

**IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

NETCO, INC., et al.,)	
)	
Plaintiff-Respondent,)	
)	
vs.)	SD26064
)	
JIMMY V. DUNN, et al.,)	
)	
Defendants-Appellants.)	

RESPONDENTS’ MOTION FOR REHEARING EN BANC

COME NOW Respondents Netco, Inc. (“Netco”) and Schmitz & Associates, Inc. (“Schmitz Associates”), and move this Court, pursuant to Mo. R. Civ. P. 84.17(a)(1) and Supreme Court Operating Rule 22.01, for rehearing *en banc* because this Court necessarily chose not to follow clear Missouri authority on an appellate court’s inability to weigh evidence.

This appeal arises from the trial court’s denial of Appellants’ motion to compel arbitration. Appellants’ motion had been submitted to the trial court solely on opposing affidavits and deposition testimony. No trial or full evidentiary hearing was held. On appeal, this Court reversed the trial court’s decision, holding, *inter alia*, that Respondents are estopped to deny arbitration. For estoppel to lie, every fact must be proven by *clear and satisfactory* evidence. *Van Kampen v. Kauffman*, 685 S.W.2d 619, 625 (Mo. App. S.D. 1985) (citing *Peerless Supply Co. v. Industrial Plumbing & Heating Co.*, 460 S.W.2d 651, 666 (Mo. 1970)). The evidence in this case was not clear and satisfactory. Virtually every single fact upon which this Court relied in finding that Respondents were bound to arbitrate was gleaned solely

from Appellants' affidavits, which the Court accepted as true, despite the fact that Respondents had specifically controverted each of those facts by substantial, competent evidence. *A court has no authority to weigh the credibility of conflicting affidavits. New Prime, Inc. v. Professional Logistics Mgmt Co., Inc.*, 28 S.W.3d 898, 904 (Mo. App. S.D. 2000). Importantly, because the "facts" upon which this Court relied were submitted by affidavit, Respondents did not have an opportunity to challenge, by cross-examination, the veracity, accurateness and completeness of the assertions therein. For these reasons alone, this Court should rehear this case and remand it to the trial court for a full evidentiary hearing on these disputed material facts, so that the trial court may hear and adjudge the parties' respective credibility.

Further, as this Court considers this motion, it should bear in mind that "[a]ll evidentiary conflicts are for the trial court to resolve, and [appellate courts] take the facts according to the result reached." *Evans v. Stirewalt*, 2005 WL 729568, *1 (Mo. App. S.D. 2005). "Where facts essential to an element of a case are derived from non-live sources and are in conflict, appellate courts give deference to the trial court conclusions about those facts." *Jarrell v. Director of Revenue*, 41 S.W.3d 42 (Mo. App. S.D. 2001). The trial court here found, after devoting considerable time and careful review of the voluminous record, that Respondents were not subject Pro Net Arbitration. This Court failed to give deference to the trial court's evidentiary and legal conclusions as required by *Evans* and *Jarrell*. When the facts of this case are considered in a light favorable to Respondents and the conclusion of the trial court, it is clear that Appellants failed to sustain their burden of showing an agreement to arbitrate.

Aside from the factual disputes, in compelling Respondents to arbitrate, the Court has failed to follow its own precedent, as well as binding precedent of the United States and Missouri Supreme Courts, in the following respects:

1. The Court ignored United States Supreme Court precedent, as well its own, by compelling Respondents to arbitrate their claims against the three Appellants whom the Court expressly held were not Pro Net members (*i.e.*, Global, Evans and Evans Associates). Arbitration is strictly a matter of contract. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418 (1986). One who is not a party to a contract has no right to enforce it. *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947 (Mo. App. S.D. 1999). This Court offered no legal basis for its holding that these non-Pro Net members are entitled to compel Pro Net arbitration.

2. The Court failed to follow its own precedent and well-established contract principles in holding that Pro Net had the legal capacity to accept a contract after it had expressly rejected it. *See Abrams v. Four Seasons Lakesites*, 925 S.W.2d 932, 937 (Mo. App. S.D. 1996); *Beck v. Shrum*, 18 S.W.3d 8, 10 (Mo. App. E.D. 2000).

3. In holding that Schmitz Associates is bound to arbitrate under an estoppel theory, the Court applied an alter ego-type analysis. In so doing, this Court ignored Missouri Supreme Court precedent that requires, as an essential element to pierce the corporate veil, that the corporation be used to commit a fraud. *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999). No such facts were presented or exist. This Court's application of an alter ego-like theory was based primarily on three facts: (1) the Schmitzes are the owners of both Netco and Schmitz Associates; (2) Netco and Schmitz

Associates have a mutually beneficial relationship; and (3) they used the term “Organization” to collectively refer to their family of businesses. Under Missouri Supreme Court precedent, however, the first two facts upon which this Court relied are wholly insufficient to destroy the presumption of corporate distinction. *Blackwell Printing Co. v. Blackwell-Wielandy Co.*, 440 S.W.2d 433, 436-37 (Mo. 1969); *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 644 (Mo. banc 2002). And, this Court is charting an entirely new course in holding that a party who uses a term of convenience to collectively refer to his family of businesses thereby decimates each entity’s corporate distinction. Use of such a term cannot reasonably be deemed an indicia of “control” as is required to pierce the corporate veil.

4. The Court failed to follow Missouri Supreme Court and its own precedent mandating that every fact essential to create an estoppel “must be established by clear and satisfactory evidence.” *Van Kampen v. Kauffman*, 685 S.W.2d 619, (Mo. App. S.D. 1985) (citing *Peerless Supply Co. v. Industrial Plumbing & Heating Co.*, 460 S.W.2d 651, 666 (Mo. 1970)). As stated above, there are conflicting affidavits on the facts necessary to establish estoppel and thus Appellants have not shown entitlement to estoppel by clear and satisfactory evidence.

5. The Court misapplied the law in failing to apply the continuing economic duress doctrine as a defense to estoppel. Not only did Paul Brown – Respondents’ *own* agent -- *admit* coercing Netco into dealing with Pro Net with threats that Respondents’ BSMs business would be cut-off if refused, but other distributors testified that their BSMs business was, in fact, cut-off when they refused to deal with Pro Net. Respondents had no economically feasible alternative but to deal with Pro Net as instructed by their upline. Respondents could

not simply look elsewhere for BSMs. Without their upline embracing them on-stage at functions, Respondents would lose the respect, and ultimately the business, of their downline.

6. The Court exceeded its authority by effectively re-writing the plain and unambiguous language of Pro Net's Bylaws, eliminating the express requirement that only Amway businesses are eligible for membership. With the exception of Jimmy V. Dunn & Associates, none of the Appellants are Amway businesses. Nor has Schmitz Associates ever been an Amway business. Accordingly, the plain language of the Bylaws requires a finding that none of these parties are eligible to be, nor are they, Pro Net members. In ignoring the plain language of the agreement that limits membership to Amway businesses, the Court contravened well-established contract construction principles as set forth in binding precedent. *See Stephens v. Brekke*, 977 S.W.2d 87, 94 (Mo. App. S.D. 1998); *Eisenberg v. Redd*, 38 S.W.3d 409, 411 (Mo. banc 2001). The Court is also encouraging parties to blur corporate distinctions by essentially holding that non-Amway businesses may nevertheless be Pro Net members because they are part of an "organization" that includes an Amway business.

7. The Court also exceeded its authority by effectively re-writing the plain and unambiguous language of the Pro Net Terms and Conditions (1) to expand that agreement to apply to "founding" members, and (2) to eliminate the condition precedent to Pro Net membership and any agreement to arbitrate (*i.e.*, that Pro Net must accept a membership application in writing). In so doing, the Court ignored long-standing contract construction principles as set forth in binding precedent. *Stephens v. Brekke*, 977 S.W.2d 87, 94 (Mo. App. S.D. 1998); *Eisenberg v. Redd*, 38 S.W.3d 409, 411 (Mo. banc 2001).

In support of this Motion, Respondents state as follows:

I. THIS COURT MISAPPLIED THE LAW AND OVERLOOKED FACTS IN FINDING THAT NETCO AGREED TO ARBITRATE

This Court held that Netco is bound to arbitrate under the Pro Net Arbitration Agreement because “[w]hile Netco contends Schmitz’s application was rejected by Pro Net, we find that Netco’s application, inclusive of Schmitz’s handwritten reservation, was accepted. This is born[e] out by the fact that Netco was subsequently permitted to engage in all the activities provided to Pro Net members and was allowed the full benefits of membership.” Slip Op. at 15.

This Court’s holding as stated appears to commingle two separate concepts for binding a party to arbitration: contract and estoppel. To bind Netco under a *contract* theory, this Court would have had to find that Pro Net had not, in fact, rejected Netco’s application, and thus Pro Net had the power to later accept it. But this Court cannot do so. It was *uncontroverted* that Netco’s application had been rejected. Accordingly, the Court was constrained to find that Pro Net had no power to accept Netco’s application, and thus no contract was ever formed. Alternatively, at the very least, there were conflicting affidavits on the issue of whether Pro Net rejected Netco’s application and therefore an evidentiary hearing is required to resolve this dispute. This Point is addressed more fully in Section A below.

With respect to its *estoppel* theory, this Court apparently found that regardless of whether Pro Net rejected Netco’s application, Netco accepted the benefits of Pro Net membership and is nevertheless estopped to deny arbitration. The Court likewise held that Schmitz Associates is bound to arbitrate under an estoppel theory. Because the Court relied on the same set of facts to estop both Respondents, Respondents will address estoppel as to both

Respondents in Section II below. As discussed more fully there, again, for every fact that the Court relied upon in finding estoppel, Respondents had submitted deposition and/or affidavit testimony directly controverting Appellants' affidavits. As a result, this Court improperly made a determination of credibility between diametrically opposed affidavits.

A. Netco Did Not Contractually Assent to Arbitration

1. Paul Brown's Sworn Testimony that Pro Net Rejected Netco's Application Stands Uncontroverted

The issue of whether Netco is bound to arbitrate under a contract theory turns on whether Pro Net rejected Netco's membership application. This is because the power to accept a contract terminates when it has been rejected. *Boehm v. Reed*, 14 S.W.3d 149, 151 (Mo. App. W.D. 2000). Netco's alteration of the Pro Net application form constituted a rejection of Pro Net's offer and a counteroffer. *See Beck v. Shrum*, 18 S.W.3d 8, 10 (Mo. App. E.D. 2000); *see also Abrams v. Four Seasons Lakesites*, 925 S.W.2d 932, 937 (Mo. App. S.D. 1996). If, as the uncontroverted evidence herein establishes, Pro Net expressly rejected Netco's counteroffer, then no contract can be created unless Pro Net renewed its offer and Netco accepted the same. *See Beck*, 18 S.W.3d at 10. There was absolutely no evidence in the record that Pro Net renewed its offer, let alone that Netco accepted the same. After rejecting

Netco's application, Pro Net cannot simply unilaterally change its mind and resurrect a counteroffer that is legally "dead."¹

This Court did not clearly indicate whether or not it found that Pro Net had rejected Netco's application, but it seemed to suggest that it had not been rejected. The Court stated: while Pro Net was "*initially reluctant* to accept Netco's [membership] application containing Schmitz's written reservation, Pro Net ultimately accepted the application and granted Netco full membership benefits." Slip Op. at 6 n.9 (emphasis added). To the extent this Court found that Pro Net had not rejected Netco's application and therefore had the authority to later accept it, such holding is not based on fact or law. It is *uncontroverted* that Pro Net *rejected* that application. It therefore had no legal power to thereafter accept it. *See Beck*, 18 S.W.3d at 10.

In apparently finding that Pro Net had merely been "reluctant" to accept Netco's application – as opposed to having rejected it -- the Court relied on the Affidavit of Harold Gooch, a named defendant and Appellant in this case. As quoted by the Court in footnote 18, Gooch testified by way of affidavit that Pro Net directed Paul Brown to ask Mr. Schmitz to submit another application "because the initial application contained certain additional

¹ For the same reason, Pro Net's unilateral act of cashing Netco's application fee check after it had rejected Netco's application (another fact this Court relied upon in finding assent to arbitration) cannot transform an expired and rejected offer into acceptance.

language added by [Schmitz]. However, it was later determined that Pro Net would accept the application” Slip Op. at 15, n.18.

But Gooch’s “spin” on the events is misleading, at best, and an intentional perversion of the truth at worst. Glaringly absent from Gooch’s affidavit is any statement *directly refuting* Paul Brown’s testimony that Pro Net expressly rejected Netco’s application. Indeed, in stating that he asked Mr. Schmitz to submit *another* application, Gooch necessarily acknowledged that the original application had been rejected. In contrast to Gooch’s affidavit, which conveniently sidesteps directly addressing the issue of rejection, Mr. Brown’s testimony that he *personally* rejected Netco’s application at Pro Net’s request was *direct, express* and *unequivocal*: “I was instructed to tell Charlie Schmitz that his membership application had been rejected, and I did.” A1051, 179:18-21; *see also* A0196, ¶ 22; A1035, 104:21-105:2 (“on two separate occasions, I was instructed with Charlie Schmitz to let him know unless he signed the -- the application without qualification, that he was not a member.”).

Paul Brown’s testimony is corroborated by the actual audiotape of his voice mail to Mr. Schmitz in which he expressly rejected the application:

Hey, Charlie, this is Paul Brown[Y]ou had put on that application a qualification to signing the signature; basically, you weren’t giving up your rights to manufacture and/or to move other BSMs. And I need, *if you would like to be a member of the Association, Charlie, I need to get a unqualified signature on the Association membership application.* Right now, that, I’ve reviewed it with our people, and *that application is not a valid application signature*, so I need to get a, one signed with no qualifications to it. . . . So, hope you understand. That’s, that was part of the

membership application, Association rules, and if you could help me out on that, I'd appreciate it greatly. . . .

Plaintiffs' Exhibit 2 at the November 21, 2000, hearing (emphasis added); A1691.

Mr. Brown's testimony is further corroborated by Appellants' own attorney, Gaspare Bono, who *stipulated* on the record not only that Brown had the express authority to reject Netco's application, but also that the *only way* that Netco could become a member of Pro Net is if it signed a *new* application. *See* A1687-90, 36:25-39:2. It is undisputed that Netco never submitted another application. A0186, ¶ 257. In fact, Mr. Bono even *withdrew* the issue of whether Netco is bound by the Pro Net Arbitration Agreement, in apparent recognition of the fact that Netco's application was not a valid and enforceable contract. A1035, 102:9-16.

Moreover, Mr. Schmitz testified that it was his understanding that Netco's application had been rejected. A0977, ¶ 35; A0978, ¶ 44. And, Mr. Brown, who was Pro Net's agent in charge of membership, further testified that neither Respondents nor the Schmitzes ever became members of Pro Net. A1096, ¶ 22; *see also* A1377, ¶ 42.

Despite this overwhelming evidence, Gooch never directly refuted Paul Brown's testimony that he rejected Netco's application. Instead, Gooch used clever semantics to *imply* that the application had not been rejected. Gooch's failure to expressly deny the critical fact at issue renders his Affidavit wholly insufficient to controvert Brown's direct testimony. *See Jones v. Maness*, 648 S.W.2d 629, 631-32 (Mo. App. E.D. 1983). As a result, Brown's testimony that he rejected Netco's application stands uncontroverted. And because Netco's application was, as a matter of law, rejected, the Court misapplied the law in holding that Pro Net thereafter had the power to accept the application. *See Beck*, 18 S.W.3d at 10.

2. The Court Improperly Made a Credibility Determination Based on Affidavits and Respondents are Entitled to Trial to Resolve Genuine Issues of Material Fact

At the very least, the foregoing reflects that there exists a genuine issue of material fact on whether Netco's application had been rejected. In finding that Pro Net never rejected Netco's application, this Court necessarily determined Gooch's affidavit to be more credible than the affidavits and deposition testimony of Paul Brown and Charlie Schmitz. This the Court cannot do. "A trial court has no authority to weigh credibility on conflicting affidavits in adjudicating a motion for summary judgment." *See New Prime, Inc. v. Professional Logistics Management Co., Inc.*, 28 S.W.3d 898, 904 (Mo. App. S.D. 2000); *Horne v. Ebert*, 108 S.W.3d 142, 147 (Mo. App. W.D. 2003).

The procedure in this case was akin to a summary judgment, with each side presenting their evidence solely by way of affidavit and deposition. *See, e.g., Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1335 (D. Kan. 2000); *Owen v. MBPXL Corp.*, 173 F. Supp.2d 905, 922 n.9 (N.D. Iowa 2001) (citing cases). Just as a trial court in a summary judgment proceeding may not weigh conflicting affidavits, this Court, on *de novo* review of a summary judgment-like record, has no authority to judge the credibility of conflicting affidavits. *See Evans v. Stirewalt*, 2005 WL 729568, *1 (Mo. App. S.D. 2005) ("[a]ll evidentiary conflicts are for the trial court to resolve . . ."). Faced with diametrically opposing affidavits, as here, the proper procedure is to remand this case to the trial court for a trial in which the affiants testify in person so that the trier of fact can properly ascertain their credibility from their demeanor. As stated by the Missouri Supreme Court, trial courts are "in a better position [than an appellate

court] not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.” *In re Adoption of W.B.L.*, 681 S.W.2d 452 (Mo. banc 1984).

Notably, Appellants’ affidavits – in particular the Affidavits of Harold Gooch and Eileen Hague, upon which this Court so heavily relied -- were not subject to cross-examination. This Court relied upon those Affidavits, even though there was no opportunity for Respondents to test their veracity, accurateness and completeness by cross-examination.

It may be argued that Respondents might have taken Appellants’ depositions during discovery on arbitrability, or filed a motion for leave to file a sur-reply. However, a party opposing a motion to compel arbitration need only establish that there is a genuine issue of material fact. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980). Upon such a showing, it is entitled to a jury trial to resolve those disputes pursuant to the Federal Arbitration Act, which, as this Court held (Slip Op. at 11 n.14), governs this dispute. *See id.*; 9 U.S.C. § 4; *Premiere Automotive Group, Inc. v. Welch*, 794 So.2d 1078, 1083 (Ala. 2001); *Allied-Bruce Terminix Co., Inc. v. Dobson*, 684 So.2d 102, 108 (Ala. 1995); *England v. Dean Witter Reynolds*, 811 S.W.2d 313, 314 (Ark. 1991); *Adler v. Rimes*, 545 So.2d 421, 422 (Fl. App. 1989). Undeniably, Respondents have established that there are genuine issues of material fact, thereby entitling them to a jury trial on the disputed factual issues. Respondents specifically requested a jury trial by filing a demand therefor with the trial court. A0476; A0625.

At the very least, Respondents are entitled to a full evidentiary hearing before the trial court, as required by the Missouri Uniform Arbitration Act, RSMo § 435.355.1 (“the court

shall proceed summarily to the determination of the issue . . .”), and as is consistent with *New Prime*. Implicit in the Court’s holding in *New Prime* that a trial court may not weigh credibility on conflicting affidavits is that a jury trial or full evidentiary hearing is required to resolve the conflict. *See New Prime, Inc.*, 28 S.W.3d at 904. Respondents alternatively requested an evidentiary hearing from the trial court, as well as from this Court in the Conclusion of Respondents’ Brief. A0476, A3538, A3736. Accordingly, Respondents respectfully request this Court to remand this case to the trial court for a jury trial or other evidentiary hearing to determine the genuine issues of material fact.²

² The Court made two other factual findings based on Appellants’ evidence that were controverted by Respondents: (1) The Schmitzes “were advised of the terms and conditions of membership” at the Myrtle Beach, South Carolina, meeting in May 1998 (Slip Op. 5); and (2) the Pro Net Terms and Conditions were attached to Netco’s membership application (*Id* at 6). Mr. Schmitz controverted both of those “facts” in his Affidavit:

No specifics were discussed [at the Myrtle Beach meeting] about . . . the benefits of membership, or the terms or conditions of member in Pro Net. . . . We were never given any forms or documents informing us that binding arbitration of disputes was a condition to being a Pro Net member. The only form we received at this meeting was a *one-page* ‘Pro Net Global Association Membership Application Information.’ To my knowledge, no terms and conditions of Pro Net membership were distributed to attendees.” (emphasis added)).

3. The Court Misapplied the Law in Holding that Netco Assented to Arbitration Because It Did Not Specifically Object to the Arbitration Clause

This Court also ignored its own precedent when it found that Netco assented to arbitration because it “did not in any way seek to alter the terms of the [Pro Net] arbitration provision.” Slip Op. at 15. In essence, this Court is giving independent legal effect to an isolated term of a proposed contract that never came into existence. As this Court correctly recognized, before a court can compel arbitration, it must first find that the contract containing the arbitration clause is a valid and enforceable contract. Slip Op. at 13 (citing *Estate of Burford ex rel. Bruse v. Edward D. Jones & Co., L.P.*, 83 S.W.3d 589, 592 (Mo. App. 2002)). It is undisputed that Netco altered the terms of Pro Net’s application and, in response, Pro Net rejected the *entire* application. Therefore, neither party is bound by *any* of the proposed terms. See *Abrams v. Four Seasons Lakesites*, 925 S.W.2d 932, 937 (Mo. App. S.D. 1996) (“The acceptance of a proposition presented by one party must be accepted by the other in the form tendered; if the acceptance purports to add or alter the proposition made,” then neither party is bound.). Under *Abrams*, a finding that Netco assented to arbitration cannot be based on a clause in an invalid and unenforceable contract.

See A0975-76, ¶¶ 26, 29.

Although this Court did not expressly rely on these “facts” with respect to any specific holding, the opinion must be corrected to reflect that these were disputed issues of fact.

II. ESTOPPEL HAS NOT BEEN SHOWN BY CLEAR AND SATISFACTORY EVIDENCE IN LIGHT OF THE CONFLICTING AFFIDAVITS

In addition to a contract theory, this Court alternatively held that Netco is bound to arbitrate under an estoppel theory because, it found, Netco accepted the “benefits” of Pro Net. *See Slip Op.* at 15 (Netco “was subsequently permitted to engage in all the activities provided to Pro Net members and was allowed the full benefits of membership.”). This Court held that Schmitz Associates likewise accepted the benefits of Pro Net membership and therefore it was also estopped to deny arbitration. *See id.* at 16-19.

Again, each and every fact upon which this Court relied to estop Netco and Schmitz Associates was gleaned solely from Appellants’ affidavits.³ And each and every one of those facts was ***directly controverted*** by Respondents’ affidavits and deposition testimony. Either Respondents’ evidence was overlooked or this Court improperly made credibility determinations on the basis of conflicting affidavits. Following Missouri Supreme Court precedent, this Court has previously held that every fact essential to create an estoppel “must be established by *clear and satisfactory* evidence.” *Van Kampen v. Kauffman*, 685 S.W.2d 619, (Mo. App. S.D. 1985) (emphasis added) (citing *Peerless Supply Co. v. Industrial Plumbing & Heating Co.*, 460 S.W.2d 651, 666 (Mo. 1970)). The evidence in this case was not *clear and satisfactory*. As established below, each fact upon which this Court relied in

³ The only affidavit expressly cited by the Court in support of its estoppel holding is the Affidavit of Appellant Harold Gooch.

finding estoppel was disputed by substantial, competent evidence, and other evidence militating against estoppel was disregarded.

Additionally, the Court overlooked facts and/or misapplied the law by failing to consider that Respondents' purchases through Global were not voluntary and consensual acts, but rather they were made under continuing economic duress. Economic duress defeats estoppel, as discussed in Section 2 below.

A. The Court Overlooked Facts or Improperly Weighed the Credibility of Conflicting Affidavits

The Court held that "Netco was subsequently permitted to engage in all the activities provided to Pro Net members and was allowed the full benefits of membership." Slip Op. at 15. In making its finding, the Court relied on the Affidavit of Harold Gooch and, in particular, his conclusory allegation that "[t]he Schmitz organization was permitted to continue their Pro Net membership and it did so." *Id.* at n.18. However, Mr. Schmitz expressly controverted Gooch's testimony, stating that he never considered Respondents to be Pro Net members, and that Respondents never received any benefits of Pro Net membership. A0979, ¶ 38, A0980, ¶ 44.

More specifically, the Court cited the following "facts" as evidencing estoppel. Following each "finding of fact" is a citation to Respondents' evidence directly controverting such "fact."

1. Respondents purchased BSMs from Global to which they otherwise would not have had access. Slip Op. 17-18.

Appellants' self-serving affidavits misled this Court into believing that Respondents purchased a substantial volume of BSMs from *Global* which they would not have been able to do unless they were Pro Net members.⁴ First, it the *uncontroverted* fact that Netco⁵ did not purchase BSMs from *Global*. Netco purchased its BSMs from its upline, Appellant Jimmy Dunn and Dunn Associates – just as it did *before* Pro Net was formed. A0980, ¶ 44. *Global* was, in effect, simply a warehouse from which the product was shipped. It was *Dunn* – not *Global* – (1) that determined the sale price; (2) that invoiced Netco; and (3) whom Netco paid for its BSMs. These facts were *admitted* by Appellants:

⁴ Attorney Gap Bono explained this purported “fact” in rebuttal oral argument. He explained that each Diamond distributor owns the copyrights on his audiotapes. Using Mr. Schmitz as an example, Mr. Bono explained that Mr. Schmitz therefore could not purchase Mr. Foley’s tapes or the tapes of any other distributor who was not in Mr. Schmitz’s upline. With the creation of Pro Net, these Diamond distributors assigned their copyrights in their tapes to Pro Net. As a result, Mr. Schmitz could, as a member of Pro Net, purchase the tapes of other distributors for resale to Netco’s downline.

⁵ Schmitz Associates is engaged in the “functions” business, i.e., facilitating seminars and rallies. It did not purchase any “BSMs,” and certainly none from *Global*. (In this instance, “BSMs” refers to “tools,” i.e., audio and videotapes, books and other printed literature).

The Schmitz Organization *ordered* a substantial amount of BSMs *through* Global.⁶ Global invoiced the Schmitz Organization's upline, Bill Childers and his company, TNT, Inc., for the Schmitz Organization's BSMs purchases. As a Pro Net Diamond member, Global could ship the purchases directly to the Schmitz Organization, but *did not bill the Schmitz Organization*. TNT, Inc. then billed Jimmy Dunn and his company *Jimmy V. Dunn & Associates ("Dunn & Associates")* which in turn billed the Schmitz Organization. *Dunn & Associates solely determined the price that was charged to the Schmitz Organization.*

A2516, ¶ 5.

Second, and more importantly, the ability to purchase BSMs through Global – including BSMs on which other distributors have a copyright – is not limited to members of Pro Net, as Appellants led this Court to believe. ***Eight*** non-Pro Net members – and non-parties hereto – submitted affidavits in this case, each testifying that they purchased BSMs through Global notwithstanding the fact that they were not members of, or even eligible to be members of, Pro Net.⁷ A1181, ¶ 6-7; A1541, A1545, ¶¶ 2, 16; A1551, A1555, ¶¶ 2, 16; A1569, A1573, ¶ 2, 16; A1578, A1582, ¶¶ 2, 17; A1602, A1606, ¶¶ 2, 16; A1612, A1615-17, ¶¶ 2, 15, 19, 22; A1620,24, ¶¶ 2, 15.

⁶ It is most telling that the affiant did not say Netco *purchased* BSMs *from* Global.

⁷ Pro Net membership was limited to "Diamond-level" distributors. *See* A1374, ¶¶ 31-33; A0979, ¶¶ 41-42, 46; A1003, ¶¶ 39-40; A1181, ¶¶ 6-7; A1112, ¶ 13, A1091, ¶ 3; A1093, ¶ 12.

The BSMs that these *non*-members purchased included Pro Net members' audio and videotapes, directly refuting Appellants' contention that such is a benefit available *only* to Pro Net members. A1181, ¶ 6-7; *see also* A0981, ¶ 46. In fact, Global sold many products to non-Pro Net members that were not even associated with Pro Net or its members, such as books, Amway-produced BSMs, generic office products, and audio/videotapes of non-Pro Net speakers. A1181, ¶ 6-7; A0981, ¶ 46.

Because the ability to purchase through Global was not a direct benefit available solely to Pro Net members it cannot reasonably be held that Respondents accepted the benefits of Pro Net membership.

2. Respondents “utilized the Pro Net Website.” Slip Op. 18.

Mr. Schmitz controverted this “fact,” expressly stating “we never subscribed to the Pro Net website [W]e never utilized this website, nor did we order any products through this website.” A0981. In fact, the Pro Net Website did not even come on-line until June 2000, nearly a year *after* the Schmitzes sold their Amway and BSMs business. *Id.*

3. Respondents customized their own website “to include references to Pro Net.” Slip Op. 18.

Even assuming this fact was true (which it is not), the mere fact that Respondents merely mentioned Pro Net on their website, without more, does not indicate that Respondents were *members* of Pro Net. Again, Paul Brown and Respondents both submitted affidavits that Respondents were *not* Pro Net members. A1096, ¶ 22; A1377, ¶ 42; A0977, ¶ 35; A0978, ¶ 44.

4. Respondents listed their own BSMs for sale in the Global catalogue distributed to Pro Net members. Slip Op. 18.

Mr. Schmitz testified that Global did not edit, sell or advertise any tapes in which he was featured as a speaker. *Id.* And, Mr. Schmitz testified that Schmitz Associates' functions were not promoted by Pro Net. A0980. Even if Global listed Netco's BSMs in Global's catalogue, Global sold products that were not related to Pro Net or its members, such as BSMs produced by Amway and generic office products. A1181, ¶¶ 6-7. Thus, this is not a benefit available only to Pro Net members.

5. Respondents "ordered two hundred copies of 'Profiles,' which is a Pro Net magazine." Slip Op. 18.

Again, as established in response to Finding of Fact No. 1 above, Global routinely sold Pro Net materials to non-Pro Net members. Therefore, even if Respondents purchased "Profiles" for resale that fact is wholly insufficient to create estoppel.

6. "The Schmitzes personally attended Pro Net functions." Slip Op. 18.

Respondents directly controverted this "fact," stating: "[W]e did not attend nor participate in Pro Net functions." A0980.

In looking solely to Appellants' affidavits for its findings of fact on estoppel, the Court overlooked additional evidence submitted by *Respondents*, which further dispels the argument that they accepted the benefits of Pro Net membership. Specifically:

- Among the purported benefits of Pro Net membership are the ability to purchase or use the following: (1) EasyTel voice messaging system; (2) Go-Print.com; (3) ToolsCart.com; (4) MedJet; and (5) Financial Passport. A1973 ¶ 9.

In sworn testimony, Netco denied purchasing or using the "EasyTel" telephone voicemail messaging system; "Go-Print.com," "ToolsCart.com," or "McCoy Services," "MedJet" or "Financial Passport." A0980 ¶ 44; A1004 ¶ 42.

- Another purported benefit of Pro Net membership is that Pro Net would act "on behalf of its members to negotiate certain purchase agreements. In that respect, Pro Net identified five purchase agreements negotiated by Pro Net: the Master Supply Agreement between Pro Net and Global; Pro Net I's agreements with EasyTel, Go-Print.com and ToolsCart.com; and an Agreement with McCoy Services regarding the Pro Net Website. A1972 ¶ 8.

Again, Global routinely sold products to non-Pro Net members; Respondents never participated in any activities associated with "EasyTel," "Go-Print.com," "ToolsCart.com," or "McCoy Services;" and Respondents never subscribed to, utilized, or ordered any products through the Pro Net website.

- A third purported benefit of Pro Net membership was that Pro Net would provide a forum for sharing ideas and promoting, arranging and sponsoring member meetings. *See* A1103.

Again, the Plaintiffs did not receive any of these benefits, as established by the following:

- After the Schmitzes refused to join Pro Net at the Vail meeting, the Pro Net Steering Committee "blackballed" them. A0980.

- The Schmitzes were excluded from speaking at all Pro Net conventions and functions. *Id.*
- Respondents' functions were not promoted in Pro Net or Pro Net members' literature advertising upcoming functions and events. *Id.* In fact, rather than promote the Schmitzes' Amway business, the Pro Net Steering Committee instructed specific members of the Schmitz upline to inform Schmitz downline that the Schmitzes were no longer "active" in the Amway business. *Id.*
- Pro Net admitted that it did not provide any meetings or forums in the State of Missouri. A1974, ¶ 10.
- Pro Net admitted it did not promote, arrange, or sponsor any meetings in Missouri. *Id.* at ¶ 11.
- A fourth purported benefit of Pro Net membership is "periodic information helpful in developing the members' Amway business." *See* A1103.

Since the Plaintiffs were not members of Pro Net, they never received any such information. A0980.

Additional indicia that Respondents did not accept any benefits of Pro Net membership include:

- Respondents did not vote in any nominal Pro Net "elections;" A0980
- Respondents did not serve on any Pro Net committees; *Id.*
- Respondents did not pay any annual dues as required by Pro Net; *Id.*

- Respondents did not use the temporary account log-in and password Pro Net sent them; A0981.
- Respondents did not subscribe to or use Pro Net’s “personal web office;” *Id.*
- Respondents did not participate in “recognition updates” for members of their downline that was offered through the website; *Id.*
- Global did not edit, sell or advertise any tapes in which Charlie Schmitz was featured as a speaker; *Id.*
- The Schmitzes' "profiles" were removed from the Pro Net website, BSMS and literature; *Id.*
- Respondents did not consent to Pro Net’s use of the Schmitzes’ likeness and information on its website. *Id.*

As the foregoing establishes, each of the facts upon which the Court relied to find estoppel were *controverted* by substantial, competent evidence, and therefore the Court had no authority accept Respondents’ version of the facts as true. *See New Prime, Inc. v. Professional Logistic Mgmt Co., Inc.*, 28 S.W.3d 898, 904 (Mo. App. S.D. 2000). When *all* of the facts and circumstances are considered – including Respondents’ additional uncontroverted evidence and the fact that any estoppel is vitiated by the continuing economic duress doctrine, as discussed in Section C below -- no fact-finder could reasonably conclude that Respondents accepted the benefits of Pro Net membership.

B. This Court Misapplied the Law in Implicitly Finding that Schmitz Associates is Bound to Arbitrate Under an Alter Ego Theory

This Court began its discussion of estoppel with respect to Schmitz Associates by holding that “Netco’s agreement with Pro Net was set up to benefit the entire Schmitz Organization, including Schmitz Associates.” Slip Op. at 17. This holding was based on the following facts:

1. Respondents and Mr. Schmitz referred to Netco, Schmitz Associates and the Schmitzes, individually, collectively as the “Schmitz Organization,” paying “little deference to the individual nature of the separate entities.”
2. Schmitz Associates facilitated Netco’s functions business;
3. Respondents operated in tandem to build, support and enhance the Amway business;
4. Respondents operated out of the same office;
5. Mr. Schmitz was the principal of both corporations;
6. Respondents used the same letterhead and facsimile number;
7. Schmitz Associates paid Netco a management fee to perform its business operations.

While not expressly so stating, the foregoing suggests the Court used an alter ego-type analysis as part of the basis for its finding that Schmitz Associates is bound to arbitrate. This Court ignored multiple Missouri Supreme Court precedents in holding that those seven facts, individually or collectively, are sufficient to pierce the corporate veil.

There are three elements that must be shown in order to pierce the corporate veil:

- 1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- 2) Such control must have been used by the corporation to commit fraud or wrong, to perpetrate the violation of statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
- 3) The control and breach of duty must proximately cause the injury or unjust loss complained of.

66, Inc. v. Crestwood Commons Redevelopment Corp., 998 S.W.2d 32, 40 (Mo. banc 1999).

The second element is dispositive, so it will be addressed first. There are absolutely no facts, let alone any allegation, that Schmitz Associates was formed or used to perpetrate a fraud, violate a statute or commit a dishonest or unjust act. *See id.*; *Fairbanks v. Chambers*, 665 S.W.2d 33, 36 (Mo. App. W.D. 1984). For this reason alone, the Court misapplied the law in implicitly holding that Respondents are alter egos of each other or the Schmitzes.

This Court's findings also fall far short of establishing the first element.⁸ There is a presumption of separateness between two corporations *even when they are owned or*

⁸ *See also Collet v. American National Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. App. E.D. 1986), for the eleven factors that must be considered in determining whether one corporation so dominates another that the dominated corporation is but an alter ego. The facts upon which

controlled by the same persons. Blackwell Printing Co. v. Blackwell-Wielandy Co., 440 S.W.2d 433, 436-37 (Mo. 1969). Per this binding precedent, the mere fact that the Schmitzes are the owners of both Netco and Schmitz Associates is wholly insufficient to pierce the corporate veil.

Nor is the fact that the Schmitzes' use of the term "Organization" in their Petition to refer to their businesses collectively indicative of the requisite control. "Organization" is not intended to imply a single entity; it is nothing more than a term of convenience to refer collectively to individuals and their corporations. In fact, because Amway expressly prohibits distributors from using their Amway distributorship corporation from operating any other business (A5443), distributors participating in the BSMs industry formed separate corporation(s) to operate their tool and/or functions businesses. As a matter of convenience, the three corporations (Amway, tools, and functions) and their principals are sometimes collectively referred to as the distributor's "Organization" – not to connote a single entity, but to refer to a family of businesses.

The fact that both corporations operated "in tandem" with each other does not support this Court's finding that they have ignored corporate distinctions. Each corporation engaged in entirely distinct business operations. As the Court noted, Schmitz Associates facilitated

the Court relies does not come close to satisfying those elements. Nor have Appellants presented sufficient evidence to establish those factors.

“functions,” *i.e.*, a *service-based* business consisting of coordinating seminars and rallies. Slip Op. at 4. Netco, on the other hand, engaged the sale of Amway products and “tools,” – a *product-based* business -- until the business was sold. *Id.* The fact that two corporations have a mutually beneficial relationship does not destroy their corporate distinction. Indeed, Respondents’ relationship is even *less* intertwined than the common situation where a business is set up with one corporation to conduct its business operations and a separate corporation to hold the real estate. Yet, without far more, courts would not destroy the corporate distinction in that situation. For example, the Missouri Supreme Court refused to destroy the corporate distinction between Ford Motor Company and its wholly owned subsidiary, Ford Credit Corporation. *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641, 642 (Mo banc 2002). Clearly, as the facts in that case revealed, the two corporations operate in tandem with each other and have a mutually beneficial relationship, *i.e.*, Ford Credit Corporation extends credit for the purchase of Ford Motor Company vehicles. Although the plaintiff in that case was trying to establish an *agency* relationship from the close, symbiotic relationship between the two entities, the Court recognized that the plaintiff had not alleged facts sufficient to pierce the corporate veil. *See id.* at 644. Likewise, the existence of symbiotic relationship between Respondents is wholly insufficient to bind one to a contract of the other.

In finding that Respondents’ corporate distinctions were ignored, the Court overlooked the following facts, which Appellants did not – and could not – controvert: each has its own assets, maintains a separate bank account and records, and pays their own expenses; they are not inadequately capitalized; they do business with corporations other than each other; and they comply with corporate formalities. A0971. The fact that Schmitz Associates paid Netco

a management fee to perform its business operations supports, rather than dispels, the fact that Respondents respected corporate distinctions. Lastly, merely sharing office equipment and supplies is not equivalent to exercising control over another's conduct, as required to satisfy the first element of alter ego status.

Moreover, the Missouri Supreme Court in *Dunn* indicated its disapproval of binding a non-signatory to an arbitration contract it did not sign, no matter how intertwined the issues are to an arbitration contract. *See Dunn*, 112 S.W.3d at 436 (holding that while a *signatory* to an arbitration agreement may be estopped from avoiding arbitration with a non-signatory if the non-signatory is seeking to resolve issues that are intertwined with that contract, it does not operate in the inverse – a non-signatory cannot be compelled to arbitrate even though the issues relate to a contract containing an arbitration clause).

For the foregoing reasons, the Court misapplied the law in implicitly finding that Schmitz Associates is bound to arbitrate under Netco's (non-existent) arbitration agreement via an alter ego-type theory.

C. The Court Overlooked the Facts and/or Law Establishing Respondents' Economic Duress Argument

Respondents affirmatively argued that they could not be estopped from denying arbitration because Netco was compelled under *continuing economic duress* not only to submit the Pro Net membership application in the first instance, but also to thereafter continuing to purchase BSMs that originate from Global. Continuing economic duress is a defense to arbitration by estoppel. *See Powertel, Inc. v. Bexley*, 743 So.2d 570, 575 (Fla. Dist. Ct. App. 1999) (holding that cell phone customers were not bound to arbitrate under a unilaterally

imposed arbitration clause where they had no economically feasible alternative but to accept arbitration or switch providers and suffer “a great deal of inconvenience and expense.”).

Like *Powertel*, Missouri courts recognize the contract defense of economic duress or business compulsion. *See State ex rel. State Highway Comm’n v. City of St. Louis*, 578 S.W.2d 712 (Mo. App. E.D. 1978) (citing *Coleman v. Crescent Insulated Wire & Cable Co.*, 168 S.W.2d 1060 (Mo. 1943)). In *State Highway Comm’n*, the court noted that “the victim of duress ‘acts knowingly but unwillingly because of the coercion . . . ‘ and ***he may continue to be submissive to the threatened force*** which caused him to act after the action has accrued.” *Id.* at 718 (emphasis added).

This Court misapplied the law in failing to apply the continuing economic duress doctrine under the facts of this case. As Paul Brown confessed that, while acting as Pro Net’s agent and at Pro Net’s express direction, he threatened to cut off Respondents’ BSMs business unless Netco submitted a Pro Net application. A1111-13, ¶¶ 13-17; *see also* A0976, ¶¶ 31-33. Ten other distributors – non-parties hereto -- submitted sworn affidavits affying that the same threats were made to them. A1497-99, ¶¶ 41-42, 44, 48; A1536-38, ¶¶ 12, 16; A1562-65, ¶¶ 13, 15, 22; A1573, ¶ 15; A1581, ¶ 14; A1590, ¶ 14; A1606, ¶ 15; A1615, ¶ 14; A1624, ¶ 14; A1634, ¶ 14. These threats did not end with submission of a membership application. Respondents ***justifiably*** believed that Pro Net had both the power and the ability to cut off its BSMs business if they failed to deal with Pro Net. Indeed, five distributors testified that their BSMs business was, in fact, cut off when they either refused to join Pro Net or otherwise came into disfavor with the Pro Net Steering Committee. A1563-65, ¶ 19, 22-23; A1583-85, ¶¶ 22, 28; A1593, ¶ 27; A1616-17, ¶¶ 22-25; A1638, ¶ 32; *see also* A1094, ¶¶ 16, 22-24; A1041-42,

132:22-135:12. Netco had no economically feasible alternative but to acquiesce to the Pro Net system or its BSMs business would be cut off, which is what eventually happened. A0980-81, ¶¶ 43-44; A1041-42, 132:22-15:12.

This Court was understandably concerned about the volume of BSMs obtained through Global. But what the Court does not understand is that the BSMs industry is unlike an ordinary situation where if a buyer has a disagreement with Coca-Cola he can simply go buy Pepsi. As this Court found, distributors are indoctrinated into “edifying” their upline such that high-level upline distributors are almost God-like. And adherence to the line of sponsorship is paramount. As Paul Brown succinctly put it, unless Mr. Schmitz was up on stage with his upline at functions, he was “dead.”

Again, if you understand the Amway business, okay, you know if you destroy a Diamond in front of his group, that he is done, he is dead, it is over with, and he is not going to get the respect of his people. He can continue buying tapes through ProNet but eventually he has lost all the respect of his people because he is not out there motivating and educating them as he had done for all the previous years.

A1086, 354:17-355:3.

Respondents could not simply go elsewhere to purchase motivational materials or put on their own separate functions. They knew that if their upline blackballed the Schmitzes from speaking at functions, which is what eventually happened, the business they had spent *years* building was over. It is difficult to imagine a case more appropriate for application of the continuing economic duress doctrine.

Estoppel is a *question of fact* that must be proved by clear and satisfactory evidence. *Savannah Place, Ltd. v. Heidelberg*, 122 S.W.3d 74 (Mo. App. S.D. 2003); *Van Kampen*, 685 S.W.2d at 625. For the foregoing reasons, there are genuine issues of material fact that precluded this Court from holding that Respondents are estopped to deny arbitration, and this Court should remand this case to the trial court for a full evidentiary hearing.

III. THE TRIAL COURT MISAPPLIED THE LAW IN COMPELLING RESPONDENTS TO ARBITRATE AGAINST NON-PRO NET MEMBERS

A. Global, Evans and Evans Associates

This Court held that three of the Appellants are not Pro Net members: Global, Evans and Evans Associates. Slip Op. 21 n.23. Yet this Court compelled Respondents to arbitrate *all* of their claims against *all* Appellants. The Court apparently overlooked these four Appellants when it issued its holding compelling Respondents to arbitrate their claims. Alternatively, the Court misapplied the law in holding that these non-signatories were entitled to enforce Pro Net arbitration, when there is no legal or factual basis to support that opinion.

It is well-settled that one who is not a party to a contract has no right to enforce a contract. *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947 (Mo. App. S.D. 1999). Because arbitration is a matter of contract,⁹ and no agreement existed between Respondents and

⁹ *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418 (1986); *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995).

Global, Evans and/or Evans Associates to arbitrate their disputes, this Court erred in compelling arbitration of those claims.

Moreover, because Global, Evans and Evans Associates are not members of Pro Net, Respondents claims are not within the scope of the Pro Net Arbitration Provision. That arbitration provision covers disputes over the performance or breach of the Pro Net agreement, or between members of Pro Net. Since Global, Evans and Evans Associates are not members of Pro Net, there can be no contention that they failed to perform or breach the Pro Net agreement. And, since neither Respondents nor these three Appellants are members, their dispute is not one between members of Pro Net.

B. The Remaining Appellants

This Court summarily found that all Respondents except Global, Evans and Evans Associates are members of Pro Net. The Court overlooked facts and/or misapplied the law in so holding, as the following establishes.

1. In implicitly rejecting Respondents' argument that Schmitz Associates and the remaining seven Appellants are *ineligible* for membership in Pro Net, this Court ignored well-established legal principles and binding precedent, which requires it to construe Pro Net's Bylaws from the four corners of the document according to its plain and unambiguous language.

The Bylaws clearly and unambiguously prohibit any person or entity from being a member except one engaged in the *Amway* business. By-Laws, Art. II, §§ 1-2 (A1126-27); A1093, ¶ 11; A1108-10, ¶¶ 5, 8, 10. A1773-74, ¶¶ 13, 15, 17. With the exception of Dunn

Associates,¹⁰ none of the seven Appellants are Amway businesses. A1108, ¶ 5; A1155, at § II.A.I. Nor has Schmitz Associates ever engaged in the Amway business. As a result, under the plain language of the Bylaws, they are ineligible for Pro Net membership.

A court is required to construe a contract according to its plain and unambiguous language; it has no authority to re-write the contract for the parties. *See Stephens v. Brekke*, 977 S.W.2d 87, 94 (Mo. App. S.D. 1998). In construing an unambiguous contract, as these Bylaws are, a court must determine the parties' intent from the four corners of the contract. *Eisenberg v. Redd*, 38 S.W.3d 409, 411 (Mo. banc 2001).

In holding that Appellants and Schmitz Associates are eligible for membership, this Court effectively re-wrote the Bylaws, eliminating the express requirement that they be engaged in the *Amway* business. In so doing, the Court exceeded its authority. *See Stephens*, 977 S.W.2d at 94. It is interesting that, after admonishing Respondents for failing to respect

¹⁰ Although the individual Appellants also own Amway businesses, they are not being sued in their capacity as principals of those Amway corporations; they are sued individually and as principals of their separate BSMs corporations. Appellant Jimmy V. Dunn & Associates engages in *both* the BSMs corporation and the Amway business (despite Amway's Rule of Conduct that no other business may be conducted through a corporation engaged in the Amway business). This Court should clarify its Opinion at n. 1 when it misleadingly stated that "Appellants are all Amway Corporation ("Amway") distributors" as none are being sued in such capacity.

corporate distinctions, this Court is effectively blurring those distinctions, finding entities to be Pro Net members if they are somehow related to an Amway business that is a Pro Net member.

Because neither Appellants nor Schmitz Associates are eligible for Pro Net membership, Appellants are not entitled to enforce Pro Net Arbitration, and Schmitz Associates may not be compelled to arbitrate its claims. Arbitration is strictly a matter of contract. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418 (1986). “Parties without an agreement to arbitrate cannot require each other to submit a dispute to arbitration.” *Lake Ozark Constr. Indus., Inc. v. North Port Assoc.*, 859 S.W.2d 710, 714 (Mo. App. W.D. 1993); *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947, 948 (Mo. App. S.D. 1999).

Even if the Bylaws were ambiguous and that the Court could look outside the four corners to determine the parties’ intent, there would still exist genuine issues of material fact as to whether the parties are Pro Net members, which precludes this Court from deciding the issue as a matter of law. Specifically, in construing the Bylaws, the Court overlooked the fact that the Bylaws were initially drafted so that the eligible members would be BSMs corporations, which would have included these Appellants. But that draft was *deliberately* amended to limit membership to Amway businesses. A1108-10 ¶¶ 5, 8. This conscious, deliberate amendment *unequivocally* establishes that the parties intended what they plainly said. The Court also overlooked Paul Brown’s testimony that “Pro Net considered the ‘member’ to be the applicant’s Amway distributorship/independent business.” A1109, ¶ 8. Additionally, although Appellants contended that the member of Pro Net included the BSMs

corporation, it is most telling that when Pro Net sent correspondence to its “members” it did so to the Amway corporation, not the BSMs corporations. *See, e.g.*, A1372-73, ¶¶ 26-27.

Given the existence of genuine issues of material fact, this Court had no authority to weigh the evidence or credibility of the conflicting affidavits, and hold that non-Amway businesses are members of Pro Net. *New Prime, Inc. v. Professional Logistics Mgmt Co., Inc.*, 28 S.W.3d 898, 904 (Mo. App. S.D. 2000).

2. The Court also exceeded its authority by effectively rewriting the unambiguous Pro Net agreement, finding that the Appellant “founding members” were entitled to enforce arbitration. There is no arbitration agreement applicable to founding members and therefore they have no right to enforce it. Assuming they are eligible to be Pro Net members, Appellants Harold Gooch; Gooch Support; Gooch Enterprises; Billy Childers; and TNT would be “founding” members, as they assert. The application for membership, on its face, does not state that it is an application for regular membership. It is nothing more than a form to provide identifying information about the member – whether it be a regular or founding member. Thus, from the four corners of the application form, it cannot reasonably be said that the signatories were thereby applying for “regular” membership.

In contrast to the one-page application form, the Pro Net Terms and Conditions, including the arbitration provision, clearly and unambiguously states that it applies only to “regular” members. *See* A1103 (“This is an application for *non-voting* membership . . .”) (emphasis added); A1105 (“This Membership Application must be completed by all applicants . . . for *regular* membership in Pro Net Global Association . . .”) (emphasis added). It would be nonsensical for persons who are already founding members to submit an application for

“regular” membership. If the intent was to bind them themselves to the Pro Net Terms and Conditions or to the arbitration provision, they could have done so clearly and expressly – by revising the Terms and Conditions to state that it applied equally to founding and regular members. The fact that Appellants did not do so is most telling and cannot be ignored.

A court is required to construe a contract according to its plain and unambiguous language; it has no authority to re-write the contract for the parties. *See Stephens v. Brekke*, 977 S.W.2d 87, 94 (Mo. App. S.D. 1998). Additionally, contracts are to be construed against the drafter – in this case, Pro Net. *Triarch Indus., Inc. v. Crabtree*, 2005 WL 77888, *3 (Mo. banc 2005). Moreover, in construing an unambiguous contract, as here, the court must determine the parties’ intent from the four corners of the contract. *Eisenberg v. Redd*, 38 S.W.3d 409, 411 (Mo. banc 2001). This Court exceeded its authority by re-writing the Pro Net agreement so that it applies to founding members, as it necessarily did when it held that these five Appellants are entitled to arbitrate. “Parties without an agreement to arbitrate cannot require each other to submit a dispute to arbitration.” *Lake Ozark Constr. Indus., Inc. v. North Port Assoc.*, 859 S.W.2d 710, 714 (Mo. App. W.D. 1993); *Prickett v. Lucy Lee Hosp., Inc.*, 986 S.W.2d 947, 948 (Mo. App. S.D. 1999).

Even if this Court were to find the Pro Net Terms and Conditions to be ambiguous, there would be genuine issues of material fact that preclude this Court from resolving the issue as a matter of law. Paul Brown and Ken Stewart testified that the Pro Net arbitration provision was intended to apply only to regular – not founding members. A1095, ¶ 17; A1111, ¶ 11; A1370, ¶ 21. Even Appellants’ own attorney, Gaspare Bono, stipulated: “I’ll state for the

record that the membership application expressly said that it was for non-voting members.”
A1044, 145:1-3.

Again, given the disputed issues of material fact, this Court has no authority to weigh the evidence or credibility of the conflicting affidavits. *New Prime, Inc. v. Professional Logistics Mgmt Co., Inc.*, 28 S.W.3d 898, 904 (Mo. App. S.D. 2000). An evidentiary hearing is required to resolve this dispute.

3. The Court further exceeded its authority by re-writing both the Pro Net Agreement and Bylaws, to eliminate the plain and unambiguous condition precedent to membership: acceptance in writing.

Not one but two separate documents -- the Pro Net By-Laws and the Pro Net Terms and Conditions – require acceptance of the contract before any duty to arbitrate arises. The Bylaws plainly provide that an applicant does not become a member of Pro Net unless and until Pro Net accepts the applicant’s membership *in writing*, and specifying the class of membership conferred (*e.g.*, “regular” or “founding” member). By-Laws, § 2 A1127; *see also* A1110, ¶ 9.

In addition, the Pro Net Terms and Conditions expressly state that an agreement to arbitrate does not arise unless and until the membership application has been accepted. *See* Pro Net Membership Application (A1105) (“Upon acceptance of this Membership Application by the Association, the Member agrees . . . to be bound by the Terms and Conditions of this Membership Application as set forth on the attachment to this Application.”).

It is uncontroverted that Pro Net never notified *any* Appellant or Respondent in writing that his/its membership application had been accepted, and the membership status conferred.

A1110, ¶ 9. Appellants did not and cannot produce any writing evidencing Pro Net's acceptance of the membership of Respondents or any of the Appellants who claim to be members. A1811-12, ¶¶ 16-17; A1776-78, ¶¶ 23-28; A1821, ¶ 15; A1827, ¶ 15; A1835, ¶¶ 10-11; A1970, ¶¶ 5-6.

Since the condition precedent to membership (*i.e.*, acceptance in writing) was never satisfied, neither Appellants nor Respondents are members of Pro Net, and an agreement to arbitrate never arose. This Court had no authority to re-write the Pro Net Bylaws and Terms and Condition dispensing with the express requirement of acceptance in writing. *See Stephens*, 977 S.W.2d at 94 (Mo. App. S.D. 1998); *Eisenberg*, 38 S.W.3d at 411. Without a valid and enforceable written contract, this Court may not compel Respondents to arbitrate. 9 U.S.C. § 2 (arbitration agreement must be in writing); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418 (1986) (arbitration is strictly a matter of contract); *Prickett*, 986 S.W.2d at 948 (one not a party to a contract has no right to enforce it); *Lake Ozark*, 859 S.W.2d at 714 (same).

IV. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request this Court for rehearing *en banc*, that it affirm the trial court's judgment, or, in the alternative, that this case be remanded to the trial court for a jury trial or full evidentiary hearing to resolve the genuine issues of material fact.

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CERTIFICATE OF SERVICE

I hereby certify that I did on this 28th day of April, 2005, cause a copy of the foregoing RESPONDENTS' MOTION FOR REHEARING, to be served via overnight mail, postage prepaid, to:

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