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U.S. DISTRICT COURT  
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DISTRICT OF UTAH  
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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

Quixtar Inc. )  
 )  
Petitioner, )

v. )

MonaVie, LLC, )  
 )  
Respondent. )

Case: 2:08mc00142  
Assigned To : Benson, Dee  
Assign. Date : 2/21/2008  
Description: Quixtar v. MonaVie

QUIXTAR INC.'S PETITION TO  
COMPEL COMPLIANCE WITH  
NON-PARTY SUBPOENA  
*DUCES TECUM*

Petitioner, Quixtar Inc. (“Quixtar”), through counsel and pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (“FAA”), files this petition to compel Respondent, MonaVie, LLC (“MonaVie”)<sup>1</sup> to comply with the Subpoena *Duces Tecum* for Documents and Things (“subpoena”) issued in the arbitration styled *Quixtar Inc. v. Merritt, et al.*, Case No. 33 155 Y 00049 07 (American Arbitration Association) (“Merritt Arbitration”), between Quixtar and Steven & Gina Merritt, Charles & Debbie Kalb, Jeffrey & Pamela Bowyer, Matthew & Kimberly Curtis, Vern & Linda Horne, Terry & Amy Pitt, Tony Stivers, and Lynn & Renee

<sup>1</sup> MonaVie has changed its name several times. Upon information and belief, MonaVie Enterprises, LLC, is also the same company as Mona Vie, Inc. and MonaVie, LLC.

Revell (collectively, “Arbitration Respondents”).<sup>2</sup> In support of this petition, Quixtar states as follows:

**I. UNDISPUTED FACTS**

1. Quixtar is a Virginia corporation with its principal place of business in Ada, Michigan.
2. MonaVie, upon information and belief, is a Utah corporation with its principal place of business is Salt Lake City, Utah.
3. Quixtar operates a multilevel marketing Sales and Marketing Plan and comprises a network of independent distributors who sell Quixtar products and recruit other distributors into Quixtar.
4. The Arbitration Respondents are current and former independent distributors of Quixtar products. As with all Quixtar independent distributors, the Arbitration Respondents agreed to certain provisions regarding non-competition, non-solicitation, and confidentiality of Quixtar trade secrets.
5. MonaVie is competitive multilevel marketing company, whose products, like Quixtar’s, are sold though a multilevel marketing distribution system. MonaVie provides incentives to its distributors in part through its executive ranking program, containing the following award levels (in ascending order of prestige): Star, Bronze, Silver, Gold, Ruby, Emerald, Diamond, Blue Diamond, Hawaiian Blue Diamond, Black Diamond, Royal Black Diamond, Presidential Black Diamond, Imperial Black Diamond, and Crown Black Diamond

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<sup>2</sup> Pursuant to Local Rule DUCivR 37-1(a), Quixtar’s counsel conferred with counsel for MonaVie on regarding the subject of the instant Petition; MonaVie’s counsel did not concur.

6. The Arbitration Respondents are or were MonaVie distributors; many of them achieved high-ranking MonaVie distributor award levels. For example, MonaVie lists Steven and Gina Merritt as having achieved the rank of Presidential Black Diamond Executive; Charles and Debbie Kalb as having achieved the rank of Royal Black Diamond Executive; Jeffrey and Pamela Bowyer as having achieved the rank of Blue Diamond Executive; Matthew and Kimberly Curtis as having achieved the rank of Black Diamond Executive; Terry and Amy Pitt as having achieved the rank of Blue Diamond Executive; Tony Stivers as having achieved the rank of Blue Diamond Executive; and Lynn and Renee Revell as having achieved the rank of Blue Diamond Executive. (See Ex. 1, Archive of MonaVie Field Leaders, <http://onthemove.monavievo.com/fieldleaders.asp>, at 1-3, 11, 25, 30 36, 38 (last visited Feb. 15, 2008).)

7. In addition, at least some of the Arbitration Respondents are featured speakers on motivational and training products that are used for recruiting and encouraging individuals to become MonaVie distributors. (See Ex. 2, Archive of R3 Global Website, [http://www.r3globalstore.com/cgi-bin/commerce.cgi?display=action&emptyoverride=yes&template=PDGCommTemplates/Header\\_Footer/cd-av.html](http://www.r3globalstore.com/cgi-bin/commerce.cgi?display=action&emptyoverride=yes&template=PDGCommTemplates/Header_Footer/cd-av.html), at 1-4 (last visited Feb. 12, 2008).)

8. Quixtar believes that MonaVie possesses information, documents, and things supporting at least some of Quixtar's claims in the Merritt Arbitration against the Arbitration Respondents.

9. The parties to this petition are diverse, and this Court has subject matter jurisdiction under 28 U.S.C. § 1332.

10. On January 11, 2008, the Honorable Alice D. Sullivan (Ret.) (“Arbitrator Sullivan”), presiding arbitrator for the Merritt Arbitration, issued a subpoena against MonaVie that was presented to her by Quixtar. (Ex. 3, Jan. 11, 2008, Subpoena to MonaVie.) The subpoena included a list of topics for deposition and an identification of documents and things for production. (*Id.*)

11. On January 17, 2007, counsel for MonaVie agreed to accept service of the subpoena. (Ex. 4, Feb. 12, 2007, Email chain between G. Jackson and J. Beaupré at 6-8.)

12. The subpoena commanded MonaVie to produce documents and things by January 18, 2008 and to appear for a deposition on January 22, 2008 at the offices of Brinks Hofer Gilson & Liono in Salt Lake City, Utah. (Ex. 3, Jan. 11, 2008, Subpoena to MonaVie.)

13. Arbitrator Sullivan entered a protective order in the Merritt Arbitration that is sufficient to maintain the confidentiality of any information produced or otherwise disclosed by MonaVie. (*see* Ex. 5, Jan. 28, 2008, Protective Order at 9, 10.) Specifically, the protective order provides that a participant may designate information “CONFIDENTIAL—ATTORNEY EYES ONLY.” Moreover, the Protective Order includes a mechanism for non-parties, such as MonaVie, to elect to participate in the Protective Order by signing an attached agreement. (*Id.*)

14. Quixtar has communicated with MonaVie’s counsel numerous times, and the parties are at an impasse. (*See* Ex. 4, Feb. 12, 2007, Email chain between G. Jackson and J. Beaupré.) Given the fact that the Merritt Arbitration will likely have a hearing in a matter of months, Quixtar is in need of the information expeditiously.

## II. LEGAL OVERVIEW

15. The FAA governs the enforcement of subpoenas in the Merritt Arbitration. The FAA permits arbitrators to “order and conduct such discovery as they find necessary,” including document subpoenas and pre-hearing appearances by witnesses. *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 142-43 (S.D. Fla. 1988) (“[T]he contention that § 7 of the Arbitration Act only permits the arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances, is unfounded.”); *Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F.Supp 69, 72 (S.D.N.Y. 1995) (“the courts have permitted arbitrators to order prehearing discovery. . . .”); *Festus v. Merrill Lynch & Pierce*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (finding that the “court has the authority under the FAA to enforce properly issued subpoenas”); 9 U.S.C. § 7 (2007) (“arbitrators . . . may summon in writing any person to attend before them or any of them as a witness in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case.”).<sup>3</sup>

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<sup>3</sup> The FAA is consistent with Utah state law:

(2) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, *an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.*

(3) *An arbitrator may permit any discovery the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.*

continued . . . .

16. Section 7 of the Federal Arbitration Act permits a party to file a petition to compel a non-producing entity to comply with the arbitrator's pre-hearing discovery order. *In Re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000) (holding that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.").

17. Arbitrator Sullivan issued the subpoena to MonaVie in compliance with the FAA. Pursuant to Fed. R. Civ. P. 45, Quixtar filed the instant Petition in the district where MonaVie resides.

### **III. IT IS PROPER TO ENFORCE THE SUBPOENA**

18. The subpoena issued by Arbitrator Sullivan is valid and enforceable. MonaVie failed to file written objections to the subpoena within fourteen days of service, pursuant to Fed. R. Civ. P. 45(c)(2)(B).

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\* \* \* \*

*(7) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this state and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state must be served in the manner provided by law for service of subpoenas in a civil action in this state and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this state.*

U.C.A. 1953 § 78-31a-118 (2008) (emphasis added).

19. In addition, federal courts have enforced arbitrators' subpoenas seeking pre-hearing depositions and document production from third parties. *See Stanton*, 685 F. Supp. at 1243 (“[T]he contention that § 7 of the Arbitration Act only permits the arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances, is unfounded.”); *Festus v. Merrill Lynch & Pierce*, 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006).<sup>4</sup> Indeed, the court in *Stanton* observed that it could “find no support” permitting it to interfere with the arbitrator’s decision to issue pre-hearing subpoenas for discovery. *Stanton*, 685 F. Supp. at 1242. Such interference “would vitiate the purpose of the Federal Arbitration Act” to facilitate and expedite resolution of disputes, ease court congestion, and provide a less costly alternative to litigation. *Id.*

20. Arbitrator Sullivan reviewed the subpoena and concluded that it seeks relevant and discoverable information, documents, and things under the rules governing the Merritt Arbitration. Quixtar’s need for this discovery from MonaVie is legitimate, necessary, and was requested in accordance with the governing rules. Arbitrator Sullivan properly issued the subpoena pursuant to 9 U.S.C. § 7, and MonaVie waived any objection by failing to file written objections. Accordingly, this Court should compel MonaVie to produce the requested documents and things.

WHEREFORE, Quixtar requests this Court to enter an order:


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<sup>4</sup> The United States District Court for the Southern District of Florida recently denied Quixtar’s petition to compel compliance with a non-party subpoena in another matter (*see Ex. 6*, Jan. 10, 2008, Order on Petition to Compel.) Briefly, the court took a narrow view of the scope of Section 7 of the FAA, even though the court recognized that its view is contrary to *Stanton* and other decisions of the eleventh circuit. (*Id.* at 5.) Quixtar has appealed that order. Quixtar has not found 10<sup>th</sup> Circuit case law that addresses this issue.

- (1) granting the instant Petition;
- (2) compelling MonaVie to produce those electronic documents and things listed in the Request for Production attached to the subpoena within ten days of the execution of the Court's order;
- (3) compelling MonaVie to appear for its deposition at the offices of Brinks Hofer Gilson & Lione, 405 South Main Street, Suite 800, Salt Lake City, Utah 84111, within ten days of MonaVie's production of those items ordered to be produced in number (2); and
- (4) granting such further relief that the Court deems proper.

DATED: February 21, 2008

Respectfully submitted,

By: 

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(801) 355-7900 Telephone  
(801) 355-7901 Facsimile  
**Attorneys for Petitioner, QUIXTAR INC.**

**CERTIFICATE OF SERVICE**

I certify that on February 21, 2008, I caused a copy of the foregoing QUIXTAR INC.'S  
PETITION TO COMPEL COMPLIANCE WITH NON-PARTY SUBPOENA *DUCES TECUM*  
to be served via email on:

<p>Graden P. Jackson, Esq. gjackson@strongandhanni.com STRONG AND HANNI 3 Triad Center, Ste 500 Salt Lake City, UT 84180 Telephone: (801) 532-7080 Facsimile: (801) 596-1508</p> <p><b>Attorneys for Respondent, Mona Vie, LLC</b></p>	<p>Andrew Kantor, Esq. akantor@bmdpl.com LAW OFFICES OF BRENNAN MANNA &amp; DIAMOND 76 South Laura Street, Suite 2110 Jacksonville, Florida 32202</p> <p><b>Attorneys for Steven &amp; Gina Merritt, Charles &amp; Debbie Kalb, Jeffrey &amp; Pamela Bowyer, Matthew &amp; Kimberly Curtis, Terry &amp; Amy Pitt, Tony Stivers, and Lynn &amp; Renee Revell</b></p> <p>Via Federal Express:</p> <p>Verne &amp; Linda Horne 4482 Oak Hill Church Road Kingsland, Georgia 31548</p>
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One of the attorneys for Petitioner QUIXTAR INC.

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**IN THE UNITED STATES DISTRICT COURT  
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Exhibits/  
Attachments  
to this document  
have **not** been  
scanned.

Please see the  
case file.