IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN OF TEXAS
HOUSTON DIVISION

DR. JOE AND DAWN MORRISON KELLY ROBBINS, RANDY AND JANET COUNCILL, DAN AND HELEN HIGGINS, RON & KAREN GREEN, VICTOR & CATHY BROOK, DR. MARION & JEAN MCMURTREY, DAN & HELEN HIGGINS, DR. T. M. & CYNTHIA HUGHES, RICHMOND EAGLE CORP., DAVE & ROSE ROBERTS, DR. RICHARD & LINDA WERNER, TONY & MARYANN CUTAIA, WARREN & DONNA BIRD, TOM & KYE YEAMAN, and WADE & DEBBIE MCKAY	§	
VS.	§	C. A. NO. H-98-0352
AMWAY CORPORATION, RICH DeVOS, JAY VANANDEL, DICK DeVOS, STEVE VAN ANDEL, DOUG DeVOS, BOB KERKSTRA, JA-RI CORPORATION, DEXTER YAGER, INDIVIDUALLY AND D/B/A YAGER ENTERPRISES AND INTERNET SERVICES CORPORATION, JEFF YAGER, DONALD R. WILSON, INDIVIDUALLY AND D/B/A WOW INTERNATIONAL AND WILSON ENTERPRISES, INC., RANDY & VALORIE HAUGEN, INDIVIDUALLY AND D/B/A FREEDOM ASSOCIATES, INC., FREEDOM TOOLS, INC. AND ALL STAR PRODUCTION COMPANY, JOHN SIMS, INDIVIDUALLY AND D/B/A SIMS ENTERPRISES, RANDY & SUSAN WALKER, INDIVIDUALLY AND D/B/A WALKER, INTERNATIONAL, MARK & MARTHA HUGHES, BILL & ALYSSA BERGFELD, INDIVIDUALLY AND D/B/A AS BERGFELD INTERNATIONAL, INC., JODY VICTOR, INDIVIDUALLY AND D/B/A JEVI CORPORATION, MARK CORDNER, BILLY ZEOLI, INDIVIDUALLY AND D/B/A GOSPEL FILMS, DENNIS JAMES	§	

PLAINTIFFS' REQUEST FOR REHEARING OF STAY OF LITIGATION PENDING ARBITRATION, OR IN ALTERNATIVE, A STATEMENT BY COURT THAT THIS ISSUE SHOULD BE SUBJECT TO INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. SEC. 1292(b)

TO THE HONORABLE UNITED STATES DISTRICT JUDGE: COMES NOW, DR. JOE and DAWN MORRISON, KELLY ROBBINS, RANDY and JANET COUNCILL, DAN and HELEN HIGGINS, RON & KAREN GREEN, VICTOR & CATHY BROOK, DR. MARION & JEAN MCMURTRY, DAN & HELEN HIGGINS, DR. T. M. & CYNTHIA HUGHES, RICHMOND EAGLE CORP., DAVE & ROSE ROBERTS, DR. RICHARD & LINDA WERNER, TONY & MARYANN CUTAIA, WARREN & DONNA BIRD, TOM & KYE YEAMAN, and WADE & DEBBIE MCKAY, Plaintiffs in the above-entitled and numbered cause and files this, their Request for Rehearing of the

Court's Stay of Litigation Pending Arbitration, or in the Alternative, a Statement from this Court that this subject matter should be subject to Interlocutory Appeal, and in support thereof would show unto the Court the following:

I. With all due respect to this court's opinion and order of October 13, 1998, the result of staying this case pending arbitration would result in a tragic denial of Plaintiffs' substantive rights and in particular, their inherent constitutional right to a trial by jury.

While the notion of arbitration may seem reasonable on its face, the entire means and manner of Defendant Amway's conduct leading up to the arbitration provision, coupled with the prior refusal of the vast majority of the Plaintiffs to participate in an Amway sponsored and sanctioned resolution process, makes the court's ruling requiring this process a substantial impediment to the opportunity of Plaintiffs to have their disputes equitably and fairly determined. Quite frankly, Plaintiffs believe that the arguments against the arbitration weigh so heavily in Plaintiffs' favor that it must surely be a failure of Plaintiffs' counsel to adequately enunciate the various arguments against enforcing this arbitration claim. It is for that reason, that Plaintiffs beg this court to revisit this critical issue, permit oral argument, and have the opportunity to reconsider this ruling.

II. SUMMARY OF ARGUMENT There is no agreement to arbitrate. Even the few that signed the purported arbitration agreement should not be bound by the agreement because 1. They did not know what they were allegedly agreeing to since the arbitration rules had not yet been drafted, 2. There was no consideration for the agreement, and importantly 3. They did not know the agreement could be interpreted to relate to issues that had already developed. For those that did not sign the agreement, such was a conscious decision to reject arbitration.

Moreover, the Federal Arbitration Act specifies that any agreement to arbitrate relates only to controversies which arise after the agreement, unless one specifically agrees to submit then existing controversies. No such agreement exists. The automatic renewal forms, signed in some cases ten years ago, speak to changes in rules, not fundamental contract changes such as losing your constitutional right to trial by jury. The issue which this court should revisit is whether or not an agreement exists. The arbitration provision is unconscionable per se if it is to be enforced even when a party refuses to enter into such an agreement. But, whether or not the provision is unconscionable should not be the threshold issue, as it appears the court's memorandum order seems to make it.

III. WAS THERE AN AGREEMENT AS TO THOSE WHO SIGNED THE AGREEMENT? Of the original 30 plaintiffs, six signed the purported arbitration agreement: Dan and Helen Higgins, Marion and Jean McMurtrey, Tom and Kye Yeaman. A fourth couple sent the agreement into Amway, but did not sign the agreement: Wade and Debbie McKay. Fundamental contract principles must apply as to whether or not the agreement to arbitrate exists as to these parties. As to the McKays, the failure to sign the agreement is tantamount to failing to agree. There is nothing within the document which purports to be the agreement that indicates the McKays gave their assent to the agreement. The form therefore is meaningless as to them. For the Higgins, McMurtreys and Yeamans, other contract principles need to be addressed.

A. Consideration.
There is no consideration given in exchange for this arbitration agreement. The only consideration which is even plausible is that somehow the individual distributors derive some benefit from arbitrating. However, the very thing which the parties dispute as being valid and enforceable cannot be at the same time the consideration upon which the bargain is made.

Consideration that a party doesn't desire is no consideration at all. This issue has been recently addressed in Tenet Healthcare Ltd v. Cooper, 960 S.W.2d 386 (Tex. App.—Houston (14th Dist.), writ dism'd w.o.j), where an arbitration provision in an employment agreement was found to be unenforceable because of lack of consideration.

The agreement is void as to lack of specificity. The Amway Arbitration rules and regulations were not even written at the time the request was made for everyone to sign the agreement. In fact, the earliest that any of the Plaintiffs had notice of what the terms of the arbitration agreement might be was when Dr. Joe Morrison, (who did not sign the agreement) received a "Draft" copy of the arbitration rules in November, 1997. None of the signers had any idea what they were agreeing to, because the terms of the agreement were not spelled out. They did not know, for instance, the arbitrators would be hand selected and trained by the Amway Distributors Association. They did not know that this same group, on whose board sits many of the Defendants herein, would have the right and power to remove the arbitrators from the process. The signers cannot be held to an agreement they did not make.

The agreement is prospective only. Pursuant to the arbitration provisions, the Federal Arbitration Act is supposed to apply. The court should therefore look carefully at the Act and its provisions relating to written arbitration agreeements:

> A written provision…to settle by arbitration a controversy thereafter arising out of such contract…or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. §2

The agreement in question was signed some time in the fall of 1997. All of the fact and circumstances to this claim relate to matters which occurred long before the execution of the arbitration agreement. The FAA then, relates to matters which arise after the execution of the agreement, unless there is an agreement to submit existing controversies to arbitration.

There is absolutely NO evidence, no matter how strained one looks through this agreement, to conclude that the parties agreed to submit existing controversies to arbitration. Such an agreement must be clearly and unequivocally made, and it is no where to be found. To the contrary, those who signed the agreement did not know they were being asked to submit existing controversies to arbitration. Please see the affidavits of the agreement signers, attached as Exhibit A.

IV. WAS THERE AN AGREEMENT AS TO THOSE WHO DID NOT SIGN THE AGREEMENT? Twenty-two Plaintiffs herein signed no arbitration agreement. Plaintiff Joe Morrison specifically wrote Amway about the agreement and refused to sign the agreement. The others simply failed to sign the agreement, thinking that alone

would be enough indication of their lack of assent to the arbitration process. Please see Exhibit B, wherein each of these parties says by way of affidavit they never agreed to an arbitration agreement. The failure to sign should have been enough, however, Defendants take the position the automatic renewals signed by the Plaintiffs cause them to agree by default. In so doing, Defendants have confused the process so as to make it appear the arbitration provision is agreed to. However, nothing could be further from the truth, in fact or at law, even if the two concepts are different. The arbitration provision is a modification of a contract, not a rule change. A primer on how the Amway distributorship process exists and is formulated is necessary, so as to not confuse terms. When an individual originally becomes an Amway Distributor, he or she signs a contract. Within that contract, the relationship between the parties is defined, as well as their rights and responsibilities.

The contract in question is called "Amway Distributor Application." There are rules which relate to conduct and other matters which are specific to the business relationship. These rules change from time to time. The contract, which is the agreement between the parties, does not. Each year, an Amway Distributor renews his or her contract by way of an "Intent to Continue" form. As a convenience, Amway offered the option of automatic renewal for parties that chose that mechanism. The "Intent to Continue" form extended the original contract for another year. Within the automatic renewal agreement is the following language which Defendants contend is the "bootstrap" of the arbitration provision:

> I agree 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 Distributorships, and all other rules, requirements and Regulations as they are set forth from time to time in official Amway literature.

The arbitration provision is a change of the contract, it isn't just a change of the rules.

Publishing this in their trade magazine and sending out letters doesn't make this fundamental change in the manner in which the parties have to resolve their legal disputes a rule change. One ought not sacrifice their constitutional rights by way of a unilateral rule change. Indeed, in the history of Amway, or at least as far back as any of the Plaintiffs have been associated with Amway, this is the first time that a purported rule change has come along with a form for a signature. Why? The answer is simple: this is a change of the contract between the parties. As such, there needs to be a written agreement to change or modify the terms of the contract.

To establish a contract under Texas state law, there must be a meeting of the minds as to all essential terms. See Solis v. Evans, 951 S.W.2d 44, 49 (Tex.App.—Corpus Christi 1997, n.w.h.). Any modification of a contract must possess the essential elements of a contract. See Mandril v. Kasishke, 620 S.W.2d 238, 244 (Tex.Civ.App.—Amarillo 1981, writ ref'd n.r.e.). One party cannot unilaterally modify the terms of the original contract. See Tex. Workers' Comp. V. State Bd. Of Ins., 894 S.W.2d 49 (Tex.App.—Austin 1995, app. Dism'd. 910 S.W.2d 176). In this case there was no meeting of the minds as to the arbitration agreement and the essential elements of a contract are nowhere to be found. Amway has unilaterally modified the terms of the original agreement.

Amway argues that the original agreement was not unilaterally modified because the distributors were bound by the rules "as they are amended from time to time." This flies in the face of contract law as well as basic principles of equity and justice. While the Plaintiffs concede that sometimes parties may agree to have the power to amend or change the terms of a contract, there is no authority for the proposition that a party (Amway) can add a completely new provision (arbitration) that bears no relation to the original contract. This line of reasoning was recognized by the Texas Supreme Court in Ashford Development, Inc. v. USLife Real Estate Services Corporation, 661 S.W.2d 933 (Tex. 1983).

The court recognized that if a contract provides that conditions may be added by one of the parties to the contract, any added condition must flow naturally from the terms of the contract. See id. at 935. Even as a more practical matter however, it can not be a rule that if one party agrees that another party can unilaterally amend or change the terms of a contract, that this power is absolute. Such a contract would be unconscionable at the very best. This is especially so when the provision acts to deprive a group of people their constitutional right to a trial by jury.

The FAA relates to prospective controversies. As discussed above, the Federal Arbitration Act relates to controversies which arise after the agreement is entered, unless the parties agree to submit existing controversies to arbitration. The automatic renewal became effective at the start of the new year, January 1, 1998. All of the controversies which form the basis of this lawsuit arose before that day. The lawsuit was filed on January 5, 1998. All of the controversies arose before the arbitration form was sent to Plaintiffs. On its face then, the FAA cannot apply to this lawsuit. Surely, no one could argue with a straight face that the automatic renewal, executed in some cases in the 1980's, qualifies as an agreement to submit then existing controversies to arbitration.

V. THE ARBITRATION AGREEMENT DOESN'T APPLY TO THIS CONTROVERSY

The arbitration agreement, even if enforceable, is not enforceable as to all aspects of the disputes between these parties. A substantial portion of Plaintiffs' lawsuit relates to issues concerning Business Support Materials, and the handling of same by various Defendants.

The area of Business Support Materials is one for which, interestingly, Amway claims no responsibility. In the same 1998 form sent to all distributors, Amway has a separate section relating to Business Support Materials which contains the following pronouncement:

> Offered independently of Amway Corporation. Independently produced Business Support Materials are offered independently of Amway Corporation and have not been endorsed or approved by Amway Corporation. Business Support Materials should be clearly labeled to show they do not come from Amway. Distributors who choose to sell Business Support Materials must make it clear to their customers that such materials are produced and sold independently of Amway.

Now, Defendants want their cake and to eat it too. On the one hand, they want an acknowledgement, fallacious as it may be, that Business Support Materials have nothing to do with Amway, but if you have a dispute relating to Business Support Materials, you must submit to arbitration. It is surely an interesting coincidence that this pronouncement by Amway Corporation comes, for the first

time, after the discussions with Plaintiffs relative to the complaints and problems they have had which ultimately resulted in this lawsuit.

Plaintiffs are mindful of the "any dispute" language discussed in the order. However, a substantial amount of this lawsuit is between parties that are not even in privity to the purported arbitration agreement. When Joe Morrison sues Dexter Yeager and Internet, Yeager's company, where and how have these parties agreed to an arbitration agreement between them? If this lawsuit involved, for instance, some land deal gone sour between them, would the Amway arbitration provision apply? Of course not. Amway takes extraordinary pains to distance itself from the business supply materials game. They should not be permitted to invoke this arbitration provision and still disclaim responsibility for the conduct of the co-Defendants such as Yeager.

VI. THE ARBITRATION PROVISION IS UNCONSCIONABLE

Though the issue of unconscionability need not be reached, since there is no contract or agreement to arbitrate, Plaintiffs cannot concede this court's determination that the arbitration provision is not unconscionable. Plaintiffs believe it is. The court points out that the decision at issue is one where the court should exercise judgment weighing all of the competing interests and maintaining an even balance. (Page 4 of Memorandum Order). With that in mind, where is the equity in enforcing a purported arbitration agreement as against people who not only didn't sign it but specifically protested it? How can it be fair for one party to potential litigation to unilaterally completely change the landscape as to how disputes may be resolved, and in the process deny a party their right to trial by jury? The Plaintiffs are inherently concerned about a process which their adversary has drafted, drafted at a time the dispute was ripe but not yet filed, and in which their adversary not only makes all of the rules, but hand picks the umpire and then has the power to "fire" the umpire if they are dissatisfied. That is the Amway Arbitration process. That is not a system promoting "even balance."

Plaintiffs acknowledge that adhesion contracts are not automatically void. See Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1154 (5th Cir. 1992). As this Court points out, a party seeking to avoid an arbitration agreement must have a well-founded claim of fraud or excessive economic power that "would provide grounds 'for the revocation of any contract."' Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985). A party seeking to avoid an adhesion contract must generally show that it is unconscionable. See Dillard, 961 F.2d at 1154. The Court then looks at the factors that determine "unconscionability." The factors the court points to are the following, with a brief application of the facts surrounding the disputed arbitration "agreement." To determine whether a contract is unconscionable a court must look to: "…the circumstances surrounding the agreement…" The two groups of parties had operated under a contract for years that allowed them to pursue their Amway businesses. Never had arbitration been a term of the contract. Never had any of the distributors agreed to give up their rights to have a dispute settled before a jury. Several years before the arbitration "agreement" was forced onto the distributors a dispute arose with respect to their businesses. When it became inevitable that litigation might ensue, Amway incorporated the arbitration "agreement" into their contracts. They were asked to sign a form acknowledging they agreed to arbitration, but were told that was just a formality—that the arbitration "agreement" is automatically incorporated into their contracts. In short, they had absolutely nothing to do with the arbitration "agreement," other than their diputes with the Defendants are what triggered the new provision. "…the alternatives, if

any, which were available to the parties at the time of making the contract…" The distributors had no alternatives. According to Amway, the arbitration "agreement" was automatically incorporated into their contracts. They were asked to sign the acknowledgement, but told that that was just a formality. "… the nonbargaining ability of one party…" Again, the Plaintiffs had absolutely zero bargaining power. The arbitration "agreement" was added to their contracts without their consent and against their will. "…whether the contract is illegal or against public policy…" This contract, such that it is, is certainly against public policy if not illegal, for depriving another party of its day in court. Surely it can not be in favor of public policy to give one party complete and absolute power to adjust the terms of an already existing contract, in any way it sees fit, for its own benefit. Why would anyone ever enter into a contract such as this? This Court then discusses the questions that provide guidance as to whether or not a contract is unconscionable: (1) How did the parties arrive at the terms in controversy?; and (2) Are there legitimate commercial reasons which justify the inclusion of these terms? See Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 499 (Gonzalez, J., concurring). It is pointed out that the first question, described as the procedural aspect of unconscionability, deals with assent and focuses on the facts surrounding the bargaining process. See Lindemann v. Eli Lilly & Co., 816 F.2d 199, 203 (5th Cir. 1987); DeLanney, 809 S.W.2d at 499 (Gonzalez, J., concurring); Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 821 (Tex.App.—San Antonio 1996, no writ). The second question, the substantive prong of unconscionability, deals with the fairness of the resulting agreement. See Lindemann, 816 F.2d at 203; DeLanney, 809 S.W.2d at 499 (Gonzalez, L., concurring); Pony Express, 921 S.W.2d at 821. As required by Texas law, Plaintiffs prove both substantive and procedural unconscionability in this case.

This Court quotes DeLanney by pointing out that, "the principle of unconscionability is one of preventing oppression and unfair surprise, not the disturbance or allocation of risks because of superior bargaining power." See DeLanney, 809 S.W.2d at 498 (Gonzalez, J., concurring).

If unilaterally forcing one to forfeit their constitutional right to a trial by jury in the middle of a disagreement, and after years of doing business together isn't oppression and unfair surprise, one might wonder what is. This is not comparable to a situation like that in DeLanney, where there was a clause in a contract limiting liability for errors or omissions in the performance of a contract. See id. First and foremost, there, the clause in question was present when the contract was signed. See id. As such, the parties knew the terms, and understood the effects of those terms, even if the bargaining power was skewed. Secondly, and as the court in DeLanney pointed out, the clause in question there was not completely one-sided because it benefited both parties. See id. at 499. Finally, unlike our situation, the Plaintiff in DeLanney had other alternatives. The Plaintiffs in the instant case had no such luxury. They had operated their businesses for years without any thought of giving up their right to a trial by jury. Many of them had retired from their former professions and jobs to pursue their Amway businesses, which often represented their sole sources of income. Again, the arbitration provision was quite literally "forced" onto them without any notice, opportunity to bargain or alternatives. In its memorandum the court explains that, "the Plaintiffs are not unsophisticated parties that were beguiled into entering a fundamentally outrageous contract that they now wish to avoid." See Lindemann, 816 F.2d at 204. This is absolutely correct. The Plaintiffs are indeed rather sophisticated business people and when they

entered into their contracts with Amway, they knew exactly what they were doing.

Further, the Plaintiffs do not argue that the contract they entered into, when they entered into it, was unconscionable. It is the interpretation of the contract to allow Amway to unilaterally add a completely new provision that makes it unconscionable. With regard to the substantive prong of unconscionability, the Plaintiffs respectfully disagree that they have failed to produce any evidence that the agreement to arbitrate itself is unfair or oppressive. First and foremost, it is the Plaintiffs constitutional right to have their case heard before a jury of their peers, unless they agree otherwise. They have not. To force them to forego this right is unfair and oppressive in and of itself. Secondly, when Amway announced the rule that everyone had to arbitrate their disputes, they did not even know how the process would work. It was a hurried attempt to prevent what they saw coming—a big lawsuit. Further, Amway controls everything about the whole process. Amway picks the arbitrators. Amway trains the arbitrators. Amway has the power to remove the arbitrator.

Such a system implemented, designed and controlled by one party can not be fair to an adversary of that party.

VII. REQUEST FOR ORAL ARGUMENT

This issue is fundamentally important to the parties. Plaintiffs respectfully request the privilege of making its arguments directly to the court by way of oral argument at a time convenient to the court.

VIII. ALTERNATIVELY, PLAINTIFFS REQUESTS THIS COURT CERTIFY THIS CASE FOR INTERLOCUTORY APPEAL

Given the importance of this issue to Plaintiffs which potentially involves a denial of their right to a jury trial, and given the fact that this is surely a matter upon which reasonable people may have a difference of opinion relative to the controlling law, Plaintiffs respectfully request the opportunity to present these issues on interlocutory appeal pursuant to 28 U.S.C. § 1292. Plaintiffs request that this court issue an order indicating that its ruling on arbitration issues is one involving a controlling question of law as to which there is substantial ground for difference of opinion on and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. This is surely true, inasmuch as it would be far more efficient to deal with the arbitration issue now than at the conclusion of the arbitration process.

IX. ALTERNATIVELY, THIS COURT SHOULD DISMISS THIS CASE

As the court knows, this current lawsuit is just one part of a larger piece of litigation which is currently pending in the 129th Judicial District Court of Harris County, Texas. In that case, there are an additional 51 people who are currently involved in litigation with the same Defendants herein, but over whom this court has no jurisdiction. All of the parties in this case are also in the state court litigation. The state court litigation involves people who did not even have an automatic renewal agreement to allegedly bootstrap the arbitration agreement. The arbitration issue has been briefed and argued in that court. Plaintiffs had previously moved to dismiss this lawsuit so that the state court matter might proceed, where all of the parties are before one court, where there is no chance of conflicting court rulings, and where judicial economy would be best served. This is as true today as before the court's ruling on the arbitration issues. Plaintiffs still desire that this

case be dismissed so that this and all other issues incident to this litigation may be decided in a common forum.

CONCLUSION

Plaintiffs respectfully pray that this Court reconsider its prior order and instead deny the Motion to Stay Pending Arbitration of the Defendants. Alternatively, Plaintiffs pray that this court certify the case for interlocutory appeal, or alternatively, that is court grant the previously filed Motion to Dismiss.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to all counsel of record, on October 23, 1998.
Brock C. Akers