

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION**

NITRO DISTRIBUTING, INC., et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 03-3290-CV-S-RED
)	
ALTICOR, INC., et al.,)	
)	
Defendants.)	

**PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL EXHIBIT
IN SUPPORT OF PLAINTIFFS' SUGGESTIONS OPPOSING DEFENDANTS'
MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY THE
CASE AND COMPEL ARBITRATION**

COME NOW the Plaintiffs, and for their Motion for Leave to File a Supplemental Exhibit in Support of Plaintiffs' Suggestions Opposing Defendants' Motion to Dismiss, or in the Alternative, to Stay the Case and Compel Arbitration, state as follows:

1. By Order of this Court dated April 23, 2004 (**Docket # 116**), the parties were granted until June 10, 2004, to complete discovery on the issue of arbitrability. Briefing on this issue concluded on July 8, 2004, and the Court heard oral argument on September 9, 2004.

2. On October 27, 2004, Plaintiffs received belated discovery from Defendants in the form of a partial videotape from the May 2, 2003 Quixtar/JAMS training session. Defendants could not account for this videotape during discovery, along with other videotapes of Quixtar/JAMS training sessions.

3. Though the newly-surfaced videotape is incomplete, it does contain a number of key admissions against Defendants respecting the issues of (1) the scope of the Amway arbitration provision, and (2) unconscionability.

4. For example, Mr. VanderVen, a Quixtar executive, can be heard telling the JAMS arbitrators that “the disputes that arise from there [BSMs] *are not* specifically covered by the [Quixtar] Rules.” (emphasis added). Mr. VanderVen further represented, “The big difference is it [the dispute resolution procedure for BSM disputes] doesn’t come back to the company for us to make a decision, *because it’s not covered by our Rules.*” (emphasis added). These admissions squarely contradict Mr. VanderVen’s March 11, 2004 deposition testimony wherein he stated that “. . . disputes relating to the sale of independently-produced BSMs *are* covered by Rule 11 in the Rules of Conduct,” as well as argument of Defendants’ counsel respecting the scope of the Amway arbitration provision.

5. Other relevant admissions and comments include:

- When telling the JAMS arbitrators what types of disputes they may be called to arbitrate, a Quixtar representative stated that “some of the disputes may even question the arbitration process” – followed by laughter from the entire room.
- Untold numbers of representations to the JAMS arbitrators that Quixtar was “not a pyramid,” that Quixtar has “character,” the “integrity” of the Quixtar business, and how “fair and equitable” the Quixtar business is.
- How “both sides” were represented in the JAMS arbitration program (i.e. Quixtar and the IBOAI) and how the IBOAI is not the “alter ego” of Quixtar.
- Jody Victor, during a break in the training and apparently not realizing that the video camera was still operating, woodshedding a JAMS facilitator about Plaintiff U-Can-II’s arbitration ruling in its Florida state court case and how it “sends a great message” about the Quixtar arbitration program.

- Jody Victor, during the same break, discussing a confidential arbitration with the JAMS facilitator, telling him why the distributors in that action “knew why what they were doing was wrong.”
- Jody Victor explaining why the Quixtar Rules of Conduct only apply to Quixtar lines of sponsorship and not BSM lines of affiliation.
- Jody Victor referencing “training cats, dogs, seals, elephants” as he did in his deposition testimony respecting the training of JAMS arbitrators.

6. Plaintiffs request leave of Court to file this newly-produced videotape with the Court for consideration in its ruling upon Defendants’ Motion to Compel Arbitration.

WHEREFORE, Plaintiffs respectfully request this Court grant them leave to file a supplemental exhibit in the form of the newly-produced videotape in support of their Suggestions Opposing Defendants’ Motion to Compel Arbitration, and for such other and further relief as the Court deems just and equitable.

Respectfully submitted,

SHUGHART THOMSON & KILROY, P.C.

By /s/ R. Todd Ehlert

R. Dan Boulware - #24289

Todd H. Bartels - #45677

R. Todd Ehlert - #51853

3101 Frederick Avenue

St. Joseph, Missouri 64506

Telephone: (816) 364-2117

Facsimile: (816) 279-3977

George E. Leonard - #19145

SHUGHART THOMSON & KILROY, P.C.

120 West 12th Street

Kansas City, Missouri 64105

Telephone: (816) 421-3355

Facsimile: (816) 374-0509

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL EXHIBIT IN SUPPORT OF THEIR SUGGESTIONS OPPOSING DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY THE CASE AND COMPEL ARBITRATION** was filed electronically with this Court this 5th day of November, 2004. A notice of case activity is to be generated and sent electronically by the Clerk of said Court to the following parties, each of whom is designated to receive electronic notice.

James R. Sobieraj
Timothy Q. Delaney
Laura Beth Miller
Brinks Hofer Gilson & Lione
NBC Tower, Suite 3600
455 North Cityfront Plaza Drive
Chicago, IL 60611

Hal D. Meltzer
Baker Sterchi Cowden & Rice, LLC
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108

Albertus Hultink
Catherine Lynem
Alticor, Inc.
7575 Fulton Street East
Ada, Michigan 49335-0001

ATTORNEYS FOR DEFENDANTS

/s/ R. Todd Ehlert
ATTORNEY FOR PLAINTIFFS