown's deposition, Defendants' attorney, Gaspare Bono, stipulated: "I'm going to object to the line of questioning because *we withdrew our arbitration argument as to Pro Net* at the hearing in St. Joseph, so *that is not an issue in the Netco proceeding*. . . . The only arbitration agreement in Netco that is at issue is the Amway arbitration agreement." A1035, at 102:9-16 (emphasis added). Mr. Brown's counsel questioned Mr. Bono whether there was "even a small chance" that the Pro Net arbitration Provision "could become relevant in any respect," to which Mr. Bono responded: "Not for Mr. Schmitz." *Id.* 102:22-103:5.

b. Netco Did Not Make An Arbitration Agreement with Pro Net

Defendants argue that Netco is bound to arbitrate under the Pro Net Arbitration Provision because it submitted an application for Pro Net membership that contained an arbitration clause. *See* A0110. But they neglect to inform the Court that Netco's application was expressly rejected and therefore no contract was ever formed.

It is elementary contract law that no contract is formed until there has been *both* an offer *and* acceptance of the terms *as presented*. *Abrams v. Four Seasons Lakesites*, 925 S.W.2d 932, 937 (Mo. App. S.D. 1996). "If the acceptance purports to add or alter the proposition made," then neither party is bound. *Id.*; *Revere Copper & Brass, Inc. v. Manufacturers' Metals & Chemicals, Inc.*, 662 S.W.2d 866, 870 (Mo. App. W.D. 1983).

It is undisputed that Charlie Schmitz altered the terms of the Pro Net membership application when he wrote thereon:

> I sign this with the understanding that I am not giving up my right to buy-sell or produce support materials from other suppliers or manufacturers. *As per phone conv with Paul Brown 12/8/98.
>
> CS

See A0110; A0977, ¶ 34. Netco's alteration of the Pro Net application form constituted a rejection of Pro Net's offer and a counteroffer. *See Beck v. Shrum*, 18 S.W.3d 8, 10 (Mo. App. E.D. 2000). No contract can be created unless Pro Net either accepted the offer as amended, or renewed its offer and Netco accepted the same. *See id.* at 10. Neither happened.

Pro Net responded to Mr. Schmitz' counteroffer by *expressly* rejecting Netco's application. This is *conclusively* established by Paul Brown (Pro Net's own agent), who was charged with obtaining Pro Net membership applications. A1108, ¶ 4. Brown testified that he expressly rejected Netco's application at the instance of the Pro Net Board of Directors because of that alteration: "I was instructed to tell Charlie Schmitz that his membership application had been rejected, and I did." A1051, 179:18-21; A1035, 104:21-

105:2 ("on two separate occasions, I was instructed with Charlie Schmitz to let him know unless he signed the -- the application without qualification, that he was not a member."); A1096, ¶ 22; *see also* Plaintiffs' Ex. 2 (audiotape wherein Brown *again* expressly rejected the application). Defendants' attorney, Gaspare Bono, *stipulated* before the court that Brown had the express authority to reject Netco's application. *See* A1687-90, 36:25-39:2. Mr. Bono further stated that the *only way* that Netco could become a member of Pro Net was if it signed a *new* application. *Id.* There is no evidence that a new application had ever been submitted by Netco. There was thus no meeting of the minds and, as a result, no valid and enforceable contract was ever formed.

Defendants argue that Pro Net later changed its mind and accepted the application. Specifically, Defendants Gooch and Childers testified that Pro Net directed Paul Brown to ask Mr. Schmitz to submit another application "because the initial application contained certain additional language added by [Schmitz]. However, it was later determined that Pro Net would accept the application . . . ." A2091, ¶14; A2315-16. Their testimony is misleading "spin" at best, and an intentional perversion of the truth at worst. Glaringly absent from their affidavits is any statement ***directly refuting*** Brown's testimony that Pro Net expressly rejected Netco's application. Indeed, in stating that he asked Mr. Schmitz to submit *another* application, they necessarily acknowledged that the original application had been rejected. In contrast to Defendants' *equivocal* affidavits on the issue of rejection, Mr. Brown's testimony that he *personally* rejected Netco's application at Pro Net's request was ***direct, express*** and ***unequivocal.*** Accordingly, Defendants' affidavits are insufficient

to create a genuine issue of material fact. *See* *Jones v. Maness*, 648 S.W.2d 629, 631-32 (Mo. App. E.D. 1983).

Moreover, the power to accept a contract terminates when it has been rejected. *Boehm v. Reed*, 14 S.W.3d 149, 151 (Mo. App. W.D. 2000). Pro Net cannot resurrect a counteroffer that is legally "dead" by changing its mind.

c. Netco Is Not Estopped to Deny Arbitration

Although not using the term "estoppel" or discussing any of the essential elements thereof, Defendants alternatively assert that Netco accepted the benefits of Pro Net membership and therefore cannot avoid the obligations thereof. This Court should affirm the trial court's implicit determination that Defendants failed to satisfy their burden of showing estoppel because they failed satisfy each element of estoppel with clear and satisfactory evidence. *See* *Brown v. State Farm Mutual Automobile Ins. Co.*, 776 S.W.2d 384, 388 (Mo. banc 1989) (elements of estoppel, set forth at pages 44-45, *supra*); *Peerless Supply Co. v. Industrial Plumbing & Heating Co.*, 460 S.W.2d 651, 666 (Mo. 1970) (requiring "clear and satisfactory proof" of elements of estoppel). Alternatively, the evidence upon which Defendants relied to show estoppel was controverted by Plaintiffs. Accordingly, those factual disputes must be decided by trial.

Defendants' primary argument in support of estoppel is that Netco is estopped from denying arbitration because Netco (and the Schmitzes) purchased BSMs from Global, which, they contend, is a benefit available only to Pro Net members. This fact was controverted.

First, as Defendants admitted, Netco purchased BSMs not from *Global* but from Defendant *Dunn Associates* – just as it did *before* Pro Net was formed. A2516, ¶5; A0980, ¶ 44; A0949, at 167:9-14. Indeed, "Dunn Associates solely determined the price" of the BSMs, and Netco was invoiced by and paid Dunn Associates for its BSMs. A2516, ¶ 5. Thus, Netco did not purchase BSMs from Pro Net or Global.[25]

Second, and crucially, the ability to purchase BSMs through 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.[26] A1181, ¶6-7; A1612, A1615-17, ¶¶ 2, 15, 19, 22; A1374, ¶¶ 31-33, A1541, A1545, ¶¶ 2, 16; A1551,

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[25] In *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003), this 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 Netco received benefits were between Netco and Dunn, not Pro Net or Global. Therefore, under *Dunn*, the agreement is collateral to Pro Net and estoppel does not lie.

[26] Pro Net membership was limited to "Diamond-level" distributors. The affiants were not "Diamonds." *See* A1091, ¶ 3; A1093, ¶ 12; A1112, ¶ 13; A1374, ¶¶ 31-33; A0979, ¶¶ 41-42, 46.

A1555, ¶¶ 2, 16; A1569, A1573, ¶ 2, 16; A1578, A1582, ¶¶ 2, 17; A1602, A1606, ¶¶ 2, 16; A1620, A1624, ¶¶ 2, 15; A0979, A0981, ¶¶ 41-42, 46. Indeed, Joanne Schmitz, who was not a Diamond-level distributor and therefore not eligible for Pro Net membership, testified that she purchased Pro Net members' (copyrighted) tapes -- contrary to Defendants' contention that such is a benefit made available only to Pro Net members. A1181, ¶6-7; *see also* A0981, ¶46. 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 (A1181, ¶ 6-7), which supports the fact that it sold products to non-Pro Net members.

Third, other purported benefits of Pro Net membership are set forth in Pro Net's "Terms and Conditions." A1103. But Plaintiffs presented substantial, competent evidence directly controverting acceptance of ***each and every one*** of those purported benefits, as well as additional evidence establishing that they did not accept any benefits of Pro Net membership:

- Pro Net identified the following items as print or electronic literature 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. A1973.
    - Plaintiffs never subscribed, used or ordered any products through the Pro Net website. A0981. (controverting Southern District's finding, App. A60). In fact, the website did not even come

on-line until June 2000, nearly a year *after* the Schmitzes sold their Amway and BSMs business. *Id.*

- Plaintiffs did not purchase, use or participate in any activities associated with the "EasyTel" voicemail messaging system; "Go-Print.com," "ToolsCart.com," or "McCoy Services," "MedJet" or "Financial Passport." A0980 ¶ 44; A1004 ¶ 42.

- Global did not edit, sell or advertise any tapes in which Charlie Schmitz was featured as a speaker. *Id.* (controverting Southern District's finding, App. A60).
- The Schmitzes did not attend or participate in Pro Net functions, other than two meetings in which Pro Net tried to recruit them. A0980 (controverting Defendants' testimony at A2091).
- After the Schmitzes refused to join Pro Net, the Pro Net Steering Committee "blackballed" them, and they were excluded from speaking at all Pro Net conventions and functions. A0980.
- Plaintiffs' functions were not promoted in Pro Net or Pro Net members' literature advertising upcoming functions and events. *Id.* To the contrary, the Pro Net Steering Committee instructed specific members of the Schmitz upline to inform Schmitzes' downline that the Schmitzes were no longer "active" in the Amway business. *Id.*
- Pro Net admitted it did not provide, promote, arrange, or sponsor any meetings or forums in the State of Missouri. A1974, ¶¶ 10, 11.

- Plaintiffs did not vote in any nominal Pro Net "elections." A0980.
- Plaintiffs did not serve on any Pro Net committees. *Id.*
- Plaintiffs did not pay annual dues. *Id.*
- Plaintiffs did not use the temporary account log-in and password Pro Net sent them. A0981.
- Plaintiffs did not subscribe to or use Pro Net's "personal web office." *Id.*
- Plaintiffs did not participate in "recognition updates" for members of their downline that was offered through the website. *Id.*

Defendants also cite as evidence of estoppel that the Schmitzes were featured in Pro Net's "Profiles of Success." However, Defendants presented no evidence that the Schmitzes consented to the use of their likeness in that publication. Indeed, Pro Net had a habit of using the Schmitzes' likenesses without authorization, as evidenced by the fact that it posted their photo on its website without the Schmitzes' consent. A0981. And the Schmitzes' subsequent purchase of copies of "Profiles" – which is available for sale to non-Pro Net members -- is wholly insufficient to establish assent to *membership*.

Fourth, Netco cannot be estopped because it was compelled under *continuing economic duress* to submit the Pro Net membership application in the first instance and then purchase BSMs that ultimately originated from Global. Missouri courts recognize the contract defense of economic duress or business compulsion. *See State ex rel. State Highway Comm'n v. City of St. Louis*, 575 S.W.2d 712 (Mo. App. E.D. 1978) (citing *Coleman v. Crescent Insulated Wire & Cable Co.*, 168 S.W.2d 1060 (Mo. 1943)); *see also*

Powertel, Inc. v. Bexley, 743 So.2d 570, 575 (Fla. 1st DCA 1999) (no economically feasible alternative).

Netco was compelled against its will to submit a Pro Net application form under threat that its BSMs business would be cut off. In 1998, Defendants' agent, Paul Brown, at the instruction of Pro Net and Attorney Bono, repeatedly demanded Charlie Schmitz to submit a Pro Net membership application. A0976, ¶ 31. Mr. Brown told Mr. Schmitz that unless he joined Pro Net, his BSMs business would be cut off. *Id.* at ¶¶ 31-33; *see also* A1111, ¶ 13. These same threats were made to numerous other BSMs distributors.[27] These were not idle threats. Pro Net followed through on its threats by taking away the tool business of the Schmitzes and other BSMs distributors who left Pro Net or were otherwise viewed with disfavor by Pro Net.[28]

The foregoing facts, as confirmed by Paul Brown, Pro Net's own agent, who *admitted* coercing Mr. Schmitz, undeniably establish that Netco had no option but to acquiesce to the Pro Net system or risk having its BSMs business cut-off, which is what eventually happened.

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[27] *See* A1111-13, ¶¶ 13-17; A0980-81, ¶¶ 43-44; A1497-99, ¶¶ 41-42, 44, 48; A1536-38, ¶¶ 12, 16; A1562, ¶¶ 14; A1573, ¶ 15-16; A1582, ¶ 17; A1590, ¶ 14-15; A1606, ¶ 15-16; A1615, ¶ 14-15; A1624, ¶ 14-15; A1634, ¶ 15-16.

[28] *See* A1094, ¶¶ 16, 22-24; A1041-42, 132:22-135:12; A1563-65, ¶ 19, 22-23; A1583-85, ¶¶ 22, 28; A1593, ¶ 27; A1616-17, ¶¶ 22-25; A1638, ¶ 32.

Even if the foregoing were not sufficient to establish that Netco was not a member of Pro Net as a matter of law, there at least is a fact question as established by the testimony of Pro Net's agent, Paul Brown, who testified that neither the Schmitzes, Netco nor Schmitz Associates ever became members of Pro Net. A1096, ¶ 22; *see also* A1377, ¶ 42.

d. Schmitz Associates is Not Bound by Pro Net Arbitration

Defendants assert three theories in their specious attempt to bind non-signatory Schmitz Associates to arbitrate under the Pro Net Arbitration Provision: an alter ego-like theory; third party beneficiary and estoppel.

However, Defendants did not assert in the trial court that Schmitz Associates is bound by a third-party beneficiary theory and thus have not preserved that issue for appeal. *See State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. banc 2000). *See* A0053-54; A2071-73. With respect to estoppel, Defendants argued only that Schmitz Associates purchased BSMs from Global. *Id.* They did not argue, as they do here, that it is seeking to enforce the Pro Net Agreement. Thus, that issue, too, is not preserved.

Defendants' quasi-alter ego argument posits that Schmitz Associates is part of the "Schmitz Organization" as is Netco; Netco is a member of Pro Net; Pro Net considers the "organization" to be a member; ergo Schmitz Associates is a Pro Net member. First, that syllogism is patently lacking in logic, as well as any recognized contract law principle for binding a non-signatory to arbitrate.

Second, there is no such entity as the "Schmitz Organization." "Organization" is a term of convenience used in Respondents' Petition to refer collectively to multiple distinct persons/entities -- 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).

Third, Defendants' argument that Pro Net considers each entity in an "Organization" to be a member is contrary to its Bylaws and the evidence presented.

Pursuant to Pro Net's Bylaws, only those "compan[ies] or business[es]" that are "engaged in distributing Amway products or services" are eligible for membership in Pro Net. A1126-27; A1093, ¶ 11; A1108-10, ¶¶ 5, 8, 10. Importantly, it was a conscious and *deliberate* choice to define the member of Pro Net as being an Amway distributorship as opposed to a BSMs business. Initial drafts of the Pro Net Bylaws provided for the members to be *BSMs companies* owned by Amway distributors ("IBOs"). A1108, ¶ 5; A1155, at § II.A.I. However, the Bylaws were revised at attorney Gaspare Bono's direction to provide that the members would be *Amway distributorships* ("IBs"). A1108, ¶ 5. This was done with the intended purpose of maintaining the impression that the common link between Pro Net members was the Amway business and not the BSMs business, and to attempt to avoid antitrust problems. *Id.* at A1108-10 ¶¶ 5, 8.

Moreover, Pro Net's agent, Paul Brown, testified that only Amway businesses were considered Pro Net members. A1109, ¶8. Since Schmitz Associates has never sold Amway products or services, it cannot be a Pro Net member.

Defendants next argue that Schmitz Associates is a third-party beneficiary of Pro Net because it placed the Pro Net Terms and Conditions in issue by alleging that Defendants used Pro Net to facilitate their unlawful conspiracy to violate antitrust laws. To the contrary, none of the counts in Plaintiffs' Petition assert any cause of action against Pro Net or any other Defendant for breach of any obligation under the Pro Net Agreement. *See* A0597-0618. Pro Net was sued because it participated in the unlawful conspiracy, not because it breached a contractual term. Thus, Schmitz Associates is not seeking to enforce the Pro Net Agreement and hence cannot be a third-party beneficiary. *See* *Flink v. Carlson*, 856 F.2d 44, 46, 46 n.3 (8th Cir. 1988).

Further, Defendants point to no Pro Net provision evidencing an intent to benefit Schmitz Associates, who is not a signatory to the Pro Net Application, or even eligible to be a member. *See* *Peters v. Employers Mutual Casualty Co.*, 853 S.W.2d 300, 301 (Mo. banc 1993); *OFW Corp. v. City of Columbia*, 893 S.W.2d 876, 879 (Mo. App. W.D. 1995) (the third party must be the "*cause of the creation* of the contract."). Indeed, the Pro Net agreement evinces an intent to benefit only its *members*, which are *Amway distributors*. A1105 ("The purpose of the Association is to promote the common business interests of its members *engaged in distributing Amway products or services*.") (emphasis added); A1103 ("The Association will act to provide benefits to its members" – which, according to its Bylaws, are Amway distributors – not BSMs businesses). Schmitz Associates is not an

Amway distributor and thus not an intended beneficiary of the Pro Net agreement. A0967, ¶ 2, A1096, ¶ 22.

Lastly, Defendants argue that Schmitz Associates is equitably estopped to deny arbitration because it is "assert[ing] rights under an agreement." As established above, Schmitz Associates is not asserting any rights under the Pro Net Agreement. Nor has it received any direct benefits thereof. *See* § 2.c., *supra*. Therefore, estoppel cannot lie. *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 779 (2nd Cir. 1995); *see also Brown v. State Farm Mutual Automobile Ins. Co.*, 776 S.W.2d 384, 388 (Mo. banc 1989) (elements of estoppel).

For these reasons, this Court should affirm the trial court's judgment that Schmitz Associates is not, as a matter of law, bound to arbitrate, or, alternatively, remand for a trial on any disputed fact issues.

e. 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 Global, Evans and Evans Associates are not Pro Net members. *See* Appellants' Brief, p. 93-94 n.19. They argue that the seven remaining Defendants are Pro Net members and thus they, as well as Pro Net itself, are entitled to

enforce arbitration. However, those seven Defendants were never members because they are *ineligible* for Pro Net membership.

Again, pursuant to Pro Net's Bylaws, only Amway distributorships are eligible for membership in Pro Net. A1126-27; A1093, ¶ 11; A1108-10, ¶¶ 5, 8, 10**.** None of the corporate Defendants[29] (except Dunn Associates[30]) engage in distributing Amway products or services; they engage solely in the BSMs business.[31] In addition, none of the individual Defendants (Dunn, Gooch and Childers) are "companies" or "businesses" engaged in distributing Amway products and therefore they do not fall within the definition of persons eligible for Pro Net membership. A1773-74, ¶¶ 13, 15, 17. Again, Pro Net's own agent testified that the member was the Amway corporation, not the individual or his BSMs business. A1109-10, ¶ 8. He testified that when Gooch, Childers and Dunn submitted membership applications, they did so on behalf of their Amway businesses. *Id*. Since these Defendants are not Amway distributorships, they cannot, under Pro Net's By-laws, be members of Pro Net and are therefore not entitled to enforce Pro Net arbitration.

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[29] *I.e.*, Gooch Support, Gooch Enterprises, and TNT.

[30] When they filed their lawsuit, Plaintiffs believed that Jimmy V. Dunn & Associates was Jimmy Dunn's *BSMs* corporation, not an Amway distributorship. In any event, Dunn Associates is not entitled to enforce arbitration for the reasons discussed in Section (2), *infra* (failure to satisfy condition precedent).

[31] *See* A1907-09; A1847-48, ¶¶ 21, 22, 24; A1851-52, ¶¶ 32-33; A1845, ¶ 15.

(2) Founding Members are Not Entitled to Enforce Arbitration

Further, five of the seven Defendants whom Defendants claim are Pro Net members – Gooch; Gooch Support; Gooch Enterprises; Childers; and TNT – are, to the extent they are members at all, "founding" members of Pro Net. However, the Pro Net Arbitration Provision expressly applies only to "regular" members. Therefore, those five Defendants have no right to enforce Pro Net arbitration.

The Pro Net By-Laws establish two distinct classes of membership: "founding" members and "regular" members. A1126-27. Founding members have voting rights; regular members do not. *Id.* Only those *companies* that joined Pro Net at the time it was formed are eligible to be "founding" members. *Id.* at § 1.1. Despite the language of the Bylaws providing otherwise, Defendants consider Gooch and Childers – together with their respective Amway distributorships and BSMs companies – to be founding members of Pro Net.[32]

Paul Brown (Defendants' own agent) and Ken Stewart testified that the Pro Net arbitration provision was intended to apply only to regular – not founding members. A1095, ¶ 17; A1111, ¶ 11; A1370, ¶ 21. Their testimony is corroborated by the express language of the two documents that purportedly comprise the Pro Net Arbitration Provision: The "Pro Net Global Membership Application" states: "This Membership Application must be completed by all applicants . . . for *regular* membership in Pro Net

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[32] *See* A1905, ¶ 1; A1966-67, ¶ 1(b), (d); A1110, ¶ 10; A1806, ¶ 5.

Global Association . . . ." (A1105) (emphasis added). The "Pro Net Global Association Membership Application Terms and Conditions" states: "This is an application for *non-voting* membership . . . " A1103 (emphasis added). *See also* A1093, ¶ 11. Indeed, Defendants' attorney Gaspare Bono stipulated: "I'll state for the record that the membership application expressly said that it was for non-voting members." A1044, 145:1-3.

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 . . . .") (emphasis added). Since there is no written arbitration agreement applicable to *founding* members of Pro Net, these five Defendants, who by their own admission are founding members, did not agree in writing to arbitrate and thus are not entitled to compel Pro Net arbitration.

These five Defendants may argue in Reply (as they did in the court below) that even though they are founding members, they signed the same application form as regular members and are therefore both founding *and* regular members. However. in sowrn interrogatory answers, both Defendants *and* Pro Net identified Gooch, Gooch Support, Gooch Enterprises, Childers, and TNT as being *only* "founding members" and stated that the only defendants who were "regular members" were Dunn and Dunn Associates. *See* A1965-67; A1420; A1805-06; Supp. L.F. 0005. 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.

And, contrary to Defendants' contention that Childers, Gooch and Dunn submitted applications covering the individuals, as well as both their Amway corporations and BSMs corporations, the application forms belie that contention. They submitted applications in their individual names (or on behalf of their Amway distributorships as suggested by the ADA (Amway) number listed). *See* A2131, A2324, A2667. Their conduct in failing to list their BSMs company or "Organization" is consistent with Pro Net's Bylaws – and Plaintiffs' position – that Pro Net members are Amway distributorships, not BSMs corporations.

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 and Ken Stewart's testimony that notwithstanding the name that appeared on the application, Pro Net considered the member to be the Amway corporation. A1103, A1093, ¶ 11; A1044, 145:1-3; A1095, ¶ 17; A1110, ¶ 10; A1370, ¶ 23.

Because Defendants are not parties to the Pro Net Arbitration Provision, they have no right to enforce it. *See* *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947, 948 (Mo. App. S.D. 1999).

(3) Global, Evans and Evans Associates Are Not Entitled to Enforce Arbitration

Although Defendants admit that Global, Evans and Evans Associates are ***not*** members of Pro Net,[33] they nevertheless argue that the three are entitled to arbitrate because they are named as co-conspirators and their claims are "directly related to, if not predicated upon, [the signatory's] conduct," citing *Pritzker v. Merrill Lynch,* 7 F.3d 1110, 1122 (3d Cir. 1993). As discussed in Point I, § B.4.c., *supra*, *Pritzker's* doctrine has been expressly rejected by Missouri courts. *See Byrd v. Sprint Communications Co. L.P.*, 931 S.W.2d 810, 814 (Mo. App. W.D. 1996); *see also Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 436 (Mo. banc 2003). As a matter of law, Global, Evans and Evans Associates are not entitled to compel arbitration. *See Prickett*, 986 S.W.2d at 948.

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

The trial court's judgment should be affirmed because Plaintiffs' claims are not within the scope of the Pro Net Arbitration Provision. 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." A1104. Plaintiffs' claims do not fall within any of these three categories.

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[33] *See* Appellants' Brief, p. 93-94 n.19; A1779-80, ¶¶ 29, 32, 35.

Plaintiffs' claims do not fall within the first category because *no contract was ever created*. Specifically, Netco's application was rejected, and neither Plaintiff expressly or impliedly contracted with Pro Net.

Nor are Plaintiffs seeking an interpretation or performance of the Pro Net agreement, or alleging a breach of it. Pro Net it is sued as a *participant* in the conspiracy, not for breach of any contract term. 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' claims do not fall within the second or third categories because, as established above, neither Defendants nor Plaintiffs are "members" of Pro Net.

Plaintiffs suggest that the Pro Net Arbitration Provision applies to every dispute between Pro Net members, regardless if it relates to one of the three enumerated categories. A contract must be construed consistently with the reasonable expectations of the parties. *Whitney v. Alltel Communications, Inc.*, 2005 WL 1544777, *9 (Mo. App. W.D. July 5, 2005). The only reasonable interpretation of the arbitration provision is that the dispute must relate to the interpretation, performance or breach of the Pro Net agreement.

The *U-Can-II* decision cited by Defendants is not well-reasoned and, in any event, is inapposite. In this case, Pro Net expressly *rejected* Netco's application; no such fact existed in *U-Can-II*. *See* A3693-3700.

Looking at the four corners of the Pro Net Agreement, Plaintiffs' claims are not within the scope of arbitration.

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

Defendants argue 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. This argument ignores the many other reasons upon which the trial court properly rejected Pro Net arbitration, not the least of which is that no valid contract was ever formed because of Pro Net's rejection of Netco's application.

h. Plaintiffs' Defenses Are for the Court to Resolve

As in Point II, Defendants again argue that Plaintiffs' defenses go to the contract as a whole rather than the arbitration clause itself and therefore must be decided by an arbitrator. It is well-settled that whether a valid and enforceable agreement to arbitrate exists is an issue for the courts, not an arbitrator, to resolve. *Estate of Burford v. Edward D. Jones & Co., L.P.*, 83 S.W.3d 589, 592 (Mo. App. W.D. 2002).

Netco's defense that its application was rejected and therefore there was no mutual assent, as required to form a valid contract, is precisely an issue that is reserved to the courts. *See Abrams v. Four Seasons Lakesites*, 925 S.W.2d 932 (Mo. App. S.D. 1996).

Plaintiffs' argument that Netco was under duress when it submitted its membership application is likewise an issue of assent. A person under duress lacks the capacity to form a valid contract. *See Coleman v. Crescent Insulated Wire & Cable Co.*, 168 S.W.2d 1060 (Mo. 1943) ("The question is: Was the person so acted upon by threats by the person

claming the benefit of the contract, . . . *as to be bereft of the quality of mind essential to the making of a contract* . . . .") (emphasis added).

Plaintiffs' legal defense to Defendants' estoppel theory is continuing economic duress. Whether a party made a contract by estoppel is an issue for the courts to resolve. *See* *Dunn*, 112 S.W.3d at 436. If that issue is for the court, so too must be Plaintiffs' defense thereto. *See* *Powertel*, 743 So.2d at 575 (invalidating arbitration agreement because there was no economically feasible alternative).

The parties' ineligibility for Pro Net membership also goes to whether a valid contract was ever formed as well as whether the claims are within the scope of arbitration. The scope of Pro Net's arbitration provision is limited to disputes between "members" of Pro Net. Since the parties are ineligible for membership, Plaintiffs' disputes are not between "members" of Pro Net and thus not within the scope.

Additionally, Defendants seek to bind Plaintiffs – and particularly Schmitz Associates - to an arbitration agreement they never signed. The United States Supreme Court expressly stated that whether a non-signatory is bound is an issue for a court to resolve. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 592 (2002).

Lastly, Defendants argue that the issues are to be decided by an arbitrator 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). But since Plaintiffs never agreed to arbitrate, they never assented to the AAA rules. *See* *Abrams*, 925 S.W.2d at 937 (a fundamental

element of a contract is the mutual assent). Defendants' cited cases are inapposite. In one, the party expressly requested the arbitrator to rule on the question of arbitrability. *Lucile Packard Children's Hosp. v. U.S. Nursing Corp.*, 2002 WL 1162390 (N. D. Cal. 2002). In the other, both parties acknowledged signing the contract that incorporated by reference an arbitration provision. *Sleeper Farms v. Agway, Inc.*, 211 F.Supp.2d 197, 201 (D. Me. 2002). And, the court held that only if it *first* found an agreement to arbitrate exists would it submit the question of scope to the arbitrator. *Id.* at 200.

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 disputed fact issues for the reasons set forth in Point I, § B.2, which is incorporated herein by reference.

CONCLUSION

Plaintiffs respectfully request this Court to affirm the trial court's judgment denying Defendants' Motion to Compel Arbitration and to Stay Litigation. Alternatively, Plaintiffs request that this case be remanded to the trial court for a trial of any disputed fact issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing RESPONDENTS' SUBSTITUTE BRIEF, with a copy on disk, to be served on this 2nd day of August, 2005, and a copy of RESPONDENTS' APPENDIX was served on the 29th day of July, 2005, via overnight mail, postage prepaid, to :

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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 27,258 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