

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

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

DEFENDANTS’ MOTION FOR AN ORDER TO SHOW CAUSE

Defendants request the Court to enter an order for plaintiffs to show cause why they should not be sanctioned for violating the Protective Order. Damaging and misleading excerpts from defendants’ confidential materials were widely disseminated on the Internet almost immediately after they were filed by plaintiffs, as plaintiffs are no doubt aware. Plaintiffs admittedly failed to file the confidential materials under seal. If plaintiffs are unable to satisfactorily explain their conduct, the Court should sanction them for their breach of the Protective Order in a manner that will effectively dissuade them from future violations.

I. PLAINTIFFS’ VIOLATION OF THE PROTECTIVE ORDER

Paragraph 9(e)(2) of the Protective Order in this case requires the following procedure to be followed for the filing of materials designated “CONFIDENTIAL”:

[S]uch material shall be filed with the Clerk of the Court in sealed envelopes or containers prominently marked with the caption of the case, a general description of the contents of the envelope or container and the notation:

CONTAINS CONFIDENTIAL INFORMATION
COVERED BY PROTECTIVE ORDER TO BE OPENED
ONLY (1) BY OR AS DIRECTED BY THE COURT OR
(2) BY WRITTEN AGREEMENT OF THE PARTIES.

Plaintiffs' counsel admittedly failed to abide by this procedure when it filed its Motion for leave to File Supplemental Exhibit in Support of Plaintiffs' Suggestions Opposing Defendants' Motion to Dismiss/Stay Arbitration (Dkt. No. 153) and Supplement Notice of Exhibit Attachment to Plaintiffs' Suggestions Opposing Defendants' Motion to Dismiss (Dkt. No. 155). The motion and the supplemental exhibit (a videotape of a JAMS orientation) contained material designated "CONFIDENTIAL" by defendants. When plaintiffs filed them with the Court, they failed to file them under seal in breach of the Protective Order.

Recently, plaintiffs sought to excuse their breach by requesting sealing by the Court and by claiming that their failure was inadvertent. The fruits of their failure are now pasted all over the Internet. A few examples are attached as Exhibits A-C. The characterizations and out-of-context distortions are lifted almost word-for-word from plaintiffs' motion. The Internet spread began almost immediately after plaintiffs' improper filing; plaintiffs made no effort to correct their disclosure until after the online smear campaign was fully developed.

Paragraph 13 of the Protective Order requires a party that has made an improper disclosure under the Protective Order to apprise the producing party of all pertinent facts relating to such disclosure and to instruct each unauthorized recipient to treat the information as confidential and demand that it be returned. Plaintiffs have done neither, thereby breaching this provision of the Protective Order as well.

It is an unlikely coincidence that during the brief period of public availability through PACER, in a case where there has been very little recent activity, a mere curious observer stumbled on plaintiffs' filings. Moreover, it is notable that the Internet postings blindly accept plaintiffs' contentions. The website owners obviously made zero effort to investigate or to consider the other side of the story. It is probable that plaintiffs and their counsel have allied themselves with these Internet rumormongers.

II. PLAINTIFFS' VIOLATION DAMAGED DEFENDANTS

Plaintiffs' violation of the Protective Order has damaged defendants. Defendants designated the videotape as "CONFIDENTIAL" to preclude the very conduct which has now occurred—distortions and disinformation by Quixtar-hating Internet zealots. Unfortunately, because of plaintiffs' misconduct, some people are going to be misled by what they read on the Internet. Quixtar is likely to lose existing and potential distributors of its products because of the inaccurate Internet charges. Defendants have spent, and will continue to, spend time, money and effort trying to mitigate the damage.

Plaintiffs and their counsel are fully aware of the Internet's destructive role. They have long known that this case and the prior Florida and Missouri cases have played a prominent role on many anti-Quixtar websites. The Court needs to order the plaintiffs to provide a full account of their actions, which they have passed off as mere "inadvertence." As plaintiffs fully appreciate the damaging consequences of carelessness with confidentiality, they need to explain why they should not be sanctioned and how defendants and the Court can be assured of no further breaches.

III. CONCLUSION

At best, plaintiffs' counsel were grossly negligent. At worst, they willfully disregarded this Court's Order to aid and abet their Internet allies. The Court should order plaintiffs to show cause why they should not be sanctioned for violating the Protective Order.

Respectfully submitted,

Dated: November 26, 2004

/s/ Timothy Q. Delaney

James R. Sobieraj
Timothy Q. Delaney
Laura Beth Miller
BRINKS, HOFER, GILSON & LIONE
NBC Tower, Suite 3600
455 North Cityfront Plaza Drive
Chicago, IL 60611-5599
Telephone: (312) 321-4200
Facsimile: (312) 321-4299

Hal D. Meltzer – MO #38535
BAKER STERCHI COWDEN & RICE
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108-2504
Telephone: (816) 471-2121
Facsimile: (816) 472-0288

Albertus Hultink
Catherine Lynem
ALTICOR INC.
7575 Fulton Street East
Ada, Michigan 49355-0001
Telephone: (616) 787-6000
Facsimile: (616) 787-9027

ATTORNEYS FOR DEFENDANTS