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

NITRO DISTRIBUTING, INC., WEST PALM CONVENTION SERVICES, INC.; NETCO, INC.; SCHMITZ & ASSOCIATES, INC.; and U-CAN-II, INC.,	)	
Plaintiffs,	)	Case No. 03-3290-CV-S-RED
v.	)	
ALTICOR, INC., AMWAY CORPORATION, and QUIXTAR, INC.,	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY THE CASE AND COMPEL ARBITRATION

COME NOW defendants, Alticor, Inc. ("Alticor"), Amway Corporation ("Amway") and Quixtar, Inc. ("Quixtar") (collectively, "defendants"), by and through their attorneys of record, and submit the following Suggestions in Support of Defendants' Motion to Dismiss, or in the Alternative, to Stay the Case and Compel Arbitration.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 1

- A. The Amway Business 2
- B. Business Support Materials ("BSM") 3
- C. The Contractual Relationship Between Amway And Its Independent Distributors 4
- D. The Contractual Relationship between Amway and the Plaintiffs 5
  - 1. The Stewart Organization 6
  - 2. The Schmitz Organization 7
  - 3. The Hart Organization 8
- E. The 1998 Addition of Binding Arbitration to the Amway Rules of Conduct 9
- F. The Pro Net Agreement 10
- G. The Related Suits 11

III. DISMISSAL PURSUANT TO RULE 12 IS APPROPRIATE 12

IV. GOVERNING FEDERAL LAW FAVORS ENFORCEMENT OF ARBITRATION AGREEMENTS 13

V. PLAINTIFFS ARE CONTRACTUALLY BOUND TO ARBITRATE 14

- A. Netco And The Principals Of The Plaintiffs Are Signatories Of The Amway Arbitration Contract 15
- B. Plaintiffs Are Bound To Arbitrate As Agents Of Signatories Of The Amway Arbitration Contract 15
  - 1. The plaintiffs have actual authority 16
  - 2. The plaintiffs have apparent authority 17
- C. Plaintiffs Are Bound to Arbitrate As They Share A Community Of Interest With Signatories Of The Amway Contract 17
- D. Plaintiffs Are Bound To Arbitrate Based On Their Pro Net Agreement To Abide By The Amway Rules Of Conduct 18

VI. PLAINTIFFS ARE ESTOPPED FROM AVOIDING THEIR DUTY TO ARBITRATE 19

VII. THE COMPLAINT ALLEGATIONS ARE COVERED BY THE AMWAY ARBITRATION AGREEMENT 21

VIII. THE AMWAY ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE 22

IX. CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Arnold v. Arnold Corp.,
920 F.2d 1269 (6th Cir. 1990) 15, 17

Barker v. Golf U.S.A., Inc.,
154 F.3d 788 (8th Cir. 1998) 12

Branchville Mach. Co., Inc. v. Agco Corp.,
252 F. Supp. 2d 307 (E.D. Va. 2003) 12

Byrd v. Sprint Communs. Co.,
931 S.W.2d 810 (Mo. Ct. App. 1996) 15, 16, 17, 18

Dominium Austin Partners v. Emerson,
248 F.3d 720 (8th Cir. 2001) 19, 21

E.I. DuPont De Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates,
269 F.3d 187 (3d Cir. 2001) 21

Eckel v. Equitable Life Assur. Soc'y of the U.S.,
1 F. Supp. 2d 680 (E.D. Mich 1998) 18

Essco Geometric v. Harvard Indus.,
46 F.3d 718 (8th Cir. 1995) 16, 17

Flink v. Carlson,
856 F.2d 44 (8th Cir. 1988) 13, 14

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 14

Griffith v. Amway Corp.,
Case No. 98-17491
(District Court of Harris Co., TX, Jan. 25, 1999, writ denied) 22

Inlandboatmans Union of the Pacific v. Dutra Group,
279 F.3d 1075 (9th Cir. 2002) 12, 13

International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,
206 F.3d 411 (4th Cir. 2000) 19

Javitch v. First Union Secs., Inc.,
315 F.3d 619 (6th Cir. 2003) 14, 19, 21

Keymer v. Management Recruiters Int'l,
169 F.3d 501 (8th Cir. 1999) 14

Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Empl. Int'l Union,
954 F.2d 794 (2d Cir. 1992) 23

Lyster v. Ryan's Family Steak Houses,
239 F.3d 943 (8th Cir. 2001) 14, 22

Meretta v. Peach,
491 N.W.2d 278 (Mich. Ct. App. 1992) 16, 17

Morrison v. Amway Corp.,
49 F. Supp. 2d 529 (S.D. Tex. 1998) 21, 22, 23

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 14, 23

Mouille v. Amway Corp.,
Case No. 99-04014 (District Court of Orleans Parish, Dec. 15, 1999) 22, 23

Nesslage v. York Secs., Inc.,
823 F.2d 231 (8th Cir. 1987) 15

PaineWebber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996) 12

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith,
7 F.3d 1110 (3d Cir. 1993) 17, 18

Ritzel Communs., Inc. v. Mid-American Cellular Tel. Co.,
989 F.2d 966 (8th Cir. 1993). 13

Rosenblum v. Jacks or Better of Am. W.,
745 S.W.2d 754 (Mo. Ct. App. 1988) 16

Tractor-Trailer Supply Co. v. NCR Corp.,
873 S.W.2d 627 (Mo. Ct. App. 1994) 19

U-Can-II v. Setzer,
No. 02-2535-CA, slip op.
(Fla. Cir. Ct. April 23, 2003) 11, 12, 18

United Steelworkers of Am. v. Warrior and Gulf Nav. Co.,
363 U.S. 574 (1960) 22

Webb v. R. Rowland & Co.,
800 F.2d 803 (8th Cir. 1986) 13

Statutes

9 U.S.C. § 1 13

9 U.S.C. § 2 ..... 13, 14

9 U.S.C. § 3 ..... 13, 14

9 U.S.C. § 4 14

Other Authorities

Bette J. Roth et al., *The Alternative Dispute Resolution Practice Guide* § 1:19 (rev. ed. 1996) 23

Rules

Fed. R. Civ. P. 12 ..... 12, 13

I. INTRODUCTION

This suit comprises the fourth in a series of duplicative actions over a dispute between several Amway distributors. In each of the prior litigations, plaintiffs endeavored to avoid their contractual obligation to submit the dispute to binding arbitration. Plaintiffs brought this suit to take yet another bite at the apple. This Court should either dismiss this case or compel arbitration and stay this litigation pending its outcome.

Amway distributors are contractually obligated to arbitrate any disputes they have with Amway or other distributors. Plaintiffs are fully aware of this fact. For this reason, the complaining distributors behind this action did not file in their own names, with the exception of Netco, but instead in the names of their wholly-owned and controlled corporations. The distributors' attempt at subterfuge must fail, because their corporations are also required to arbitrate this dispute.

II. STATEMENT OF FACTS

All of the claims herein arise out of the participation of three Amway distributors in the Amway[1] business and their related business of selling materials to support the Amway business. It is upon that basis that this dispute should be arbitrated.

---

[1] Plaintiffs' assertion that "Amway Corporation" is a fictitious name (Complaint, ¶ 11) is wrong, but immaterial. Amway Corporation existed to provide a business opportunity for distributors globally until 1999, and continues to exist outside of the North American market. Some of the conduct alleged in the complaint occurred contemporaneously with 1999 corporate form changes as a result of which Alticor, Quixtar, and Amway succeeded to interests formerly held solely by Amway Corporation. At about the same time, changes were made to the multi-level marketing plan that Amway had operated in North America. This resulted in changes in nomenclature, such as the title of "Distributor" being changed to "Independent Business Owner" or "IBO." Today, Alticor Corporation is the parent of Amway Corporation and Quixtar Inc. For simplicity, and because these details are immaterial to the disposition of this

A. The Amway Business

Amway was founded in 1959 by Rich DeVos and Jay Van Andel and offers people an opportunity to own their own businesses as independent distributors of Amway products. Today, Amway manufactures and sells home care products, health and beauty products, and "home tech" products, such as air and water treatment systems. Amway also sells the products and services of third parties such as Kellogg's® and MCI. Amway sells these products and services exclusively through millions of independent distributors in over 80 countries. Amway distributors can earn income by selling products and services to customers. Anyone over 18 may become an Amway distributor if "sponsored" by an existing Amway distributor, who introduces them to the Amway business and countersigns their application form. (Ex. A, Declaration of Gary D. VanderVen, ¶¶ 2 and 3).

Distributors are independent business persons, whose individual success depends on their own selling efforts and the selling efforts of the persons they sponsor and support. Distributors can increase their overall business by helping distributors that they sponsor to increase their sales volume and, in turn, sponsor other distributors creating what is referred to as a distributor's "downline." When a downline distributor in turn sponsors other distributors, these become part of the "Line of Sponsorship" and each "upline" distributor can earn bonus income based on the product sales of his or her entire downline group. "Lines of Sponsorship" can grow into very large "family trees" of hundreds or even thousands of distributorships. (Ex. A, VanderVen Decl., ¶ 3).

---

motion, defendants (like the Complaint) herein refer to "Amway" and the " Amway business" as well as "distributors."

B. Business Support Materials ("BSM")

To preserve the benefits of the Amway business to all Amway distributors, Amway requires distributors to agree to comply with "Rules of Conduct" promulgated by Amway. One of the Rules requires distributors to train and motivate their personally sponsored distributors. (Complaint, ¶ 17). Many distributors find the use of live events, such as rallies, seminars, and other "functions" helpful in providing the required training and motivation. Some distributors also find it useful to reproduce speeches and seminars on sales and recruiting techniques in books and on tapes or other recorded media, generally referred to as "tools." The term "BSM" is often used to refer to tools and/or functions. (Ex. A, VanderVen Decl., ¶ 5).

Like a number of well-known "personal success" trainers and financial advisors, some distributors have developed businesses making and selling these training and motivational materials and holding functions or rallies. Sometimes their BSM businesses are operated through corporations. These corporations can operate tools businesses, functions businesses or both. Often the principals and shareholders of BSM corporations are identical to those of corporations that operate corresponding Amway distributorships. (Ex. A, VanderVen Decl., ¶ 5). Thus, plaintiffs admit that their "function and tool business is related and supportive of the Amway business." (Complaint, ¶ 18).

Amway does not require distributors to use BSM and does not receive any revenue from the sale of distributor-produced BSM. However, because of the relationship between the Amway business and the BSM businesses operated by distributors, there are Rules of Conduct that relate to BSM, some of which are -- partially and incorrectly -- referenced in the Complaint (e.*g.*, Complaint, ¶ 45). For example, Amway requires distributors who sell BSM to their downline distributors to disclose that BSM are optional and to offer commercially reasonable

refunds on any unwanted BSM. Also, tools that are to be used with prospects for the Amway business, or which depict the Amway Sales and Marketing Plan,[2] must first be submitted to Amway for authorization.[3] Also, as plaintiffs correctly observe, distributors are prohibited from soliciting other distributors whom they do not sponsor for the sales of BSM or other non-Amway products. (Ex. A, VanderVen Decl., ¶ 6).

C. The Contractual Relationship Between Amway And Its Independent Distributors

All Amway distributors must sign a written Distributor Application agreeing to comply with the "Rules of Conduct of Amway Distributors . . . as they are set forth from time to time in official Amway literature." The application, the annual renewal, the Business Reference Manual, which includes the Rules, and other official company literature become the "contract" between Amway and its distributors. (Ex. A, VanderVen Decl., ¶¶ 4 and 7).

Distributorships must be renewed annually. Some distributors renew each year by sending in an annual form (a Notice of Intent to Continue ("ITC") form) together with their check for the annual renewal fee. Since Amway has existed since 1959, it is necessary or prudent to amend the Plan or the Rules of Conduct from time to time. Thus, the ITC binds distributors anew to comply with the "Rules of Conduct." Distributors may also sign up for "automatic renewal," in which case Amway continues their distributorship automatically each year and charges the annual fee to their credit card. The Automatic Renewal Form contains the same re-affirmation. Thus, regardless of the form of renewal, distributors annually reaffirm their

---

[2] The Amway Sales and Marketing Plan ("the Plan") refers to the compensation system, including how distributors earn income and receive bonuses. (Ex. A, Vanderven Decl., ¶ 4).

[3] Plaintiffs' characterization of this Rule as requiring Amway review of "all" BSM (Complaint, ¶ 45) is an overstatement. (Ex. A, Vanderven Decl., ¶ 6)

agreement to abide by the "Rules of Conduct of Amway Distributors . . . as they are set forth from time to time in official Amway literature." (Ex. A, VanderVen Decl., ¶ 7).

In some cases, distributors may wish to operate their distributorships through wholly-owned or closely-held corporations. Amway requires the individual distributors (who typically become the principals of the corporate distributorship) to agree, by signing an "Application for Amway Distributor Authorization (Corporate)" (herein "Corporate Authorization"), that they will personally be bound by and operate the corporation in accordance with the rules and contractual provisions of the Plan, as follows:

> (12) The corporation, and each shareholder, director and officer promise and agree that:
>
> * * *
>
> (b) They will comply with the Amway Sales and Marketing Plan and the Code of Ethics and Rules of Conduct for Amway distributors.
>
> * * *
>
> In consideration of the authorization by Amway to the corporation to conduct an Amway distributorship, the undersigned stockholders, directors and officers do hereby certify that the information set forth in this application is correct and agree to abide by and perform the terms, conditions and promises hereinabove set forth therein and do hereby guarantee performance by the corporation of all of said terms, conditions and promises.

(Ex. A, VanderVen Decl., ¶ 8).

D. The Contractual Relationship between Amway and the Plaintiffs

Netco is a former Amway distributor. (Ex. A, VanderVen Decl., ¶ 10). Each of the remaining plaintiffs is a member of an organization that includes Amway distributors and is owned and controlled by Amway distributors. Nitro and West Palm are part of the Stewart organization. (Ex. B, *Nitro v. Dunn* Petition, ¶¶ 2, 4, 7, 72-74). Netco and Schmitz & Associates

are part of the Schmitz organization. (Ex. C, *Netco v. Dunn* Petition, ¶¶ 3-4, 19, 42-43). U-Can-II is part of the Hart Organization. (Ex. D, *U-Can-II v. Setzer* Complaint, ¶¶ 2, 4, 5, 23, 62, 66).

1. The Stewart Organization

In 1980, Ken Stewart and his wife, Donna, applied to become independent Amway distributors by submitting a completed application form. Amway accepted the application, and the Stewarts thereupon became authorized independent Amway distributors. In 1985, Ken and Donna Stewart signed the Corporate Authorization in order to transfer their Amway distributorship to Stewart and Associates. Ken Stewart signed the corporate authorization form as the President of Stewart and Associates. He and Donna also signed as stockholders, directors and officers of Stewart and Associates.[4] (Ex. A, VanderVen Decl., ¶ 9).

Nitro was incorporated in 1988. Ken Stewart is the "principal" and president of Nitro. He owns and controls the corporation which the Complaint acknowledges operates "by and through [its] principals" (Complaint, ¶ 52). Nitro facilitates the BSM tool business for Stewart and Associates' Amway distributorship. (Ex. B, *Nitro v. Dunn* Petition, ¶ 4). West Palm was incorporated in Florida in 1996. Ken Stewart is the principal of West Palm. He owns and controls the corporation -- in the Complaint's lexicon he is "West Palm's principal." West Palm facilitated the function business of Stewart and Associates and Ken Stewart. Nitro operates in tandem with West Palm to build, support and enhance Stewart and Associates' Amway business. (Ex. B, *Nitro v. Dunn* Petition, ¶ 5) (*See also* Complaint, ¶ 111 (referring to "Ken Stewart of

[4] At the time that they made the corporate authorization agreement, Ken and Donna Stewart jointly owned all shares of Stewart and Associates. Sometime in the 1990's, Ken and Donna Stewart divorced. As part of their divorce settlement, Donna transferred to Ken all but one share of stock in Stewart and Associates. Ken Stewart has owned and controlled Stewart and Associates since the divorce settlement was finalized. (Ex. A, VanderVen Decl., ¶ 9).

Nitro and West Palm")). Nitro claims to have the benefit of Stewart and Associates' downline Amway distributors and regards that line of sponsorship in the Amway business as its "'line of affiliation' in the tool and function business." (Complaint, ¶ 20, 111, 156.) Stewart and Associates, Nitro and West Palm describe themselves collectively as the Stewart Organization. (Ex. B, *Nitro v. Dunn* Petition, ¶ 4). Plaintiffs Nitro and West Palm claim they were harmed because their "principal" Ken Stewart was deprived of a leadership position due to an alleged boycott or was otherwise excluded from specified business activities. (Complaint, ¶¶ 96, 110-112.)

2. The Schmitz Organization

In 1984, Charlie Schmitz applied to become an independent Amway distributor by submitting a completed application form. Amway accepted the application, and Schmitz thereupon became an authorized independent Amway distributor. Charlie added his wife, Kim, to the distributorship in 1984. In 1991, Charlie Schmitz signed the Corporate Authorization, in order to transfer his Amway distributorship to Netco, Inc. Charlie Schmitz signed the form as the President of Netco. He and Kim also signed as stockholders, directors and officers of Netco. From mid-1991 until August 1999, Netco was the Amway distributorship of Charlie and Kim Schmitz. (Ex. A, VanderVen Decl., ¶ 10). For a time, Netco also was active in the BSM tools business in connection with its Amway distributorship. (Complaint, ¶ 5.)

Schmitz & Associates was incorporated in Missouri in 1992. Charlie and Kim Schmitz who own and control Schmitz & Associates are its "principals." For a period of time, this corporation facilitated the BSM function business for Charlie and Kim Schmitz (Netco), and was operated "by and through [its] principals" (Complaint, ¶ 52) in tandem with Netco to build,

support and enhance the Schmitz (Netco) Amway business.[5] (Ex. C, *Netco v. Dunn* Petition, ¶ 4). Plaintiffs Netco and Schmitz & Associates claim they were harmed because their "principal" Charlie Schmitz was deprived of a leadership position due to an alleged boycott or was otherwise excluded from specified business activities. (Complaint, ¶ 96). Netco and Schmitz & Associates claim to have the benefit of Netco's downline Amway distributors and regard that line of sponsorship in the Amway business as their "'line of affiliation' in the tool and function business." (Complaint, ¶¶ 20 and 156).

3. The Hart Organization

In 1978, Brig Hart applied to become an independent Amway distributor by submitting a completed application form. Amway accepted the application, and Hart thereupon became an authorized independent Amway distributor. Hart subsequently added his wife, Lita, to the distributorship. In 1989, Hart signed the Corporate Authorization in order to transfer his Amway distributorships to B&L Hart Enterprises, Inc. ("B&L"). Hart signed the form as the President of B&L. He and Lita also signed as stockholders, directors and officers of B&L. (Ex. A, VanderVen Decl., ¶ 11).

U-Can-II was incorporated in Florida in 1989. Brig and Lita Hart are the owners of U-Can-II, and they control U-Can-II. (Ex. D, *U-Can-II v. Setzer* Complaint, ¶ 2) (*See also* Complaint, ¶¶ 59, 111 (referring to "the Harts of U-Can-II")). U-Can-II is the operating entity for the BSM tool and function business "by and through [its] principal" (Complaint, ¶ 52). (Ex. D, *U-Can-II v. Setzer* Complaint, ¶ 2). Brig Hart, Lita Hart, B&L and U-Can-II comprise the Hart Organization. (Ex. D, *U-Can-II v. Setzer* Complaint, ¶ 5). U-Can-II claims it was

[5] In August 1999, Netco sold its Amway distributorship (IB#1001476) to Joanne Schmitz, Charlie's mother. (Ex. A, VanderVen Decl., ¶ 10).

harmed because its "principal" Hart was deprived of a leadership position due to an alleged boycott and other exclusionary conduct. (Complaint, ¶¶ 96, 110-112). U-Can-II claims to have the benefit of Hart's downline Amway distributors and regards the line of sponsorship in that Amway business as its "'line of affiliation' in the tool and function business." (Complaint, ¶¶ 20, 111, 156) (*See also* Complaint, ¶ 61 (referring to U-Can-II's place in the "line of sponsorship to D'Amico [another Amway distributor]")).

E. The 1998 Addition of Binding Arbitration to the Amway Rules of Conduct

Amway, Netco and the principals of the remaining plaintiffs have an agreement to arbitrate via the distributorship contract and the Corporate Authorization. This agreement results from revisions to Amway's dispute resolution procedures contained in the "Rules of Conduct for Distributors" effective January 1, 1998. The agreement is noted in the Complaint at ¶¶ 78-80 and requires distributors first to:

> give notice in writing of any claim or dispute arising out of or relating to their Amway distributorship, or the Amway Sales and Marketing Plan or Rules of Conduct, to the other party or parties
> . . . [and] then try in good faith to resolve the dispute using Amway's Dispute Procedures contained herein.

Those who have been unsuccessful in resolving a dispute through Amway's internal conciliation process must:

> submit any remaining claim[s] arising out of or relating to the Amway distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct (including any claim against another Amway distributor . . . or against Amway Corporation or any of its officers, directors, agents, or employees) to binding arbitration in accordance with the Amway/ADA Arbitration Rules . . . .

(Ex. A, VanderVen Decl., ¶ 12, Ex. 1 thereto at 66).

The contract includes a choice of law provision, which requires Michigan law to apply. (Ex. A, VanderVen Decl., ¶ 12, Ex. 1 thereto at 73).

All then-current distributors were notified of this change in the September 1997 issue of *The Amagram*, the company's monthly magazine to distributors. Existing Distributors who were not on automatic renewal signed an ITC for 1998 which reflected the agreement. Distributors on automatic renewal (*i.e.* not required to submit any form), were mailed in September 1997 a formal notice noting that the arbitration rule had become a part of their agreement along with an "Acknowledgment of Distributor Changes" form requesting them to acknowledge their obligations to arbitrate disputes concerning their businesses. Through these documents and communications, all distributors were on notice that, by renewing for 1998, they obligated themselves to resolve disputes confidentially through conciliation, and if necessary, binding arbitration. (Ex. A, VanderVen Decl., ¶ 13).

On or about October 1, 1997, the principals' Amway distributorships were on automatic renewal, and their Amway distributorships were renewed for 1998 upon the charge of their credit cards. Ken Stewart also signed an Amway "Acknowledgment of Distributor Changes" form, which expressly acknowledged the arbitration provision and memorialized the notice, conciliation and binding arbitration procedures listed above. Brig and Lita Hart also expressly affirmed the same notice, conciliation and binding arbitration procedures when they signed an "Add The Quixtar Business" form. (Ex. A, VanderVen Decl., ¶ 14).

F. The Pro Net Agreement

In 1998, several Amway distributors formed Pro Net Global Association ("Pro Net"). Pro Net's founding members, who had been part of a large BSM-related organization, formed Pro Net with the intent of creating a new organization that would assist its members with the

training and education of their downline distributor organizations. (Ex. E, Affidavit of Harold Gooch, Jr. (Mo.), ¶¶ 4-6). Stewart was one of the founding members of Pro Net. Stewart served as Secretary of Pro Net, and was also a member of the Pro Net Board of Directors and of the Pro Net Steering Committee, along with other founding members of Pro Net. (Ex. E, Gooch Aff. (Mo.), ¶ 6).

Several months after Pro Net's formation, Nitro, Netco and U-Can-II became members in Pro Net. (Ex. F, Affidavit of Robert A. Blanchard (Mo.), ¶ 5 and 6; Ex. E, Gooch Aff. (Mo.), ¶ 7 and 8; Ex. G, Affidavit of Harold Gooch, Jr. (Fla.), ¶ 6 and 7). The Pro Net terms and conditions of membership included the following: "Member agrees to adhere to the Amway Corporation's . . . Rules of Conduct . . . ." (Ex. G, Gooch Aff. (Fla.), Ex. 1 thereto). The Amway Rules of Conduct require arbitration for disputes related to the Amway business. All members of Pro Net agreed to this term as a condition of membership in Pro Net.

G. The Related Suits

This case is the fourth in a series. None of the earlier suits named the defendants in this case; instead they named defendants' supposed co-conspirators. The Schmitz organization plaintiffs filed in state court in Missouri on June 27, 2000. (Ex. C). The Stewart organization plaintiffs filed in the same state on December 7, 2001. (Ex. B). Finally, the Hart organization plaintiff filed in state court in Florida on April 4, 2002. (Ex. D). Defendants in each of the prior cases moved to compel arbitration. (Ex. H).

Although filed later than either Missouri suit, the Florida court issued its decision first, *U-Can-II v. Setzer*, No. 02-2535-CA, slip op. (Fla. Cir. Ct. April 23, 2003) (Ex. I). The court compelled the parties to proceed to arbitration and stayed the litigation. *Id.* This decision is currently on appeal.

In its order compelling arbitration, the Florida court made the following findings:

- Brig and Lita Hart and B&L Enterprises are contractually obligated to arbitrate under the Amway Rules of Conduct;

- U-Can-II is obligated to arbitrate under the Amway Rules of Conduct under agency principles and also because U-Can-II agreed to comply with the Rules of Conduct when it joined Pro Net;

- Disputes pertaining to BSM are governed by the obligation to arbitrate in the Amway Rules of Conduct; and

- The arbitration clause in the Amway Rules of Conduct is valid and enforceable.

See id. at 13-16 (Ex. I).

The two Missouri state court suits are both before Judge Sweeney in Springfield County. He issued an informal letter decision a few weeks ago denying the motions to compel arbitration. (Ex. J, Judge Sweeney letter dated September 17, 2003).

III. DISMISSAL PURSUANT TO RULE 12 IS APPROPRIATE

The Court may dismiss a complaint under Fed. R. Civ. P. 12 if it finds that the dispute is subject to an arbitration agreement.[6] *See Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 793 (8th Cir. 1998) (affirming the District Court's dismissal of the complaint in favor of enforcing an arbitration clause); *Inlandboatmans Union of the Pacific v. Dutra Group*, 279 F.3d 1075, 1083-84 (9th Cir. 2002) (holding that a failure to exhaust non-judicial remedies must be raised in a

[6] The law is unsettled as to whether a motion to dismiss in favor of arbitration should be raised as a Rule 12(b)(1), 12(b)(6), or a non-enumerated Rule 12 motion. *See, e.g., Branchville Mach. Co., Inc. v. Agco Corp.*, 252 F. Supp. 2d 307, 312 (E.D. Va. 2003) (dismissing complaint under Rule 12(b)(1)); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1196-97 (2d Cir. 1996) (dismissing a complaint under Rule 12(b)(6)); *Inlandboatmans*, 279 F.3d at 1083 (dismissing the complaint under Rule 12).

motion to dismiss under Rule 12)). A party raising a Rule 12 motion to dismiss based on an arbitration agreement does not need to answer the complaint.[7] *See Inlandboatmans*, 279 F.3d at 1083.

Dismissal in this case is appropriate. In the alternative, the Court should stay the proceedings until the conclusion of the arbitration in accordance with § 3 of the Federal Arbitration Act ("FAA").[8]

IV. GOVERNING FEDERAL LAW FAVORS ENFORCEMENT OF ARBITRATION AGREEMENTS

Federal law preempts state law with respect to the interpretation and construction of arbitration agreements concerning interstate commerce. *See Webb v. R. Rowland & Co.*, 800 F.2d 803, 806 (8th Cir. 1986). This includes the determination of what persons are bound by an arbitration agreement. *See Flink v. Carlson*, 856 F.2d 44, 46 n.2 (8th Cir. 1988). Federal law is embodied in the FAA, 9 U.S.C. § 1 et seq.

The FAA states, in relevant part, that an arbitration agreement "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. According to the United States Supreme Court,

---

[7] Answering a complaint could be construed as an act inconsistent with a party's right to demand arbitration and therefore, a waiver to a right to arbitrate the dispute. *See generally Ritzel Communs., Inc. v. Mid-American Cellular Tel. Co.*, 989 F.2d 966, 969 (8th Cir. 1993). In fact, in one of the related litigations, U-Can-II argued that the filing of an answer by the defendants constituted a waiver. (Ex. K, U-Can-II Opposition, p. 4).

[8] § 3 of the FAA states: "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

"Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (affirming appellate court's decision directing the district court to enter an order to arbitrate); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration").

The FAA provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4. Both of these sections call for an "expeditious and summary hearing, with only restricted inquiry into factual issues." *Moses*, 460 U.S. at 22.

V. PLAINTIFFS ARE CONTRACTUALLY BOUND TO ARBITRATE

In determining whether to dismiss or stay this action in favor of arbitration under the FAA, the Court must determine whether the plaintiffs are contractually bound to arbitrate and then determine whether the dispute at issue is within the scope of their agreement. *See Lyster v. Ryan's Family Steak Houses*, 239 F.3d 943, 945 (8th Cir. 2001). While federal law applies to this determination, federal courts look to state law in shaping federal law. *See Flink*, 856 F.2d at 46 n.2. In this case, since the arbitration agreement includes a choice of law provision, the Court should look to Michigan law. *See Keymer v. Management Recruiters Int'l*, 169 F.3d 501, 504 (8th Cir. 1999).

Netco is the only one of the five plaintiffs that signed a distributor contract with Amway in its own name. However, it is well-settled that parties that did not sign a contract in their own name still may be bound to its terms based on a variety of legal theories, including agency and estoppel. *See, e.g., Javitch v. First Union Secs., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003). For each

of the plaintiffs, there are several independent reasons that require them to arbitrate this dispute in accordance with the Amway Rules of Conduct.

A. Netco And The Principals Of The Plaintiffs Are Signatories Of The Amway Arbitration Contract

Netco and the principals of the remaining plaintiffs are signatories of the Amway distributor contract. Netco and plaintiffs' principals, in signing the Corporate Authorization and in renewing their distributorship contracts through "automatic renewal," expressly and personally agreed to abide by the Amway Rules of Conduct as they are set forth from time to time. In 1997, the Rules were amended to require arbitration. Netco and plaintiffs' principals were aware of the change and still renewed their distributorship contracts. Further, Netco and plaintiffs' principals have ratified their arbitration agreement by continuing to act as Amway distributors for years after the time the arbitration rules went into effect. Also, plaintiffs' claims were filed after the incorporation of arbitration into the Amway Rules. Therefore, all claims are arbitrable.

B. Plaintiffs Are Bound To Arbitrate As Agents Of Signatories Of The Amway Arbitration Contract

A plain reading of the Complaint's allegations reveals that this dispute arises out of and relates to Amway distributorships, and, therefore, is subject to the Amway arbitration agreement. However, the principals of the plaintiffs seek to avoid arbitration by bringing their complaint in the name of their agents, their Amway tools businesses. Agreements to arbitrate would be of little value if a contracting party could avoid its agreement by acting through an agent. For this reason, it is well-settled that non-signatory agents of a principal are bound to the arbitration agreement. *See, e.g.*, *Nesslage v. York Secs., Inc.*, 823 F.2d 231, 233 (8th Cir. 1987); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990); *Byrd v. Sprint Communs. Co.*, 931 S.W.2d

810, 815 (Mo. Ct. App. 1996).[9] The plaintiffs are all agents of signatories to the Amway arbitration agreement, and, therefore, are required to arbitrate.

A party is deemed an agent when its principal provided the party with actual or apparent authority to act on the principal's behalf. *See Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 723-27 (8th Cir. 1995); *Meretta v. Peach*, 491 N.W.2d 278, 280 (Mich. Ct. App. 1992). As discussed below, plaintiffs possess actual and apparent authority to act on behalf of their principals who signed the Amway arbitration agreement.

1. The plaintiffs have actual authority

The plaintiffs admit that each is authorized to act in their principal's behalf. The Complaint states that "Amway requires its Amway distributors to train and motivate the downline distributors that they sponsor and bring into Amway's multi-level business." (Complaint, ¶ 17.) According to plaintiffs, this requirement "'birthed' the tool and function business." (Complaint, ¶ 18.) Plaintiffs further explain that each is merely the tool and function businesses "of 'eligible' Amway distributors." (Complaint, ¶ 52). Plaintiffs characterize this business as "related and supportive of the Amway business" (Complaint, ¶¶ 16-18).

Based on these allegations, Amway distributors expressly authorized plaintiffs to act as agents on their behalf in complying with their required training and motivating of their downline distributors. Therefore, they are agents of a signatory that is obligated to arbitrate. *See Essco Geometric*, 46 F.3d at 723 (finding that a party is an agent if the principal has empowered him or her to act on the principal's behalf); *Meretta*, 491 N.W.2d at 280; *Rosenblum v. Jacks or Better of Am. W.*, 745 S.W.2d 754, 760 (Mo. Ct. App. 1988).

[9] While Michigan not Missouri law is applicable to this determination, for the convenience of the Court, Amway provides citations to the law of both states.

2. The plaintiffs have apparent authority

In addition to actual authority, plaintiffs are also agents because they are cloaked in apparent authority to act in their principal's behalf. Apparent authority is created by the acts of a principal that lead third parties to believe that another has authority to act for the principal. *See Essco Geometric*, 46 F.3d at 726; *Meretta*, 491 N.W.2d at 280. Each of the principals here, Stewart, Hart and Schmitz, holds out their tools organizations as integral parts of their Amway business. For example, the principals use letterhead that lists their Amway distributorship and their tool company. The principals also issue literature that presents their Amway distributorship and their tools and function business as one and the same. In operation, the principals do not differentiate between their BSM businesses and their Amway distributorships; each operates on behalf of the other. (Ex. A, VanderVen Decl., ¶ 15). In fact, plaintiffs admit that they operate in "concert" or in "tandem" with their related Amway distributorships. (Ex. B, ¶¶ 4 and 5; Ex. C, ¶ 43; Ex. D, ¶¶ 25 and 69). For these reasons, third parties may reasonably expect the plaintiffs are authorized to act on their principals' behalf. *See Essco Geometric*, 46 F.3d at 726; *Meretta*, 491 N.W.2d at 280.

As agents of their principals, plaintiffs are required to arbitrate under the Amway contract. *See Arnold*, 920 F.2d at 1281 (holding that ordinary principles of agency may bind nonsignatories); *Byrd*, 931 S.W.2d 810, 815 (Mo. Ct. App. 1996).

C. Plaintiffs Are Bound to Arbitrate As They Share A Community Of Interest With Signatories Of The Amway Contract

The Third Circuit has held that non-signatories should be bound to an arbitration agreement when their interests are "directly related to, if not congruent with, those of a signatory." *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1122 (3d Cir. 1993);

Eckel v. Equitable Life Assur. Soc'y of the U.S., 1 F. Supp. 2d 680, 687 n.1 (E.D. Mich 1998).[10] This is particularly the case when the arbitration clause evinces the signatories' intention to arbitrate all disputes that may arise between them. *See Pritzker*, 7 F.3d at 1122. The distributors and their tool companies undeniably share a community of interest. Plaintiffs acknowledge, as they must, that their business is "inextricably" linked to their corresponding Amway distributorships. (Complaint, ¶ 18; Ex. B, ¶ 33; Ex. C, ¶ 27; Ex. D, ¶ 42). The principals of plaintiffs agreed to arbitrate "any . . . claim or dispute arising out of or relating to [their] Amway distributorship." (Ex. A, VanderVen Decl., ¶ 15). Thus, plaintiffs also must arbitrate under a community of interest theory.

D. Plaintiffs Are Bound To Arbitrate Based On Their Pro Net Agreement To Abide By The Amway Rules Of Conduct

While Netco is the only plaintiff that signed the Amway contract in its own name, two other plaintiffs, U-Can-II and Nitro, joined Netco in signing the Pro Net agreement. The terms and conditions they accepted state: "Member agrees to adhere to the Amway Corporation's Code of Ethics and Rules of Conduct for distributors . . . ." (Ex. E, Gooch Aff. (Mo.), Ex. 1 thereto; Ex. F, Blanchard Aff., Ex. A thereto ; Ex. G, Gooch Aff. (Fla.), Ex. 1 thereto). By agreeing to adhere to the Amway Rules, Netco, U-Can-II and Nitro, contractually assumed the duty to arbitrate tool disputes as provided by those Rules. *See U-Can-II v. Setzer*, slip op. at 13 and 14 (Ex. I). This agreement provides an independent basis for requiring arbitration.

[10] The Missouri Court of Appeals declined to apply the "community of interests" law set forth in *Pritzker*. *See Byrd*, 931 S.W.2d at 814. As *Eckel* above demonstrates; however, it has been applied in Michigan federal court.

VI. PLAINTIFFS ARE ESTOPPED FROM AVOIDING THEIR DUTY TO ARBITRATE

Each of the plaintiffs has received direct benefits from the Amway contract. Moreover, the contract between Amway and the plaintiffs' principals provide part of the factual foundation for every claim asserted by plaintiffs. Under these circumstances, they may not avoid an arbitration term of the contract that they dislike. *See Javitch*, 315 F.3d at 629; *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (holding non-signatory equitably estopped from refusing to comply with arbitration clause in contract that directly benefits it and underlies its claims). *See also Dominium Austin Partners v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001) (holding that a non-signatory party cannot avoid enforcement of an arbitration clause when it is otherwise claims that a party is liable for failing to perform under the agreement); *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 630-31 (Mo. Ct. App. 1994).

Each of the plaintiffs and their principals directly benefited from the Amway contract. In fact, their very existence is attributable to the Amway contract as plaintiffs' Complaint acknowledges. (Complaint, ¶ 17). Plaintiffs allege that they are beneficiaries of "valid business relationships or expectancies with their respective downline distributors within their line of sponsorship/affiliation." (Complaint, ¶ 156). These relationships were formed through the Amway contract. (Complaint, ¶¶ 20-21).

Moreover, throughout the Complaint, plaintiffs refer to and rely on the Amway contract to support their claims. Below are just a few examples of plaintiffs' reliance:

> Amway <u>requires</u> its Amway distributors to train and motivate the downline distributors that they sponsor and bring into Amway's multi-level business. (Complaint, ¶ 17).

> What is commonly referred to as the "line of sponsorship" in the Amway business is sometimes referred to as the "line of affiliation" in the tool and function business. (Complaint, ¶ 20).
>
> Because of an Amway rule prohibiting Amway distributorships from engaging in any other business, the "eligible" Amway distributors were instructed by the Amway kingpins to set up their own corporations which would engage in the tool and function business as independent distributors, separate and apart from the Amway business. (Complaint, ¶ 22).
>
> Amway "closed its eyes" and ignored what they considered to be a business rampant with abuse because Amway had become inherently dependent on the tool and function business to sustain its growth and profitability. (Complaint, ¶ 42).
>
> Amway . . . require[s] all tool literature to be sent to Amway for prior approval before dissemination and use of that literature. . . This Amway rule permitted Amway, a competitor in the tool business, to become the **gatekeeper** for what could and could not be sold as literature in the tool business. (Complaint, ¶ 45).
>
> **The second myth**, related to Amway distributors once they became eligible for participation in the tool and/or function profits (Direct level or above), is that those distributors will be treated fairly under the Rules, including the line of sponsorship and/or affiliation and the Servicing Agreement Rule, being honored. (Complaint, ¶ 51).

The gist of plaintiffs' claim is that they had the exclusive right to sell BSM through the line of sponsorship of their related Amway distributorships, and that Amway did not protect that alleged exclusive right from competition. Thus, on the one hand, plaintiffs allege that Amway has a duty to promulgate and enforce Rules of Conduct for their benefit, but on the other hand they disavow the Rule requiring arbitration over any dispute related to an Amway distributorship. They can't have it both ways.

In addition, each of the plaintiffs, acting through their principals, sought Amway's assistance in resolving their tools disputes. (Ex. A, VanderVen Decl., ¶ 15; Complaint, ¶ 92).

The principals wanted Amway to apply the Rules of Conduct in a way that would benefit their tool companies. (Ex. A, VanderVen Decl., ¶ 15). Therefore, plaintiffs, who embraced the contract despite their non-signatory status prior to litigation, are estopped from now repudiating the contract and its arbitration clause. *See Javitch*, 315 F.3d at 629; *Dominium*, 248 F.3d at 728; *E.I. DuPont De Nemours and Co. v. Rhone Poulenc Fiber and Resin Intermediates*, 269 F.3d 187, 200 (3d Cir. 2001).

VII. THE COMPLAINT ALLEGATIONS ARE COVERED BY THE AMWAY ARBITRATION AGREEMENT

The dispute framed by the Complaint is within the scope of the arbitration agreement. The Amway contract states as follows in pertinent part:

> AGREEMENT TO ARBITRATE - I agree that I will give notice in writing of any claim or dispute <u>arising out of or relating to my Amway distributorship, or the Amway Sales and Marketing Plan or Rules of Conduct</u> to the other party or parties, 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 Amway Conciliation and Enforcement Procedures contained in the Rules of Conduct for Amway Distributors.

(Ex. A, VanderVen Decl., ¶ 13, Ex. 14 thereto) (emphasis added).

Even a cursory reading of the Complaint establishes that this dispute arises out of the principals' Amway distributorships and the Rules of Conduct. In fact, plaintiffs acknowledge that their very corporate existence arose out of their principals' Amway distributorships. (Complaint, ¶ 17). Moreover, as discussed above, plaintiffs' Complaint boils down to their principals' Amway distributorships, their related tools businesses and how they have been treated under the Rules of Conduct. As such, it is specifically covered by the agreement to arbitrate. *See Morrison v. Amway Corp.*, 49 F. Supp. 2d 529, 534 (S.D. Tex. 1998). Arbitration

should be denied only if it may be said with "positive assurance" that an arbitration clause cannot be interpreted to cover the dispute. *Lyster*, 239 F.3d at 945.

The language of the Amway Rules is a "broad form" arbitration agreement. *Morrison*, 49 F. Supp.2d at 535. It expressly applies to "any claim or dispute." (Ex. A, VanderVen Decl., ¶ 13, Ex. 14 thereto; *see also* Ex. A. VanderVen Decl., ¶ 4 and Exh. 1 at 66, thereto). In the case of a broad arbitration clause, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *United Steelworkers of Am. v. Warrior and Gulf Nav. Co.*, 363 U.S. 574, 584-85 (1960). No such evidence exists here.

Because plaintiffs are obligated to arbitrate, and their filing of this lawsuit is a violation of the Amway contract, Alticor filed a demand for arbitration. (Ex. L). The arbitration commenced on September 25, 2003. (Ex. M).

VIII. THE AMWAY ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

The Amway arbitration agreement has been enforced by several courts.[11] *See, e.g.*, *Morrison*, 49 F. Supp. 2d at 533. As discussed above, one court has enforced the agreement as to one of the plaintiffs, U-Can-II. Courts have applied the same Amway arbitration agreement in dismissing or staying pending arbitration lawsuits brought by other Amway distributors, including in *Griffith v. Amway Corp.*, Case No. 98-17491 (District Court of Harris Co., TX, Jan. 25, 1999, writ denied) and *Mouille v. Amway Corp*., Case No. 99-04014 (District Court of

[11] The only rejection of the agreement occurred a few weeks ago in the informal letter opinion of the Circuit Court of the State of Missouri. (Ex. J). Amway is not a party to the Missouri case. Moreover, this opinion is based on erroneous factual and legal conclusions by the court. For example, the court wrongly concluded that "Amway is not bound by its own arbitration requirements." (Ex. A, VanderVen Decl., ¶ 13).

Orleans Parish, Dec. 15, 1999). Copies of these unpublished orders are attached as Exhibits N and O.

The plaintiffs in *Morrison* argued, *inter alia*, that: (1) they "never signed" the arbitration agreement; (2) the agreement was a contract of adhesion; (3) the arbitration agreement is procedurally and substantively unconscionable; and (4) the arbitration clause did not cover the claims at issue, which related to BSM. All of these arguments were rejected.

Arbitration is also well justified in this case because the process will provide a quick, cost effective and fair resolution of the dispute. As an alternative form of dispute resolution, arbitration will save the parties time, money and effort "by substituting for the litigation process the advantages of speed, simplicity, and economy . . . ." *Landy Michaels Realty Corp. v. Local 32B-32J, Serv. Empl. Int'l Union*, 954 F.2d 794, 796 (2d Cir. 1992) (citations omitted). "Congress' clear intent . . . was to move the parties to an arbitrable dispute out of court and into arbitration as quickly as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Arbitration also represents a willingness by parties to voluntarily invest energy in resolving difficult issues and an opportunity to examine how such disputes arise. *See* Bette J. Roth et al., *The Alternative Dispute Resolution Practice Guide* § 1:19 (rev. ed. 1996).

The Amway/ADA Arbitration Rules are designed to provide parties all the due process that accompanies judicial trials. The claimant submits disputes to a neutral arbitrator selected by J.A.M.S./ENDISPUTE, a leading dispute resolution firm that insists upon standards of fairness as a condition of its participation in arbitration. *See* *www.jamsadr.com*. The arbitrator is selected from a list of neutrals, which includes many retired federal and state judges. *See* *www.jamsadr.com/neutrals.asp*. The arbitration rules require, for example, that arbitrators "shall

have no personal or financial interest in the results of the proceedings in which they are appointed and shall have no relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias." (Ex. A, VanderVen Decl., ¶ 16). Parties may conduct discovery, subpoena witnesses and documents, and they have the right to be represented by counsel, to call witnesses to testify under oath and on the record and to make evidentiary objections. Where, as here, complex claims involving multiple parties arise from commercial disputes, arbitration is a particularly attractive and economical alternative to litigation. Accordingly, the arbitration requirement here should be given full force and effect.

IX. CONCLUSION

For all the foregoing reasons, this Court should either dismiss this action or stay the litigation and compel the plaintiffs to comply with their obligation to arbitrate. An arbitration relating to this dispute is pending; plaintiffs should be directed to raise their claims in that forum.

Respectfully submitted,

BAKER STERCHI COWDEN & RICE, L.L.C.

October 1, 2003

By: /s/ Hal D. Meltzer, Esq.

Hal D. Meltzer
Crown Center
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108-2504
Telephone: (816) 471-2121
Facsimile: (816) 472-0288

James R. Sobieraj
Timothy Q. Delaney
Laura Beth Miller
Brinks Hofer Gilson & Lione
NBC Tower—Suite 3600
455 North Cityfront Plaza Drive
Chicago, Illinois 60611-5599
Telephone: (312) 321-4200
Facsimile: (312) 321-4299

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

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY THE CASE AND COMPEL ARBITRATION was served electronically via e-mail together with a copy of the Suggestions and exhibits via regular mail, postage prepaid, this 1st day of October, 2003 to the following attorneys:

R. Dan Boulware - #24289
R. Todd Ehlert - #51853
SHUGHART THOMSON & KILROY
WATKINS BOULWARE, P.C
3101 Frederick Avenue
P.O. Box 6217
St. Joseph, Missouri 64506
Telephone: (816) 364 2117
Facsimile: (816) 279 3977

DATED: October 1, 2003

BAKER STERCHI COWDEN & RICE, L.L.C.

/s/ Hal D. Meltzer, Esq.
One of the Attorneys for Defendants