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QUIXTAR INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

QUIXTAR INC., et al.,

Defendants.

Case No. C 07-00201 SC

DEFENDANT QUIXTAR INC.'S NOTICE OF MOTION AND MOTION TO DISMISS OR STAY AND COMPEL COMPLIANCE WITH DISPUTE RESOLUTION AGREEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 27, 2007
Time: 10:00 a.m.
Room: 1, 17th Floor
Judge: Honorable Samuel Conti

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NOTICE OF MOTION AND MOTION

Please take notice that on April 27, 2007, at 10:00 a.m. or as soon thereafter as the matter may be heard, before the Honorable Samuel Conti, United States District Court, Northern District of California, San Francisco Division, 450 Golden Gate Avenue, Courtroom 1, 17th Floor, San Francisco, California, Defendant Quixtar Inc. ("Quixtar") will, and hereby does, move to dismiss the Complaint of Plaintiffs Jeff Pokorny and Larry Blenn ("plaintiffs") or stay litigation and compel compliance with the parties' dispute resolution agreement on the grounds that plaintiffs failed to engage in non-binding dispute resolution pursuant to the parties' agreement which is a condition precedent to plaintiffs pursuing their claims, thus requiring dismissal or a stay pending plaintiffs' compliance with the agreement. In the alternative, if the Court were to find the conciliation procedure unenforceable, Quixtar moves to stay this action and compel arbitration.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, the Declaration of Gary D. VanderVen filed herewith, the Appendix of Authorities Regarding the Quixtar ADR Agreement filed herewith, the reply papers to be filed by the moving defendants, the pleadings and other papers on file herein, and such other written and oral argument as may be presented to the Court.

I. INTRODUCTION

Plaintiffs Jeff Pokorny and Larry Blenn, each an independent Quixtar distributor, agreed not just once to resolve all the claims they assert in this case through alternative dispute resolution (ADR). They agreed at least ten times. Each entered into an agreement with defendant Quixtar Inc. (the "Quixtar ADR Agreement") that provides for a three-step ADR process: (1) informal conciliation, (2) formal conciliation, and then (3) binding arbitration administered by JAMS. Plaintiffs also entered into two other agreements with the non-Quixtar defendants, both incorporating the Quixtar ADR Agreement. Any one agreement, by itself, warrants granting this motion. That there are three — one of which Pokorny agreed to ten times — is redundant. Taken together, the three agreements leave no doubt that the parties intended to resolve all disputes through the three-step Quixtar ADR process.

Plaintiffs have anticipated this, for at the very outset of their Complaint and elsewhere they urge that Quixtar's multi-tiered ADR process should not be enforced. Indeed, Pokorny and Blenn seek to persuade this Court to strike down all of the ADR provisions in all of the plaintiffs' multiple contracts with defendants. They are wrong.

This motion is in two parts. First, as a threshold matter, this Court should dismiss the Complaint because plaintiffs have not submitted their claims to the conciliation processes in the Quixtar ADR Agreement. Courts treat the failure to engage in mandatory, non-binding dispute resolution procedures as a failure of a condition precedent and dismiss for failure to exhaust a contractual remedy. In the alternative, this Court could specifically enforce plaintiffs' agreements, order plaintiffs to submit their claims to the Quixtar ADR process, and stay all litigation in the meantime.[1] Either way, the Court need not reach the "arbitration" part of this motion; indeed, this Court may lack jurisdiction even to entertain an arbitration motion where, as here, plaintiffs have failed to exhaust their contracted-for mediation remedy.

[1] Plaintiffs' failure to satisfy these procedures is fatal whether viewed under contract law or under the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA"). *See e.g, Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998) (non-binding arbitration enforceable under the FAA); *Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287 (11th Cir. 2002) (before parties could arbitrate under terms of a multi-tiered ADR process, they must first satisfy the mediation requirement under the parties' agreement); *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) (same).

Second, if the Court were to find the conciliation procedure unenforceable, defendants move to stay this action and compel arbitration. Plaintiffs object, yet their arguments are not new. Every federal and state court that has addressed the Quixtar ADR Agreement in similar cases over the course of the last ten years has found it valid and enforceable.

This Court should decide as a threshold matter that the Quixtar conciliation process establishes a condition precedent that must be satisfied before plaintiffs can proceed, and that neither plaintiff has satisfied this condition. On this basis, the complaint should be dismissed. In the alternative, if the Court were to find the conciliation procedure unenforceable, this Court should compel plaintiffs to comply with the Quixtar arbitration process, order plaintiffs to arbitration, and stay all further litigation pending the outcome of arbitration.

II. STATEMENT OF FACTS

Plaintiffs' lawsuit involves a two-pronged challenge. First, they attack the business model Quixtar uses to distribute Quixtar-approved products. Second, they separately attack the "tools and functions" business, which consists of business support and promotional materials sold to distributors, not by Quixtar, but by the two groups of non-Quixtar co-defendants.[2] (Compl. ¶ 1.)

A. The Quixtar Business Model.

Quixtar Inc. is a successor in interest to Amway Corporation, a Michigan corporation. Since 1959, first Amway and now Quixtar have provided the opportunity for hundreds of thousands of individuals throughout the United States to own their own businesses as independent distributors of Amway products. (Declaration of Gary D. VanderVen ("VanderVen Decl."), filed herewith, Ex. 1.) Quixtar sells its own brand of home care products, including such well-known brands as Nutrilite® (vitamin and dietary supplements) and Artistry® (cosmetics and beauty products). (*Ibid.*) Quixtar also distributes products and services of partner companies, including Kodak, Barnes & Noble, and Dell Computers. (*Ibid.*) It distributes these products and services exclusively through individual distributors, known as Independent Business Owners ("IBOs").

[2] The two groups are (i) the "Puryear Defendants" consisting of Mr. and Mrs. Puryear and an affiliated company, Worldwide Group, L.L.C., and (ii) the "Britt Defendants" consisting of Mr. and Mrs. Britt and their companies, Britt Worldwide, L.L.C., American Multimedia, Inc., and Britt Management, Inc.

Plaintiffs contend Quixtar's business model is an illegal "pyramid scheme." (*See* Compl. ¶ 1.) They are wrong. The Federal Trade Commission (FTC) conducted an exhaustive four-year proceeding that, after trial, conclusively established that "[t]he Amway Sales and Marketing Plan is not a pyramid plan." *In the Matter of Amway Corp.*, 93 F.T.C. 618, 706 (1979). Indeed, the key attributes of Quixtar's business model that plaintiffs Pokorny and Blenn now cite as indicia of a "pyramid" scheme are the very things the FTC investigated and found lawful. *Id*. at 711.

B. The Puryear and the Britt Defendants ("Business Support Materials").

Each IBO has an obligation under the Quixtar Rules of Conduct to train and motivate the people they sponsor. (VanderVen Decl., Ex. 2 at D-21.) Successful IBOs often form a separate company to carry out this function.

The Puryear Defendants and the Britt Defendants are examples of companies formed by successful IBOs for training and motivating their "downline" IBOs. These co-defendants supply promotional aids, such as motivational books and lectures on tapes (known as "tools"), and host conventions and seminars about the Quixtar business (known as "functions"), all for the purpose of helping IBOs sell more Quixtar products. This is the "tools and functions" business, collectively referred to as business support materials or "BSM." (VanderVen Decl., Ex. 2 at C-4 & D-32-35.)

C. The Quixtar ADR Agreement.

The Quixtar ADR Agreement is a multi-tiered dispute resolution process that requires notice and submission of a written claim. If the claim is not resolved, Quixtar requires its IBOs to resolve their disputes through a more formal three-stage process described below.

1. Step One: Informal Conciliation.

Step One, the informal conciliation procedure, is conducted by Quixtar's Business Conduct and Rules Department along with the chairperson of the Independent Business Owners' Association International ("IBOAI") Hearing Panel. The IBOAI is an independent trade association comprised of Quixtar distributors. It represents the interests of all Quixtar distributors, including Pokorny and Blenn. (VanderVen Decl., Ex. 2 at C-4.)

The Business Conduct and Rules Department, individually or with the assistance of the Hearing Panel Chairperson, attempts to resolve IBO disputes. Although denominated "informal

conciliation," the process mirrors that of standard commercial mediation.[3] If informal conciliation is unsuccessful, the complainant moves on to "formal conciliation." (VanderVen Decl., Ex. 2 at D-40.)

2. Step Two: Formal Conciliation.

Formal conciliation involves the presentation of evidence before a disinterested panel of the IBOAI Board. At the conclusion of the hearing, the panel submits a written recommended resolution to the parties and to Quixtar. (VanderVen Decl., Ex. 2 at D-40.) The recommendations are non-binding. Any party may appeal to the entire IBOAI. The parties are further free to disregard the recommendations and invoke the arbitration stage of the Quixtar ADR Agreement.

3. Step Three: Arbitration.

If non-binding conciliation is unsuccessful, the parties must submit any remaining disputes to "binding arbitration" administered by JAMS under rules designed jointly by Quixtar and the IBOAI. (VanderVen Decl. ¶ 6.) These rules closely resemble, and in many cases are identical to, the commercial arbitration rules applied by organizations like JAMS and the American Arbitration Association (AAA). (VanderVen Decl., Ex. 2 at D-42.)

A flow chart of the Quixtar ADR Agreement illustrates these stages:

Informal Conciliation	?	Formal Conciliation	?	Arbitration

D. Plaintiffs Agreed to The Quixtar ADR Process.

1. Pokorny Agreed Not Once But Ten Times.

Pokorny agreed to the Quixtar ADR Agreement not just once, but ten times. In 1997, he renewed his Amway IBO and signed his name directly above an express "AGREEMENT TO ARBITRATE." (VanderVen Decl., Ex. 6.) Pokorny also signed this same multi-tiered dispute resolution in 1998 and 1999. (*Id.*, Exs. 7 & 8.) He has automatically renewed his IBO every subsequent year, subject to the same multi-tiered ADR agreement. (*Id.*, Ex. 9.) Thus, Pokorny has

[3] *See, e.g.,* Cal. Evidence Code §1115 ("'Mediation' means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement").

contracted with Quixtar to submit disputes to the Quixtar ADR process no fewer than ten times over the course of the past decade. The agreement provides, in relevant part:

> AGREEMENT TO ARBITRATE. I agree that I will give notice in writing of any claim or dispute arising out of or relating to my Independent Business, the Independent Business Ownership Plan, or the IBO Rules of Conduct, to the other party or parties involved in the dispute, specifying the basis for my claim and the amount claimed or relief sought. I will then try in good faith to resolve the dispute using the Dispute Resolution Procedures contained in the IBO Rules of Conduct, including the conciliation process.
>
> If the claim or dispute is not resolved to my satisfaction within 90 days, or after the conciliation process is complete, whichever is later, I agree to submit any remaining claim or dispute arising out of or relating to my Independent Business, the Independent Business Ownership Plan, or the IBO Rules of Conduct [. . .] to binding arbitration in accordance with the Arbitration Rules, which are set forth in the IBO Rules of Conduct.

(Compl., Ex. 1.)

2. Blenn Agreed to the Quixtar ADR Agreement.

Blenn joined Quixtar by becoming a partner in his wife's pre-existing Quixtar business. In October 2004, Blenn's wife, Lorraine Blenn, became an IBO by signing the Quixtar Registration Agreement that includes the identical "AGREEMENT TO ARBITRATE" Pokorny signed. (VanderVen Decl., Ex. 12.) Blenn became a partner in his wife's Quixtar Business in 2005, when it was renamed Blenn Enterprises. (*Id*., Ex. 14.) Blenn automatically renewed his Quixtar business for 2006. Thus, Blenn contracted with Quixtar to submit disputes to the Quixtar ADR process on two separate occasions during the three years he worked as a Quixtar distributor. (*Id*., Ex. 15.)

E. Pokorny and Blenn Also Signed a "Business Support Materials" Arbitration Agreement.

In connection with their purchase of business support materials, Pokorny and Blenn's wife also signed a "Business Support Materials Arbitration Agreement." (VanderVen Decl., Exs. 10 & 13.) The agreement contains an obligation to resolve disputes under the Quixtar ADR Agreement. (*Ibid*.) Blenn became a party to that agreement when he joined his wife's Quixtar Business.

F. Both Plaintiffs Signed a "Dreambuilders Membership" ADR Agreement.

Finally, both Pokorny and Blenn agreed to the terms and conditions of the "Dreambuilders Membership Agreement" when they subscribed to the Dreambuilders website, which offers BSM for sale. That Agreement requires Pokorny and Blenn to "submit to binding arbitration any and all differences or disputes related to or arising out of this Agreement or the services or the goods." (Declaration of Richard A. Davis ("Davis Decl."), filed with Puryear Defendants' Motion, Exs. 1 & 2.) It provides that all disputes shall be subject to the Quixtar ADR Agreement. (*Ibid.*)

G. The Quixtar ADR Agreement Encompasses All of Pokorny and Blenn's Claims.

Pokorny and Blenn do not dispute that they agreed to the Quixtar ADR Agreement; nor do they dispute that the clause encompasses all of their claims. (Compl., ¶ 26.) They merely want to be excused from performing their contracts.

The Quixtar ADR Agreement, however, is broad and encompasses all of Plaintiffs' claims. *Morrison v. Amway Corp.*, 49 F. Supp. 2d 529, 534-35 (S.D. Tex. 1998) (Amway ADR clause was broad and encompassed plaintiff distributors' claims)[4]; *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720-21 (9th Cir. 1999). Moreover, the Quixtar IBO Registration Agreement provides that if Pokorny or Blenn have a dispute with another distributor relating to the purchase of tools and functions, they acknowledge that it will be subject to the same Quixtar ADR Agreement. Their claims against the Britt and Puryear Defendants fall within that provision.

H. Quixtar Can Enforce the BSM and Dreambuilders ADR Agreements.

The BSM Arbitration Agreement offers another alternative. It expressly states that it applies to any BSM dispute involving "any publisher, author, speaker, distributor, manufacturer, seller, reseller, or marketer of Business Support Materials" and "Amway Corporation or any of its officers, directors, agents or employees." Thus, even without the Quixtar IBO Registration Agreement, all of Plaintiffs' claims would be subject to this ADR process. All defendants are express third-party beneficiaries of the BSM Arbitration Agreement and can enforce the BSM Arbitration Agreement and the Dreambuilders Membership Agreement as express third party beneficiaries. Mich. Comp.

[4] Attached as Exhibit B to the accompanying "Appendix of Authorities Regarding Quixtar ADR Agreement" ("Appendix"), filed herewith.

Laws § 600.1405(1) (a party is a third-party beneficiary if the promisor "has undertaken to give or to do or refrain from doing something directly to or for said person."). *See also Vestax Secs. Corp. v. McWood,* 116 F. Supp. 2d 865, 868 n.4 (E.D. Mich. 2000) (concluding that third-party beneficiaries had the right to compel arbitration).[5]

III. ARGUMENT

A. The Quixtar Non-Binding Conciliation Procedures Are Enforceable and Require Dismissal of This Action.

Courts analyzing non-binding, mandatory dispute resolution procedures have uniformly found that a plaintiff's failure to exhaust contractual mediation procedures warrants dismissal. Here, the "Step One" process contemplated by Quixtar's ADR process — informal conciliation — falls outside the FAA. Yet, it is nevertheless a condition precedent that must be exhausted before litigation *or* arbitration can be brought. Plaintiffs have failed to satisfy that condition.

1. The Law Overwhelmingly Favors Non-Binding Dispute Resolution Procedures Like Quixtar's.

In *Wolsey, Ltd. v. Foodmaker, Inc.,* 144 F.3d 1205, 1207 (9th Cir. 1998), the Ninth Circuit enforced a contract provision requiring the parties to submit controversies to non-binding arbitration. That case involved a multi-tiered dispute resolution process very similar to Quixtar's, contained in a franchise agreement to develop Jack-in-the-Box® restaurants in Hong Kong and Macau: (i) Step One — a senior executive officer meeting; (ii) Step Two — non-binding arbitration under the rules of the AAA; and (iii) Step Three — litigation in federal court. The Ninth Circuit reasoned that the FAA applies when parties "agree to submit a dispute for a decision by a third party" whether that decision is final or non-binding. *Id*. at 1208. Reversing the district court's ruling that denied a motion to

[5] Because the arbitration agreement includes a Michigan choice of law clause (VanderVen Decl., Ex. 2 at D-47), this Court should look to Michigan law in determining the agreement's enforceability, as other courts have done. *See e.g., Stewart & Assocs. Int'l v. Alticor Inc.*, No. 05-3440-CV-RED, (W.D. Mo. Nov. 20, 2006) (Appendix, Ex. A at 7 n.3) (applying Michigan law to determine whether Quixtar's ADR Agreement was unconscionable). *See also Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269-70 (9th Cir. 2002) (observing that Illinois choice of law clause in arbitration agreement meant that Illinois supplied substantive law on contract validity).

compel arbitration, the Ninth Circuit concluded that the plaintiff was required to comply with the terms of the dispute resolution process and submit his claims to non-binding arbitration.

Other Circuits and numerous district courts have reaffirmed the *Wolsey* principle: a party's failure to comply with mandatory non-binding dispute resolution procedures bars that party from pursuing *either* arbitration *or* litigation.[6] For example, in *DeValk Lincoln Mercury, Inc. v. Ford Motor Company*, 811 F.2d 326, 335 (7th Cir. 1987), the Seventh Circuit addressed a dispute resolution procedure that is remarkably similar to the conciliation procedures in the Quixtar ADR Agreement. In *DeValk*, an automobile dealership sued an auto manufacturer over disputes arising from the dissolution of the dealership. The parties' relationship required submission of disputes to the "Ford Policy Board" for mediation. *Id*. at 335. Given that "the mediation clause demands strict compliance with its requirement of appeal to the Dealer Policy Board before the parties can litigate," the Seventh Circuit affirmed summary judgment against the dealership for failure to comply with the mediation clause. *Id*. at 336.

The same result should obtain here. Pokorny and Blenn should be required to comply with the non-binding dispute resolution procedures in the Quixtar ADR Agreement.

[6] *See HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) (holding that mediation was a condition precedent to arbitration); *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (same); *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 208 (6th Cir. 1995) (enforcing requirement to present claim to Dealer Policy Board as condition precedent barring suit); *Ponce Roofing, Inc. v. Roumel Corp.*, 190 F. Supp. 2d 264, 267 (D.P.R. 2002) (dismissing action where the plaintiff failed to submit to multi-tiered ADR process); *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 463 (S.D.N.Y. 1985) (enforcing clause for submission of disputes to expert panel for "advisory opinion"); *Allen v. Apollo Group, Inc.*, No. Civ. 04-3041, 2004 WL 3119918, at *9-*10 (S.D. Tex. Nov. 9, 2004) (dismissing action by multiple employees who failed to submit their claims to grievance process involving notice-and-claim procedure and dispute resolution before a sub-committee of uninvolved employees); *Ziarno v. Gardner Carton & Douglas, LLP*, Civ. A. 03-3880, 2004 WL 838131, at *3 (E.D. Pa. Apr. 8, 2004) (dismissing action where the plaintiff failed to comply with agreement to proceed before a "mediator-arbitrator who has special expertise"); *Mortimer v. First Mount Vernon Indus. Loan Ass'n*, Civ. AMD 03-1051, 2003 WL 23305155, at *3 (D. Md. May 19, 2003) (dismissing action for failure to submit to dispute resolution before the Maryland Association of Realtors, Inc.); *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891, 893-94 (M.D. Tenn. 2003) (staying action where the plaintiffs failed to comply with multi-tier dispute resolution system requiring mediation).

2. Quixtar's ADR Process Is Indistinguishable from Those That Have Been Uniformly Upheld in the Ninth Circuit and Elsewhere.

a. Step One: Informal Conciliation.

Plaintiffs should be required to comply with the first stage informal conciliation process; a step that requires nothing more of them than picking up a telephone, complaining to the Quixtar Rules Department, and participating in a mediation. That "Step One" is easy and the result non-binding does not make it any less of a condition precedent that must be exhausted before proceeding to binding adjudication.

Quixtar's informal conciliation procedure mirrors the mediation process found to be a condition precedent to arbitration in *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003) and *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002). In *Kemiron* the Eleventh Circuit required mediation as a condition precedent to arbitration:

> [U]nder the plain language of the contract, to invoke the arbitration provision, either party must take two steps: first, Aguakem or Kemiron must request mediation and provide notice of the request to the other party. If the mediation subsequently fails, arbitration still cannot take place. The aggrieved party must then take a second step, by providing additional notice, under the terms of the contract that they wish to pursue arbitration. Then, and only then, is the arbitration provision triggered.

Kemiron, 290 F.3d at 1291; *see also HIM*, 317 F.3d at 44 (affirming denial of motion to compel arbitration where parties' contract required mediation as condition precedent to arbitration).

Not just the law, but public policy requires that Pokorny and Blenn comply with the terms of the non-binding procedures in the Quixtar ADR Agreement before proceeding to a final adjudication of their claims in arbitration. First, it accords with courts' desires to effectuate the contractual intention of the parties: "Where contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration." *HIM*, 317 F.3d at 44; *see also Kemiron*, 290 F.3d at 1291; *Ponce*, 190 F. Supp. 2d at 267.[7]

[7] This policy also finds expression in the Federal Arbitration Act, by which a court — "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is

Second, it favors quick resolution of disputes before adjudicators having industry-specific expertise. As Judge Weinstein explained in *AMF Inc. v. Brunswick Corporation*, 621 F. Supp. 456, 463 (S.D.N.Y. 1985), a case in which two bowling-industry competitors agreed to submit disputes over advertisements to an informal review board:

> A remedy at law would be inadequate since it could only approximate the skilled, speedy and inexpensive efforts available by way of specific performance. A law suit would deny AMF the practical specialized experience that the parties agreed to have available for an examination of data-based comparative advertising. A court decision and an NAD decision would have different effects on the parties' reputations within the bowling products industry.

Both policies are implicated here. Enforcing the "Step One" conciliation process comports with the parties' intent, and establishes as the venue for the dispute a panel knowledgeable about Quixtar's business and capable of reaching a cost-efficient resolution.

b. Step Two: Formal Conciliation.

Quixtar's formal conciliation procedures — "Step Two" of the process — is likewise favored. In fact, Quixtar's program echoes the non-binding arbitration procedures in *Wolsey* and *AMF*. The Quixtar procedure — like *Wolsey* and *AMF* — contemplates the presentation of evidence and concludes with the issuance of a recommended resolution. In each, the non-binding procedure is a precondition to final, binding adjudicatory proceedings. Pokorny and Blenn should be required to comply with the formal conciliation procedures in the Quixtar ADR Agreement.

3. Agreements to Engage in Non-Binding Dispute Resolution Procedures Are Pervasive in Our Economy and Are Routinely Enforced.

Quixtar's conciliation procedures are unobjectionable precisely because they are non-binding. Like mediation, conciliation procedures have achieved broad acceptance as a condition precedent to litigation and arbitration. And as the leading California ADR treatise notes, mediation has been accepted in a broad range of industries:

- "Mediation has been widely used in labor relations for years. Mediation of labor grievances, workplace disputes and wrongful termination claims is now standard

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not in issue" — "shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*." 9 U.S.C. § 4 (italics added).

practice." Knight, et al., *Cal. Prac. Guide: Alternative Dispute Resolution,* § 3:39 (Rutter Group 2006).

- "Mediation is also extremely useful in settling disputes between *franchisors and franchisees*. It usually provides a quick and inexpensive resolution and reduces animosity between the parties, thus encouraging a continuing business relationship." *Id.* at § 3:43 (emphasis in original).

- "Mediation often works best in complex, multi-party cases. . . . Also, the parties and their representatives in such cases are usually sophisticated enough to understand the advantages of mediation over litigation, particularly: the cost savings to everyone involved and avoidance of delay." *Id.* at § 3:47.

Each of these considerations applies to the Quixtar conciliation procedures.

These procedures are especially favored where, as here, business relationships are ongoing, such as Quixtar's relationship with, and among, its IBOs. In *Philadelphia Housing Authority v. Dore & Associates Contracting, Inc.*, 111 F. Supp. 2d 633, 637 (E.D. Pa. 2000), the district court granted a defense motion for summary judgment where the plaintiff did not formally request internal appeal, mediation, or arbitration as required by the contract's ADR provision. The court observed that such provisions are common in contracting. *See also United States v. Grace & Sons*, 384 U.S. 424, 429 (1966) (requiring aggrieved contractor to comply with administrative process to which it had agreed in contract with government).

Reliance on non-binding mediation as a predicate in a dispute resolution regime has been a defining characteristic of American labor relations since the advent of collective bargaining. The seminal "Steelworkers Trilogy" of cases[8] sets forth the general principles:

> [T]the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

[8] *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). That reasoning of the United States Supreme Court applies with equal force in the Quixtar/IBO context.

Nothing quite sums up how overwhelmingly favored are contractual agreements to mediate than a recent Harvard law review article. There, the authors canvassed 279 published opinions involving agreements to mediate and concluded: "Collectively, the 279 opinions support a simple principle: courts are inclined to order mediation on their own initiative, and will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute or stipulated in the parties' pre-dispute contract." James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43, 105 (2006); *see also id*. at 108 ("Courts routinely enforce contractual obligations to mediate as a condition precedent to litigation").

4. Quixtar Conciliation Is Not Unconscionable.

Plaintiffs ask the Court to forgive their non-compliance with the Quixtar ADR Agreement saying that it is unconscionable and designed "to stifle claims against Quixtar." (Compl., ¶¶ 72-83.) Not so.

All IBOs with a dispute with Quixtar or a fellow IBO must use the conciliation process. Other IBOs comprise the Hearing Panel and are involved in any potential resolution of the dispute. As such, the conciliation procedures do not render the Quixtar ADR Agreement substantively unconscionable. *See Allen v. Apollo*, No. Civ. 04-3041, 2004 WL 3119918, at *4-*5 (S.D. Tex. Nov. 9, 2004) (rejecting unconscionability challenge to mandatory pre-arbitration grievance procedures).

That plaintiffs bring allegations on behalf of a class does not change the result.[9] Any IBO who believes that he or she has been aggrieved must engage in the ADR process. Plaintiffs suggest that this illegally "purports to restrict" the right to bring class actions. They are wrong.

In the first place, that argument fails the test of common sense. Why should the Court presume, as Pokorny and Blenn allege, that by their silence the vast majority of IBOs who do not

[9] *See DeValk* 811 F.2d at 335 (enforcing strict compliance with a requirement that claims be presented to Dealer Policy Board as condition precedent to *any* litigation).

complain were wronged? If an IBO doesn't complain, isn't the fairer inference to draw that he or she *wasn't* aggrieved? Plaintiffs' argument amounts to the claim that this Court should presume that (i) every IBO has been harmed (whether they know it not), (ii) they are too unsophisticated to do anything about it and, (iii) by implication, those hundreds of IBOs who did avail themselves of the Quixtar ADR Agreement are either fools or were duped. This is nonsense.[10]

Logic says the opposite, that if the non-binding conciliation process can successfully resolve Pokorny's and Blenn's claims, they should not be a part of a class. Indeed, even before a court (or arbitrator) could consider class certification, the class would need to be limited to those IBOs who had satisfied the contractual condition precedent and exhausted their conciliation remedy.

In the second place, the law accords with common sense. In the analogous arbitration context, courts hold that the assertion of class claims cannot bar sending a claim to an arbitral panel. As the Second Circuit has observed, "federal courts have . . . consistently enforced arbitration provisions in the context of class action lawsuits when federal statutory claims have been at issue." *JLM Industries, Inc. v. Stolt Nielsen SA,* 387 F.3d 163, 180 n.9 (2d Cir. 2004) (quoting *Lewis Tree Serv., Inc. v. Lucent Techs. Inc.,* 239 F. Supp. 2d 332, 338 (S.D.N.Y. 2002)).

This Court should dismiss the Complaint due to plaintiffs' failure to tender their claim to the mandatory conciliation process set forth in the Quixtar ADR Agreement.

B. In the Alternative, the Court Should Enforce the Arbitration Provision in the Quixtar ADR Agreement.

In the alternative, defendants move to compel arbitration under the Quixtar ADR Agreement and to stay further judicial proceedings pending the outcome of arbitration. As noted above, however, this Court would need to reach this alternative request only if it determined that the conciliation provisions are somehow unenforceable. Otherwise, it could stop reading here.

[10] *Cf. Citibank N.A. v. Bankers Trust Co.*, 633 N.Y.S.2d 314, 314 (N.Y.A.D. 1995) ("Plaintiffs' contentions, that the ADR agreement at issue is unenforceable because it calls for a procedure other than arbitration and the resulting determination is only partially binding, and that defendants' breach of the ADR discovery deadlines justified plaintiffs' commencing this lawsuit, are without merit").

If the Court decides to reach the arbitration provision, it should find it enforceable and order plaintiffs to arbitrate per their written agreements and stay this litigation pending arbitration. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1271 (9th Cir. 2006) ("Where, as here, no claim threatens to invalidate or otherwise directly affect the entire contract, the federal court must decide claims attacking the validity of the arbitration provision"). The reason is simple.

1. Every Federal and State Court That Has Addressed a Dispute Involving Similarly Situated Plaintiffs Has Enforced the Quixtar ADR Agreement.

Since arbitration was first introduced in IBO contracts in the fall of 1997, every federal and state court that has addressed a dispute such as the present case, where IBOs brought claims (including in two cases purported RICO claims) against Quixtar, other IBOs and BSM companies, has enforced the arbitration agreement. Every such court has held that the arbitration agreement applies to claims by IBOs against Quixtar, against other IBOs, and against BSM companies. And every such court has rejected unconscionability arguments. *See, e.g., Stewart & Assocs. Int'l v. Alticor Inc.*, No. 05-3440-CV-RED (W.D. Mo. Nov. 20, 2006) (Appendix, Ex. A) (rejecting IBOs' challenge that Quixtar Mediation and Arbitration Agreement was unconscionable due to Quixtar's ability to amend the rules and the Agreement's mandatory "loser pays" provision). *See also Morrison v. Amway Corp.*, 49 F. Supp. 2d 529 (S.D. Tex. 2005) (*id.*, Ex. B); *U-Can-II v. Setzer*, 870 So. 2d 99 (Fla. Dist. Ct. App. 2003) (*id.*, Ex. C) (finding, *inter alia*, that agreement was neither procedurally nor substantively unconscionable); *Edel v. Amway*, Case No. 00-2-04650-2KNT (Wash. Super. Ct. Aug. 17, 2001) (*id.*, Ex. D); *Vance v. Amway*, Case No. 99-44470 (Tex. Dist. Ct. May 12, 2000) (*id.*, Ex. E); *Mouille v. Amway Corp.*, Case No. 99-04014 (La. Dist. Ct. Dec. 15, 1999) (*id.*, Ex. F); *Griffith v. Amway Corp.*, Case No. 98-17491 (Tex. Dist. Ct. Jan. 25, 1999) (writ denied) (*id.*, Ex. G).[11]

In some instances, these courts rejected similar challenges to the enforceability of the Quixtar ADR Agreement. For example, in *Morrison*, the district court concluded that the Quixtar ADR

[11] In a case which did not involve an IBO suing Quixtar, a court held that Quixtar could not compel plaintiffs to arbitrate under an agreement which they never signed. *Nitro Distributing, Inc. v. Alticor Inc.*, 453 F.3d 995 (8th Cir. 2006). In *Nitro*, plaintiff *BSM companies* asserted that they had been systematically excluded from the *BSM business*. *Id.* at 997-98.

Agreement was not procedurally unconscionable. 49 F. Supp. 2d at 534 (Appendix, Ex. B.) While recognizing that Quixtar was in a stronger bargaining position, the district court noted that plaintiffs had failed to produce any evidence that the ADR Agreement was the product of plaintiffs' business ignorance or inexperience. *Ibid.* To the contrary, the *Morrison* court found that, like Pokorny and Blenn, the plaintiffs were sophisticated business people who had for some time operated an Amway distributorship. Similarly, there was no evidence that the ADR Agreement was unfair or oppressive, and thus the district court concluded that the Agreement was not substantively unconscionable, either. *Ibid.*

Likewise, the plaintiffs in *Stewart* launched many of the same unconscionability challenges as the plaintiffs here, yet they were still compelled to arbitrate their claims against Alticor under the Quixtar ADR Agreement. (Appendix, Ex. A at 9.) The *Stewart* Court compelled arbitration despite plaintiff IBOs' contentions that the Quixtar ADR Agreement was unenforceable due to Quixtar's so-called "unilateral" right to amend the Rules and the prohibitive cost of arbitration proceedings. *Ibid.*

2. Pokorny and Blenn's Unconscionability Attacks Fail.

Under Michigan law, a party seeking to invalidate an agreement must show both procedural and substantive unconscionability. *See Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 474 (Mich. Ct. App. 2005); *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 322 (6th Cir. 1998) (applying Michigan law).[12]

a. The Quixtar Arbitration Agreement Is Not Procedurally Unconscionable.

Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair assessment of the circumstances, the weaker party was free to accept or reject a contract term, there is no procedural unconscionability under Michigan law. *Clark,* 706 N.W.2d at 474-75. The mere fact that a standard form contract is offered on a take-it-or-leave-it

[12] The result is the same under California law. *Nagrampa,* 469 F.3d at 1280-81 (California courts apply a "sliding scale" analyzing both procedural and substantive unconsionability). Unlike in *Nagrampa,* which involved an agreement that failed for lack of mutuality, an arbitration venue 3,000 miles away, and a fee-splitting provision that could impede vindicating statutory claims, none of the offending provisions constituting substantive unconscionability are present here.

basis does not render it procedurally unconscionable. According to the Supreme Court of Michigan, "[a]n 'adhesion contract' is simply that: a *contract*. It must be enforced according to its plain terms unless one of the traditional contract defenses applies." *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 35 (Mich. 2005). Here, the Quixtar ADR Agreement does not suffer from procedural unconscionability for two reasons.

First, the Quixtar ADR Agreement was negotiated between Quixtar and a trade association of IBOs, the Independent Business Owners Association International ("the IBOAI"). The IBOAI is governed by a board comprising a cross-section of 24 experienced IBOs, who communicate regularly with Quixtar regarding key issues affecting IBOs. The IBOAI Board voted in favor of including binding arbitration before it was added to the Rules of Conduct. (VanderVen Decl. ¶ 6, Exs. 3 & 4.)

Second, Pokorny and Blenn signed agreements stating their obligation to arbitrate in plain text on the front of the document, either directly above or beneath their signatures. The arbitration agreement was not buried or concealed. Had Pokorny or Blenn wished to avoid arbitration, they had the ability to enter into another business opportunity with another company that did not have such a requirement. *See Clark*, 706 N.W.2d at 475 (concluding that an arbitration agreement in employment context was not procedurally unconscionable where plaintiff failed to present evidence that he had no realistic alternative to employment with the defendant); *see also Posern v. Prudential Sec., Inc.*, No. C-03-0507 (SC), 2004 WL 1145877, at *8 (N.D. Cal. May 3, 2004) (concluding that disparity in bargaining power "does not invalidate a contract where the buyer can choose an alternate seller").

b. The Quixtar Arbitration Agreement Is Not Substantively Unconscionable.

Under Michigan law, substantive unconscionability exists where a challenged term is not substantively reasonable. A term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience; the fact that a term might provide one party an advantage over another does not per se render the term substantively unconscionable. *See Clark*, 706 N.W.2d at 475.

(i) The Arbitration Provision Is Not Illusory.

Contrary to plaintiffs' assertions (Compl., ¶ 75), Quixtar's ability to modify the arbitration rules is limited and is not "a reservation to change any rule at will case by case." *Cf. Michaels v.*

Amway Corp., 522 N.W.2d 703, 706 (Mich. Ct. App. 1994) (concluding that Quixtar's predecessor Amway's reservation of rights in the Rules of Conduct did not allow Rules to be changed on a whim in a case-by-case basis). Rule 1 requires that prior to any amendment becoming final, Quixtar must submit a proposed change to the IBOAI Board. (VanderVen Decl., Ex. 2 at D-11.) Similarly, Rule 11.5.1 specifies that the arbitration rules "shall be amended only by mutual agreement" between Quixtar and the IBOAI Board. (*Id*. at D-43.)

The Rules in effect on the date of commencement of an arbitration apply to that proceeding. (VanderVen Decl., Ex. 2 at D-43.) Plaintiffs have not attached the most current version of the Arbitration Rules to their Complaint, such that in some instances, their challenges are based upon rules no longer in effect.[13]

Once an arbitration has commenced, the only way rules may be changed during that proceeding is by mutual consent of the parties. (VanderVen Decl., Ex. 2 at D-43.) Thus, plaintiffs' assertion that Quixtar has a right to "unilaterally modify the terms of the arbitration provision at any time" is wrong. (Compl., ¶ 20.) Quixtar's limited ability to amend the Rules prospectively does not render its promises illusory. "In the modern economic climate, the operating policies of a business enterprise must be adaptable and responsive to change." *See In re Certified Question*, 443 N.W.2d 112, 120 (Mich. 1989) (observing that an employer's unilateral right to modify its policy handbook from time-to-time does not render the employment contract illusory, even where such modifications alter the terms under which employees may be discharged). *See also Local 3-7, Int'l Woodworkers of Am. v. Daw Forest Prods. Co.*, 833 F.2d 789, 796 (9th Cir. 1987) ("[w]here the terms of a promise limit the promisor's future freedom of choice, such that the promisor's future action is not left to 'his own future will,' the promise is not illusory and is therefore sufficient consideration.").

Moreover, even if Quixtar had a "unilateral" right to amend, this would not prove fatal to the Quixtar ADR Agreement. Numerous courts have upheld arbitration agreements where one party had the unilateral right to amend, even if that right could be exercised at any time, so long as certain

[13]Plaintiffs attached a February 2003 version of the Arbitration Rules to their Complaint. (Compl., Ex. 8.) This outdated version of the Rules does not apply. The most recent iteration of the Arbitration Rules, to which both Pokorny and Blenn have agreed, is attached as Exhibit 2 to the VanderVen Declaration. (VanderVen Decl., Ex. 2.)

limitations applied. *See Melton v. Philip Morris Inc.*, 01-35883, 71 Fed. Appx. 701, 703-04 (9th Cir. May 7, 2003) (unpublished) (upholding arbitration agreement because Philip Morris could only amend the agreement prospectively); *Feltner v. Bluegreen Corp.*, No. IP 02-0873-C-M/S, 2002 WL 31399106, at *6 (S.D. Ind. Oct. 8, 2002) (enforcing arbitration agreement where one party had the right to amend, where amendments could not apply until parties had received notice of them); *Gutman v. Baldwin Corp.*, No. Civ. A 02-CV-7971, 2002 WL 32107938, at *4-*5 (E.D. Pa. Nov. 22, 2002) (upholding arbitration agreement that allowed only one party to amend it); *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 823 (S.D. Ohio 1999) (enforcing arbitration agreement where Circuit City retained the right to amend); *Kelly v. UHC Mgmt. Co.*, 967 F. Supp. 1240, 1258 (N.D. Ala. 1997) (enforcing arbitration agreement where one party had "reserved the right to alter, amend or revoke the arbitration policy").

(ii) The Arbitral Forum Is Neutral.

Since October 2005, the Quixtar ADR Agreement has provided two potential arbitrator pools from JAMS and the option of arbitration under the American Arbitration Association (AAA) should JAMS prove unwilling or unable to administer a case. The arbitrator selection process contemplates three options. First, the default Roster of Neutrals from which JAMS initially selects a list of potential candidates consists of arbitrators who have attended an orientation program offered by Quixtar and the IBOAI Board, which explains the unique aspects of the Quixtar business. (VanderVen Decl., Ex. 2 at D-46.) Any party can opt out of this roster, thereby striking all neutrals who ever participated in the orientation program. The parties then receive an alternative list of potential JAMS arbitrators, who have not attended the orientation, from which they may select candidates to hear their dispute. (*Ibid*.) This is the second option. Under this option, *Pokorny and Blenn may select any neutral from the JAMS panel.* Third, in the event that JAMS is unwilling or unable to arbitrate a dispute, the Rules provide for arbitration under AAA. (*Id*. at D-43.)

This Court should reject plaintiffs' generalized allegations of JAMS's bias. In *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166, 1181 (W.D. Wash. 2002) the court rejected the identical argument advanced by plaintiffs:

> Plaintiffs' counsel suggested that corporations utilizing the arbitration process might enjoy an unfair advantage over consumers because arbitrators may be wary of 'biting the hand that feeds them.' The Court expressly rejects this argument. The panels of . . . JAMS/Endispute . . . and other arbitration administrators . . . throughout the United States are comprised of distinguished attorneys, including many former judges. . . . the Court knows of no evidence that impugns the impartiality of the women and men who resolve disputes outside of traditional judicial forums.

See also Nagrampa, 469 F. 3d at 1285 ("merely raising the 'repeat player effect' claim, without presenting more particularized evidence demonstrating impartiality, is insufficient under California law to support an unconscionability finding"); *Posern*, 2004 WL 1145877, at *7 (rejecting blanket claims of bias asserted against arbitration panel comprised of industry members).

(iii) The Arbitral Forum Is Not Prohibitively Expensive.

The parties challenging the arbitration agreement bear the burden of showing the likelihood of incurring prohibitive costs such that they cannot vindicate their rights in the arbitral forum. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-92 (2000).[14] Plaintiffs must show actual hardship, not mere risk that they would be required to bear prohibitive arbitration costs. *See id.* at 91-92.

Plaintiffs assert that the Quixtar arbitration agreement "requires an individual to pay 'location' costs for the arbitration and hearing costs that total $18,000 for a three day trial." (Compl., ¶¶ 22, 79). This is made up. Rule 11.5.56 provides a $6,000 daily cap for arbitrator's fees, but that is the *maximum* amount of arbitrator's fees to be *charged* (not paid for by an individual) in a case. (VanderVen Decl., Ex. 2 at D-52.) Rule 11.5.56 does not specify which party will pay the arbitrator's fees or how such fees might be shared by the parties in a multi-party case like the present one. (*Ibid*.)

[14] Several courts in this district have questioned whether the issue of effective vindication of rights in the arbitral forum is separate from or different than the issue of substantive unconscionability. *See, e.g., Miyasaki v. Real Mex Rests., Inc.*, No. C 05-5331 (VRW), 2006 WL 2385229, at *6 (N.D. Cal. Aug. 17, 2006) (questioning whether costs of arbitration raise separate federal law issues of effective vindication of rights in the arbitral forum and state law issues of unconscionability). To the extent Michigan law of substantive unconscionability could be characterized as different from the requirements of *Green Tree*, Quixtar submits that the fees in its arbitration program meet both standards, and has cited authority accordingly. In any event, plaintiffs' first claim of declaratory relief requests a "Judgment Declaring Quixtar's Arbitration Agreement Unconscionable," thereby treating the questions as identical. (Compl., p.25).

Moreover, Rule 11.5.53 provides for parties to proceed in arbitration without prepaying fees and costs upon a showing of indigency. (VanderVen Decl., Ex. 2 at D-51.) Plaintiffs contend that the chances of establishing indigency under the program are difficult and fault the program for resting the decision solely with the Case Administrator. In this respect, their allegations are pure speculation, as plaintiffs themselves never attempted to mediate or arbitrate their claims. The showing required of applicants under the indigency program is not substantively different from the showing required by courts for litigants to proceed *in forma pauperis*. (*Id*. at D-54.)

(iv) The Contractual Limitations Period Is Enforceable.

Plaintiffs complain that the two-year contractual limitations period contained in the Quixtar ADR Agreement unduly restricts their ability to bring a RICO claim, which has a statutory four-year limitations period. Plaintiffs do not point to any claims they may have that would have been cut off by the two-year period, nor do they explain why such claims, if they ever existed, could not have been brought earlier. Indeed, plaintiff Blenn was a distributor less than two years, and therefore, is not even affected by the two-year limitations period.

Nevertheless, shortened contractual limitations periods are enforceable under Michigan law unless contrary to law or public policy. *Rory*, 703 N.W.2d at 31. Michigan courts have upheld shortened limitations periods against unconscionability challenges, even when such periods conflicted with an applicable limitations period defined by statute. *See Clark,* 706 N.W.2d at 475 (concluding that a six-month contractual limitations period was not so inherently unreasonably or so extreme that it shocked the conscience); *Dean v. Haman*, No. 259120, 2006 WL 1330325, at *3 (Mich. Ct. App. May 16, 2006) (concluding that six-month contractual limitations period was not substantively unconscionable, even where Michigan Consumer Protection Act provided for a six-year limitations period). Michigan courts reason that, where a statute does not expressly prohibit contractual agreements to shorten a limitations period, the fact that a contractual limitations period is shorter than the statutory period does not render the provision substantively unconscionable. *Ibid.* For at least these reasons, to the extent the period specified in Rule 11.5 shortens an otherwise applicable statutory limitations period, it is enforceable under Michigan law.

(v) The Arbitration Agreement Is Silent on the Availability of Class Actions.

Finally, Plaintiffs assert the Quixtar ADR Agreement "purports to restrict a distributor's right to bring a class action." (Compl., ¶ 24.) The Agreement is silent. There is no mention or reference to the issue of class actions. Whether the Quixtar ADR Agreement permits class actions is thus a matter for the arbitrator, not the court, to decide. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003) (concluding that question of whether an arbitration agreement, which was silent on the matter, provided for class actions, was a question for the arbitrator). The Agreement's silence is not a ground on which it may be declared substantively unconscionable.

C. The Court Should Stay All Further Litigation Pending Arbitration.

As an alternative to dismissal, if this Court were to determine that plaintiffs must arbitrate their claims against fewer than all defendants, Quixtar respectfully requests a stay of all further litigation pending arbitration. *See Moses Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20 n.23 (1983) ("it may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration"). Such a stay of any remaining claims against non-signatories who cannot join the arbitration is appropriately within this Court's discretion. *See Fujian Pac. Elec. Co. Ltd. v. Bechtel Power Corp.*, No. C 04-3126 (MHP), 2004 WL 2645974, at *7 (N.D. Cal. Nov. 19, 2004). Permitting litigation to continue against certain nonarbitrating co-defendants would unfairly prejudice Quixtar, whose dispute is clearly subject to arbitration. *Id*. at *7-*8 (staying litigation against non-signatories pending arbitration of claims against signatories).

IV. CONCLUSION

The Court should decide, as a threshold matter, that the Quixtar conciliation process establishes a condition precedent that must be satisfied before plaintiffs can proceed, and that this condition has not been met. In the alternative, this Court should compel plaintiffs to comply with the Quixtar arbitration process pursuant to section 4 of the Federal Arbitration Act, order plaintiffs to arbitration, and either dismiss this case or stay all further litigation pending the outcome of arbitration.

Dated: March 5, 2007

BRINKS HOFER GILSON & LIONE

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