

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ROBERT JEAN, et al.)	CASE NO. 1:04 CV 1904
)	
Plaintiffs,)	JUDGE CHRISTOPHER A. BOYKO
)	MAGISTRATE JUDGE DAVID S.
v.)	PERELMAN
)	
THE STANLEY WORKS, et al.)	MOTION OF THE STANLEY WORKS
)	FOR A PROTECTIVE ORDER
Defendants.)	

Introduction

Defendant The Stanley Works (“Stanley”) hereby moves the Court to enter the attached Protective Order (Exhibit A) to govern the use of the discovery materials produced or developed by either party in the above-captioned Action.

The Complaint originally named as plaintiffs 103 current and former distributors of Stanley. The distributor agreements of 93 of the plaintiffs required that their disputes be submitted to arbitration, and therefore Stanley moved to compel arbitration for these 93 plaintiffs, agreeing that the 10 plaintiffs without arbitration clauses should remain in this forum. The Court granted Stanley’s motion, in part, compelling arbitration for most of these 93 plaintiffs with arbitration provisions, and referred the specific claims of a small subgroup of the 93 plaintiffs to Magistrate Perelman for a hearing. Eight of these plaintiffs testified before Judge Perelman. Based on the evidence adduced at the hearing and briefing thereafter, Stanley respectfully anticipates a ruling compelling those 8 plaintiffs to also arbitrate their claims. Thus, the 10 plaintiffs without arbitration provisions in their agreements will remain in this Action,

with the other 93 plaintiffs being compelled to pursue their claims in arbitration as agreed in their contracts.

At the last pre-trial, the parties agreed that discovery by the 10 remaining plaintiffs should commence subject to an appropriate protective order, and in November 2006, the 10 remaining plaintiffs served their First Set of Requests for Production of Documents. Prior to serving its Response, Stanley provided plaintiffs' counsel with a draft stipulated protective order (Exhibit A). Stanley's draft protective order included a provision commonly used in protective orders that would require the parties to use all materials exchanged in discovery in this Action solely for the prosecution or defense of the claims in the Action, and for no other propose. The specific provision included in Stanley's draft protective order stated:

Any and all Discovery Material shall only be used in the above-captioned Action (and any mediation thereof) and shall not be used, nor the fact that such material exists be disclosed, in any other litigation, arbitration or mediation or for any other purpose.

On or about January 26, 2007, Stanley served its written Responses and Objections to Plaintiffs' First Request for Production of Documents. (A copy is attached as Exhibit B).

Counsel for the parties conferred on Stanley's proposed protective order and agreed to its provisions other than the paragraph noted above, which prohibits discovery material from this Action from being used or its existence disclosed in other legal proceedings, including any separate arbitration or mediation. Counsel agreed that the issue would best be resolved through Stanley's moving this Court, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, for entry of the proposed Protective Order, and plaintiffs responding thereto.

Analysis

The discovery provisions of the Federal Rules of Civil Procedure are designed to provide the parties with information and testimony to assist them in the prosecution or defense of their

claims in an Action, and not for use in other matters or for some other purpose. Accordingly, provisions in protective orders governing discovery that limit the use of all discovery materials produced in an Action solely for purposes of the prosecution or defense of the Action are commonplace. The disputed provision in Stanley's draft protective order does no more than this: it seeks to limit the use of discovery materials developed in this Action solely to the prosecution and defense of this Action.

Here, such a provision is especially reasonable and appropriate given that plaintiffs' counsel also represents the 93 claimants who will be pursuing similar claims to the 10 litigation plaintiffs in an arbitration forum. Indeed, without this provision, discovery in this litigation will inevitably become a tool to circumvent the rights and expectations of the parties in the ensuing arbitration, and provide plaintiffs' counsel with discovery for purposes of the arbitration proceedings that would not otherwise be available in the arbitration forum. Moreover, discovery will be pursued and prolonged by delving into areas not at issue in the litigation, but potentially relevant to the arbitration.

In this regard, Courts broadly acknowledge that arbitrations do not provide for the broad discovery allowed in the Federal Rules of Civil Procedure, and that the streamlined discovery process is one of the distinct characteristics of an arbitration proceeding: "Indeed, when parties enter arbitration agreements at arms-length they typically should expect that the extent of discovery will be more circumscribed than in a judicial setting." *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 387 (6th Cir. 2005). The Sixth Circuit has recognized that "[a]n arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these accoutrements is the right to pre-trial

discovery.” *Lynchburg v. Douglas N. Higgins, Inc.*, 822 F.2d 1088, *6-*7 (6th Cir. 1987) (citing *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980)).

The arbitration rules of Judicial Arbitration and Mediation Services (“JAMS”), which govern the arbitrations of the 93 plaintiffs, exemplifies the limited discovery permitted in arbitrations. For instance, each party is entitled to one deposition of the opposing party. (*See* JAMS Rule 17, attached as Exhibit C). The need for additional depositions “*shall be determined by the Arbitrator* based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.” *See id.* (emphasis added).

Accordingly, allowing plaintiffs’ counsel to use and disclose discovery material they obtain in this Action in their prosecution of their arbitration claims for the other arbitration plaintiffs would undermine a significant part of the purpose and intent of the arbitration provisions this Court has upheld with regard to the majority of the plaintiffs. Not only could it negate the parties’ contractual expectations in the arbitration provisions, but it usurps the arbitrator’s ability to manage and control discovery in the arbitration as she or he sees fit.

The necessity for a provision limiting discovery in this litigation to be used only in this litigation is evident by Plaintiffs’ First Request to Produce in this case. Indeed, plaintiffs’ first set of document requests already makes clear that plaintiffs’ counsel plans to use this litigation as a vehicle to obtain discovery to be used in the arbitration. (*See* Defendant’s Responses and Objections to Plaintiffs’ First Request for Production of Documents, attached as Exhibit B). For example, plaintiffs’ document requests include numerous requests relating to Stanley’s relationship with JAMS and other alternative dispute resolution services, yet none of the 10 plaintiffs to the litigation have arbitration clauses in their distributor agreements:

REQUEST NO. 28:

Documents indicating, on a year-by-year basis, the number of mediations and/or arbitrations in which Mac was a party and J.A.M.S/Endispute provided mediation and/or arbitration services.

REQUEST NO. 29:

Documents indicating, on a year-by-year basis, the number of mediations and/or arbitrations in which Mac was a party and *any company, individual, or provider of alternative dispute resolution services other than* J.A.M.S/Endispute provided mediation and/or arbitration services.

REQUEST NO. 30:

All advertising documents, including screen shots of all internet postings or advertising which mention or detail Mac's relationship with J.A.M.S/Endispute.

(*See id.*, Request Nos. 28-30.)

Plaintiffs also request documents relating to Stanley's direct sales representative ("MDSR") program – yet, none of the 10 plaintiffs were MDSRs (but some of the 93 other plaintiffs were MDSRs):

REQUEST NO. 35:

Any and all documents by and between Mac and Stanley regarding the MDSR conversion program, by which Mac converted MDSRs to traditional distributors.

(*See id.*, Request No. 35.)

In addition, Plaintiffs' Requests for Production of Documents seek information related to distributor recruiting and initial training from 1985 to the present. However, the 10 plaintiffs remaining in this Action all became distributors prior to 1993 (all of the arbitration plaintiffs

became distributors after 1993). Therefore, documents related to distributor recruiting and initial training after 1992 are irrelevant to this Action and are requested solely for use in the arbitration.

The only purpose of these above-listed document requests is to further the arbitration plaintiffs' claims in the yet to come arbitration forum. Even if these requests (and some of the other requests to produce) are marginally relevant to this Action, they clearly were primarily devised to obtain discovery materials for use in the ensuing arbitration. In any event, the proposed protective order does not limit the plaintiffs' ability to request the same documents in the arbitration that are produced in discovery in this case or request that depositions be taken in the arbitration – it simply maintains the separateness of the proceedings and protects the arbitrator's independent decision-making over the arbitration. While an arbitrator may or may not allow plaintiffs' counsel to pursue these discovery materials (including depositions) in the arbitration forum, the issue should be addressed in the first instance by the arbitrator in the arbitration.

Accordingly, Stanley respectfully requests the Court enter the attached Protective Order to govern discovery in this case.

Respectfully submitted,

s/Steven A. Friedman

Thomas S. Kilbane (0005938)

tkilbane@ssd.com

Joseph C. Weinstein (0023504)

jweinstein@ssd.com

Steven A. Friedman (0060001)

sfriedman@ssd.com

SQUIRE, SANDERS & DEMPSEY L.L.P.

4900 Key Tower

127 Public Square

Cleveland, Ohio 44114-1304

(216) 479-8500 (telephone)

(216) 479-8780 (facsimile)

Attorneys for Defendant,

The Stanley Works

CERTIFICATE OF SERVICE

The foregoing was filed electronically this 20th day of February, 2007. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

s/Steven A. Friedman

One of the Attorneys for Defendant
The Stanley Works