

(Rule 3.8) which purports to bind “leaders” to new Rules of Conduct without a signature; (3) a “data management” rule (Rule 4.27.1) under which Quixtar purported to transfer ownership of customer information from IBOs to itself; (4) an industry-wide non-competition agreement; (5) a rule (Rule 12) that permits Quixtar to withhold the “bonuses” paid to IBOs any time the company feels there has been a violation of its lengthy and obtuse rules; and (6) rules dictating who a distributorship can be sold to (Rule 6.6) and providing Quixtar with the final say-so concerning any proposed sale (Rule 6.6.6). Plaintiffs ask that these Rules be declared unenforceable. Plaintiffs further ask that the Court issue a temporary injunction (and, ultimately, a permanent injunction) prohibiting Quixtar from taking punitive action against them while this suit is pending or after this suit has been resolved.

II. PARTIES

2. Plaintiff Michael Briscoe is a resident of Denton County, Texas.
3. Plaintiff Jeff Carlton (“Carlton”) is a resident of Nevada.
4. Plaintiff Michael Singleton (“Singleton”) is a resident of California.
5. Plaintiff Quixtar, Inc. (“Quixtar”) is a Michigan Corporation with its principal place of business at 5101 Spaulding Plaza, Ada, Michigan, 49355. Quixtar is the successor to Amway

III. JURISDICTION & VENUE

6. Jurisdiction is based upon diversity jurisdiction pursuant to 28 U.S.C. §§ 2201, 1332. The matter in controversy significantly exceeds the sum of \$75,000, exclusive of interest and costs. Venue is proper in this district under 28 U.S.C. § 1391 based on Defendant’s regularly transacting business within this district.

IV. FACTS

7. Quixtar is a multi-level marketing concern. Although the details of the company's operations are complex, it basically works like this: An Independent Business Owner ("IBO") signs a contract with Quixtar acknowledging that he or she is an independent contractor who can purchase Quixtar products and sell Quixtar products to others. Quixtar emphasizes that IBOs are building their own businesses—which can be bought, sold, transferred, and even left to the beneficiaries of their estates. These "distributorships" are the property of the IBOs. As Quixtar's web site currently explains:

The Quixtar business opportunity offers entrepreneurs the ability to have a web-based business of their own. Embraced by hundreds of thousands of Independent Business Owners (IBOs) and often copied but never duplicated, the opportunity is like no other.

If you've seen the Land of Will and Won't Becomes Will ads, you know the opportunity is about hope, freedom, family, and reward. It's about possibilities, dreams, and seeing the glass as half full.

Quixtar's proven Independent Business Owner Compensation Plan enables IBOs to earn income on business volume resulting from their efforts. The business is truly performance-based, rewarding IBOs more than \$370.1 million in bonuses and incentives in fiscal 2006, and more than \$2.2 billion since 1999.

To launch a Quixtar business, individuals must sign a registration contract with an existing IBO. In addition to enabling IBOs to earn income through the Quixtar Independent Business Owner Compensation Plan, the contract also binds all IBOs to abide by Quixtar's Rules of Conduct. Interested in learning more? Check out the experiences of IBOs who have built successful Quixtar businesses and of those who choose to partner with Quixtar.

8. Where Quixtar's business plan departs from a traditional "outside sales" job is in the form of the compensation. IBO's do not just profit from their own sales. They also profit from the sales of IBOs they recruit. In the Quixtar vernacular, recruits (and recruits of recruits) are referred to as a given IBO's "downline." Although the mathematics are slightly more complicated than this, the gist of this is that an IBO with a large number of "downline" IBOs

makes more money than an IBO who individually sells products door to door. In the Quixtar vernacular, IBOs who are successful recruiters develop “recurring income.” Most, if not all, successful Quixtar IBOs spend significantly more time recruiting new IBOs than retailing Quixtar products. As Quixtar’s IBO Compensation Plan indicates, “It is important to note that IBOs who register others generally have higher average volume [i.e., make more money] than those who don’t register others.”

9. Recruiting is extra-ordinarily time-consuming. Amway and Quixtar both have significant image problems, meaning that only a small fraction of potential recruits actually sign-up. The entire value of an IBOs business is wrapped-up in the relationships he or she has with members of his or her downline. This gives Quixtar leverage over its IBOs and it has abused this power.

10. Quixtar IBOs must agree to the company’s Rules of Conduct, something that, on its face, sounds reasonable. However, Quixtar’s Rules of Conduct reach far more broadly than the name suggests. The “Rules of Conduct” currently include such things as:

- (1) an arbitration agreement subject to modification by Quixtar at any time (Rules 1, 11.5) ;
- (2) an “automatic renewal” agreement for “Group Leaders” (Rule 3.8) which purports to bind the leaders to new Rules of Conduct without a signature;
- (3) a “data management” rule (Rule 4.27.1) under which Quixtar asserts ownership over the identity of individuals in the downline of any IBO;
- (4) an industry-wide non-competition agreement (Rule 6.5);
- (5) a rule (Rule 12) that permits Quixtar to withhold the “bonuses” paid to IBOs any time the company feels there has been a violation of its lengthy and obtuse rules; and

(6) rules dictating who a distributorship can be sold to (Rule 6.6) and providing Quixtar with the final say-so concerning any proposed sale (Rule 6.6.6).

11. The Rules listed above were not always a part of the contract between Quixtar and its IBOs. Quixtar can unilaterally amend the Rules of Conduct at any time and in any way it chooses. As Rule 1 plainly states:

From time to time, the contents of these documents are changed. The Corporation will, prior to final action, submit to the IBOA International Board for discussion, evaluation, and recommendation changes within these documents which may materially affect IBOs including, but not limited to, changes to the IBO Plan, IBO agreements, and modifications to the Rules of Conduct for IBOs; provided, however, the Corporation is not required to present matters subject to any governmental order, regulation, or law. However, the Corporation will exercise its best efforts to notify the IBOA International Board of such changes required by governmental order, regulation, or law. Final decision-making authority with respect to these matters rests with the Corporation. Upon final notification by the Corporation with respect to those changes presented to the IBOA International Board, such changes will be communicated to all IBOs in a timely manner in official Corporation literature, and shall become effective upon publication. In order to preserve the goals and purposes of the IBO Plan, the Corporation reserves to itself the sole right to adopt, amend, modify, supplement, or rescind any or all of these Rules, as necessary with respect to cases of Rules enforcement. In the event the Corporation deprives an IBO of a substantial and material property right through such adoption, amendment, modification, supplementation, or rescission, such IBO shall have the right to bring such matter to the attention of the IBOA International Board for further discussion, evaluation, and recommendation.

The company has used this power to gradually enhance its own contractual rights and diminish distributors' rights by engrafting self-serving language into updated versions of the Rules. It works like this:

Step 1: Quixtar institutes a rule change according to the power it has under Rule 1 (Rule 1).

Step 2: At the end of each year, all "Group Leaders"—every successful or marginally successful Quixtar distributor—are automatically renewed (Rule 3.8).

Step 3: Renewal creates consent to rule changes (Rule 3.8 and 4.1).

12. Thus, each year, IBOs who have spent decades building their distributorships are faced with a false choice: Accept whatever rule changes Quixtar has imposed or forfeit their distributorships.

V. A REAL-WORLD EXAMPLE

13. Quixtar's abuse of its superior bargaining power (in fact, its refusal to bargain at all) is not conjectural. It has happened. Repeatedly. For example, on January 23, 2008, a Quixtar distributor named John Delin sent a letter to Quixtar's Director of Global Rules and Regulations. In that letter, Mr. Delin and his wife, Diana Delin, sought to renew their distributorship without accepting some of the conditions Quixtar had placed on renewal. They wrote:

We do not agree to Rule 6.5 and the non-compete claimed by Quixtar. There is no non-compete clause in any agreement, which we have ever agreed to with Quixtar. Any statements, written or otherwise, are not agreed to.

* * *

Intellectual Property. Since when, and we both know it was when our IBO lists went online, has the organization of people that we, being my wife & I, built now become yours? I didn't see anyone in the car with us, nor at any of the meetings, nor putting any of your dollars into, nor building any relationships with any of these people, nor anyone at any time contacting them, or helping them "build a business." You were and always have been the SUPPLIER. . . The LOS [Line of Sponsorship, i.e. the list of recruited IBOs] and the list of names and identities of the people in our personal group are the confidential that belong to us, not Quixtar. We do not accept the conversion of our property to Quixtar's name.

* * *

Pricing. We have poured a sizeable investment into our business, mostly due to loyalty. We understand this. . . . However, we do know and so do you, that a lot of the product pricing is not fair. There has to be changes. We do not agree with the manner in which Quixtar has priced the products that Quixtar sells to its IBOs. Because of the high price of the products, the products cannot be sold at retail or to retail customers. Therefore, IBOs are forced to buy products for internal consumption purposes only in order to meet their performance goals.

* * *

Name Change. You have got to be kidding me!!! We agreed to build a Quixtar business. We did not agree to build an Amway business. Any change in the name will adversely affect the business and our profits.

Five days later, Quixtar responded by terminating the Delins' distributorship.

Dear John and Diana:

We have received and acknowledge your letter dated January 23, 2007 regarding your formal protest of the renewal of IB#1229237. You state that you do not and will not agree to several of the Rules that comprise the IBO contract with Quixtar. You propose to renew your IB subject to exemption of several of these rules, as set forth in your letter. Quixtar does not accept your proposal, and, accordingly, your business is not renewed.

We would also like to remind you that although your contract with Quixtar is terminated, you are still bound by certain provisions therein, including but not limited to the provisions of Rule 6.5.

14. This is a perfect illustration of Quixtar's abusive attitude toward contracts, the law, and its distributors.

VI. RECENT CASE LAW

15. In the recent past, two Federal Courts have invalidated portions of the contract between Quixtar and its IBOs. On February 6, 2008, the Fifth Circuit, applying Texas Law, concluded:

There is nothing in any of the relevant documents which precludes amendment to the arbitration program - made under Amway's unilateral authority to amend its Rules of Conduct - from eliminating the entire arbitration program or its applicability to certain claims or disputes so that once notice of such an amendment was published mandatory arbitration would no longer be available even as to disputes which had arisen and of which Amway had notice prior to the publication.

* * *

We accordingly hold that the arbitration agreement was illusory and unenforceable under Davidson as applied to the claims asserted in the instant suit.

Morrison v. Amway Corp., 517 F.3d 248 (5th Cir. 2008). On March 31, 2008, the Northern District of California, applying California Law, followed suit, holding:

[T]he Court finds that the arbitration agreement contained in the Registration . . . and incorporating the RoC [Rules of Conduct] is procedurally and substantively unconscionable, and therefore unenforceable.

Pokorny et al v. Quixtar, No. 3:07-cv-00201-SC, *45 (N.D. Cal. March 31, 2008).

16. State courts have treated Quixtar's "Rules of Conduct" with similar disdain. For example:

Here, the non-competition section of the "Rules of Conduct" which Defendant [Quixtar] claims to be the rules under which Plaintiffs and Defendant operators are found in Section 6.5 denominated as "Non-Competition and Anti-Raiding." 6.5 restricts the sale, promotion, distribution, of any competing products, services or other business ventures. 6.5.1 defines "compete" broadly to include "own, manage, operate, consult for, be employed by, or participate as an independent distributor: in a multi-level or network marketing program or the equivalent. It covers people who have worked for the past two years (6.5.2). Further IBO (Independent Business Owners) may not compete directly or indirectly with Defendant in the United States, Canada and all other markets under the North American Independent Business Ownership Plan for a period of six months post-resignation or violation of 6.5.4 (i.e. competition).

The scope of geographic coverage of the rule takes one's breath away.

Campbell et al v. Quixtar, Inc., No. 2007-CV-662-DB, Superior Court of White County, Georgia, Order on Motion to Dismiss and Preliminary Injunction, D. Barrett, Chief Judge, March 2, 2008.

VII. QUIXTAR & OTHER OPPORTUNITIES

17. Plaintiffs wish to continue to own and profit from their Quixtar businesses, while at the same time considering other opportunities. Plaintiffs fear their Quixtar distributorships will be terminated and their businesses taken if they begin to participate in other business opportunities.

VIII. REQUEST FOR DECLARATORY RELIEF

18. Plaintiffs request the following relief:

(1) A declaration that the arbitration agreement found in Quixtar Rules 1 and 11.5 is unconscionable and unenforceable;

(2) A declaration that the “automatic renewal” agreement for “Group Leaders” (Rule 3.8) is unconscionable and unenforceable;

(3) A declaration that the “data management” rule (Rule 4.27.1) is unconscionable and unenforceable;

(4) A declaration that the non-competition agreement (Rule 6.5) is unconscionable and unenforceable;

(5) A declaration that the non-solicitation (Rule 6.5) agreement is unconscionable and unenforceable;

(6) A declaration that Rule 12, permitting Quixtar to withhold the “bonuses” paid to IBOs any time the company feels there has been a violation of its rules, is unconscionable and unenforceable;

(7) A declaration that Quixtar’s rules dictating who a distributorship can be sold to (Rule 6.6) and providing Quixtar with the final say-so concerning any proposed sale (Rule 6.6.6) are unconscionable and unenforceable;

(8) A declaration that Plaintiffs are free to pursue other business opportunities while continuing to be Quixtar IBOs;

(9) An award of costs and attorney fees;

(10) Such other and further relief as the Court deems just and proper.

IX. REQUEST FOR INJUNCTIVE RELIEF

19. Quixtar has repeatedly terminated the distributorships of those who question its rule-making or business practices. Such termination is devastating to IBOs, who, in some cases, lose their lives' work. Despite Quixtar's promise that its "business opportunity offers entrepreneurs the ability to have a web-based business *of their own*," it in fact takes the businesses of those who voice opposition to its one-sided rule-making. The Delins, whose experience is recounted above, are but one example. In the recent past, Quixtar has terminated or threatened to terminate hundreds of IBOs. It has also sent out emails to thousands of distributors falsely suggesting the terminated IBOs were violating federal anti-trust laws. For this reason, this Court recently enjoined such activity, finding:

The Court finds that Plaintiffs have laid sufficient grounds to entitle them to a temporary restraining order to prevent interference with their business or business relationships until the Court can hold an evidentiary preliminary injunction hearing. Plaintiffs have made a sufficient showing that there is a substantial likelihood that they will succeed on the merits of their claims against Defendant (Quixtar, Inc.). Moreover, Plaintiffs have shown that immediate and irreparable harm may result if Defendant is not enjoined from interfering with or disrupting Plaintiffs' business. Further, the Court finds that the threatened injury to Plaintiffs outweighs any potential harm to Defendant, and that the entry of a temporary restraining order will not disserve the public interest.

* * *

Defendant, Quixtar, and Defendant's respective officers, managers, trustees, agents, servants, employees, attorneys, confederates and all other persons in active concert or participation with them, are hereby restrained and enjoined immediately from, directly or indirectly:

1. Interfering with Plaintiffs' Team business support system;
2. Sending verbal, written, or electronic communications to business associates and upline or downline business partners of Plaintiffs related to violations of the Rules of Conduct, use of Team materials and attendance at Team meetings and conferences, and threats to suspend or terminate any Quixtar distributor's business based on Team materials;
3. Terminating or threatening to terminate the distributorships or businesses of Plaintiffs and other IBOs who use Team materials forwarded by Plaintiffs;

4. Disparaging the Team approach;
5. Taking any adverse action against Plaintiffs pending disposition of this Order;
6. Refusing to pay any bonus to Plaintiffs that may be due in the ordinary course of business;
7. Interfering with or prohibiting, in any way, the operation of the Team as a business support system for Plaintiffs or taking any action to shut down or interfere with the Team's business.

Simmons et al v. Quixtar, Inc., No. 4:07cv389, E.D.T.X., REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE MODIFYING TEMPORARY RESTRAINING ORDER, Aug. 24, 2007.

20. Plaintiffs fear they too will be terminated or threatened with termination for bringing this declaratory judgment action. Or that their bonuses will be withheld. Or that Quixtar will contact members of their downlines and allege some non-specific rule violation. Plaintiffs will suffer irreparable harm if defendant is not enjoined from:

- (1) Terminating or threatening to terminate Plaintiffs' distributorships;
- (2) Refusing to renew or threatening to refuse to renew Plaintiffs' distributorships;
- (3) Refusing to pay or threatening to refuse to pay Plaintiffs' bonuses;
- (4) Sending verbal, written, or electronic communications to Plaintiffs' business associates related to alleged violations of the Rules of Conduct;
- (5) Taking any adverse action against Plaintiffs while this litigation is pending.

21. There is a substantial likelihood that plaintiff will prevail on the merits because:

- (a) At least two courts have previously found portions of Quixtar's Rules of Conduct to be unenforceable;
- (b) At least one court has previously awarded a similar injunction.

(c) Quixtar's Non-Competition and Non-Solicitation agreements are facially overbroad, in restraint of trade;

(d) Quixtar's unilateral right to amend its contract with IBOs renders that contract unconscionable and unenforceable;

22. The harm faced by Plaintiffs outweighs the harm that would be sustained by Quixtar if the preliminary injunction were granted. All Plaintiffs ask is that their businesses not be harmed while the declaratory judgment action is decided. This does not harm Quixtar. In fact, it benefits Quixtar, since Plaintiffs will continue to purchase and sell Quixtar's products during this litigation.

23. Issuance of a preliminary injunction would not adversely affect the public interest because this declaratory judgment action is brought to strike portions of a contract of adhesion. The contract's non-competition and non-solicitation agreements are unlawful restraints of trade. The contract's arbitration provisions unlawfully preclude IBOs from seeking relief in the courts.

24. Plaintiffs are willing to post a bond in the amount the court deems appropriate.

25. Plaintiffs ask the court to set their application for preliminary injunction for hearing at the earliest possible time and, after hearing the request, issue a preliminary injunction against Quixtar.

X. REQUEST FOR PERMANENT INJUNCTION

26. Plaintiffs ask the court to set their application for injunctive relief for a full trial on the issues in this application and, after the trial, to issue a permanent injunction against defendant.

XI. PRAYER FOR INJUNCTIVE RELIEF

For these reasons, plaintiff asks that the court do the following:

- a. Enter a preliminary injunction according to the terms listed above.
- b. Enter judgment for plaintiffs permanently enjoining the acts described above.
- c. Award costs of court.
- d. Grant any other relief it deems appropriate.

Dated: August 1, 2008

Respectfully submitted,

MCCORMICK, HANCOCK &
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