IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

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

**SUGGESTIONS IN SUPPORT OF**
**PLAINTIFFS' MOTION TO STAY ARBITRATION**
**PENDING DETERMINATION OF ARBITRABILITY**

COME NOW Plaintiffs, by and through counsel, and provide the following Suggestions in support of their Motion to Stay Arbitration Pending Determination of Arbitrability by this Court:[1]

**BACKGROUND**

Plaintiffs bring the instant motion due to the fact that JAMS/Endispute, Inc. ("JAMS"), a little-known, for-profit corporation which Defendants have retained to preside over certain disputes, has stated its intention to proceed with arbitration against Plaintiffs despite this Court's exclusive jurisdiction to consider arbitrability and Plaintiffs' entitlement to a jury trial on arbitrability under 9 U.S.C. §§ 3 & 4. By proceeding, JAMS is also ignoring the fact that Plaintiffs are not parties to any arbitration agreement and that Defendants' arbitration program

[1] Defendants have implicitly acknowledged this Court's jurisdiction to decide the issue of arbitrability as evidenced by their Motion to Dismiss, or in the Alternative, to Stay the Case and Compel Arbitration.

under JAMS is unconscionable.[2] This conclusion is consistent with the ruling which the Honorable J. Miles Sweeney handed down on September 17, 2003, interpreting the same purported arbitration provision in litigation against Defendants' co-conspirators. *See* Letter Ruling of Honorable J. Miles Sweeney, Circuit Court of Greene County, Missouri, attached hereto as Exhibit 1. In addition to Judge Sweeney's conclusion that Nitro Distributing, Inc., West Palm Convention Services, Inc., Netco, Inc., and Schmitz & Associates, Inc. are not parties to any arbitration agreement, the court stated:

> What is absolutely offensive is the fact that [Amway] board members, some of whom are actual parties to this litigation, have veto power over the retention of these arbitrators in their jobs. That, coupled with the fact that Amway is not bound by its own arbitration requirements and the fact that all proceedings are held in secret leads me to believe that the Amway arbitration provision are, both substantively and procedurally unconscionable. Irrespective of the arguments about who signed which agreements and when they came into effect, I simply could not require anyone to arbitrate any of these issues under a system that is so fundamentally unfair.

*See* Exhibit 1. JAMS ignores Judge Sweeney's conclusion in state court and this Court's jurisdiction to consider arbitrability in the instant proceeding.

As recently as yesterday, JAMS' general counsel advised counsel for Plaintiffs that JAMS is proceeding with arbitration and refused to provide Plaintiffs with information disclosing the details of the relationship between JAMS and Defendants. JAMS' and its clients' heavy-handed attempt to force arbitration on Plaintiffs without even a ruling from this Court on arbitrability can hardly be deemed conducive to mediation which has been ordered by this Court to commence this fall. Plaintiffs move the Court for an expedited ruling staying the purported arbitration, pending this Court's ruling on arbitrability. As discussed below, this Court has

[2] Plaintiffs will also set forth additional grounds against arbitration in their suggestions in opposition to Defendants' motion. The instant motion is not intended to appraise the Court of all of Plaintiffs' arguments in opposition to arbitration. Rather, the instant motion is brought to request the limited relief that the Court enter an expedited ruling staying arbitration until such time as the Court can rule on the issue of arbitrability under 9 U.S.C. §§ 3 & 4.

exclusive jurisdiction to determine arbitrability under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and more particularly, §§ 3 and 4. Before addressing the FAA, some additional background is appropriate.

Plaintiffs filed this action on August 5, 2003. On September 19, 2003, prior to filing a response to Plaintiffs' Complaint, Defendants Alticor, Amway and Quixtar (hereinafter collectively referred to as "Amway") filed a Demand for Arbitration against Plaintiffs before JAMS, seeking arbitration of the claims asserted in Plaintiffs' Complaint. *See* Exhibit 2 (without attachments), attached hereto. On September 25, 2003, JAMS notified Plaintiffs that it had commenced arbitration against Plaintiffs. *See* Exhibit 3, attached hereto. Immediately upon receipt of that notice, Plaintiffs informally notified JAMS that they are not subject to the Amway Arbitration Provision and further stated their objections to JAMS. Exhibit 4, attached hereto. Plaintiffs' formal objections are purportedly due to JAMS on October 20, 2003.

After receiving Judge Sweeney's letter ruling of September 17, 2003, in related litigation, Plaintiffs conducted further factual investigation into JAMS as part of the instant litigation. In addition to the information considered by Judge Sweeney, Plaintiffs' recent investigation into the relationship between Defendants and JAMS raises yet additional questions about the Amway arbitration "program" administered by JAMS. Following this initial investigation, Plaintiffs' counsel requested that JAMS produce information disclosing the relationship between JAMS and Defendants. Exhibit 5, attached hereto. Specifically, on September 30, 2003, Plaintiffs requested the following from JAMS:

> 4. Please confirm for us that, unlike other alternative dispute resolution forums, you/J.A.M.S. is in fact a commercial for-profit corporation, in which your arbitrators are also shareholders.
>
> 5. The current Alticor/Amway/Quixtar rules purport to use you/J.A.M.S. as the sole arbitration forum. Please advise us of the number of past and pending disputes involving Alticor/Amway/Quixtar rules for which

you/J.A.M.S. serve(d) as arbitrator. Please advise us of the total fees or other compensation which you/J.A.M.S. have derived for past and pending disputes involving Alticor/Amway/Quixtar rules. Additionally, please advise us of the amount of any other fees or compensation received from Alticor/Amway/Quixtar unrelated to particular disputes, including but not limited to, any administrative, startup or similar fees.

6. The Alticor/Amway/Quixtar rules mandate "Amway Cultural Training" for your arbitrators presiding over disputes arbitrated under Alticor/Amway/Quixtar rules. Please provide us with a list of all shareholders who have attended such training.

7. Please provide us with any and all documents relating to the "Amway Cultural Training," including but not limited to, any and all manuals, agendas, outlines, slides, presentations and handouts, related to this training.

8. Please provide us with copies of any and all contracts and correspondence between you/J.A.M.S. and Alticor/Amway/Quixtar, including but not limited to, that related to the creation or existence of your Alticor/Amway/Quixtar approved panel of arbitrators and Amway Cultural Training for your arbitrators.

9. We understand that you/J.A.M.S. has its own "Quixtar Arbitration Specialist." In fact, your/J.A.M.S. preprinted Demand for Arbitration form refers to this specialist. Are you the "Quixtar Arbitration Specialist"? Please identify any and all Quixtar Arbitration Specialists employed by you/J.A.M.S. and detail for us how one becomes a Quixtar Arbitration Specialist.

JAMS has refused to provide the requested information.[3] Instead, in response to Plaintiffs' letter, JAMS notified the parties by e-mail that it is proceeding with the selection of an arbitrator. *See* Exhibit 6 hereto. JAMS rules also provide that if a party fails to participate in arbitration, he

[3] While JAMS general counsel has advised Plaintiffs that during the last two years JAMS has earned approximately $30,000 from disputes involving Defendants, JAMS has refused to provide Plaintiffs with the total fees since the inception of JAMS relationship with Defendants in approximately 1997, including fees for setting Defendants' arbitration program, administration and consulting. Moreover, JAMS refuses to provide any of the other information requested by Plaintiffs, including production of any contracts between JAMS and Defendants, and the identity of the JAMS' arbitrator/shareholders who have attended what Amway calls "Amway Cultural Training" for arbitrators on the Amway approved list of JAMS arbitrators.

or she will be held in default.[4] Within moments of filing the instant brief, Plaintiffs received a facsimile from JAMS purporting to appoint an arbitrator which Plaintiffs struck. The facsimile also states that the arbitration fee is $400/hour, plus an additional hourly fee based on administration, and that JAMS is proceeding with a Planning Conference.

Plaintiffs will not set forth herein all of the grounds in opposition to arbitration. Suffice it to state for purposes of this motion seeking limited relief that Plaintiffs are not parties to Defendants' arbitration provisions, and alternatively, the unconscionability of the Amway arbitration "program" administered by JAMS will very much be an issue on Defendants' Motion to Dismiss, or in the Alternative, to Stay the Case and Compel Arbitration. The suggestions set forth herein are proffered to the Court to show Defendants' and JAMS' intent to proceed with arbitration, notwithstanding Plaintiffs' objections and this Court's exclusive jurisdiction under 9 U.S.C. §§ 3 & 4, to determine arbitrability.

**DISCUSSION**

It is well-settled that pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, it is the function of the courts – not an arbitrator – to determine whether a plaintiff has made a valid arbitration agreement and, if so, whether the plaintiff's claims are within the scope of any such arbitration clause. *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002); *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, 694-95 (8th Cir. 1994). Further, § 4 of the FAA provides that

[4] It should be noted that JAMS has provided affidavits to Defendants' co-conspirators in the related proceedings, notwithstanding JAMS' own Ethics Guidelines that it will not act as a witness on any parties' behalf. *See* Affidavit of R. Todd Ehlert, attached hereto as Exhibit 6. These JAMS affidavits, which appeared in support of the co-conspirators' filings in related litigation, undoubtedly were the product of *ex parte* communications between JAMS and Defendants' co-conspirators. JAMS has violated its own Ethics Guidelines which prohibit *ex parte* communications and which prohibit JAMS from acting as a witness for a party in any pending litigation. JAMS Comprehensive Arbitration Rules, Rules 14 and 30 (attached hereto as Exhibit 7). Plaintiffs have requested that JAMS disclose the specifics of these *ex parte* communications. JAMS has also refused to provide this information.

a party opposing arbitration has the right to a *jury trial* on the issue of whether it made an arbitration agreement upon a showing that the making of an arbitration agreement is "in issue:"

> If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, . . . the court shall hear and determine such issue. . . .

9 U.S.C. § 4; *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir. 1980); *Klocek v. Gateway, Inc.*, 104 F. Supp.2d 1332, 1336 (D. Kan. 2000). Contemporaneously herewith, Plaintiffs are filing a demand for a jury trial on the issue of arbitrability of their claims. For the reasons discussed therein, as well as briefly in this motion and more fully in Plaintiffs' Suggestions in Opposition to Defendants' Motion to Compel Arbitration (which will be filed on or before November 12, 2003), the making of an arbitration is "in issue."

Before a party can be required to submit to arbitration, it is "entitled to a judicial determination of the threshold question of whether it ever entered into an agreement which obliges it to consent to arbitration." *PMC, Inc. v. Atomergic Chemetals Corp.*, 844 F. Supp. 177, 181 (S.D.N.Y. 1994); *Houlihan*,31 F.3d at 694-95; *Klocek*,104 F. Supp.2d at 1336. Accordingly, it is incumbent upon the Court to enjoin pending or threatened arbitration until the issue of arbitrability has been determined by jury trial. *See PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C.*, 225 F.3d 974, 977 (8th Cir. 2000). Similarly, Defendants are not entitled to a stay of this litigation until a trial is had on the issue of the arbitrability of Plaintiffs' claims. *Matterhorn v. NCR Corp.*, 727 F.2d 629, 632 (7th Cir. 1984).

Plaintiffs unequivocally deny that they made an agreement to arbitrate with Amway or that their claims within the scope of the Amway Arbitration Provision. Amway has admitted that none of the Plaintiffs, except Netco, signed any writing agreeing to arbitrate their claims with Amway. *See* Defendants' Motion to Compel Arbitration, p. 14 ("Netco is the only one of the

five plaintiffs that signed a distributor contract with Amway in its own name."); *id.* at 18 ("Netco is the only plaintiff that signed the Amway contract in its own name."). As will be shown, Netco, too, never signed any writing containing an arbitration provision. Therefore, Amway, in its motion, is relying on a number of legal theories in its effort to bind these non-signatory Plaintiffs to arbitration.

A determination of whether these Plaintiffs are bound to arbitrate under the Amway Arbitration Provision will require extensive briefing and factual evidence. Plaintiffs will address those issues more fully in their suggestions in opposition to Defendants' motion, which will be filed on or before November 12, 2003. But because Plaintiffs' rights will be jeopardized if immediate relief is not granted, Plaintiffs submit Judge Sweeney's recent letter ruling in a related action, which has already determined that these Plaintiffs are *not* bound to arbitrate under the Amway Arbitration Provision because they are not parties thereto and because the Amway Arbitration Provision is unconscionable. *See* Exhibit 1.

It also bears mention that Defendants have violated their own alternative dispute resolution rules by commencing arbitration. Amway's rules provide that disputing parties must first submit their disputes to informal conciliation and then formal conciliation prior to instituting arbitration. *See* Amway Rule 112 (n/k/a Rule 11.5), Defendants' Ex. A.1., pp. 60-65. Defendants have bypassed these prerequisite procedures in order to commence arbitration, thereby indicating their lack of bad faith.

Despite Plaintiffs' well-founded objections and federally guaranteed right to a jury trial on those objections, Defendants are, as indicated above, proceeding with arbitration under JAMS, including the selection of an arbitrator. Indeed, JAMS' General Counsel has advised: "[A]bsent a court order to the contrary, we will proceed to appoint an arbitrator." E-Mail from John Welsh, JAMS General Counsel, to Dan Boulware, dated October 13, 2003 (attached hereto

as Exhibit 8). The Court will also note that Mr. Welsh incorrectly states in his e-mail that it is the function of an arbitrator to determine "whether or not your client is subject to the Program," wholly ignoring §§ 3 and 4 of the FAA and well-established United States Supreme Court authority which vests such determinations in the courts. *See, e.g., Howsam,* 123 S. Ct. at 592 (holding that it is the function of the courts to determine whether an arbitration contract binds a party who did not sign it). Importantly, JAMS assisted Defendants in establishing the Amway arbitration "program" in an effort to ensure that disputes against Defendants are subject to arbitration, rather than a public, and unbiased, forum such as the instant court. JAMS now apparently considers itself to be unbiased and qualified to rule on issues of arbitrability, even though it was charged with the responsibility by Defendants of ensuring arbitrability when it consulted with Defendants in setting up the "program." This, of course, is ridiculous.

Aside from the fact that they are not subject to arbitration, there is a complete absence of any notion of fairness under the JAMS arbitration program, administered for its client, Amway. Plaintiffs have learned that JAMS is a for-profit corporation in which its arbitrators are also the shareholders. In other words, the arbitrators have a financial stake in the success of their corporation. Plaintiffs have also learned that JAMS has had a commercial relationship with Amway since at least 1997. In fact, JAMS participated in drafting Amway's Arbitration Provision – a clear conflict of interest given that the issues in this case involve the interpretation of those rules and whether they are unconscionable. Upon information and belief, JAMS requires its clients, such as Amway, to pay JAMS' startup costs and other fees unrelated to the arbitration of particular disputes. JAMS and Amway jointly put on mandatory seminars known as "Amway Cultural Training" in which JAMS arbitrators must participate in order to be eligible to serve as an arbitrator in Amway or Amway-related disputes. And, the extent of business

placed by Amway with JAMS – and hence JAMS' financial dependence on Amway business – is evident by the fact that JAMS has its own "Quixtar Arbitration Specialist."

Plaintiffs have requested JAMS to provide Plaintiffs with information relating its contractual and/or financial relationship with Amway. Despite the fact that the existence of such a relationship is required to be disclosed under JAMS' "Ethics Guidelines for Arbitrators," ¶ V (attached hereto as Exhibit 9), JAMS has refused to provide the requested information. The existence of such a relationship has caused other courts to question JAMS' neutrality:

> It merits mention that J*A*M*S/Endispute, Inc., is an entity owned by the very arbitrators who adjudicate disputes between the borrower and the very lender who assigns the disputes to J*A*M*S. Thus the arbitrators, in their role as owners, must seek to promote the goodwill of the lenders so as to develop and maintain a volume of business, namely, cases for adjudication. CitiFinancial is a supplier of cases, even perhaps, a major source of business for J*A*M*S. It matters little whether it was Aesop or Confucius who counseled that *one should not bite the hand that feeds* since the message is an apt reminder of the quite valid perception of a conflict of interest in the arbitration process.

*Lytle v. CitiFinancial Services, Inc.*, 810 A.2d 643, 651 n.5 (Penn. Super. 2002); *see* Exhibit 1.

Plaintiffs believe that once this Court sees the overwhelming evidence that will be presented in their Suggestions in Opposition to Defendants' Motion to Compel Arbitration on or before November 12, 2003, it will agree with Judge Sweeney that Plaintiffs' claims are not subject to arbitration. Arbitration should be stayed, at the very least, until this Court has an opportunity consider that evidence.

**CONCLUSION**

WHEREFORE, Plaintiffs respectfully request this Court to enter an order staying arbitration, pending full and final judicial resolution of the arbitrability by this Court under 9 U.S.C. §§ 3 & 4, and for such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION TO STAY ARBITRATION** was filed electronically with this Court this 14th day of October, 2003. A notice of case activity is to be generated and sent electronically by the Clerk of said Court to the following parties, each of whom is designated to receive electronic notice.

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