

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

CASE NO.: 32 180 Y 00609 07

In the Matter of the Arbitration Between:

JAMES CHRISTOPHER KURZWEG,

Claimant,

v.

INFOLINK GROUP, INC. and INFOLINK  
INFORMATION SERVICES, INC.

Respondents.

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**COUNTERCLAIM**

Respondents, INFOLINK GROUP, INC. ("Group") and INFOLINK INFORMATION SERVICES, INC. ("Services") (collectively Infolink"), hereby files its Counterclaim against Claimant, JAMES CHRISTOPHER KURZWEG ("Kurzweg"), and states:

**JURISDICTION, PARTIES**

1. This is an action for damages exceeding Fifteen Thousand Dollars (\$15,000.00), exclusive of interest, costs, and attorneys' fees and is within the jurisdiction of the American Arbitration Association.
2. Group is a corporation organized and existing under the laws of the State of Florida which maintains its principal place of business in Miami-Dade County, Florida.
3. Services is a corporation organized and existing under the laws of the State of Florida which maintains its principal place of business in Miami-Dade County, Florida.

4. Kurzweg is an individual residing in Miami-Dade County, Florida, and is otherwise *sui juris*.

### GENERAL ALLEGATIONS

#### **A. Kurzweg's Employment Agreement with Group and his Position with Infolink**

5. Services is an information technology consulting business. Group is the holding company for Services.

6. At all times material, Kurzweg was an officer of Group and Services and held the title "Vice President of Marketing."

7. On or about June 27, 2002, Group and Kurzweg executed an Employment Agreement (the "Agreement"), confirming Kurzweg's title as Vice President of Marketing, and confirming Kurzweg's rate of pay. The term of the Agreement was from May 15, 2000 through April 30, 2004 and carried no renewal clause. The Agreement could be terminated earlier either by Kurzweg on thirty (30) days written notice or for cause by Group.

8. Unfortunately, on November 4, 2002, due to Infolink's insufficient cash flow, the Agreement, along with all other Infolink employment agreements, was terminated by the written consent of the parties. As of that date, Kurzweg continued his official role as an officer of Infolink and Vice President of Marketing, but now, like all other employees of Infolink, Kurzweg did so as an "at will" employee.

9. At certain times during his tenure with Infolink, Kurzweg also served on Group's Board of Directors.

10. Because of his position as Vice President of Marketing, Infolink (both Group and Services) entrusted Kurzweg with full and complete responsibility for generating and overseeing Infolink's sales activities, managing Infolink's sales employees, and corresponding with Infolink's customers.

**B. Kurzweg's Social and Behavioral Issues**

11. When focused, Kurzweg was an excellent communicator and sales-person. During such times, Kurzweg excelled in performing his duties, and acted with the utmost loyalty required of an officer to Infolink and its shareholders. However, at other times, Kurzweg's job performance would suffer do to excessive partying, substance abuse and prolonged absences from work.

12. Although Kurzweg always showed signs of a substance abuse problem, Kurzweg's unprofessional behavior and prolonged absences from work seriously affected his job performance, and hence, Infolink and its customers, in 2005 when Kurzweg ceased performing his duties as Vice President of Marketing.

13. Instead, Kurzweg engaged in a campaign to deceive Infolink into believing that he was performing his duties as Vice President of Marketing in an ultimately successful attempt to have Infolink continue to pay his generous salary and benefits in order to fund and continue a serious substance abuse and alcohol problem.

14. In early 2006, an internal investigation revealed that rather than performing his sales and marketing duties for Infolink, Kurzweg had virtually stopped working. For instance, for a one year period between 2005 and 2006 there were no less than 76 days where Kurzweg, the head of sales and marketing for a company that relied entirely on its sales as its revenue, sent

one e-mail or less out of the office. There would be days, and even weeks at a time, where Kurzweg would fail to make a single outgoing telephone call. A review of Kurzweg's email system revealed that at certain periods, over 90% of e-mails sent out by him were not work-related and of an inappropriate nature.

15. Indeed, Kurzweg began to partake in prolonged absences from Infolink's offices in complete derogation of his duties. During such absences, Kurzweg engaged in alcohol binges, during and after which Kurzweg was entirely incapable of performing nearly any of the duties required of him as Infolink's Vice President of Marketing. Moreover, Kurzweg would consider any hangover as an acceptable excuse not to come into work and take what he termed a "sick day."

16. During this time, Kurzweg's derogation of duties resulted in Infolink providing services to a number of customers introduced by Kurzweg, who Kurzweg knew or should have known, were or would be unable to pay for Infolink's services. As Vice President of Marketing, it was Kurzweg's duty to properly perform due diligence on potential clients. However, Kurzweg was so consumed by his addictions, that when he did perform any work on behalf of Infolink, he simply signed customers up and leave the problem of whether the customer would pay to Infolink after the company had provided services.

17. Kurzweg's dereliction of duties also resulted in Infolink's sales suffering, and even involved Infolink in at least one non-paying client's bankruptcy proceeding, which resulted in a judgment being rendered against Group, Group's President and Kurzweg individually for hundreds of thousands of dollars.

18. Moreover, Kurzweg's complete disregard of his duties cost Infolink thousands of dollars in attorneys' fees in attempting to resolve matters caused by Kurzweg's malfeasance and misfeasance, including the bankruptcy and subsequent judgment mentioned above.

19. Upon discovering Kurzweg's misconduct and substance abuse and alcohol problems, Infolink confronted Kurzweg.

**C. Kurzweg Agrees to Seek Help and is Put on Paid Leave**

20. Upon confrontation, Kurzweg admitted his addictions and misdeeds and appealed to Infolink to assist him in seeking rehabilitative assistance, including professional treatment, to overcome his addictions.

21. Based upon Kurzweg's representations, Infolink offered to place Kurzweg on a three (3) month paid leave in return for Kurzweg seeking professional rehabilitative treatment. The parties contemplated that the compensation received during Kurzweg's leave of absence would be utilized, at least in part, to fund Kurzweg's rehabilitation and that Kurzweg would not be able to return until he received physician clearance.

22. As an "at will" employee, Infolink was under no duty to offer anything to or for Kurzweg. However, based on his past contributions to the company and his long-standing friendship with the Infolink's founder, Infolink agreed to the paid leave in order to assist Kurzweg with getting his life back in order.

23. Kurzweg accepted Infolink's offer, and as a result, Infolink continued to pay Kurzweg's salary and provide him with full benefits between September and December 2006, despite Kurzweg's complete absence from Infolink.

24. During the time Kurzweg was on paid leave, Kurzweg led Infolink to believe that he had sought and was receiving professional drug and alcohol rehabilitative treatment.

25. Unfortunately, rather than utilize the more than generous funds Infolink provided to Kurzweg for treatment, Kurzweg used his paid leave to continue his substance abuse and to travel to Colombia, Costa Rica, New Orleans, and Charleston, all for the purposes of furthering his addictions.

26. Further, when Kurzweg actually was in Miami, he spent the majority of his time engaging in the same detrimental behavior on his boat instead of receiving the treatment he promised to undertake.

27. On information and belief, at no time did Kurzweg seek out or actually receive professional treatment for his addictions.

28. All conditions precedent to the institution of this action have occurred, been performed, or been excused.

29. Infolink has retained the undersigned law firm to represent it in this matter and has promised to pay it reasonable attorneys' fees and costs.

**COUNT I**  
**Breach of Fiduciary Duty**

Infolink incorporates and realleges the allegations set forth in Paragraphs 1 through 29 as if fully set forth herein.

30. At all times material hereto, Kurzweg was an officer of Group and Services.

31. As an officer of Infolink, Kurzweg owed a fiduciary duty to Group and Services and their shareholders. As part of his fiduciary duties, Kurzweg was obligated to perform his

duties in good faith, to exercise the same diligence as would a reasonably prudent person in like circumstances, to act on an informed basis and to prevent the use of corporate funds for personal gain and/or for improper and unauthorized purposes

32. By and through the behavior described above, including, but not limited to: (a) his failure to devote his full time and attention to Infolink; (b) his failure to perform any due diligence on customers he did sign up for Infolink's services; (c) his acceptance of company funds for paid leave in order to seek drug and alcohol rehabilitation; and (d) his refusal to seek treatment and continue with his deleterious behavior, Kurzweg breached his fiduciary duties to Infolink and its shareholders.

33. As a direct and proximate result of Kurzweg's breaches of his fiduciary duties, Infolink has suffered damages.

**WHEREFORE**, Infolink demands judgment against Kurzweg for compensatory damages to be proven at Final Hearing, together with interest, costs and such other relief as this Panel deems just and proper.

**COUNT II**  
**Breach of Oral Agreement**

Infolink incorporates and realleges the allegations set forth in Paragraphs 1 through 29 as if fully set forth herein.

34. As an at-will employee, Kurzweg could have been terminated at any time for any lawful reason upon Infolink's discovery that Kurzweg was engaging in drawn-out alcohol binges instead of devoting substantially all of his time and attention to Infolink and his duties as Vice President of Marketing.

35. Instead, Infolink and Kurzweg entered into a valid oral agreement wherein Infolink agreed to provide Kurzweg with three (3) month's paid leave if Kurzweg agreed to seek professional rehabilitation for his substance abuse problems.

36. Kurzweg committed a material breach of said oral agreement by continuing to accept salary payments during a leave of absence without seeking out or receiving professional substance abuse treatment.

37. Infolink suffered damages as a result of Kurzweg's material breach of the oral agreement.

**WHEREFORE**, Infolink demands judgment against Kurzweg, together with interest, costs and such other relief as this Panel deems just and proper.

**COUNT III**  
**Unjust Enrichment**

Infolink incorporates and realleges the allegations set forth in Paragraphs 1 through 29 as if fully set forth herein.

38. During Kurzweg's paid leave of absence, Infolink conferred a benefit upon Kurzweg, of which Kurzweg had knowledge.

39. Kurzweg voluntarily accepted and retained the benefit conferred in the form of salary and benefits without earning same and by continuing his deleterious conduct without seeking professional treatment.

40. The circumstances render Kurzweg's retention of the benefits inequitable unless Kurzweg pays to Infolink the value of the benefits conferred.

**WHEREFORE**, Infolink demands judgment against Kurzweg, together with interest, costs and such other relief as this Panel deems just and proper.

**DATED: MARCH 13, 2008**

**KLUGER, PERETZ, KAPLAN & BERLIN, P.L.**

*Attorneys for Respondents*

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By: /s/ Jason S. Oletsky  
JASON S. OLETSKY, ESQ.

**CERTIFICATE OF SERVICE**

We hereby certify that a true and correct copy of the foregoing has been e-copied and mailed this **13<sup>th</sup>** day of March, 2008, to Pedro Menocal, Esq., Menocal & Co., 9240 Sunset Drive, Suite 236, Miami, Florida 33173 and John Arrastia, Jr., Esq., 1001 Brickell Bay Drive, Ste. 2002, Miami, FL 33131, Pedro Menocal, Esq., Menocal & Co., 9240 Sunset Drive, Suite 236, Miami, Florida 33173 and Hugo Alvarez, Esq., 2701 South Bayshore Drive, Suite 605, Miami, FL 33133.

By: /s/ Jason S. Oletsky  
JASON S. OLETSKY