
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Dr. Joe Morrison, *et al.*
Plaintiffs

Dr. Joe Morrison, Dawn Morrison, Randy Council, Janet Council, Dan Higgins, Helen Higgins, Ron Green, Karen Green, Victor Brook, Cathy Brook, Richmond Eagle Corp., Dave Roberts, Rose Roberts, Tony Cutaia, Mary Cutaia, Warren Bird, Donna Bird, Kye Yeaman, Wade McKay, Debbie McKay, Robert Price,

Plaintiffs – Appellants,

Herbert Hamilton, Marilyn Hamilton, Donald May, Celeste May, Michael Cutaia, Karen Cutaia, Randall Laine, Diana Laine, Frank Mazzola, Karen Mazzola, Larry Rogers, Suzanne Rogers, Robert Schmanski, Dana Schmanski,

Appellants,

v.

Amway Corporation, *et al.*
Defendants

Amway Corporation, Dexter Yager, Individually, doing business as Yager Enterprises and Internet Services Corp., Donald R. Wilson, Individually, doing business as WOW International, Inc., Randy Haugen, Individually, doing business as Freedom Associates, Inc., Freedom Tools, Inc., John Sims, Individually, doing business as Sims Enterprises, Internet Services Corp., Yager Enterprises,

Defendants – Appellees,

v.

Pamela Gale Johnson, Joe & Dawn Morrison Bankruptcy Estate, William G. West, Tony & MaryAnn Cutaia Bankruptcy Estate, Robert Newhouse, Herbert & Marilyn Hamilton Bankruptcy Estate, Helen G. Schwartz, Wade & Debbie McKay Bankruptcy Estate, Christopher Moser, Warren & Donna Bird Bankruptcy Estate, William G. West, Randy & Janet Council Bankruptcy Estate, Ben Floyd, Michael & Karen Cutaia Bankruptcy Estate, W. Steve Smith, Ron & Karen Green Bankruptcy Estate, Ben Floyd, Frank & Karen Mazzola Bankruptcy Estate, Janet Casciato-Northrup, Dave & Rose Roberts Bankruptcy Estate, Ben Floyd, Dana & Robert Schmanski Bankruptcy Estate,

Trustees – Appellants.

On Appeal From The United States District Court for the Southern District of Texas,
Houston Division Trial Court Cause No. 4:98-CV-1695 and 4:98-CV-352

APPELLEES' BRIEF

BRYAN CAVE, LLP
John C. Peirce
700 Thirteenth St. N.W. Suite 700
Washington, D.C. 20005
Telephone 202-508-6087
Facsimile: 202-220-7387

ABRAHAM LAW OFFICES
Rick Abraham
24 North High Street
Columbus, OH 43215
Telephone: 614-221-5474
Facsimile: 614-221-7363

BRYAN CAVE, LLP
Thomas Walsh
211 N. Broadway, Suite 3600
St. Louis, MO 63102-2750
Telephone: 314-259-2284
Facsimile: 314-552-8284

MCDONOUGH & ASSOCIATES
Edward B. McDonough, Jr.
2900 N. Loop W., Suite 1125
Houston, TX 77092
Telephone: 713-956-6500
Facsimile: 713-956-9200

ANDREWS KURTH LLP
Thomas W. Taylor
600 Travis Street, Suite 4200
Houston, Texas 77002
Telephone: 713-220-4200
Facsimile: 713-220-4285

MCCORMICK, HANCOCK & NEWTON
Michael Y. McCormick
1900 West Loop South, Suite 700
Houston, TX 77027-3206
Telephone: 713-297-0700
Facsimile: 713-297-0710

ATTORNEYS FOR APPELLEES

CERTIFICATE OF INTERESTED PERSONS

1. The style of the consolidated district-court cases are:

No. 4:98-CV-1695; *Amway Corporation, et al. v. Musgrove, et al.*; and

No. 4:98-CV-352; *Dr. Joe and Dawn Morrison, et al. v. Amway Corporation, et al.*

2. The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs – Appellants:

Dr. Joe Morrison, Dawn Morrison, Randy Council, Janet Council, Dan Higgins, Helen Higgins, Ron Green, Karen Green, Victor Brook, Cathy Brook, Dave Roberts, Rose Roberts, Tony Cutaia, Mary Cutaia, Warren Bird, Donna Bird, Kye Yeaman, Wade McKay, Debbie McKay, Robert Price

Trial and Appellate Counsel for Plaintiffs – Appellants:

Brock C. Akers
Michelle Chelvam
Phillips & Akers, P.C.
3400 Phoenix Tower
3200 Southwest Freeway
Houston, Texas 77027

Co-Appellate Counsel for Plaintiffs – Appellants:

A. Glenn Diddell, III
The Diddell Law Firm
2900 Wesleyan
Houston, Texas 77027

Appellants:

Dr. Joe Morrison, Dawn Morrison, Randy Councill, Janet Councill, Dan Higgins, Helen Higgins, Ron Green, Karen Green, Victor Brook, Cathy Brook, Richmond Eagle Corp., Dave Roberts, Rose Roberts, Tony Cutaia, Mary Cutaia, Warren Bird, Donna Bird, Kye Yeaman, Wade McKay, Debbie McKay, Robert Price

Trial and Appellate Counsel for Appellants:

Brock C. Akers
Michelle Chelvam
Phillips & Akers, P.C.
3400 Phoenix Tower
3200 Southwest Freeway
Houston, Texas 77027

Co-Appellate Counsel for Plaintiffs – Appellants:

A. Glenn Diddell, III
The Diddell Law Firm
2900 Wesleyan
Houston, Texas 77027

Trustees – Appellants:

Pamela Gale Johnson, Joe & Dawn Morrison Bankruptcy Estate, William G. West, Tony & MaryAnn Cutaia Bankruptcy Estate, Robert Newhouse, Herbert & Marilyn Hamilton Bankruptcy Estate, Helen G. Schwartz, Wade & Debbie McKay Bankruptcy Estate, Christopher Moser, Warren & Donna Bird Bankruptcy Estate, William G. West, Randy & Janet Councill Bankruptcy Estate, Ben Floyd, Michael & Karen Cutaia Bankruptcy Estate, W. Steve Smith, Ron & Karen Green Bankruptcy Estate, Ben Floyd, Frank & Karen Mazzola Bankruptcy Estate, Janet Casciato-Northrup, Dave & Rose Roberts Bankruptcy Estate, Ben Floyd, Dana & Robert Schmanski Bankruptcy Estate,

Trial and Appellate Counsel for Trustees – Appellants:

Brock C. Akers
Michelle Chelvam
Phillips & Akers, P.C.
3400 Phoenix Tower
3200 Southwest Freeway
Houston, Texas 77027

Co-Appellate Counsel for Plaintiffs – Appellants:

A. Glenn Diddell, III
The Diddell Law Firm
2900 Wesleyan
Houston, Texas 77027

Defendants – Appellees:

Amway Corporation, Dexter Yager, Individually, doing business as Yager Enterprises and Internet Services Corp., Donald R. Wilson, Individually, doing business as WOW International, Inc., Randy Haugen, Individually, doing business as Freedom Associates, Inc., Freedom Tools, Inc., John Sims, Individually, doing business as Sims Enterprises, Internet Services Corp., Yager Enterprises

Trial and Appellate Counsel for Defendant – Appellee, Amway Corporation:

John C. Peirce
Bryan Cave, L.L.P.
700 Thirteenth St, N W, Suite 700
Washington, D. C. 20005-39606

Thomas W. Taylor
Kendall M. Gray
Andrews & Kurth
600 Travis, Suite 4200
Houston, Texas 77002

Trial and Appellate Counsel for Defendant – Appellee, Internet Services Corporation:

Rick Abraham
Abraham Law Offices
24 North High Street
Columbus, Ohio 43215

Trial and Appellate Counsel for Defendants – Appellees, Dexter Yager, Individually, doing business as Yager Enterprises and Internet Services Corp., Donald R. Wilson, Individually, doing business as WOW International, Inc., Randy Haugen, Individually, doing business as Freedom Associates, Inc., Freedom Tools, Inc., John Sims, Individually, doing business as Sims Enterprises, Yager Enterprises, Internet Services Corporation

Michael Y. McCormick
McCormick, Hancock & Newton
1900 West Loop South, Suite 700
Houston, Texas 77027-3206

s/ Kendall M. Gray

Kendall M. Gray

Attorney for Appellee Amway Corporation

STATEMENT REGARDING ORAL ARGUMENT

Appellants advance the novel theory that, after an arbitrator in commercial arbitration has made a timely disclosure of previous contacts with a party or counsel, the other parties can participate fully and voluntarily in the arbitration and wait until after an adverse final award to seek to disqualify the arbitrator for “evident partiality” based on the disclosed pre-arbitration contacts. Oral argument may be helpful in exploring the ways in which Appellants’ approach would compromise the availability of expert commercial arbitrators and the finality of commercial arbitration awards.

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REFERENCES TO THE PARTIES

Abbreviations

Plaintiffs-Appellantsthe “Morrison group” or “the Morrison distributor group”¹

Appellantsthe “Hamilton group” or “the Hamilton distributor group”²

Plaintiffs-Appellants
and Appellants (collectively)Distributor Claimants

Defendants-Appellees “Amway”

REFERENCES TO THE RECORD

References to the Record Excerpts
will be in the form of ([document#]R.E.[page#])

References to the 11 volume Record
on Appeal will be in the form of ([volume #]R.[page#])

References to sealed documents
contained within the Record on Appeal
will be in the form of ([document#]S.D.[page#])

References to sealed document exhibits
contained within the Record on Appeal
will be in the form of ([document#]S.D.Exh.
[exhibit#]at[page#])

¹ The Morrison group consists of Joe Morrison, Dawn Morrison, Randy Council, Janet Council, Dan Higgins, Helen Higgins, Ron Green, Karen Green, Victor Brook, Cathy Brook, Richmond Eagle Corporation, Dave Roberts, Rose Roberts, Tony Cutaia, Mary Cutaia, Warren Bird, Donna Bird, Kye Yeaman, Wade McKay, Debbie McKay, and Robert Price.

² The Hamilton group consists of Herbert Hamilton, Marilyn Hamilton, Donald May, Celeste May, Michael Cutaia, Karen Cutaia, Randall Laine, Diana Laine, Frank Mazzola, Karen Mazzola, Larry Rogers, Suzanne Rogers, Robert Schmanski, and Dana Schmanski. None of these distributors was an original party to the *Morrison* case below.

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³ All references to United States Code herein are to the United States Code Annotated published by West Publishing Co.

MISCELLANEOUS

BLACK'S LAW DICTIONARY 342 (8th ed. 2004)32

NASD Arbitration Rules and Procedures, *available at*
[http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE
&nodeId=813&ssSourceNodeId=544](http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=813&ssSourceNodeId=544) (last viewed July 7, 2006)35

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I. STATEMENT OF ISSUES PRESENTED

- ISSUE 1: Did the District Court correctly find that the parties and their claims were subject to the Amway Arbitration Agreement?
- ISSUE 2: Did the District Court have jurisdiction to enforce (or to vacate) the arbitration award?
- ISSUE 3: Did the District Court correctly reject Appellants' attempt, after losing the arbitration on the merits, to disqualify the arbitrator for "evident partiality?"

II. INTRODUCTION AND SUMMARY

This case marks the end of a cynical, eight-year campaign by several experienced and successful Amway distributors in Houston to evade the arbitration agreement in their distributorship contracts. In the mid-1990s these distributors had business disputes with other Amway distributors and Amway Corporation. Although their distributorship contracts required them to resolve such disputes in arbitration, the distributors filed a series of lawsuits in 1998. Both the U.S. District Court and the Texas courts ruled that the arbitration agreement applies.

After losing all their court challenges, the distributors finally demanded arbitration in 2001. The experienced arbitrator, whom they helped select, disclosed her training by Amway and the Amway Distributors Association, as required by the arbitration rules. No one objected. Instead, the parties spent another 2½ years in arbitration, including a three-week hearing.

Having lost their claims, the Distributors then complained about what they claimed were reasonable suspicions that the arbitrator had concealed ongoing relationships with Amway. The District Court allowed further discovery, but the distributors failed to come up with any evidence of undisclosed contact or improper activity by the arbitrator. Nevertheless, this appeal is distributors' effort to overrule the District Court. They are still trying to get out of their arbitration agreements.

III. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal seeking to avoid an award granted in arbitration.

B. Course of Proceedings and Disposition Below

Plaintiff-Appellants, (collectively the “Morrison group”) filed a state court complaint in January 1998, pleading federal statutory causes of action and naming as defendants Amway Corporation and a group of Amway distributors (collectively “Amway”). (1R.86.) Amway immediately removed the case to the U.S. District Court for the Southern District of Texas and moved for a stay pending arbitration. (1R.88-92.) Judge Harmon ruled that (a) all Amway distributors before the court were parties to the Amway Arbitration Agreement; (b) the Amway Arbitration Agreement encompassed all alleged claims; and (c) the Amway Arbitration Agreement (including the arbitrator selection and training requirement) was neither procedurally nor substantively unconscionable. (5R.1190-1200 *published at Morrison v. Amway Corp.*, 49 F. Supp. 2d 529 (S.D. Tex. 1998).)

Appellants’ brief is strangely silent about their parallel unsuccessful effort to invalidate the Amway Arbitration Agreement in Texas state courts. In 1998, the Morrison group joined another group of independent Amway distributors, (the “Hamilton group”) and attempted to relitigate these same issues in state court. (*See generally* 4R.1041-43.) The allegations were substantially the same, minus

the federal statutory claims.⁴ (*Id.*) Judge Mizell ordered all the members of the Hamilton group to arbitration and none appealed the final judgment.⁵ (*See* 5R.E.¶¶6,8; 11R.5:13-22; 97S.D.Exh.1,2 (*Pls.’ claims subsequently dismissed for want of prosecution* Oct. 23, 2003).) Appellants unsuccessfully challenged Judge Mizell’s rulings via mandamus in the Texas Court of Appeals and the Supreme Court of Texas. (97S.D.Exh.2,3.)

Finally, after three years and losses at every level of the state appellate system, the Morrison group and the Hamilton group demanded arbitration in accordance with the Amway Arbitration Agreement. (97S.D.Exh.4.) JAMS commenced arbitration in the summer of 2001. (97S.D.Exh.5.) Appellants’ counsel participated in selecting the arbitrator, Anne Gifford, who promptly notified all parties in writing that she had been trained three years earlier by Amway and the Appellants’ trade association, the ADA, in accordance with the arbitration rules. (97S.D.Exh.6at1,2; 97S.D.Exh.7at3.) Arbitrator Gifford invited all counsel to question her about her previous contacts with Amway and the ADA, and JAMS provided all parties with an opportunity to object to her appointment.

⁴ All of the Appellees in this case were defendants in the state court case with the apparent exception of Randy Haugen, individually, and doing business as Freedom Associates, Inc., and Freedom Tools, Inc.

⁵ Judge Mizell stayed pending arbitration the Hamilton group’s claims, and abated the state court claims of the Morrison group that were already *sub judice* in the federal court. Thus Judge Mizell made findings of fact and conclusions of law with regard to each distributor in the Hamilton group, while abstaining from duplication of prior federal court rulings with regard to the Morrison group.

(See 97S.D.Exh.8at1,2.) Claimants' counsel made no effort to disqualify Arbitrator Gifford and instead proceeded with arbitration before her for 2½ more years. The outcome was a split decision in which the arbitrator dismissed all claims by Appellants and all counterclaims by Appellees, and awarded fees and costs to the prevailing party on each claim. (89S.D.Exh.Aat11.) The offsetting fee and cost awards resulted in a net money award in favor of Appellees.

The Morrison group (the original plaintiffs) and the Hamilton group (invoking federal court jurisdiction for the first time) asked the District Court to vacate the award. They did not claim that Arbitrator Gifford engaged in any misconduct in the arbitration; instead, they asserted that discovery would reveal previously undisclosed, ongoing relationships between Arbitrator Gifford and Amway. (98S.D.3; 11R.9:22-23,18:23-25.) Amway requested confirmation of the award and entry of judgment.

The District Court allowed discovery on the arbitrator's newly-alleged "evident partiality." (8R.E.1.) Discovery provided details of the previously-disclosed arbitrator training, but no evidence to support Distributor Claimants' assertion that Arbitrator Gifford had undisclosed contacts or improper financial interests. The District Court therefore denied Appellants' motion to vacate the arbitration award and granted Appellees' motion to confirm and enter judgment. (5R.E.14.)

IV. STATEMENT OF FACTS

A. The Parties in this Appeal are Involved in Marketing and Selling Amway Products

Amway has manufactured and sold consumer products since 1959 through a multi-level system of independently contracting distributors. (2R.Doc.26at1; 3R.737-38.) Every party in this appeal, other than Amway itself, was an independent Amway distributor or a company owned and operated by Amway distributors. All of the underlying disputes involve claims and counterclaims among Amway distributors and between Amway distributors and Amway Corporation. All of the claims and counterclaims involve the Amway distributorship contract, the Amway rules of conduct, and the parties' independent Amway businesses. (99S.D.Exh.A,at4,8) (listing claims and counterclaims.)

Amway distributors are independent contractors authorized to resell Amway products and to recruit and train others to do the same. Distributors can earn income in the form of sales commissions or "bonuses" based on product sales generated by their distributor group. As independent contractors, Amway's distributors control the manner and the method in which they sell Amway products. For instance, distributors, not Amway, decide how many Amway products (if any) they will sell, how much time they will dedicate to selling Amway products, and within which geographic areas they will sell Amway products. (See 2R.Doc.26Exh.A) (sample of Amway distributorship contract.)

B. The Parties' Relationship is Governed by the Amway Distributorship Contract

Every Amway distributor must enter into a standard distributorship agreement with Amway. (2R.Doc.26Exh.A; 3R.736.) Distributorship agreements confer a right to distribute Amway products, and the right to receive sales commissions or "bonuses" on any products sold, for a period of one year. In return, the distributor pays a small annual fee and agrees to abide by Amway's currently effective rules, as amended and published from time to time in official Amway literature. (3R.736; 2R.Doc.26Exh.D.)

Obviously to continue the relationship beyond the initial terms, one must renew the contract annually. Every distributorship must be renewed "no later than December 31" for the following calendar year. (2R.381.) One can either pay the annual fee and submit a renewal form each year known as the "Notice of Intent to Continue," or can execute an automatic renewal form authorizing Amway to debit the applicant's credit card and automatically renew the distributorship in each successive year until otherwise instructed. (2R.Doc.26at¶6; 3R.736¶3.)

There is no dispute that every Appellant had an Amway distributor contract in 1997 and renewed that contract for 1998 and again in successive years. (Appellants' Br. at 30, 32.) Every distributor in the Morrison group signed a standard distributorship agreement with Amway agreeing to be bound by Amway's rules, as those rules were amended and published from time to time.

(2R.Doc.26at¶7; 2R.411-438.) Each signed and submitted an automatic renewal agreement authorizing Amway to automatically renew their distributorships and charge the renewal fee to their credit cards. (2R.Doc.26at¶7.) Four members of the Morrison group additionally submitted a duplicative 1998 renewal form. (2R.381,382.) The Texas courts ordered all the members of the Hamilton group to arbitration and none appealed the final judgment. Any defense to arbitrability, including the existence and scope of their agreements to arbitrate, were (and were required to have been) raised in that proceeding. (See 5R.E.¶¶6,8; 11R.5:13-22; 97S.D.Exh.2,3.)

C. All Amway Distributorship Contracts Contained an Arbitration Provision

Practically speaking, Amway must be able to simultaneously modify its standard distributorship agreements with hundreds of thousands of distributors. So, every Amway distributor agrees to abide by Amway's Rules of Conduct as they are amended from time to time. (2R.Doc.26at¶6, 2R.Doc.26ExhD.) Amendments are normally made after consultation with the ADA, the trade association representing Amway's distributors. (3R.736.) The rules changes are then published in Amway literature such as the monthly magazine *Amagram* or the bi-weekly newsletter sent to distributors at the "Direct Distributor" level and above (which included all Appellants), *Newsgram*. (3R.736.)

In the summer of 1997, following extensive consultation with the ADA, Amway notified its distributors that it was instituting a binding arbitration program that would apply to all distributors who chose to renew their distributorships for 1998. (3R.734; 2R.Doc.26at¶4; 2R.Doc.26Exh.B.) Notification was published in *Amagram* and *Newsgram*. (2R.Doc.26Exh.B; 2R.Doc.26at¶4.) The Notice of Intent to Continue included extensive information as well as a copy of the arbitration agreement (hereinafter the “Arbitration Agreement”). (*See, e.g.*, 2R.381.) Amway also sent acknowledgment forms which included a copy of the Arbitration Agreement to distributors who were signed up for autorenewal to ensure they were aware of the new rule. (2R.Doc.26at¶11; 3R.706; 2R.378-89.) There is no dispute that all Amway distributors received these notices in 1997. (2R.Doc.26at¶¶4,10,11.) There is likewise no dispute that the agreements were renewed after notice of the new terms was given. Indeed, five members of the Morrison group returned either the completed annual renewal form or the executed acknowledgement form to Amway even though neither form was required for them to renew their distributorships.⁶ (2R.378,381-382; 2R.Doc.26at¶¶10,11.)

⁶ As all of these distributors were on automatic renewal, return of the Notice of Intent to Continue form was not required in order to renew their distributorships. (2R.Doc.26¶7.) Similarly, the acknowledgment form made clear that the changes it described “*automatically become part of your agreement with Amway.*” (3R.706.) The fact that several Appellants executed duplicative copies of the Arbitration Agreement is further evidence that they made an informed decision to agree to arbitration.

D. The Morrison Group Tried to Sue Rather Than Submit Their Claims to Arbitration

On January 8, 1998, the Morrison distributor group filed a complaint in Texas state court alleging federal and state claims against Amway and defendant distributors. (1R.86.) Amway removed the case to federal court and filed a motion to stay the suit pending arbitration. (1R.88-92; 2R.Doc.24.) The Morrison distributor group opposed arbitration on grounds that (1) the Arbitration Agreement had not been properly incorporated in their contracts, (3R.699), (2) their claims were outside the scope of the Arbitration Agreement (3R.697), and (3) the Arbitration Agreement was unconscionable (3R.701). Neither side sought any discovery, but each side filed several memoranda extensively supported by affidavits and evidentiary exhibits. (2R.Doc.24,25,26; 3R.695-702; 3R.706-726; 3R.727-737; 3R.741-805; 4R.806-832; 4R.1091-1100.)

The District Court granted Amway's motion and stayed the Morrison group's claims pending arbitration. (5R.1190-1200.) The order is supported by a published opinion containing detailed findings of fact and conclusions of law. (5R.1190 *published at* 49 F. Supp. 2d 529.) Without putting forth any new arguments or evidence, the Morrison group moved for a rehearing of Judge Harmon's order, and requested interlocutory appeal to this Court. (5R.1201-1245.) The court denied the Morrison group's motion. (5R.1340-1342.)

E. The Hamilton Group, Joined by the Morrison Group, Tried the Same Tactic in a State Court Action

While Amway's motion to stay pending arbitration was pending in the *Morrison* case, a different group of Amway distributors filed a state court action against Amway and the distributor defendants.⁷ These claims were substantially the same as the claims in *Morrison*, minus the federal statutory causes of action. (99S.D.1-2.) On July 1, 1998, the Morrison group joined the state case and asserted claims against Amway and the distributor defendants. (4R.1041.) The Hamilton group, all Amway distributors represented by the same counsel as the Morrison group, intervened and joined in those claims as well.

Amway moved for a stay in the state court pending arbitration on the same grounds asserted in its pending motion in *Morrison*, and was opposed on substantially the same grounds as had already been asserted in federal court. About a month after Judge Harmon issued the federal court stay pending arbitration, the state court entered a stay pending arbitration of the Hamilton group's claims. (97S.D.Exh.1 (*Pls.' claims subsequently dismissed for want of prosecution* Oct. 23, 2003).) Judge Mizell abated the Morrison group's state court claims in recognition that they were already *sub judice* in federal court. (97S.D.Exh.1at2.)

⁷ *Griffith, et al. v. Amway Corp.*, Case No. 98-17491 in the 129th District Court, Harris County Texas.

Both the Morrison group and the Hamilton group challenged Judge Mizell's stay order by filing a mandamus petition with the Court of Appeals for the First District of Texas. (97S.D.Exh.2.) The petition was denied. (97S.D.Exh.2at2.) Subsequently they sought mandamus relief from the Supreme Court of Texas. That petition also was denied. (97S.D.Exh.3.) The Morrison and Hamilton groups thereafter abandoned their state court claims. The case was dismissed for want of prosecution nearly three years ago and no one sought to reopen it or to pursue any further appeal from the state court rulings. (97S.D.Exh.1at2 (*Pls.' claims subsequently dismissed for want of prosecution* Oct. 23, 2003).)

F. The Distributor Claimants Finally Demanded Arbitration and the Arbitrator They Chose Disclosed the Matters About Which They Complain

The Morrison group and Hamilton group (collectively the "Distributor Claimants") thereafter demanded arbitration under the Amway/ADA Arbitration Rules. (97S.D.Exh.4.) JAMS duly commenced arbitration with an effective date of May 24, 2001. (97S.D.Exh.5.) As required under the rules specified by the Distributor Claimants in their demand for arbitration, JAMS provided the parties with a roster of five neutrals who had "completed the training course for Arbitrators offered by [JAMS/Endispute], and conducted by Amway and the Amway Distributors Association." (2R.Doc.26Exh.C,at¶15; 97S.D.Exh.4at

unnumbered11.) The parties selected arbitrator Anne Gifford to adjudicate their dispute. (97S.D.Exh.6at1-2.)

On October 9, 2001, Arbitrator Gifford disclosed, in writing, that in 1998 “she attended a training conducted by Amway, the Amway Distributors Association, and JAMS” and had also done some mediation training of Amway employees. (97S.D.Exh.7at3.) On October 8, 2001, Arbitrator Gifford held a teleconference in which she invited all parties to ask her any questions about her participation in the 1998 training. (*See* 97S.D.Exh.8at1,2) (Arbitrator Gifford allowed a ‘friendly cross-examination’ concerning disclosures.) After the teleconference, Arbitrator Gifford and JAMS invited any party to raise questions or objections regarding Arbitrator Gifford’s ability to serve as arbitrator by Friday, October 12, 2001. (*See* 97S.D.Exh.8at1-2.) Plaintiffs did not object at that time, nor did they raise any question about Arbitrator Gifford’s impartiality or the training program she had disclosed until after the arbitration was over.

G. The Arbitrator Conducted a Thorough Arbitration and Denied Each Side’s Substantive Claims

Arbitrator Gifford authorized extensive discovery including document requests, interrogatories, admissions, and 40 depositions, allowed extensive pre-hearing proceedings (including a number of dispositive motions by both sides, substantially all of which were denied), and held a three-week evidentiary hearing in Houston, Texas in January 2004. (99S.D.Exh.A,at3,7-8.) Arbitrator Gifford

allowed extensive post-hearing briefs. (99S.D.Exh.A,at8-9.) After fully considering the parties' submissions, Arbitrator Gifford ruled in Distributor Claimants' favor on all of Amway's claims, and in Amway's favor on all of Distributor Claimants' claims. (99S.D.Exh.A,at10-11.) Pursuant to the Amway/ADA Arbitration Rules, Arbitrator Gifford awarded fees and costs to each prevailing party. (99S.D.Exh.A,at11. See 5R.E.12¶48.) Amway and the other defendants were awarded \$7 million in fees offset by an award to Distributor Claimants of \$1 million in fees. (99S.D.Exh.A,at11; 7R.1509-1510.)

H. Having Lost, the Distributor Claimants Tried and Failed to Disparage the Arbitrator

Distributor Claimants moved to vacate the arbitration award in the District Court. (89S.D.) Initially they claimed that they had just learned "that arbitrator Anne Gifford had actually been 'trained' in the handling of Amway arbitrations" by some of the defendants, and that Ms. Gifford's supposed failure to disclose the training disqualified her based upon "evident partiality or corruption." (98S.D.3.) Later, during a hearing before Judge Harmon on May 20, 2005, Distributor Claimants admitted that "obviously, we knew that [Arbitrator Gifford] was trained. It's in the documents, it's in the rules." (11R.15:15-16.) They claimed instead that they had a "treasure map" that would lead to a "treasure trove of information" concerning Arbitrator Gifford's partiality if only discovery were granted. (11R.9:22-23,18:23-25.) They predicted, for example, that discovery would

produce evidence that Arbitrator Gifford had a “financial interest” in the outcome of the proceedings (11R.12:18-13:3), and that Arbitrator Gifford had an undisclosed “participation in another arbitration involving” counsel for the defendants. (11R.15:7-10.)

Based upon these representations, the District Court granted the Distributor Claimants discovery so they could follow their “treasure map.” (8R.E.1.) The District Court ordered the parties to file a joint status report at the conclusion of discovery and indicated that it would, at that time, rule on whether to confirm and enter judgment. (8R.E.2.)

The insinuation on page 29 of Appellants’ Brief that Amway failed to cooperate in a joint status report is disingenuous. Instead of preparing the joint status report as directed by the court, Distributor Claimants unilaterally filed a fourth memorandum in support of their motion to vacate, arguing that information learned in discovery supported vacatur. (132S.D.)⁸ Based on that memorandum as well as five others filed by Distributor Claimants (89S.D., 101S.D., 114S.D.,

⁸ Distributor Claimants filed their unauthorized memorandum, confusingly captioned “Plaintiffs’ Status Report In Support of Motion to Vacate Arbitration Award,” without providing Amway any opportunity to contribute to a joint filing. Rather than move to strike the unauthorized pleading, Amway’s counsel agreed that it “should be treated as a further memorandum in support of their pending motion to vacate (and in opposition to Defendants’ cross-motion to confirm)” on the condition that Amway should have the right to file a response. (6R.1491.) Amway never needed to exercise that right because the District Court realized from the face of Distributor Claimants’ filing that there was no evidence whatever of undisclosed relationships between the arbitrator and any party or counsel. Distributor Claimants simply failed to raise any issues of fact, or issues of law to warrant vacatur. (6R.1494-1508.)

115S.D., 123S.D., 132S.D.) comprising 80 pages of argument, plus the May 20, 2005 hearing, as well as two memoranda filed by Amway (98S.D., 99S.D.), the District Court denied Distributor Claimants' motion to vacate, and granted Amway's motion to confirm the arbitration award and enter judgment thereon on September 15, 2005. On September 21, 2005, Distributor Claimants filed a motion for rehearing of the District Court's decision to confirm the arbitration award. (144S.D.) On October 4, 2005, the District Court denied Distributor Claimants' motion after "carefully consider[ing]" all of Distributor Claimants' arguments. (7R.1609.)

The District Court found (a) that Distributor Claimants knew, before commencing arbitration, that the arbitrator "would be trained by Amway and the ADA" (5R.E.¶3); (b) that in addition to knowing that Arbitrator Gifford was trained by Amway, and the ADA, "[Distributor Claimants] knew that Jody Victor played a leading role on the [ADA]" and that "Jody Victor played a significant role in creating the Amway/ADA arbitration program and drafting the arbitration rules" (5R.E.¶14); (c) that Distributor Claimants had an opportunity to investigate, and inquire about, the details of the arbitrator's training (5R.E.¶12); and (d) that, despite ample opportunity, the Distributor Claimants chose not to object to the arbitrator's training. (5R.E.¶4.)

Based on precedent from this Court, as well as the First Circuit, and the Eighth Circuit, the District Court concluded that “a party which has been put ‘on notice’ of the circumstance they now allege are potentially disqualifying waives his objection if they do not object before an award is rendered.” (5R.E.¶32) (internal citation omitted.) The District Court determined that “[t]he disclosures in this case were clearer and far simpler than those” in other cases and that Distributor Claimants knew about the very circumstance they allege to be potentially disqualifying—that the principal defendant had trained the arbitrator. (6R.1496.)

The District Court distinguished cases such as *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, in which an arbitrator failed to disclose any information about an objected activity. (5R.E.¶¶28-32 (citing 337 F. Supp. 2d 862 (N.D. Tex. 2004)).) In light of the “repeated and timely disclosures that the arbitrator had attended a training program conducted in part by . . . the principal defendant” the District Court determined that this “is not a ‘nondisclosure’ case; it is, at most, an ‘adequacy of disclosure’ case” and that Arbitrator Gifford’s disclosures had been more than adequate. (5R.E.¶30.)

V. STANDARD OF REVIEW

This Court reviews “[a] district court’s decision confirming an arbitration award” under “the same standard as any other district court decision.” *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d

274, 287 (5th Cir. 2004), *cert. denied*, 543 U.S. 917 (2004). The District Court's findings of fact are accepted unless they are clearly erroneous, and the District Court's conclusions of law are reviewed *de novo*. *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 757 (5th Cir. 1999).

VI. SUMMARY OF THE ARGUMENT

Every Appellant was an independent Amway distributor, bound by the annually renewable Amway distributor contract. In 1997 Amway amended that contract for 1998 and subsequent years to require arbitration of disputes involving Amway distributors, the Amway Rules, or the Amway business. Amway made the amendment, after consulting with the Amway Distributors Association, in accordance with the modification terms of the agreement. Every Appellant knew of this change. Several of them signed and submitted documents agreeing to arbitrate or acknowledging that arbitration would apply to them. Others asked Amway questions about arbitration. All of them renewed their Amway contracts knowing arbitration had become a term of their contract.

The District Court correctly rejected Appellants' affirmative defense that the Amway Arbitration Agreement was unconscionable. There was no procedural unconscionability. Appellants were all experienced business people. Unequal bargaining positions do not, as a matter of law, create procedural unconscionability. No one deceived Appellants about the arbitration agreement;

they all knew it would become part of their contract if they renewed their distributorships for 1998. There was nothing substantively unconscionable about the fact that Amway, working with the Amway Distributors Association (an independent dealer trade association in which Appellants were all voting members), required arbitrators to attend a training program about the Amway business—particularly in view of the experience and independence of the arbitrators selected, half of whom were retired judges and none of whom was ever employed by Amway.

The Amway Arbitration Agreement covered all of Appellants' claims. The Amway Arbitration Agreement is a "broad form" agreement covering any dispute concerning Amway, Amway distributors or the Amway rules. All the parties are involved with the Amway business, and all the claims and counterclaims are business disputes relating to the Amway business. Moreover, the "Hamilton group" is bound by the rulings of the Texas courts (up to and including the Supreme Court of Texas) that they and their claims were covered by the Amway Arbitration Agreement. They cannot appeal those decisions to this Court.

Appellants did not challenge Arbitrator Gifford's impartiality until she ruled against them. They have never claimed that she engaged in any misconduct in her handling of the arbitration. Arbitrator Gifford made a full and timely disclosure that she had attended a training program offered jointly by Amway and the Amway

Distributors Association and also that she had trained some Amway employees. Appellants did not object to the previous contacts when Arbitrator Gifford disclosed them; therefore, they waived any right to use the disclosures later as a basis to challenge Arbitrator Gifford's impartiality when she ruled against them. Despite far-ranging discovery, Appellants have failed to uncover any evidence that Arbitrator Gifford had any improper or undisclosed contacts or relationships with any party or counsel. This Court should affirm the District Court's ruling enforcing the arbitrator's award.

Appellants' attack on the District Court's jurisdiction ignores the fact that they themselves invoked that jurisdiction when they moved to vacate the arbitration award, and that the arbitration agreement expressly provides that final awards may be enforced in court. This Court should affirm the District Court's rulings in all respects.

VII. ARGUMENT

A. The Amway Arbitration Agreement Applies to the Parties and Their Claims

Distributor Claimants appeal the District Court's determination that they are required under their distributor contracts to arbitrate any and all disputes with Amway. (Appellants' Br. at 58-73.) This Court has jurisdiction of that issue as to the Morrison group, because the District Court's October 13, 1998, stay pending arbitration decided this issue as to the Morrison group. The Hamilton group did

not become parties to this case until after the arbitration was complete. Texas state courts determined that the Amway Arbitration Agreement covered the Hamilton group and their claims. *See supra* § IV.E. The time for the Hamilton group to appeal in Texas state court has expired and the validity, enforceability, and applicability of the Arbitration Agreement as to the Hamilton group is *res judicata*. *See infra* § VII.A.4.

1. *The Amway Arbitration Agreement is an Enforceable Contract*

In their third issue, Appellants assert that the Arbitration Agreement was not an enforceable contract. (Appellants’ Br. at 62-73.) Their arguments boil down to the following: (a) the Morrison group did not assent to the Arbitration Agreement; and (b) there was no consideration for the Arbitration Agreement. Neither argument holds water, legally or factually.

a. *The Amway Arbitration Agreement Binds the Morrison Group*

Appellants complain that Amway “unilaterally” added the arbitration provision to their distributorship contracts without consulting or properly informing them. (Appellants’ Br. at 63-69) “Unilaterally,” in this context, seems to mean without adequate notice or a meeting of the minds.⁹ The determination as to whether a party agrees to arbitrate a dispute is made “on the basis of ordinary

⁹ The related question of whether the Arbitration Agreement was procedurally unconscionable is addressed *infra* at § VII.A.2.a.

state-law principles that govern the formation of contracts.” *Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (citations omitted).¹⁰

There is no dispute that Distributor Claimants entered into an annually renewable contract with Amway under which they agreed “to comply with the Amway Sales and Marketing Plan and to observe and abide by the Code of Ethics and Rules of Conduct of Amway Distributors, and all other rules, requirements and regulations *as they are set forth from time to time in official Amway literature.*” *Morrison*, 49 F. Supp. 2d at 533 (emphasis in original) (citations omitted). (See also 2R.Doc.26at¶6, 2R.Doc.26Exh.D.) All Distributor Claimants unquestionably knew Amway was adding an arbitration agreement to its rules as part of the 1998 renewal.

- In August 1997, Amway published a notice in *Newsgram*, a publication sent to all Direct Distributors, that the annual distributorship renewal agreement “incorporates an agreement to arbitrate all distributor disputes relating to the Amway business. . . .” (2R.Doc.26Exh.B,at unnumbered5.)

¹⁰ This Court has ruled that a “party opposing arbitration bears the burden of proving that no valid arbitration agreement exists as to the dispute” under the Texas General Arbitration Act. *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307, 310-11 (5th Cir. 1999) (noting that Texas and Federal policies favoring arbitration are “similar”). The District Courts appear divided as to which party bears the burden of proof under the Federal Arbitration Act. Compare *Morphis v. Fed. Home Loan Mortgage Corp.*, No. 302 CV0210P, 2002 U.S. Dist. LEXIS 12072, at *4 (N.D. Tex. July 3, 2002)(“party opposing arbitration bears the burden of proving that no valid agreement requiring arbitration exists”) with *Mariner Health Care, Inc. v. Estate of Rhodes*, No. 5:04cv217, 2005 U.S. Dist. LEXIS 42650, at *8 (S.D. Miss. Sept. 27, 2005) (party seeking to compel arbitration has the burden to establish that a valid agreement exists). It doesn’t matter in this case because the great preponderance of the evidence shows that Appellants are parties to the Amway Arbitration Agreement.

- In September 1997, Amway published a notice to all of its distributors in the September issue of *Amagram* stating that the “Intent to Continue (renewal) form” and the distributorship application now “incorporate[] an agreement to arbitrate all distributor disputes relating to the Amway business. . . .” (2R.Doc.26Exh.B,at unnumbered2.)
- In September 1997, Amway sent each distributor on autorenewal a letter stating that “every year you and thousands of other distributors enjoy the convenience of having your Amway business renewed automatically . . . because of some recent changes to the Intent to Continue (renewal) form we need you to review the changes. . . . While these changes automatically become part of your agreement with Amway, we wanted to make sure you are aware of them.” (3R.706.) One of the changes described in the letter was “an agreement to arbitrate all distributor disputes relating to the Amway business. . . .” (3R.706.)

The September 1997 letter also included the full text of the Arbitration Agreement:

I agree to submit any remaining claim or dispute arising out of or relating to my Amway distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct (including any claim against another Amway distributor, or any such distributor’s officers, directors, agents or employees, or against Amway Corporation, or any of its officers, directors, agents or employees) to binding arbitration in accordance with the Amway Arbitration Rules, which are set forth in the Amway Business Compendium. The arbitration award shall be final and binding and judgment thereon may be entered by any court of competent jurisdiction.

(2R.Doc.26at¶11; 2R.379.)

Several members of the Morrison group expressly assented to arbitration.

“Plaintiffs concede that about one-third of them signed the arbitration agreement.”

Morrison, 49 F. Supp. 2d at 532-33.¹¹ The District Court properly relied on such unambiguous manifestations of acceptance, particularly because the Morrison group was experienced and familiar with Amway’s long-standing practice of conditioning distributorship contracts upon a distributor’s agreement “to comply with the Amway Sales and Marketing Plan and to observe and abide by the Code of Ethics and Rules of Conduct of Amway Distributors, and all other rules, requirements and regulations *as they are set forth from time to time in official Amway literature.*” *Morrison*, 49 F. Supp. 2d at 533 (emphasis added by District Court). (See also 2R.Doc.26at¶6, 2R.Doc.26Exh.D.)¹²

¹¹ Among the Appellants, Dan Higgins, Helen Higgins, Robert McKay, and Deborah McKay filled out and returned to Amway Intent to Continue forms containing the full text of the Arbitration Agreement (2R.381-82), and Kye Yeaman returned a signed “Acknowledgment of Distributor Changes” form which included a copy of the Amway Arbitration Agreement. Appellants argue that Robert and Deborah McKay “did not want to agree to arbitration” and therefore “returned their form unsigned.” (Appellants’ Br. at 34.) This is wishful speculation. The record shows that Mr. and Mrs. McKay filled out the renewal form, indicated the amount of their renewal fee and that they were paying in cash, and returned the form to Amway. (2R.381.) The McKays manifested no disagreement with the Arbitration Agreement; like every other Appellant they renewed on the terms offered by Amway. (2R.378.) The proportion of Appellants that signed the Arbitration Agreement has changed due to settlements between 1998 and the present. As an example, Kye Yeaman’s ex-husband Tom Yeaman, who also signed the Acknowledgement form, has settled.

¹² Appellants cite *Central Education Agency v. George West Independent. School Dist.*, 783 S.W.2d 200 (Tex. 1989), for the proposition that Amway cannot modify its Rules “from time to time” to require arbitration of contract disputes. That case held that a school district could not impose a *retroactive* probationary employment period to terminate a teacher in violation of the state Term Contract Nonrenewal Act. *Id.* Appellants here are not teachers, the Term Contract Nonrenewal Act does not apply, and Amway did not terminate or refuse to renew their contracts.

Appellants' contention that Amway gave "no warning that continuing one's Amway distributorship would constitute acceptance of the arbitration clause" is pure nonsense. (Appellants' Br. at 70, 72.) Each member of the Morrison group took advantage of Amway's "auto-renewal" option and none of them disputes receiving the detailed notice about the arbitration program that Amway sent all distributors on auto-renewal during the summer of 1997: "***While these changes automatically become part of your agreement with Amway, we wanted to make sure you are aware of them.***" *Morrison*, 49 F. Supp. 2d at 533 (emphasis added by District Court); (3R.706). The Arbitration Agreement was added to the Amway distributor contract with plenty of notice, using procedures familiar to all the parties. Every Appellant accepted arbitration by renewing his or her distributorship in the fall of 1997.

b. Ample Consideration Supported the Amway Arbitration Agreement

Appellants claim the Amway Arbitration Agreement fails for lack of consideration because Amway reserved the right to "unilaterally change or even revoke the arbitration clause and rules."¹³ (Appellants' Br. at 64.) The Supreme Court of Texas recently enforced an arbitration agreement where one party had the

¹³ Amway did not in fact retain the right unilaterally to modify the rules that govern arbitration. The Amway/ADA Arbitration Rules specifically state that the arbitration rules "shall be amended only by mutual agreement between Amway Corporation and the Amway Distributors Association Board" and that "[t]he Rules in effect on the date of the commencement of an Arbitration will apply to that Arbitration." (2R.456.)

right to unilaterally amend the agreement. *In re Advance PCS Health*, 172 S.W.3d 603, 607 (Tex. 2005). The contract in that case has much in common with Amway distributorship agreements:

1.3 Amendments. From time to time Advance PCS may amend this Agreement . . . by giving notice to Provider of the terms of the amendment and specifying the date the amendment becomes effective, which shall not be less than thirty (30) days after the notice.

Id. The state Supreme Court distinguished the cases cited here by Distributor Claimants, stating that “when an arbitration clause is part of an underlying contract, the rest of the parties’ agreement provides the consideration.” *Id.* (distinguishing *J.M. Davidson v. Webster*, 128 S.W.3d 223, 228 (Tex. 2003)).¹⁴ *See also Bank One N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001) (arbitration agreement not unconscionable even though one party retained the right to “change or amend the terms of the Agreement”), *aff’d*, 34 Fed. Appx. 964 (5th Cir. 2002).

¹⁴ Appellants rely on two cases for the proposition that “Texas courts have repeatedly held arbitration agreements in which one party reserves the right to unilaterally abolish or modify the arbitration clause are not valid”: *J.M. Davidson v. Webster*, 128 S.W.3d 223 (Tex. 2003), and *In re C&H News Co.*, 133 S.W.3d 642 (Tex. App. 2003). (Appellants’ Br. at 61, 64, 65, 72.) Neither case is on point. Both involved reciprocal arbitration agreements in which one party retained the right to terminate the agreement unilaterally. Both courts determined that because a reciprocal agreement is illusory when a party can unilaterally revoke it, such an agreement is not a mutual promise and, therefore, cannot be the consideration for an agreement to arbitrate. *J.M. Davidson v. Webster*, 128 S.W.3d at 243 (illusory reciprocal agreement does not constitute consideration); *In re C&H News Co.*, 133 S.W.3d at 647 (illusory promise to arbitrate does not satisfy consideration requirement).

Appellants assert that the right to continue their distributorships does not constitute “fresh consideration” because “Distributors were told they could continue their distributorships without accepting the arbitration clause.” (Appellants’ Br. at 69-73.)¹⁵ As “evidence” they cite the unauthenticated transcript of an unauthorized recording of a telephone conversation between Amway employee Rob Davidson and one member of the Morrison group, Ronald Green (“Green”).¹⁶ (Appellants’ Br. at 34, 68 (citing 3R.750-790, 798-802).) The transcript suffers from fatal evidentiary defects including lack of authenticity, lack of best evidence, and inadmissible hearsay—all of which Amway raised with the District Court below. (*See generally* 4R.820-833.)¹⁷

This “evidence” does not stand up. Texas Courts have held that “[a]bsent a finding of ambiguity, a court must interpret the meaning and intent of a contract

¹⁵ Paradoxically, the heart of the Morrison group’s unconscionability argument in the District Court was their claim that they “had no alternatives” to agreeing to the arbitration provision if they wanted to continue to do business with Amway, and that they “had absolutely zero bargaining power” over the terms of their distributorship agreements. (*See, e.g.*, 5R.1232-33.)

¹⁶ Appellants also claim that compliance with the Rules, including arbitration, was optional because “the backside of the distributorship-agreement form states, violation of Rules of Conduct may or may not result in revocation of distributorship authorization.” (Appellants’ Br. at 71.) This argument is absurd. The acknowledgement, which states: “I understand that my distributorship may be terminated if I fail to comply with the above conditions,” does not excuse compliance with the Rules; it outlines remedies in case of breach. (2R.422)

¹⁷ It is not within this Court’s purview to “reweigh the evidence” and second-guess the low credibility assigned by the District Court to a piece of documentary evidence. *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1559 (5th Cir. 1985). *See also Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985)(appellate court should not substitute its own opinion as to evidentiary weight of physical or documentary evidence).

from the four corners of the document without the aid of extrinsic evidence” such as parol evidence. *Chapman v. Hootman*, 999 S.W.2d 118, 123 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Lidawi v. Progressive County Mut. Ins. Co.*, 112 S.W.3d 725, 731 (Tex. App.—Houston [14th Dist.] 2003, no pet.). The terms of the parties’ final written agreement are clear—Morrison Distributors each agreed to abide by the Rules “as they are set forth from time to time *in official Amway literature*.” *Morrison*, 49 F. Supp. 2d at 533 (emphasis added). Moreover, the transcript itself shows Davidson had neither actual nor apparent authority to modify the written contract.¹⁸ Further, on October 19, 1997, Joe Morrison received a letter from Amway’s Legal Division confirming that inquiries to Davidson about the contract were “more appropriate for response by the Amway Legal Division.”¹⁹ (4R818.) In response to Morrison’s request that Amway modify or drop the Arbitration Agreement from the 1998 Distributorship renewal, Amway’s Legal Division stated that Amway was “unable to accommodate your request.” (4R.818

¹⁸ According to the transcript, Davidson told Green that Amway’s legal department was the authoritative source as to Amway’s distributorship agreement. (3R.786.) Davidson made clear he was not a lawyer and not authorized even to interpret Amway distributor contracts, much less negotiate modifications of them.

¹⁹ The letter was addressed to Joe Morrison, whom Distributor Claimants state in their brief spoke “in a representative capacity for himself and other loyal long-term distributors” including the Morrison Distributors. (Appellants’ Br. at 73.) Amway has never agreed, nor is there any evidence, that Morrison represented anyone but himself.

responding to 3R.746-748.)²⁰ There is no evidence that Green or Morrison (much less any other Distributor Claimant) had any basis to believe that arbitration was not part of their distributorship contracts beginning in 1998.

2. The Appellants did not Establish Unconscionability

In their second issue, Appellants assert the Amway Arbitration Agreement was unconscionable. “The burden of proving unconscionability rests on the party seeking to invalidate the arbitration agreement.” *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 301 (5th Cir. 2004)(citations omitted); *Fleetwood Enters. v. Gaskamp*, 280 F.3d 1069, 1077 (5th Cir. 2002). To prevail, the party seeking to invalidate the arbitration agreement must prove “*both* substantive and procedural unconscionability” and show that the contract causes “oppression and unfair surprise” and not merely an “allocation of risks because of superior bargaining power.” *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1184 (5th Cir. 1988) (citing *Wade v. Austin*, 524 S.W.2d 79, 86 (Tex. Civ. App.—Texarkana 1975, no writ); TEX. BUS. & COM. CODE ANN. § 2.302 (Vernon 1994)). The grounds for a determination that a contract is either

²⁰ Appellants assert that they were required to renew their distributorships before they knew about the Arbitration Agreement. (Appellants’ Br. at 79-81.) This, too, is nonsense. Appellants contend that the deadline to automatically renew their distributorships was “October 3, 1997,” weeks after they received Amway’s notifications. (Appellants Br. at 34, 38, 79.) Moreover, Appellants could have canceled their automatic renewal agreements and waited until December 31, 1997, to renew their distributorships using Amway’s intent to continue form. (2R.381; 4R.813 (offering on November 14, 1997, to cancel the Morrison’s automatic renewal for 1998).)

substantively or procedurally unconscionable must be “sufficiently shocking or gross to compel [a] court to intercede.” *Ski River Dev. v. McCalla*, 167 S.W.3d 121, 136 (Tex. App.—Waco 2005, pet. denied) (arbitration agreement unconscionable where party seeking to impose arbitration offered money and Medicaid to inexperienced party so destitute they were reduced to heating their mobile home with a stove). *Cf. Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 822 (Tex. App.—San Antonio 1996, no writ) (per curiam) (employer’s adhesive arbitration agreement which “excludes other remedies, eliminates discovery, limits damages and the choice of arbitrators” was not unconscionable).

a. The Amway Arbitration Agreement Was Not Procedurally Unconscionable

In addressing the issue of procedural unconscionability, the District Court gave proper weight to the business setting:

unlike the classic unconscionability case, the Plaintiffs are not unsophisticated parties that were beguiled into entering a fundamentally outrageous contract that they now wish to avoid. To the contrary, the Plaintiffs are rather sophisticated business people who have for some time operated an Amway distributorship. The plaintiffs have presented no evidence that the arbitration provision was not only a result of Amway's alleged "overreaching or sharp practices" but also as a result of the Plaintiffs' own "ignorance or inexperience."

Morrison, 49 F. Supp. 2d at 534 (citations omitted). Appellants' arguments in support of their contention that the adoption of the Arbitration Agreement was procedurally unconscionable are essentially the same arguments considered and properly rejected by the District Court: that they were induced, either unwillingly or unknowingly, to accept arbitration. None of the allegations suggests "shocking or gross" practices indicative of unconscionability, and the factual record fully supports the District Court's findings. *Ski River*, 167 S.W.3d at 136.

The Morrison group states that they "lacked any bargaining ability as to the alleged arbitration agreement." (Appellants' Br. at 60.) This argument fails to meet their burden of showing "oppression or undue surprise" and not merely "superior bargaining power." *Arkwright*, 844 F.2d at 1184 (citing TEX. BUS. & COM. CODE ANN. § 2.302). A party "seeking to avoid [an] arbitration clause must prove more than that the contract was offered on a take it or leave it basis." *Serv. Corp. Int'l v. Lopez*, 162 S.W.3d 801, 809 (Tex. App.—Corpus Christi 2005, no pet. hist.). The Supreme Court of Texas has repeatedly emphasized that "unequal bargaining power does not establish grounds for defeating an agreement to arbitrate," *In re Advance PCS*, 172 S.W. 3d at 608, and that "adhesion contracts are not *per se* unconscionable or void." *In re Palm Harbor Homes, Inc.*, 2006 Tex. LEXIS 529, at *14 (June 9, 2006) (publication pending); *In re Oakwood Mobile*

Homes, Inc., 987 S.W.2d 571, 574 (Tex. 1999).²¹ The mere fact that all Amway distributors interested in doing business with Amway in 1998 were required to agree to a standard annual contract does not make that contract procedurally unconscionable.

Moreover, the conduct of the Morrison group belies the notion that they were coerced into accepting arbitration. Five of them voluntarily completed and returned forms containing the Arbitration Agreement. Messrs. Green and Morrison engaged in extended discussions with Amway. Amway returned their phone calls, answered their letters, made very clear that Amway would not agree to modify the standard contract for them, and also made clear that the choice whether to accept the standard agreement or withdraw from the business was up to them. This was the opposite of deception, trickery or coercion. Every Appellant except Green and Morrison renewed their distributorship without the slightest expression of reluctance. The mere fact that they have subsequently tried to avoid their Arbitration Agreement does not make it procedurally unconscionable.

Appellants nevertheless argue that they had “no viable alternative to renewing their distributorships.” (Appellants’ Br. at 61.) Unquestionably they

²¹ A “contract of adhesion” is typically characterized as a unilaterally developed non-negotiable consumer contract. BLACK’S LAW DICTIONARY 342 (8th ed. 2004). In this case, although the distributorship agreement was a standard contract, it was a *commercial* contract in which the arbitration provision was *developed jointly* by Amway and the Amway Distributor Association. (2R.Doc.26at¶3.)

wanted to renew their distributorships, because renew them they did. Nothing prevented them from allowing their annual Amway contracts to expire if they did not wish to accept the Amway Arbitration Agreement. *In re Halliburton Co.*, 80 S.W.3d 566, 571-72 (Tex. 2002) (arbitration agreement not procedurally unconscionable where employee could have rejected agreement by leaving employment); *Bank One N.A. v. Coates*, 125 F. Supp. 2d 819, 832 (S.D. Miss. 2001) (arbitration agreement not procedurally unconscionable where “plaintiffs could have simply declined to accept the arbitration by terminating their account before the effective date of the amendment”), *aff’d*, 34 Fed. Appx. 964 (5th Cir. 2002); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 892-93 (Ill. App. 2003) (arbitration agreement not unconscionable where plaintiff could have rejected agreement by terminating account privileges).

b. The Amway Arbitration Agreement Was Not Substantively Unconscionable

Appellants devote less than one page of their brief to the issue of substantive unconscionability. The argument seems to be that the Arbitration Agreement is “too one-sided to be fair and enforceable” because “Amway . . . handpicked the arbitrators, interviewed and trained them on substantive issues, and retained the power to change the scope of the arbitration agreement.” (Appellants’ Br. at 61)

All of the salient features of the Arbitration Agreement were before the District Court, including the requirement that arbitrators would be a select group of

JAMS dispute resolution professionals jointly trained about the Amway business by Amway and the ADA, the trade association that represented the Appellants. (See 2R.Doc.26Exh.C,at¶15.) The District Court also knew that the Arbitration Agreement afforded due process, more akin, in many respects, to that afforded by judicial trials than to many arbitrations. (2R.371.) For instance, the Arbitration Rules placed no limitation on either party's ability to conduct discovery, to subpoena witnesses and documents, to make evidentiary objections, or to be represented by counsel. (2R.371.) Nor did the Arbitration Agreement, or Arbitration Rules, limit either party's ability to recover remedies and relief "available to the parties had the matter been heard in court." (2R.Doc.26Exh.C,at¶48.)

The District Court properly rejected Appellants' claim that it was inherently unconscionable to create a roster of professional arbitrators who had "completed [a] training course for Arbitrators offered by the Administrator [JAMS], and conducted by Amway and the Amway Distributors Association." (2R.Doc.26Exh.C,at5¶15.) The purpose of this training was to ensure that potential arbitrators would have basic background information about the Amway business. (See 132S.D.Exh.L.at1.) Since most, if not all, of the disputes to be arbitrated under this program were either disputes between and among independent distributors or disputes between independent distributors and Amway Corporation,

representatives of the ADA, including Jody Victor, participated in the training, to ensure that distributors' perspectives were represented, that the training was balanced, and that the training was not biased toward the Corporation's point of view. (132S.D.Exh.K; 132S.D.Exh.Lat2; 132S.D.Exh.W at unnumbered 2.) Additionally, the training was supervised by JAMS personnel to ensure an even handed presentation. (2R.Doc.26Exh.Cat¶15; 132S.D.Exh.Lat3-5.)

Courts routinely uphold arbitration agreements specifying arbitrators with previous contact with one or more parties. "Expertise in an industry is accompanied by exposure, in ways large and small, to those engaged in it. . . ." *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 701 (2d Cir. 1978). "[P]eople who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (Posner, J.). Specialist panels are common and their awards are generally enforced. *See, e.g.*, NASD Arbitration Rules and Procedures (requiring that all arbitrators adjudicating disputes between members must successfully complete a NASD Panel Member training program).²²

²² Available at http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=813&ssSourceNodeId=544 (last viewed July 7, 2006). *Cf. LoDal, Inc. v. Home Ins. Co. of Ill.*, No. 95-2187, 1998 U.S. App. LEXIS 12841, at *20 (6th Cir. June 12, 1998)(affirming enforceability of arbitration agreement requiring arbitrator to be a present or former executive of an insurance company); *Garfield & Co. v. Wiest*, 432 F.2d 849, 854 (2d Cir. 1970) (confirming award in arbitration under NYSE arbitration rules requiring arbitrator to be selected from a panel

The results of the Amway/ADA/JAMS selection and training process speak for themselves. It is difficult to imagine a more balanced, diverse, independent and experienced group of dispute resolution professionals than those selected for the roster of Amway/ADA neutrals. (132S.D.Exh.F,J.) The District Court correctly held that it is not substantively unconscionable for professional arbitrators to receive (and disclose receiving) training conducted, in part, by a litigating party.

c. The *Nitro* Case *Dicta* Do Not Apply to This Case

Distributor Claimants rely on an unpublished order of the United States District Court for the Western District of Missouri stating, in *dicta*, that the Amway Arbitration Agreement would be unconscionable as applied to plaintiffs that were *not* Amway distributors. (Appellants Br. at 58) (unpublished decision available at 144S.D.Exh.A.) Affirming on other grounds, the Eighth Circuit mooted the unconscionability *dicta* emphasizing that the lower court's thoughts on unconscionability were not central to the holding. *Nitro Distrib., Inc. v. Alticor, Inc.*, No. 05-3686, 2006 U.S. App. LEXIS 17257, at *11 (8th Cir. July 11, 2006).²³

Furthermore, the question in the *Nitro* case is not before this Court for at least two

of fifteen members or allied members of the Exchange); *Humbert v. Zaner*, No. 90 Civ. 843, 1991 U.S. Dist. LEXIS 1491, at *18 (S.D.N.Y. Feb. 8, 1991) (arbitration panel made up of coin dealer association members not inherently biased); *Jot Corp. v. Graham Cent. Station, Inc.*, No. 75-2004, 1976 U.S. Dist. LEXIS 13368, at *8-9 (E.D. Pa. Sept. 3, 1976)(arbitration agreement requiring disputes arising from a music contract to be arbitrated by the International Executive Board of the Federation of Musicians was not inherently biased).

²³ Amway also explained the Missouri decision's irrelevance to this case before the District Court. (143S.D.7-13.)

decisive reasons. First, unlike the plaintiffs in *Nitro*, Distributor Claimants were voting members of the ADA, which participated in the arbitrator training to which they belatedly object. Second, the non-distributor plaintiffs in *Nitro* raised their objections at the beginning of the case, whereas here Distributor Claimants ignored the arbitrator's disclosures until after she ruled against them.

3. The Amway Arbitration Agreement Covers the Distributor Claimants' Claims

Appellants contend that the Arbitration Agreement did not cover all their claims. The District Court's holding that these claims were covered by the "broad" language contained within the Arbitration Agreement is amply supported by the plain language of the agreement and this Court's precedent. *Morrison*, 49 F. Supp. 2d at 535.

The ultimate "decision as to whether or not an issue is arbitrable is for the arbitrator to decide" and "courts have no business overruling an arbitrator because their interpretation of the contract is different from his." *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 355 (5th Cir. 2004)(citations omitted). The District Court correctly referred the Morrison group's claims to arbitration because the Morrison group failed to present evidence proving "with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Safer v. Nelson Fin. Group, Inc.*, 422 F.3d 289, 294 (5th Cir. 2005)(citations omitted); *In re Hornbeck Offshore*, 981 F.2d 752, 755 (5th Cir.

1993)(“heavy” presumption favors finding that scope of arbitration clause embraces dispute). Any “doubts concerning the scope of an arbitration agreement should be resolved in favor of arbitration.” *Safer*, 422 F.3d at 294.

Appellants agreed to arbitrate “any remaining claim or dispute arising out of or relating to [their] Amway distributorship[s], the Amway Sales and Marketing Plan, or the Amway Rules of Conduct.” (2R.Doc.26Exh.A.) This Court has characterized similar arbitration clauses that use the terms ‘any dispute,’ ‘arising out of’ and ‘relating to’ as “broad arbitration clauses capable of expansive reach.” *Pennzoil Exploration and Prod. Co. v. Int’l Inc.*, 139 F.3d 1061, 1067 (5th Cir. 1998)(involving arbitration clause that stated “any dispute . . . arising out of or in relation to or in connection with”); *In re Hornbeck Offshore*, 981 F.2d at 755 (holding that use of “any dispute” indicates broad arbitration clause); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985)(holding that “whenever the scope of an arbitration clause is in question, the court should construe the clause in favor of arbitration.”)

Appellants argue that the scope of the Arbitration Agreement does not extend to claims that involve business support materials because of a separate arbitration agreement, which they did not enter, that applied specifically to business and support materials—the Business Support Materials Arbitration Agreement (“BSMAA”). (Appellants’ Br. at 74-75) According to the Morrison

group, the existence of a second BSMAA arbitration agreement limits the scope of the Amway Arbitration Agreement. The District Court correctly and concisely rejected this position on the ground that the two arbitration provisions overlap and are not mutually exclusive. 49 F. Supp. 2d at 535, n.5 (citing *Hornbeck Offshore*, 981 F.2d at 755). (See 2R.Doc.26at¶3; 2R.Doc.26Exh.A.; 2R.Doc.26Exh.B,at unnumbered2,5,7.)²⁴

4. *The Hamilton Group is Barred from Re-Litigating the Validity or Applicability of the Arbitration Agreement*

In response to a motion for stay pending arbitration, Judge Mizell sitting in the Civil District Court for Harris County Texas, evaluated whether the members of the Hamilton group entered binding and enforceable arbitration agreements with Amway under Texas law. Finding that a valid arbitration agreement existed, Judge Mizell stayed the state court proceedings pending arbitration of the Hamilton group's claims. (97S.D.Exh.1; 11R.5:13-22; 97S.D.Exh.2,3.) Since that time, the Civil District Court for Harris County Texas has issued final judgment against the

²⁴ *Nitro Distrib. Inc. v. Dunn*, No. SC 86854, 2006 Mo. LEXIS 55 (May 2, 2006), is not on point. The plaintiffs in *Nitro*, several of whom were not Amway distributors, entered into an agreement that contained two arbitration provisions: an incorporation by reference of the Amway Arbitration Agreement and a "separate Pro Net arbitration clause . . . explicitly set forth in the Terms and Conditions." *Nitro*, 2006 Mo. LEXIS 55, at *9. The court held that the Pro Net arbitration agreement was more specifically related to the parties' disputes, applied to all signatories regardless of whether they were Amway distributors, and therefore superseded the more general Amway agreement. *Nitro*, 2006 Mo. LEXIS 55, at *9. *Accord Netco, Inc. v. Dunn*, No. SC86855, 2006 Mo. LEXIS 72 (June 1, 2006). See also *Nitro Distrib. v. Alticor*, No. 05-3686, 2006 U.S. App. LEXIS 17257, at *8 (8th Cir. July 11, 2006) (Amway arbitration agreement did not apply to plaintiffs that were not Amway distributors). All of the Appellants here were Amway distributors.

Hamilton group for want of prosecuting their claim. *Griffith v. Amway Corp.*, Case No. 199817491 (Civil District Court Harris County Texas) (subsequently dismissed for want of prosecution Oct. 23, 2003).²⁵

This Court grants state court judgments “the same preclusive effect that they would enjoy in the courts of the rendering state.” *In re Erlewine*, 349 F.3d 205, 210 (5th Cir. 2003). There is no question that Judge Mizell’s determination that a valid arbitration agreement exists as to the Hamilton group has preclusive effect. According to the Supreme Court of Texas, where a case is dismissed for want of prosecution, a merits determination made before the dismissal is dismissed “with prejudice” and, therefore, enjoys preclusive effect. *Newco Drilling Co. v. Weyand Corp.*, 960 S.W.2d 654, 656 (Tex. 1998)(plaintiff who suffers an adverse holding should “be barred from having a second bite at the apple” by allowing his claims to be “dismissed for want of prosecution”). This is consistent with this Court’s observation that “[o]nce the state court decide[s] the issue of arbitrability, [a] federal court [is] bound to honor that determination as *res judicata*.” *EEOC v. Neches Butane Prods. Co.*, 704 F.2d 144, 150 (5th Cir. 1983) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). As a result, the

²⁵ Appellants unsuccessfully challenged Judge Mizell’s decision by petitioning the Court of Appeals for the First District of Texas, and the Supreme Court of Texas, for a writ of mandamus. (*Supra* § IV.E. 97S.D.Exh.2at2, 97S.D.Exh.3.) Following arbitration the Hamilton group has made no attempt to reopen the *Griffith* case or to pursue any appeal of the state court’s ruling.

enforceability of the Hamilton group's Amway Arbitration Agreements is not properly presented to this Court for review.

B. The Appellants Failed To Establish “Evident Partiality”

If they cannot evade their arbitration contract, Distributor Claimants are at least determined to discredit the arbitrator. Indeed, they make this “Issue One” in their brief, tacitly acknowledging the flimsiness of their contractual and jurisdictional arguments. They proclaim that after discovery in 2005 they “present[ed] a treasure trove of previously undisclosed information about the relationship between the arbitrator, defendants, defense counsel, JAMS and Amway” to the District Court demonstrating Anne Gifford’s evident partiality. (Appellants’ Br. at 29.) Not so. The “treasure trove” was simply a rehash of issues already disclosed by Arbitrator Gifford, as to which Distributor Claimants waived any objection by not challenging at the beginning of the arbitration. The evidence shows there were no undisclosed relationships or financial interests between Arbitrator Gifford and any party or counsel.

1. Arbitrator Gifford Properly Disclosed Her 1998 Training by Amway and the ADA

The District Court’s determination that Distributor Claimants “had actual knowledge” that Arbitrator Gifford was “trained by Amway and the ADA” is supported by overwhelming evidence. (5R.E.¶3.)

- The Arbitration Rules state unambiguously that: “Arbitrators serving under these rules shall be experienced in dispute resolution *and will have completed the training course for Arbitrators offered by [the Administrator], and conducted by Amway and the Amway Distributors Association.*” (2R.Doc.26Exh.C,at¶15.)
- On October 23, 1998, Distributor Claimants stated in a pleading to the District Court that “Amway trains the arbitrators.” (5R.1229.)
- On December 1, 1998, Distributor Claimants stated in a pleading to the District Court that “Rule 15 of Amway’s arbitration rules provides for the qualifications to serve as an Arbitrator. It explains that the Arbitrator ‘will have completed the training course for Arbitrators offered by the Administrator, and conducted by Amway and the Amway Distributors Association.’” (5R.1291.)
- Arbitrator Gifford herself disclosed through JAMS on October 9, 2001 that “[i]n order to be eligible as an arbitrator candidate in accordance with the Amway/ADA Arbitration Rules, in 1998 she [Arbitrator Gifford] attended a training conducted by Amway, the Amway Distributors Association, and JAMS.” (89S.D.Exh.7at1.)

Thus, by the time Distributor Claimants participated in selecting Ms. Gifford as the arbitrator for this case, they had known about the training session for over three years. While an arbitrator’s failure to disclose prior contacts with a party or counsel can demonstrate “evident partiality” sufficient to disqualify the arbitrator²⁶ in the present case the disclosure was both timely and effective, and there was no ground to disqualify Arbitrator Gifford for lack of candor.

²⁶ *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 502 (5th Cir. 2006) , *reh’g en banc granted*, 449 F.3d 616 (5th Cir. 2006).

2. *Distributor Claimants Waived Objection to the Arbitrator Training Program*

The purpose for requiring arbitrator disclosures is, of course, to give the parties a chance to challenge a prospective arbitrator before wasting time and effort in a defective arbitration. The rule in the Fifth Circuit is clear: failure to challenge an arbitrator's neutrality *during the arbitration* waives a party's right to challenge that neutrality in later proceedings. *Bernstein v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 674 (5th Cir. 2002); *Lummus Global Amazonas v. Aguaytia Energy Del Peru*, 256 F. Supp. 2d 594, 625 (S.D. Tex. 2002). The rule prevents a party from withholding objection in order to get a free shot at winning while preserving the chance to try again with a different arbitrator if the first one does not rule favorably. This is exactly what Distributor Claimants are trying to achieve here. They knew about Arbitrator Gifford's 1998 training for three years before the arbitration commenced. She reminded them about the training when they selected her in 2001. Still, Appellants passed up every opportunity to investigate or challenge her qualifications until after she had ruled against them in 2005.

The District Court's finding that Distributor Claimants "never sought at any point during the arbitration proceeding to disqualify Arbitrator Gifford on the basis of her training by Amway and the ADA in 1998" is supported by the record. (5R.E.¶18) (emphasis omitted). After Arbitrator Gifford disclosed her

participation in the Amway training program, Distributor Claimants participated in a teleconference with the arbitrator in October 2001 to discuss the disclosure. (*See* 97S.D.Exh.8at1,2.) After the teleconference, Arbitrator Gifford and JAMS invited any party to raise questions or objections regarding Arbitrator Gifford’s ability to serve as arbitrator by Friday, October 12, 2001. (*See* 97S.D.Exh.8at1-2.) Distributor Claimants did not challenge Arbitrator Gifford’s impartiality, either by October 12, 2001, or at any subsequent time during the arbitration.

This Court has recently discussed the quantum of information necessary to trigger “waiver of a nondisclosure objection.” *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 504 (5th Cir.), *reh’g en banc granted*, 449 F.3d 616 (5th Cir. 2006). In *Positive Software*, the Court held that a party waives their objection where they have “*actual knowledge*” of “an arbitrator’s *potential partiality . . .*” *Id.* at 504 (emphasis added). Where there is disclosure, an award cannot be vacated based upon details about which the losing party later chooses to complain. Courts have consistently taken this position because “[i]f merely adding additional facts to a bias claim were enough to avoid waiver, then waiver could be easily avoidable.” *Bianchi v. Roadway Express, Inc.*, 441 F.3d 1278, 1285 (11th Cir. 2006).²⁷

²⁷ *See also* *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 648 (6th Cir. 2005) (there is no “nondisclosure” problem when a party learns new details concerning the arbitrator’s previously disclosed relationship with another party); *ANR Coal Co. v. Cogentrix of*

For instance, in *Kiernan v. Piper Jaffray Co.*, 137 F.3d 588 (8th Cir. 1998), the arbitrator disclosed that the company for whom she worked was founded by the same family that founded the defendant. As in this case, plaintiffs were given an opportunity to submit questions to the arbitrator “so that they could decide whether to object to her continuing to serve on the arbitration panel.” *Id.* at 592. Plaintiffs, although expressing discomfort with the situation, did not move to disqualify the arbitrator. *Id.* Only after receiving an unfavorable award in arbitration did they begin to complain that the arbitrator had failed to disclose vital details concerning the alleged conflict, and that they “did not have enough information to have knowingly waived their objection” during the arbitration. *Id.* at 593. The Eighth Circuit rejected the plaintiffs’ argument and found they had actual knowledge of the conflict even though they had not chosen to investigate the details:

[claimants] had the opportunity to submit written questions to Powers regarding her associations and to conduct their own investigation of any individuals’ ties to [respondent]. While they did not have full knowledge of *all* the relationships to which they now object, they did have concerns about Powers’ impartiality and yet chose to have her remain on the panel rather than spend time and money investigating further until losing the arbitration.

N.C., Inc., 173 F.3d 493, 501 (4th Cir. 1999) (vacatur denied when arbitrator had disclosed representation by his firm in some but not all types of cases and no one objected); *Lummas*, 256 F. Supp. 2d at 622-626 (party waived objection where they had actual knowledge of circumstances now alleged to be disqualifying, but later learned additional details).

Id. (emphasis added).²⁸

In *Positive Software*, the complaining party lacked any knowledge about an arbitrator's potential partiality because the arbitrator, asked whether he had "any professional or social relationship with counsel for any party" in the proceeding, bluntly replied that he had "nothing to disclose." 436 F.3d at 497. The plaintiff learned only after the proceeding that the arbitrator had a years-long association as co-counsel with one of the defendant's attorneys. *Id.* In light of the arbitrator's affirmative misrepresentation, and the plaintiff's lack of any independent indication of possible partiality, a panel of this Court found that it was beyond dispute that the plaintiff lacked knowledge of the arbitrator's "potential partiality." Similarly, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, provides the archetypal example of nondisclosure warranting vacatur. The arbitrator failed to give any indication to the plaintiff that the defendant in the litigation was "one of his regular customers" whose patronage had been "repeated and significant" involving about \$12,000 in fees for service over a period of four or five years. 393 U.S. 145, 146 (1968).

²⁸ See also *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 805 (Tex. App.—Austin 2004, pet. denied) (party with "actual knowledge" of the "facts giving rise to what they now contend is a reasonable possibility of partiality" may not point to the non-disclosure of details as a defense to waiver); *Haynes Constr. Co. v. Cascella & Son Constr.*, 647 A.2d 1015 (Conn. App. 1994) (waiver where plaintiff had actual knowledge of arbitrator's attorney-client relationship with defendant's family, but did not know all the details of that relationship).

This case is a stark contrast to *Positive Software* and *Commonwealth*. Distributor Claimants knew all along that the arbitrator had been trained by Amway and the ADA. (2R.Doc.26Exh.C, at ¶15; 5R.1229,1291,1507.) Arbitrator Gifford affirmatively disclosed the training. (97S.D.Exh.7at2.) Arbitrator Gifford gave Distributor Claimants the opportunity to ask her direct questions concerning any details they thought relevant about the training. (See 97S.D.Exh.8at1,2) (referring to teleconference in which Arbitrator Gifford allowed a ‘friendly cross-examination’ concerning disclosures.) Unlike the plaintiffs in *Positive Software* and *Commonwealth*, Distributor Claimants knew of the arbitrator’s “potential partiality” for years before they selected and accepted her as the arbitrator.

The expanded disclosure standard Distributor Claimants propose is not only inconsistent with case law; it is counter to sound policy. In order to ensure the finality of an arbitration award, parties would be forced to select arbitrators with no relationships with the parties or knowledge of the industry. The result would be contrary to the Arbitration Act which “does not fasten on every industry the model of the disinterested generalist judge.” *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 646 (6th Cir. 2005) (citing *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002)).

3. The Arbitrator Selection Process Did Not Create Evident Partiality

Distributor Claimants melodramatically assert that Amway and the other appellees “culled a pool of 103 arbitrators to eight arbitrators” to be placed on the roster of neutrals, and that the “defense handpicked” the arbitrators included on the roster of neutrals. (Appellants’ Br. at 24, 43, 45-46.) This colorful assertion is simply not true. The selection process was a collaborative effort involving JAMS, Amway and the Amway Distributors Association. JAMS began the process by selecting a list of 46 arbitrators “seek[ing] diversity by gender and ethnicity,” (2R.Doc.26Exh.C,at¶16). JAMS sent its list to both Amway and the ADA along with detailed biographical information and references for each candidate. (132S.D.Exh.D(Letter of 12/6/97 from Debra Holzman to Dave Carroll); 132S.D.Exh.F.) JAMS advised both Amway and the ADA to review each arbitrator’s resume as well as to conduct due diligence by researching references, and, in the case of retired judges, to research publicly available decisions. (132S.D.Exh.D.) After reviewing this material, representatives of Amway and the ADA were asked to rate each of the candidates on a scale of 1-5 on three factors: applicable legal expertise, ADR experience and personal background. (*See, e.g.*, 132S.D.Exh.G.) In addition, like JAMS, Amway and the ADA took into consideration other factors such as gender and racial diversity. (2R.Doc.26Exh.C,at¶16.)

Fifteen arbitrators jointly selected in this fashion by JAMS, Amway and the ADA were invited to attend the training seminar on March 10-12, 1998. (132S.D.Exh.I.) Only fourteen were able to attend, as Hon. Bruce Wayne Wettman canceled due to a skiing injury. (132S.D.Exh.C.) Following that seminar, eleven of the fourteen (not eight as Plaintiffs contend (Appellants' Br. at 25)) were listed as members of the Roster of Neutrals. The eleven neutrals were Martha J. Cook, Hon. H. Dee Johnson, Jr., Lisa Salkovitz Kohn, Hon. Bernard H. Jackson, Hon. Curtis Emery VonKann, Anne Gifford, J. Joaquin Fraxedas, Hon. John J. Upchurch, Hon. Betty Roberts, Hon. Sharon E. Shuteran and Denise Madigan. (132S.D.Exh.J; 98S.D.Exh.A,at unnumbered32.)²⁹ The biographies of these eleven arbitrators, half of whom are retired judges, show that they are an independent, diverse and extraordinarily accomplished group of professionals. (132S.D.Exh.F,J.)

Distributor Claimants nevertheless claim that “[u]nder the FAA parties must have equal rights to select and control the arbitration panel.” (Appellants' Br. at 46.) That is not the law of commercial arbitration. The FAA “will not protect a party that consents in advance to an arbitration process, *even one with a clearly*

²⁹ There is no evidence why Arden Siegendorf, Stephen Scott and Andrew Gil Meyer, each of whom attended the seminar, did not appear on JAMS' final list. It seems clear that JAMS considered Judge Meyer to be active on the Roster of Neutrals in 2001, since he was one of the five arbitrators on the “Strike List” JAMS provided to the parties in this case on May 18, 2001. (97S.D.Exh.4at consecutive 11.)

built-in bias favoring the other party to the arbitration.” *LoDal v. Home Ins. Co. of Ill.*, 1998 U.S. App. LEXIS 12841, at *16 (6th Cir. June 12, 1998) (emphasis added); accord *Cook Indus., Inc. v. C. Itoh & Co. (America)*, 449 F.2d 106, 107-08 (2d Cir. 1971) (Plaintiffs may not complain about unequal selection when they consented to the arbitration program).³⁰ In the present case, Distributor Claimants have not identified anything in Ms. Gifford’s conduct or background that shows any bias against them. (5R.E.¶24 (stating that “Plaintiffs indicate they are *not* seeking to show any actual misconduct by Arbitrator Gifford. . .”).) They simply don’t like her ruling, and therefore they are now belatedly attacking the process by which she was selected.

Distributor Claimants rely heavily on *Hooters v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999). (Appellants’ Br. at 46.) *Hooters* is inapplicable because it involved the arbitration of Title VII employment discrimination claims. *Id.* at 937. Courts have made clear that unlike commercial arbitration, “civil rights statutes . . . protect vulnerable plaintiffs,” especially employees who “are members of traditionally disadvantaged groups—women or minorities.” *Rosenberg v. Merrill Lynch*, 955 F. Supp. 190, 196, 197 (D. Mass. 1998), *aff’d on other grounds*, 170

³⁰ See also *Garfield & Co. v. Wiest*, 432 F.2d 849, 854 (2d Cir. 1970) (parties cannot complain about impartiality of a process to which they agreed); *Humbert v. Zaner*, 1991 U.S. Dist. LEXIS 1491 (S.D.N.Y. Feb. 8, 1991); *Jot Corp. v. Graham Cent. Station*, 1976 U.S. Dist. LEXIS 13368 (E.D. Penn. Sept. 3, 1976); Robert M. Rodman, *Commercial Arbitration with Forms* § 9.9 (1984) (“if the arbitration agreement specifies the method of selecting arbitrators, that method shall be followed”).

F.3d 1, 4, 14 (1st Cir. 1999). “[T]he *Mitsubishi* trilogy’s freedom of contract presumptions,” otherwise applicable in commercial arbitration cases, does not apply in the civil rights context.³¹ *Id.* *Hooters* is also factually distinguishable. In *Hooters*, the employer held “total control over the choice of the arbitrators” and thus exercised “unbridled authority . . . to manipulate the composition of the panel, and to ensure that any decision maker is not a true, impartial arbitrator, but rather, a carefully selected decision maker tied to Hooters.” 39 F. Supp. 2d at 600, 601.³² Amway did not unilaterally select any of the arbitrators but shared the selection process with JAMS and the Amway Distributors Association, of which the Distributor Claimants were voting members.³³

³¹ See also *Hooters v. Phillips*, 39 F. Supp. 2d 582, 588 (D.S.C.) (discussing strict standard applicable for a Title VII civil rights case), *aff’d*, 173 F.3d 933 (4th Cir. 1999); *Rembert v. Ryan’s Family Steak House*, 596 N.W.2d 208, 210 (Mich. Ct. App. 1999) (discussing strict arbitration standards under state civil rights act).

³² In addition, egregious deficiencies existed in the Hooters arbitration program which are not present in Amway’s arbitration program. In particular, the Hooters program attempted to bind state and federal agencies to adjudicate *their* claims in the arbitration program; limited employees ability to take meaningful discovery; required the employee, but not the employer, to make certain evidentiary disclosures; conferred preferential discovery rights to the employer; granted the employer “total control” over the arbitration record; allowed the employer to change the rules of the arbitration retroactively and without notice during an arbitration proceeding; granted the employer, but not the employee, limited judicial review; and granted the employer, but not the employee, the right to submit certain dispositive pleadings. 39 F. Supp. 2d at 601-602. These provisions led the former president of the National Academy of Arbitrators to comment that “reputable designating agencies, such as . . . Jams/Endispute, would refuse to administer a program so unfair and one-sided as this one.” *Hooters*, 39 F. Supp. 2d at 600.

³³ The Morrison group claims that the ADA Board members did not represent distributors’ interests in general, and Distributors’ interest in particular. (See Appellants’ Br. 50-52.) This contention is based on speculation and is substantially contrary to the record. The ADA undisputedly was the non-profit trade association of Amway distributors. (132S.D.11; 132S.D.Exh.A,at26:21-24, 29:24-30:2; 132S.D.Exh.Q,at93:25-94:3.) All Amway distributors

4. *There Were No Ex Parte Contacts with Arbitrator Gifford*

Distributor Claimants allege that Arbitrator Gifford was tainted by *ex parte* contacts. (Appellants’ Br. at 41.) Appellants persuaded the District Court to grant them post-arbitration discovery in large part because they claimed they would be able to prove Amway and other parties, especially Jody Victor, had *ex parte* contacts with Arbitrator Gifford in 2003 while the arbitration in this case was in full swing. Appellants struck out; no such *ex parte* contacts ever occurred. (5R.E.¶19-21.) The only “*ex parte* contact” between Arbitrator Gifford and any party took place during her training, ***three years before Distributor Claimants even demanded arbitration*** in this case! Certainly such prior contacts with a party or counsel may require disclosure—Arbitrator Gifford ***did*** disclose them—but once disclosed they do not support a finding of “evident partiality.”³⁴

5. *Arbitrator Gifford Had No Financial Stake in the Outcome*

Distributor Claimants also assert that Arbitrator Gifford was tainted with “evident partiality” because JAMS had a “financial stake in the litigation.” (Appellants’ Br. at 48.) The “financial stake” purportedly arises from the

were eligible for membership and all distributors achieving the level of Direct Distributor (“Platinum”) were voting members. (132S.D.11-12.) Each member of the Morrison group had achieved the level of Direct Distributor in the years leading up to the adoption of the arbitration program and, therefore, was a voting member. ADA’s revenue came exclusively from voluntary dues payments by distributors. (132S.D.Exh.A,at27:5–29:23.) The ADA’s main mission was to represent distributors’ interests in dealing with Amway. (132S.D.Exh.A,at 26:21-24.)

³⁴ They certainly do not carry the stigma of misconduct sometimes associated with the term “*ex parte*.”

allegation that JAMS is “owned by the very arbitrators who adjudicate disputes” and thus “the arbitrators, in their role as owners, must seek to promote the goodwill” of the party that does the larger amount of business with JAMS. (Appellants’ Br. at 49 (citing *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 651 n.5 (Pa. Super. 2002)).)

Nothing in the record indicates that Arbitrator Gifford had an ownership interest in JAMS. JAMS had 67 neutrals who were shareholders and about 180-190 independent contractor neutrals who were not shareholders. (132S.D.Exh.B,at25:11-26:19). Even assuming Arbitrator Gifford was a JAMS shareholder, it would not establish “evident partiality.” The District Court correctly found that Ms. Gifford’s connection to JAMS was disclosed, and her disclosed financial incentives were benign: “if anything, the financial incentive for arbitrators, at JAMS and elsewhere, is to be well-regarded by all parties.” (5.R.E.¶22.)

6. *Decisions by Other Arbitrators Cannot Prove Partiality by Arbitrator Gifford*

As further “support” for their allegation of evident partiality, Distributor Claimants posit that “no litigant has prevailed against Amway in JAMS arbitration.” (Appellants’ Br. at 48.) Distributor Claimants cite no evidence for this assertion. They refer only to *dicta* in an unpublished decision by the Western District of Missouri in *Nitro v. Alticor*. (Appellants Br. at 61-62 (citing

144S.D.Exh.A,at24, *aff'd on other grounds, Nitro Distrib., Inc. v. Alticor, Inc.*, No. 05-3686, 2006 U.S. App. LEXIS 17257, at *11 (8th Cir. July 11, 2006)).) The record here establishes that Amway does not always win in arbitration. Arbitrator Gifford dismissed Amway's counterclaims and assessed one million dollars in fees and costs against Amway on account of those unsuccessful counterclaims. (89S.D.Exh.A.)

Even if the Distributor Claimants had proffered evidence that Amway prevailed in more arbitrations than it lost (or even that Amway had a perfect winning record), Amway's "record" no more proves the arbitrator is biased than Amway's perfect record before the Seventh Circuit "proves" that court's partiality. *See All-Tech Telecom v. Amway Corp.*, 174 F.3d 862 (7th Cir. 1999) (affirming decision for Amway).³⁵ A much more plausible inference would be that Amway, like other successful businesses, settles many cases it is not confident of winning.

C. The District Court Had Jurisdiction to Enforce the Arbitration Award

In "Issue Five," Distributor Claimants challenge the District Court's subject matter jurisdiction to enter judgment on the arbitration award generally, as well as against two specific distributors.³⁶ (Appellants' Br. at 75-78.) This question

³⁵ Judging from Distributor Claimants' track record in the *Morrison* and *Griffith* cases, the federal and state courts in Texas are as "partial" to Amway as Arbitrator Gifford.

³⁶ Appellants make a one-line allegation that the District Court lacked jurisdiction as to "Distributors Larry and Suzanne Rogers . . . because they were not listed in or subject to the Arbitrators Final Award." (Appellants' Br. at 78.) Contrary to Distributor Claimants' assertion,

necessarily embraces the District Court's jurisdiction (and therefore this Court's appellate jurisdiction) to rule on Distributor Claimants' motion to vacate the arbitration award.

1. Appellants Invoked the Jurisdiction of the District Court by Moving to Vacate the Final Award

Any doubt concerning the District Court's jurisdiction to confirm and enter judgment on the arbitrator's final award is resolved by the fact that *all of the Distributor Claimants* filed a motion in the District Court to vacate the arbitrator's award. (89S.D.) *Higgins v. U.S. Postal Serv.*, a case cited by Distributor Claimants in their opposition to Amway's motion to confirm (115S.D.3), holds that "a court may confirm an award under section 9 absent an express agreement regarding confirmation . . . if the parties have previously invoked the jurisdiction of the court to supervise the arbitration in some way." 655 F. Supp. 739, 743 (D. Me. 1987). The *Higgins* court specifically noted that one example of such an invocation might be a party's "*attempt to vacate or modify the award.*" *Id.* (emphasis added) (stating that the party's attempt to vacate award was 'the most important' factor in *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974), for inferring agreement for entry of judgment on arbitration award). *See also T&R Enters., Inc. v. Cont'l Grain Co.*, 613 F.2d 1272, 1279 (5th Cir.

the arbitrator's final award explicitly states that "Larry and Suzanne Rogers" were "added as claimants and counterrespondents" during the arbitration, and lists the Rogers as Claimants under "Remaining Parties." (99S.D.Exh.A,at6.)

1980) (citing with approval language in *Stavborg* indicating that “[w]hatever doubt remains as to the intent of the parties . . . that doubt is removed” when “appellant moved in federal district court under 9 U.S.C. § 9 to vacate and/or modify that award”). Distributor Claimants invoked the jurisdiction of the District Court; they cannot renounce that jurisdiction just because the District Court ruled against them.

2. The Arbitration Agreement Expressly Provided for Judicial Enforcement

Distributor Claimants assert that the District Court lacked subject matter jurisdiction because the parties did not “consent to enter judgment on any arbitration award.” (Appellants’ Br. at 75-76.) The Federal Arbitration Act grants jurisdiction to enter judgment upon an award “[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.” 9 U.S.C. § 9. In this case, the Arbitration Agreement specifically states “*The arbitration award shall be final and binding and judgment thereon may be entered by any court of competent jurisdiction.*” (2R.Doc.26Exh.A) (emphasis added); *Morrison*, 49 F. Supp. 2d at 533. (See also 2.R.Doc.26Exh.C, at ¶49 (stating parties “shall be deemed to have consented that judgment upon the arbitration award may be entered by any court of competent jurisdiction”).)³⁷

³⁷ Distributor Ron Green claims that he was told in a purportedly “tape-recorded conversation that no one would ‘go to court’ after arbitration.” (Appellants’ Br. at 77 citing

VIII. CONCLUSION

Amway and the distributor Appellees are entitled to the benefit of their arbitration bargain. Parties to commercial arbitration agreements like the one in this case should be able to rely on efficient adjudication and finality. It has been over eight years since Distributor Claimants first tried to evade their promise to resolve disputes in arbitration. Now, at last, their claims have been fully and fairly adjudicated in the proper forum. This Court should affirm the District Court's rulings in all respects.

3R.787-88.) As discussed *supra*, this "tape-recorded" conversation is an unauthenticated transcript of an unauthorized recording of an alleged telephone conversation between Distributor Green and an Amway employee. In addition the text of the transcript makes clear that the speaker was indicating that the *merits* of a dispute would be resolved by an arbitrator, and did not discuss the parties' remedies to enforce the arbitrator's decision: "The concept [concerning the Arbitration Agreement] is still the same. If you get into conflict challenges within your organization, instead of taking the issues to court, you agree to sit down with an arbitrator." (3R.787.) Furthermore, absent an ambiguity in its terms the Arbitration Agreement must be interpreted on its face without resort to parol evidence. *Chapman*, 999 S.W.2d at 122; *Lidawi*, 112 S.W.3d at 73.

Respectfully submitted:

s/Thomas W. Taylor (signed by permission KMG)

Thomas W. Taylor
Texas Bar No. 19723875
ANDREWS KURTH LLP
600 Travis Street, Suite 4200
Houston, Texas 77002
Telephone: 713-220-4200
Facsimile: 713-220-4285

ATTORNEYS FOR APPELLEE
AMWAY CORPORATION

s/Rick Abraham (signed by permission KMG)

Rick Abraham
ABRAHAM LAW OFFICES
24 North High Street
Columbus, OH 43215
Telephone: 614-221-5474
Facsimile: 614-221-7363

Edward B. McDonough, Jr.
MCDONOUGH & ASSOCIATES
2900 N. Loop W., Suite 1125
Houston, TX 77092
Telephone: 713-956-6500
Facsimile: 713-956-9200

ATTORNEYS FOR APPELLEE INTERNET
SERVICES CORPORATION

s/Michael Y. McCormick (signed by permission KMG)

Michael Y. McCormick

MCCORMICK, HANCOCK & NEWTON

1900 West Loop South, Suite 700

Houston, TX 77027-3206

Telephone: 713-297-0700

Facsimile: 713-297-0710

ATTORNEYS FOR APPELLEES DEXTER YAGER,
INDIVIDUALLY, DOING BUSINESS AS YAGER
ENTERPRISES AND INTERNET SERVICES
CORP., DONALD R. WILSON, INDIVIDUALLY,
DOING BUSINESS AS WOW INTERNATIONAL,
INC., RANDY HAUGEN, INDIVIDUALLY, DOING
BUSINESS AS FREEDOM ASSOCIATES, INC.,
FREEDOM TOOLS, INC., JOHN SIMS,
INDIVIDUALLY, DOING BUSINESS AS SIMS
ENTERPRISES, YAGER ENTERPRISES,
INTERNET SERVICES CORP.

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Brock C. Akers
Michelle Chelvam
Phillips & Akers, P.C.
3400 Phoenix Tower
3200 Southwest Freeway
Houston, TX 77027
Counsel for Appellants

A. Glenn Diddell, III
The Diddell Law Firm
2900 Wesleyan
Houston, TX 77027
Counsel for Appellants

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Clerk, United States Court of Appeals, Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

s/ Kendall M. Gray
Kendall M. Gray

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Kendall M. Gray
Attorney for Appellee Amway Corporation

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