IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RON and LISA SIMMONS, BRENTERPRISES, L.P., CHARLES SCOTT TYKES, JR., d/b/a CSS TECHNOLOGY ASSOCIATES SYKES & ASSOCIATES,	§	
Plaintiffs,	§	
v.	§	CASE NO. 4:07cv389
QUIXTAR, INC.,	§	
Defendant.	§	

ORDER AND RECOMMENDATION REGARDING ARBITRATION

Before the Court is Plaintiffs' Motion for Reconsideration of Order of Stay (Dkt. 83). This case involves a business dispute between certain Quixtar business distributors and Quixtar. Essentially, the distributors sued Quixtar for breach of contract, and interference with prospective and business relations. Soon after this case was filed, the Court heard evidence on Plaintiffs' motion for preliminary injunction and recommended that the motion be granted in part. Thereafter, Quixtar filed a motion for arbitration under its distributor agreements with certain of the Plaintiffs. After hearing the arguments of the parties and over the objection of Plaintiffs, that motion was granted and the case was referred to arbitration for resolution. The Court notes that Plaintiffs' opposition to the arbitration sufficiently preserved its argument that there was no valid arbitration agreement.

Plaintiffs now seek reconsideration of the Court's order staying this case pending arbitration in light of a recent decision issued by the Fifth Circuit Court of Appeals involving Amway, Quixtar's

predecessor. The Court, after hearing the argument of the parties at the hearing held on May 22, 2008 and noting the Fifth Circuit's decision in *Morrison v. Amway,* finds that the arbitration clause in the case sub judice is the same as that in *Morrison* and that the language from the Court's opinion that follows sums up the matter before the Court and requires that the Motion for Reconsideration be granted:

> There is no express exemption of the arbitration provisions from Amway's ability to unilaterally modify all rules, and the only express limitation on that unilateral right is published notice. While it is inferable that an amendment thus unilaterally made by Amway to the arbitration provision would not become effective until published, there is nothing to suggest that once published the amendment would be inapplicable to disputes arising, or arising out of events occurring, *before* such publication.
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> There is nothing in any of the relevant documents which precludes amendment to the arbitration program-made under Amway's unilateral authority to amend its Rules of Conduct-from eliminating the entire arbitration program or its applicability to certain claims or disputes so that once notice of such an amendment was published mandatory arbitration would no longer be available even as to disputes which had arisen and of which Amway had notice prior to the publication. There are no *Halliburton* type savings clauses which preclude application of such amendments to disputes which arose (or of which Amway had notice) before the amendment.

Morrison v. Amway Corp., 517 F.3d 248, 254, 257 (5th Cir. 2008).

Before the Court is the same agreement scrutinized by the Fifth Circuit. The material terms of Rule 1 and Rule 11 in the parties' agreements here are the same as those examined by the Fifth Circuit in *Morrison*. While the agreements allow for distributor input prior to any amendment to the arbitration provisions, Quixtar still retains the unilateral right to do as it sees fit. The fact that the *Morrision* case dealt with matters which occurred before the arbitration clause was inserted in the

Rules of Conduct does not change the Circuit's holding that the contract was merely illusory.

Quixtar attempts to distinguish *Morrison* on four grounds. First, it argues that *Morrison* dealt with a retroactive application of a requirement to arbitrate. The Court agrees. However, a close reading of the Fifth Circuit's opinion indicates that the Court's decision is not predicated on that sole ground. The Court's reasoning applies to the Rules of Conduct and Amway's (Quixtar's) ability to unilaterally change the rules of the game. The 1998 contract before the Court in *Morrison* provided that "Amway reserves to itself the sole right to adopt, amend, modify, supplement or *rescind* any or all of these Rules, as necessary with respect to Rules enforcement." *Introduction to The Rules of Conduct of an Amway Distributor* (emphasis added). Amway acknowledges that from time to time the contents of its various documents may be changed. Although it represents it will present such changes to the distributor board, final decision making authority rests with Amway (Quixtar).

Quixtar admits that the preface to its Rules of Conduct has not materially changed since 1998. It was this preface that appears to have drawn the Circuit's attention and, in this Court's opinion, the ultimate rationale for its holding that the arbitration contract was merely illusory. A promise is illusory if it does not commit the promisor to perform. *Alex Sheshunoff Mgm't Servs., L.P. v. Johnson*, 206 S.W. 3d 644 (Tex. 2006). Quixtar argues that the Rules governing arbitration do not permit it to amend the Rules once arbitration has commenced. That is what the arbitration provisions state in part. However, Quixtar has left itself ample "wiggle" room by providing that it may modify the Rules of Conduct as it sees fit. The same provision appears to have been before the Circuit in *Morrison.* Quixtar presents this scenario to its distributors, you agree to arbitrate but we reserve the right to change the rules whenever it suits Quixtar. Therefore, Quixtar's first point is

overruled.

Second, Quixtar argues that *Morrison* dealt with matters that predated the unilateral imposition of an agreement to arbitrate, and therefore, on that ground, it is distinguishable. The Court disagrees. The language of the Circuit's opinion addressed this issue but decided the issue on the basis that the ability to change the rules at any time made the contract merely illusory.

Third, Quixtar argues that the Circuit did not address the point that any change requires distributor input. However, the old rules so provided, and, in fact, Quixtar is still free to do whatever it decides.

Quixtar's last point is that the distributor's performance under these yearly agreements with the arbitration clause amounts to consideration and perforce a valid and enforceable contract. Under Texas law, an illusory promise can still serve as a basis for a valid unilateral contract if accepted by performance. *Alex Sheshunoff Mgm't Servs.*, 206 S.W. 3d at 644. Quixtar points out that the distributors have enjoyed the fruits of their agreements in the way of sales and bonuses for a period of well in excess of ten years. Suddenly, the hue and cry is that the arbitration contract is illusory. Under the contract before the Court, Quixtar could still amend the arbitration provision even after arbitration began. Quixtar could not amend the rules governing how the arbitration is conducted. In other words, how the arbitrator is selected could not be changed. But the Court sees no prohibition as to Quixtar changing the rules on what matters would be subject to arbitration.

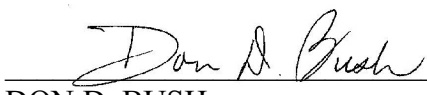
To borrow a page from these parties, this Court is bound by the rules and decisions of its up-line decision-makers, and further discussion and analysis is pointless. This Court is bound by the Fifth Circuit's holding in *Morrison* regarding the specific arbitration provisions at issue here.

Therefore, Plaintiffs' Motion for Reconsideration of Order of Stay (Dkt. 83) is GRANTED and it is further recommended that the order referring this matter to arbitration (Dkt. 56) be VACATED and that the case proceed in this Court.

Within ten (10) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 23rd day of May, 2008.



DON D. BUSH
UNITED STATES MAGISTRATE JUDGE