

DONALD W. CARLSON [Bar No. 79258]
EDWARD F. DONOHUE [Bar No. 112730]
CARLSON, CALLADINE & PETERSON LLP
353 Sacramento Street, 16th Floor
San Francisco, California 94111
Telephone: (415) 391-3911
Facsimile: (415) 391.3898
E-mail: dcarlson@ccplaw.com
edonohue@ccplaw.com

C. MATTHEW ANDERSEN [WA Bar No. 6868] (*pro hac vice pending*)
WINSTON & CASHATT
601 W. Riverside Ave., Suite 1900
Spokane, Washington 99201
Telephone: (509) 838-6131
Facsimile: (509) 838-1416
cma@winstoncashatt.com

Attorneys for Defendants JAMES RON PURYEAR, JR.,
GEORGIA LEE PURYEAR, AND WORLD WIDE GROUP, L.L.C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEFF POKORNY and LARRY BLENN on
behalf of themselves and those similarly
situated,

Plaintiffs,

vs.

QUIXTAR, INC., JAMES RON PURYEAR,
JR., GEORGIA LEE PURYEAR, and
WORLD WIDE GROUP, L.L.C., BRITT
WORLD WIDE L.L.C., AMERICAN
MULTIMEDIA INC., BRITT
MANAGEMENT, INC., BILL BRITT and
PEGGY BRITT,

Defendants.

CASE NO.: C 07-00201 SC

**PURYEARS AND WORLD WIDE
GROUP, LLC'S MEMORANDUM IN
SUPPORT OF JOINDER IN QUIXTAR
INC.'S AND BRITT'S MOTION TO
DISMISS OR STAY LITIGATION AND
COMPEL COMPLIANCE WITH
DISPUTE RESOLUTION
AGREEMENT**

Date: April 27, 2007

Time: 10:00 a.m.

Room: 1, 17th Floor

Judge: The Honorable Samuel Conti

TABLE OF CONTENTS

1.	Relief Requested.....	1
2.	Basis for Motion	1
3.	Issues	1
4.	Facts Relevant To Motion	2
5.	Points of Authority and Argument	3
5.1	Puryears and World Wide may enforce Quixtar's ADR procedure, the BSMAA arbitration provision, and the DM arbitration provision	4
5.1.1	Plaintiffs and Puryears must contractually use the Quixtar ADR process	5
5.1.2	Pokorny and Blenn are estopped from avoiding ADR/arbitration with all Defendants.....	5
5.1.3	World Wide, as the parent to DM, is entitled to enforce DM's arbitration provision	7
5.1.4	Defendants are third party beneficiaries of the ADR and Arbitration Agreements	8
5.2	The Quixtar conciliation procedures require dismissal of this premature action	9
5.3	The arbitration agreement is not unconscionable	10
6.	If not dismissed, this action should be stayed pending the outcome of the ADR process.....	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>B.C. Rogers Poultry, Inc. v. Wedgeworth</u> , 911 So.2d 483 (Miss. 2005).....	8
<u>Blumenthal-Kahn Electric, Ltd. v. American Home Ins. Co.</u> , 236 F.Supp.2d 575 (E.D. Va. 2002)	8
<u>Denney v. BDO Seidman</u> , 412 S.3d 58, 70 (2nd Cir. 2005)	6, 7
<u>Doctors Associates, Inc. v. Jabush</u> , 89 F.3d 109 (2 nd Cir. 1996).....	11
<u>Fairchild v. National Home Ins. Co.</u> , 17 Fed.Appx. 631 (9th Cir. 2001)	4
<u>Fisher v. GE Medical Systems</u> , 276 F.Supp.2d 891, 892 (M.D. Tenn. 2003)	9
<u>Hill v. G.E. Power Sys. Inc.</u> , 282 F.3d 343, 348 (5 th Cir. 2002)	11
<u>J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A.C.A.</u> , 863 F.2d 315 (4th Cir. 1988)	8
<u>Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.</u> , 460 U.S. 1 (1983)	4, 11
<u>Morrison v. Amway Corp.</u> , 49 F.Supp. 2d 529 (S.D. Texas 1998)	10
<u>MS Dealer Serv. Corp. v. Franklin</u> , 177 F.3d 942, 947 (11 th Cir. 1977)	6, 8
<u>Nagrampa v. Mailcoups, Inc.</u> , 469 F.3d 1257 (9 th Cir. 2006)	10
<u>Perry v. Thomas</u> , 482 U.S. 483 (1987)	4
<u>Shearson/American Exp. v. McMahon</u> , 482 U.S. 220 (1987)	4

Shopmen's Local Union No. 790 of the Bridge v. Bostrom-Bergen Metal Prods.,
No. C-80-2334 (SC), 1980 WL 2109, at *3 (N.D. Cal. Aug. 29, 1980)5, 6

Vestax Secs. Corp. v. McWood,
116 F.Supp.2d 865 (E.D. Mich 2000)9

STATUTES AND RULES

1 Commercial Arbitration §11:7.....6

1 Commercial Arbitration §11:13 (2006).....7

FRCP 8(c).....1

FRCP 12(b)(1)1

9 U.S.C. §41

CARLSON CALLADINE & PETERSON LLP
353 SACRAMENTO STREET
16TH FLOOR
San Francisco, CA 94111

1. Relief Requested.

Defendants James and Georgia Puryear (Puryears), and World Wide Group LLC (World Wide) join in Quixtar Inc.'s and Britt's motions to dismiss or stay this litigation. Puryears and World Wide also request the Court compel arbitration pursuant to the Quixtar rules for the further reason that Plaintiffs have signed other agreements binding them to the Quixtar arbitration process. This motion is made pursuant to FRCP 8(c); FRCP 12(b) (1) and (3); and 9 U.S.C. §4. Puryears and World Wide reserve the right to otherwise appear and defend to the fullest extent of the law and rules as required after the Court's ruling on the motions.

2. Basis for Motion.

Jeff Pokorny ("Pokorny") and Larry Blenn ("Blenn") are contractually bound to resolve all claims against Puryears and World Wide via: (1) the Quixtar ADR Agreement; (2) the Dreambuilders Membership LLC ("DM") Agreement; and (3) the Business Support Materials Arbitration Agreement ("BSMAA"). These agreements bind the parties to resolve disputes using the Quixtar dispute procedure. It is undisputed Plaintiffs have not done so. As a matter of basic contract law, and the strong public policy supporting the parties' agreements to alternative dispute resolution, this Court is asked to dismiss this action for Plaintiffs failure to exhaust the necessary Quixtar conciliation procedure and the binding arbitration procedures they agreed to in three separate agreements. In support of this motion, Puryears and World Wide incorporates and relies on the memorandum filed by Quixtar and does not repeat those arguments in this memorandum.

3. Issues.

3.1 Should the Plaintiffs' claims should be dismissed for failure to exhaust their contractual pre-claim conciliation process as required by Quixtar Rule 11?

3.2 Have Plaintiffs contractually bound themselves to comply with the mandatory arbitration required by Quixtar Rule 11 and should they be compelled to arbitrate?

3.3 May a non-signatory to a contractual obligation to arbitrate demand that the claims made against the non-signatory be arbitrated with those of the signatories because of the interrelated nature of the claims, the interrelationship of the businesses of the parties and the purpose of the arbitration agreement?

4. Facts Relevant To Motion.

4.1 Pokorny and Blenn entered into Quixtar Registration Agreements to become independent distributors of products sold by Quixtar; such distributors are known as independent business operators ("IBOs"). (Complaint ¶3, 4) Plaintiffs do not challenge the enforceability of the entire Registration Agreement. (Complaint ¶18) The Quixtar Registration (and subsequent Renewal Agreements) provide Alternative Dispute Resolution ("ADR") procedures to resolve all disputes arising from the Quixtar Rules of Conduct, whether such disputes are between IBOs and Quixtar, as well as between the IBOs themselves. (Complaint ¶18 and Memorandum of Quixtar) The precise procedure is outlined in Quixtar's Motion to Compel, but the process includes informal conciliation, formal conciliation, and binding arbitration. Plaintiffs challenge their obligations to comply with the ADR process. (Complaint ¶18, 26)

4.2 Puryears are Quixtar IBOs. (Dec. of R. Davis, ¶3) As with all Quixtar Distributors, they are required to sign the Quixtar Registration Agreement and are bound to its terms. (Complaint ¶18)

4.3 Puryears have a member's ownership interest in World Wide Group LLC ("World Wide"), a Washington limited liability company. (Complaint ¶6-8) World Wide is a company formed to meet the specialized needs of IBOs as a centralized support center. (Dec. of R. Davis ¶4)

4.4 World Wide is the sole member of Dreambuilders Membership LLC, ("DM") a Washington LLC. DM sells memberships to IBOs to obtain discounted services such as integrated communication services (phone service, internet service, voice messaging, etc.) online business planning services, motivational materials (produced on CD/tape format) and other related items often referred to as "tools". (Dec. of R. Davis ¶7) DM is not a party to the litigation.

4.5 Both Plaintiffs subscribed to DM as Premier Members. Pokorny registered as a DM Premier Member on December 27, 2004; he upgraded his service on March 7, 2005; and again on May 3, 2005. Blenn registered as a DM Premier Member on December 27, 2004 and he upgraded his service on March 7, 2005. Neither Plaintiff is a Quixtar "Platinum", i.e., a level of success in Quixtar. As such, they could buy educational and motivational tapes through

1 distribution from a DM registered member who is Platinum. Tools have never been made
2 available for sale to either Plaintiff by World Wide. (Dec. of R. Davis ¶9, ¶10)

3 4.6 Registration with DM is done electronically. As part of the registration, the new
4 member is asked to agree to certain Terms and Conditions. One of those terms is an obligation to
5 submit any disputes to binding arbitration in accordance with the Quixtar arbitration rules.
6 Pokorny and Blenn agreed to submit "any and all differences or disputes related to or arising out
7 of this agreement or the services or the goods" to arbitration in accordance with the Quixtar rules.¹
8 (Dec. of R. Davis, ¶12, ¶13; Ex. 1 and Ex 2)

9 4.7 Pokorny and Blenn also signed Business Support Materials Arbitration Agreements
10 ("BSMAA"), which likewise contain alternative dispute clauses requiring arbitration. The
11 BSMAA applies to any dispute involving Quixtar as well as any "... publisher, author, speaker,
12 distributor, manufacturer, seller, reseller or marketer of business support materials". (Dec of
13 VanderVen. Exs. 10, 13 & 14)

14 4.8 Pokorny and Blenn allege all Defendants are interrelated groups, are in "close
15 association" and have a "symbiotic relationship". (Complaint ¶¶44-45) They assert Defendants
16 collectively solicit and require participation in both the Quixtar and the "tools and functions"
17 (Complaint ¶ 1, ¶14) line of products, which Plaintiffs allege is illegal. (Complaint ¶¶ 85-94)²

18 4.9 Pokorny and Blenn have failed to utilize the dispute process and assert they are not
19 required to do so. (Complaint ¶18-26)

20 5. Points of Authority and Argument.

21 Quixtar Rule of Conduct Number 11 is the dispute process and it incorporates the Federal
22 Arbitration Act (FAA). Under the FAA, arbitration is a highly favored method of dispute
23 resolution, and if the parties have agreed to arbitrate the claims presented, the Court must compel
24

25 ¹ The Agreement does modify the Quixtar rules to the extent that each party will bear its
26 own fees and expenses.

27 ² Defendants do not admit the truth of Plaintiffs' averments, but for the purposes of this
28 motion Plaintiffs are bound by their own assertions, which state claims that if true, must be
arbitrated per Plaintiffs' agreements.

such arbitration. Moses H. Cone Memorial Hosp. v. Mercury Const. Corp. 460 U.S. 1 (1983)³
 Here, Plaintiffs' claims are included within the various ADR Agreements Plaintiffs have signed
 and they will be unable to establish any defense to their contractual obligation to arbitrate.⁴

5.1 Puryears and World Wide may enforce Quixtar's ADR procedure, the BSMAA arbitration provision, and the DM arbitration provision.

The disputes alleged in the Complaint against Quixtar are within the ambit of a claim for
 violation of Quixtar's rules and would require compliance with the Quixtar ADR process. To the
 extent Plaintiffs' disputes are with Puryears, those claims are subject to the Quixtar ADR process
 as each actor is an IBO. To the extent Plaintiffs claim closely interrelated illegal conduct by
 World Wide for the sale of "tools", such claim is within the ambit of the DM's arbitration
 provisions. Plaintiffs did not name DM as a party but clearly this is the entity with which it has
 contractual privity concerning "any difference or dispute" involving the purchases at issue
 concerning World Wide. The law permits World Wide to enforce DM's arbitration agreement.

Although Plaintiffs do not acknowledge in the Complaint their contractual obligation to
 arbitrate under the DM Agreement and BSMAA, they do acknowledge the contractual obligation
 to arbitrate under the Quixtar Registration Agreement. To avoid this obligation, they assert as a
 defense that those ADR provisions should not be enforced. Plaintiffs' argument is not supported
 by the law. Based on the contracts, the relationship of the parties and the interrelated nature of the
 disputes, all Defendants, including Puryears and World Wide, are entitled to compel use of the
 dispute resolution agreement for the various reasons supported by the law and set forth in this
 memorandum.

³ The FAA creates a body of federal substantive law of arbitrability, but some contractual
 issues may be covered by applicable state law. Moses H. Cone, 460 U.S. at 24-25; Perry v.
Thomas, 482 U.S. 483 (1987). The Quixtar ADR provisions adopts the FAA and Michigan law.

⁴ Plaintiffs' claims under the RICO and Unfair Business Practices are specifically
 arbitrable. Shearson/American Exp. v. McMahon, 482 U.S. 220 (1987); Fairchild v. National
Home Ins. Co., 17 Fed. Appx. 631 (9th Cir. 2001).

5.1.1 Plaintiffs and Puryears must contractually use the Quixtar ADR process.

Puryears, Britts, Pokorny and Blenn are all IBOs. Each has a Registration Agreement with Quixtar. Each has agreed to submit disputes between themselves to the Quixtar ADR process. Pokorny and Blenn assumed a direct obligation to all IBOs including Puryears, to abide by Quixtar's Rules of Conduct relating to compliance with laws (Rule 4.8); to refrain from deception or unlawful trade practices (Rule 4.9); and not to operate an illegal or unlawful business (Rule 4.10). (Dec. of VanderVen, Ex. 2) Puryears assumed that same direct obligation. Plaintiffs' Complaint is rife with averments invoking the dictates and prohibitions of these Quixtar Rules. If there is a claim that amounts to a violation of the Rules, the ADR process is to be invoked. (Rule 11) These contractual provisions were designed to directly deal with disputes between IBOs. As IBOs, Puryears join in the Quixtar motion because all IBOs must use the Quixtar ADR process when there are claims alleging rules violations and touching on their relationship. On behalf of Puryears, the Court is asked to dismiss the complaint for Plaintiffs failure to comply with the Quixtar ADR process.

5.1.2 Pokorny and Blenn are estopped from avoiding ADR/Arbitration with all Defendants.

Plaintiffs' averments assert a sophisticated interrelated program to deceive arising out of the sale of Quixtar products and "tools" by all Defendants, including World Wide. (Complaint, e.g. ¶1, 6, 45) World Wide is not a signatory to an arbitration agreement with Plaintiffs. Rather, the complained of sale activity (Complaint ¶6) asserted against World Wide, if it occurred, would in fact be the sale activity of DM. The Complaint asserts World Wide is involved in the "tool business" and it is owned by Puryears. (Complaint ¶6, ¶7, ¶8) Plaintiffs, Puryears, Britts and Quixtar are all signatories to the Registration Agreement that provides for the ADR process at issue. The law provides that since the complained of conduct is so interrelated, Plaintiffs are estopped from denying any Defendant, including World Wide, the right to invoke Quixtar's ADR process.

An arbitration agreement can be enforced as to non-signatories if the dispute is one which the signing party agreed to submit to arbitration. Shopmen's Local Union No. 790 of the Bridge

1 v. Bostrom-Bergen Metal Prods., No. C-80-2334 (SC), 1980 WL 2109, at *3 (N.D. Cal. Aug. 29,
 2 1980) ("the fact that the dispute touches upon parties who did not sign the Agreement does not
 3 detract from the court's power to compel . . . to arbitration"). A signatory is estopped from
 4 avoiding arbitration when the issues the non-signatory is seeking to resolve are "intertwined" with
 5 the agreement that the estopped party has signed, if the dispute concerns the relationship between
 6 the parties and is closely linked to claims subject to the contractual obligation to arbitrate; a court
 7 will examine "the nexus between the persons, wrongs and issues". 1 Commercial Arbitration
 8 §11:7.

9 Here, these factors combine to establish Plaintiffs' claims as pled are intertwined. The
 10 nature of Plaintiffs entire claim that Defendants' collective conduct created an illegal pyramid
 11 scheme which violates RICO and constitutes unfair business practices is to aver collusive conduct.
 12 If a plaintiff alleges "substantially interdependent and concerted misconduct by both the non-
 13 signatory and one or more of the signators to the contract," equitable estoppel permits the non-
 14 signator to compel arbitration. MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir.
 15 1977) (non-signator could invoke arbitration provision for fraud and conspiracy allegations
 16 dependent on contractual relationship). Moreover, when each of the signatories' claims makes
 17 reference to and presumes the existence of the written agreement containing arbitration provisions,
 18 arbitration is appropriate to non-parties. Id. In MS Dealer, the court noted that the signators'
 19 claims against all defendants were based on the same facts and were inherently inseparable; they
 20 were also based on allegations of collusive behavior in which both signatory and non-signatory
 21 defendants acted together to establish a scheme relative to the contractual relationships with the
 22 signator plaintiff. The court required arbitration of the allegedly collusive claims against both
 23 signators and non-signatories to the arbitration agreement.

24 Signators to an arbitration agreement can be compelled to arbitrate with a non-signatory
 25 where "a careful review of the relationship among the parties, the contracts they signed ... and the
 26 issues that had arisen among them discloses that the issues the non-signatory is seeking to resolve
 27 in arbitration are intertwined with the agreement that the estopped party has signed." Denney v.
 28 BDO Seidman, 412 S.3d 58, 70 (2nd Cir. 2005). In Denney, investors brought a putative class

1 action suit against law and accounting firms that offered consulting advice on tax shelters. In
 2 remanding and directing an analysis of whether claims against all defendants must be arbitrated,
 3 the Second Circuit noted:

4 Having alleged in this RICO action that the Deutsche Bank and BDO defendants
 5 acted in concert to defraud the plaintiffs ..., and that the defendants' fraud arose
 6 in connection with BDO's tax strategy advice ... plaintiffs cannot now escape the
 7 consequences of those allegations by arguing that the Deutsche Bank and BDO
 8 defendants lack the requisite close relationship, or that the plaintiffs' claims
 9 against the Deutsche Bank defendants are not connected to Deutsche Bank's
 10 relationship with BDO.

11 Denney, 412 F.3d at 70.

12 Plaintiffs alleged Defendants "... approve, promote and facilitate the systematic
 13 noncompliance" with a breach of the rules that purportedly protect against the operation of a
 14 pyramid scheme. (Complaint ¶61) Plaintiffs allege all Defendants are an illegal association in
 15 fact constituting an enterprise in violation of RICO. (Complaint ¶84) The contract language, the
 16 parties' relationships, and the claims asserted, establish the Plaintiffs' obligation to use the Quixtar
 17 ADR process and submit to binding arbitration with all Defendants. The Court is asked to rule
 18 and direct that Plaintiffs are estopped from denying World Wide's demand that the claims against
 19 it be the subject of arbitration with the other Defendants.

20 **5.1.3 World Wide, as the parent to DM, is entitled to enforce DM's arbitration** 21 **provision.**

22 The sales activity alleged in the Complaint ¶6 is in fact sales activity conducted by DM, a
 23 wholly owned subsidiary of World Wide. Plaintiffs' averment truly is against the subsidiary of
 24 World Wide. In addition to the application of the doctrine of estoppel, World Wide also asserts
 25 Plaintiffs' obligation to arbitrate pursuant to the DM Agreement, which invokes the Quixtar
 26 arbitration process that is at issue in Quixtar's motion.

27 It is well settled that a court may refer claims against a parent corporation to arbitration
 28 even though the parent is not a signator to an arbitration agreement, when allegations against both
 the parent and its subsidiary are based on the same facts which are inherently inseparable.
 1 Commercial Arbitration §11:13 (2006). A non-signator to an arbitration agreement has standing
 to compel arbitration where the non-signator has a close legal relationship, such as a parent

1 subsidiary, with a signator to the agreement. B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So.2d
 2 483 (Miss. 2005). When allegations against a parent and its subsidiary are based on the same facts
 3 and are inherently inseparable, courts refer claims against the parent to arbitration even though the
 4 parent is not formally a party to the arbitration agreement. J.J. Ryan & Sons, Inc. v. Rhone
 5 Poulenc Textile S.A.C.A., 863 F.2d 315 (4th Cir. 1988). A parent company generally is allowed
 6 to stand in its subsidiary's shoes and invoke the arbitration clause contained in the contract the
 7 subsidiary signed with the plaintiff, otherwise, if the parent company is forced to try the case, the
 8 subsidiary's right to have arbitration would be compromised. Blumenthal-Kahn Electric, Ltd. v.
 9 American Home Ins. Co., 236 F.Supp.2d 575 (E.D. Va. 2002).

10 Plaintiffs claim that Defendants, including World Wide, are intrinsically interconnected
 11 with Quixtar (Complaint ¶45). Plaintiffs' averments in part are based on the facts surrounding the
 12 purchase of "tools". (Complaint ¶33-46) Plaintiffs do not clarify which tool sales they find
 13 offending. However, for the purposes of this motion, it can not be disputed the sale of the
 14 allegedly offending tools were made through DM, not World Wide. The claims made against
 15 World Wide are that it is part of "symbiotic relationship" with the other Defendants because
 16 Plaintiffs assert World Wide sells tools and functions as a business. (Complaint ¶6, ¶45)

17 Since any asserted misconduct could only be affected through the sale of the tools as
 18 alleged by Plaintiffs, the contract they must rely upon supporting the sales claim can only be the
 19 contract with DM. That contract calls for arbitration of the claims of the type made in the
 20 Complaint. World Wide, as the parent corporation, is entitled to assert its right to enforce DM's
 21 arbitration agreement with Plaintiffs based on the interrelated facts. The Court is asked to rule
 22 that World Wide may also compel arbitration with Plaintiffs as the corporate parent of DM.

23 **5.1.4 Defendants are third party beneficiaries of the ADR and Arbitration** 24 **Agreements.**

25 In addition, all the Defendants, including Puryears and World Wide, are intended third
 26 party beneficiaries entitled to require recourse to the various ADR provisions. Creation of a third
 27 party beneficiary contract requires that the parties intend that the provision assume an obligation to
 28 the intended beneficiary at the time they enter into the contract. MS Dealer, 177 F.3d at 947;

1 Vestax Secs. Corp. v. McWood, 116 F.Supp.2d 865 (E.D. Mich 2000). It can not be disputed that
 2 Quixtar had every intention of binding IBOs to arbitrate any dispute they have arising out of
 3 alleged rules violations or the sale of products, including "tools". It can not be disputed that DM
 4 intended that any IBO who has a dispute arising out of the sale of "tools" would agree to resolve
 5 such through the Quixtar arbitration process. This requirement is neither onerous nor adding a
 6 layer of dispute resolution on any IBO. In fact it is a congruent process.

7 Plaintiffs in essence concede the arbitration process is in place and part of the contract.
 8 They ask the Court to excise that obligation, without disturbing the balance of the contract. If the
 9 Court was to do such, it would deprive all parties of their expectations, not only the direct parties,
 10 but the intended beneficiaries such as World Wide and Britt World Wide LLC. World Wide is
 11 entitled to enforce the arbitration provisions as an intended beneficiary. The Court is asked to rule
 12 that third party beneficiary is an additional basis to compel arbitration as to all Defendants.

13 **5.2 The Quixtar conciliation procedures require dismissal of this premature** 14 **action.**

15 The conciliation procedure is outlined in the Quixtar Motion to Dismiss or Stay Litigation
 16 and Compel Compliance with Dispute Resolution Agreement. Puryears join in that request as a
 17 party to the contract and World Wide joins as a beneficiary of the contract who may assert
 18 estoppel against Plaintiffs. As outlined by Quixtar, courts routinely recognize that grievance ADR
 19 procedures agreed to by a claimant must be complied with before proceeding to either arbitration
 20 or litigation.

21 Just as with arbitration, non-signatories, such as World Wide, can also enforce multi-tier
 22 dispute resolution processes as conditions precedent to further action. See, Fisher v. GE Medical
 23 Systems, 276 F.Supp.2d 891, 892 (M.D. Tenn. 2003). In Fisher, an employer had a multilevel
 24 dispute resolution system requiring mediation type processes which had to be exhausted before
 25 filing any claim in court, which the court enforced against a non-signatory employee. The Fisher
 26 court drew no distinction between the ADR process and arbitration, but instead was "persuaded
 27 that arbitration in the FAA is a broad term that encompasses many forms of dispute resolution,"
 28 and that a policy favoring the finality of arbitration is but one part of a broader goal of

1 encouraging informal, i.e., non-judicial resolution of disputes, including other ADR processes.
2 276 F.Supp.2d at 893.

3 The Court is asked to rule that as a condition precedent to the Quixtar arbitration, the two
4 part conciliation process must be enforced as to all of Plaintiffs' claims against all Defendants.

5 **5.3 The arbitration agreement is not unconscionable.**

6 Recognizing their obligation to participate in ADR, much of Pokorny and Blenn's
7 Complaint contains multiple allegations attempting to vitiate their obligation. However, no
8 averment in the Complaint establishes a basis to avoid the contractual arbitration procedure.

9 Plaintiffs, as the party challenging a contract provision as unconscionable, bear the burden
10 of proving unconscionability. See, Nagrampa v. Mailcoups, Inc., 469 F.3d 1257 (9th Cir. 2006).
11 Absent the well founded claim that an entry into the arbitration agreement resulted from the sort of
12 fraud or excessive economic power that would provide grounds for the revocation of any contract,
13 there is no basis for disfavoring agreements to arbitrate. Morrison v. Amway Corp., 49 F.Supp. 2d
14 529 (S.D. Texas 1998). In Morrison, the court specifically rejected the argument that an Amway
15 arbitration provision was unconscionable based on the bargaining positions of the parties, noting
16 that the plaintiffs were not unsophisticated parties beguiled into entering into a fundamentally
17 outrageous contract, but rather operators of their own independent business distributorships
18 through Amway.

19 Plaintiffs have not asserted, and could not prove, they are unsophisticated consumers,
20 victimized by overreaching. They are independent business operators who chose to engage with
21 Quixtar in this business, seeking financial success. Pokorny became an IBO in 1994 (Dec. of
22 VanderVen ¶8) and Mrs. Blenn became an IBO in 2004 (Dec. of VanderVen ¶13, Exs. 13, 14 and
23 15). As outlined in Quixtar's motion, each allegation by Plaintiffs fails to meet their burden to
24 prove by substantial evidence that the ADR provisions are procedurally and substantively
25 unconscionable. Courts have refused to void arbitration provisions in agreements based on
26 assertions of excessive expense, bias of the forum toward one party as a source of repeat business,
27 or overreaching, where the arbitration provisions are provided to prospective business people prior
28 to signing; and where Plaintiffs can claim no surprise they were bound to the agreements they

executed. See, Doctors Associates, Inc. v. Jabush, 89 F.3d 109 (2nd Cir. 1996). There is no basis to "blue-line" out of the contracts the obligation to arbitrate. The Court is asked to reject an assertion of unconscionability and compel arbitration of Plaintiffs claims as to all Defendants.

6. If not Dismissed, This Action Should Be Stayed Pending the Outcome of the ADR Process.

To the extent the Court does not dismiss this action on a specific claim as to Puryears or World Wide, but others proceed to ADR, the Court is asked to stay action against any party not found subject to the ADR process. While Puryears and World Wide believe all Plaintiffs' claims must be submitted to the ADR and arbitration process, any claims or issues not there addressed should be stayed pending the outcome of that ADR process to avoid prejudice and possible inconsistent results. See Moses 460 U.S. at 20 n. 23 (Court recognizes that it may be advisable to stay litigation among non arbitration parties pending the outcome of the litigation). The Court should exercise its discretion to stay the litigation so that any arbitration proceedings are not undermined by litigation which invokes the same operative facts and is inherently inseparable from the claims being arbitrated. See Hill v. G.E. Power Sys. Inc., 282 F.3d 343, 348 (5th Cir. 2002)

DATED: March 5, 2007

CARLSON, CALLADINE & PETERSON LLP

By: 

EDWARD F. DONOHUE

Attorneys for DEFENDANTS
JAMES RON PURYEAR, JR., GEORGIA LEE
PURYEAR, AND WORLD WIDE GROUP, L.L.C

CARLSON CALLADINE & PETERSON LLP
353 SACRAMENTO STREET
16TH FLOOR
San Francisco, CA 94111