

IN THE SUPERIOR COURT OF WHITE COUNTY  
STATE OF GEORGIA

TODD CAMPBELL and  
DWAYNE TURNER,

Plaintiffs

vs.

QUIXTAR, INC.,

Defendant.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

CIVIL ACTION FILE NO.:

2007-CV-662-DB

ORDER ON MOTION TO DISMISS AND  
PRELIMINARY INJUNCTION

The Court heard evidence and oral argument on the above action on January 30, 2008. Three issues were requested to be further briefed by the Court: (1) mootness; (2) whether any claims were to be resolved under the mediation and arbitration provisions of the Rules of Conduct; and (3) the effect of the post termination non-competition clause.

1. Mootness:

The mootness doctrine is based upon the principle that the Courts will not decide cases in which there is no remaining controversy. Georgia Constitution Article VI, allows courts to decide "cases", even if the action is one for a Declaratory Judgment for so long as there is a "live" controversy. See In Re: JB, 219 Ga. App. 268 (1995). In this action, the Plaintiffs have amended their Complaint for Declaratory Judgment and Interlocutory Relief adding claims and seeking declaratory judgment concerning the terms of the contracts between Plaintiffs and Defendant and enforceability thereof. "A

controversy is justiciable when it is appropriate for judicial determination. It must be definite and concrete, touching the legal relations of the parties having adverse legal interests, rather than being hypothetical, abstract, academic or moot." Allstate Insurance Company v. Shuman, 163 Ga. App. 313, 315 (1982) (emphasis supplied).

Here the relationship past, present and future, between the Plaintiffs and the Defendant remains at center focus of this litigation. Plaintiffs claim that they wish to compete with Defendant but are seeking a declaration of their rights. Defendant stated at the hearing that all rights which Defendant had under its agreements with Plaintiffs are subject to being enforced and it would not waive any such rights. Thus, the rights of the parties under the terms of the Application with Defendant and Amway are at issue and are therefore the case matter is not moot.

## 2. Referral to ADR:

Defendant contends that if the case is not moot, that it should be referred to a form of alternative dispute resolution under the terms of the Rules of Conduct for Quixtar/Amway Distributors. Defendant argues that the construction and application of the non-competition clause and other issues should be referred to ADR for decision under the Rules of Conduct. The Federal Arbitration Rules favor sending matters to arbitration if there is any doubt in the applicability of such. "Unless 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' . . . Accordingly an injunction against arbitration is

appropriate only where an asserted claim clearly falls outside of the substantive scope of the agreement.” Horner, Townsend & Kent v. Hamilton, 218 F. Supp.2d 1369, 1374 (N.D.Ga. 2002).

The Georgia rule of arbitration is similarly restricted. See BellSouth Corporation v. Forsee, 265 Ga. App. 589, 591 (2004).

However, the first issue is whether the covenant not to compete should be referred for arbitration or is it a matter which should be resolved by the Court without referral to arbitration?

In BellSouth v. Forsee, Id., 596-597, the Court of Appeals held that where the Court found the covenant not to compete “unenforceable on its face, Wilson [Uni-Worth Enterprises v. Wilson], 244 Ga. 636, (1979)] authorize the court to enter a definitive ruling as to its enforceability. Certainly at that point, the severability clause authorized the court to remove the invalid covenant from the arbitrator’s consideration.”

Here, the non-competition section of the “Rules of Conduct” which Defendant claims to be the rules under which the Plaintiffs and Defendant operators are found in Section 6.5 denominated as “Non-Competition and Anti-Raiding.” 6.5 restricts the sale, promotion, distribution of any competing products services or other business ventures. 6.5.1 defines compete broadly to include “own, manage, operate, consult for, be employed by, or participate as an independent distributor” in a multi-level or network marketing program or the equivalent. It covers people who have worked for the past two

years (6.5.2). Further IBO (Independent Business Owners) may not compete directly or indirectly with Defendant in the United States, Canada and all other markets under the North American Independent Business Ownership Plan for a period of six months post-resignation or violation of 6.5.4 (i.e. competition)(6.5.4).

The scope of geographic coverage of the Rules takes one's breath away. In Georgia, the question of "whether the restraint of trade imposed a covenant not to compete is reasonable is a question of law for determination by the Courts." W. R. Grace & Company v. Mouryal, et al., 262 Ga. 464, 465 (1992).

Under the traditional test in Georgia, a covenant not to compete ancillary to an employment contract has been held unenforceable on public policy grounds, unless it is strictly limited in time and territorial effect and is otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee. [Cit.] Under this test, it has been held that a restrictive covenant - which prohibits an employee from accepting employment with a competitor of the employer "in any capacity," or from engaging in a business "similar to" the employer's business or a "related trade"- is enforceable in that it imposes a greater limitation upon the employee than is necessary for the protection of the employer and does not specify with particularity the nature of the business activities in which the employee is forbidden to engage. (Emphasis added) Roberts v. Tifton Medical Clinic, 206 Ga. App. 612, 614 (1992).

Further, the Court is to determine whether a contract is a prohibited one in restraint of trade upon the factual basis to which it is being applied. Roberts. Here the alleged contract covers all of North America for an IBO working in Cleveland, Georgia. The area covered is so incredibly large that the non-competition clause is "unenforceable on its face, [under Georgia law and] Wilson, [supra] authorize[s] the court to enter a

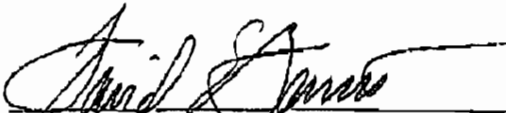
definitive ruling as to its enforceability" Forsce, at 597. As in Forsce, the severability clause authorizes the Court to remove the invalid covenant from the arbitrator's consideration. Therefore, the non-competition clause is declared invalid and if the contract is to be arbitrated, then such issue will not be subject to arbitration as such is invalid as a matter of law.

3. **Effect:**

The third issue is answered by this Court's answer to the second decision, that is that the non-competition clause would be of no effect even after termination of the relationship.

Therefore, the Court enters an Interlocutory Injunction which prohibits the Defendant from enforcing the Rules of Conduct concerning the enforcement of the non-competition clauses during the pendency of this action.

SO ORDERED this 6 day of March, 2008.

  
David E. Barrett, Chief Judge  
White Superior Court  
Enotah Judicial Circuit

xc: Christopher D. Elrod, Attorney for Plaintiffs  
Kenan G. Loomis, Attorney for Defendant