

**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.	)	<b>REPLY IN SUPPORT OF THE</b>
	)	<b>MOTION OF THE STANLEY WORKS</b>
Defendants.	)	<b>FOR A PROTECTIVE ORDER</b>

In their opposition to Stanley's Motion for a Protective Order, Plaintiffs concede that the protections sought by Stanley in Paragraph 2 of the draft protective order will in no way hamper or affect Plaintiffs' ability to prosecute this action. Indeed, Plaintiffs' counsel readily admits that their objection to this paragraph is solely because it would prevent them from using depositions, documents and other discovery materials obtained in this litigation in the subsequent arbitration in which they represent other claimants.

While conceding this fact, Plaintiffs cite cases for the proposition that collateral litigants generally are entitled to the fruits of discovery in collateral litigation, but then wholly fail to address the key distinction that none of their cases deal with the use of information by litigants in an arbitration or other alternative dispute resolution proceeding; they address only the availability of information in other litigations. This key distinction, that is nowhere addressed in Plaintiffs' opposition, destroys Plaintiffs' argument.

As explained in Stanley's motion for a protective order, the limited discovery available in the arbitration proceeding is part of the important contractual arbitral provision which was

negotiated and agreed to by the parties. Arbitration is not merely a “procedural right,” as suggested by the Plaintiffs, to be readily disregarded. Rather, arbitration is a statutorily-protected substantive right, the protections of which should not be avoided through this litigation. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32, (1983) (holding that the Federal Arbitration Act “creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate”).

As pointed out in Stanley’s initial brief, under the arbitration rules of Judicial Arbitration and Mediation Services (“JAMS”), each party is entitled to one deposition of the opposing party. (*See* JAMS Rule 17, attached as Exhibit A). 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.” *Id.* In addition, although JAMS’ rules provide for document exchange, they do not provide for interrogatories or requests for admissions. *Id.*

As repeatedly recognized in cases addressing the availability of discovery in collateral litigation, federal civil discovery may not be used to subvert limitations on discovery in another proceeding. *See, e.g., Wilk v. American Medical Ass’n*, 635 F.2d 1295, 1300 (7th Cir. 1980). Without the requested protective order, discovery from 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.

In addition, unlike all of the case law cited by Plaintiffs, here Plaintiffs’ counsels’ seeking to obtain discovery for collateral disputes are the same counsel as those litigating here. As

pointed out in Stanley's initial brief, the opportunity for abusive discovery practices is obvious, and has already begun.<sup>1</sup>

Finally, despite Plaintiffs' unsupported protests to the contrary, the inclusion of paragraph 2 in the protective order will not prevent Plaintiffs' counsel from fully representing the interests of their clients in the arbitration forum in any way. The protective order, of course, does not require Plaintiffs' counsel to "forget" information learned in the litigation for purposes of the arbitration. It only limits Plaintiffs' counsel from using discovery material not otherwise available in the arbitration forum in that forum.<sup>2</sup> In addition, if such discovery material is made available to the Claimants in the arbitration forum, independent of its discovery in the litigation, then Claimants are not limited in any way from using these materials.

For these reasons, Stanley respectfully requests that this Court entered the proposed protective order to govern discovery in this case.

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<sup>1</sup> Plaintiffs have not explained how their requests for information as to Stanley's relationship with JAMS and other alternative dispute resolution services are relevant to this litigation, nor have Plaintiffs explained the relevance of their requests for documents relating to Stanley's direct sales representative program given that none of the parties to this litigation were involved in that program.

<sup>2</sup> The proposed protective order is not meant to limit the use of discovery from this litigation to impeach witnesses in the arbitration, when necessary. To the extent that modification of the proposed protective order is necessary to reflect the availability of discovery from this litigation for the limited purpose of impeachment, Stanley proposes modification of paragraph 2 of the proposed protective order as follows:

Any and all Discovery Material shall only be used as evidence 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, except for the limited purpose of impeachment.

Respectfully submitted,

*s/Steven A. Friedman* \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

The foregoing was filed electronically this 22nd day of March, 2007. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

*s/Steven A. Friedman*  
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One of the Attorneys for Defendant  
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