

**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
	)	
v.	)	<b>MEMORANDUM IN OPPOSITION TO</b>
	)	<b>MOTION TO COMPEL</b>
THE STANLEY WORKS, et al.,	)	<b>ARBITRATION AND DISMISS THE</b>
	)	<b>FIRST AMENDED COMPLAINT AS</b>
<u>Defendants.</u>	)	<b>TO CERTAIN PLAINTIFFS</b>

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## **SUMMARY OF THE ISSUES PRESENTED**

1. Is the record sufficient for the Court to Compel Arbitration?
2. Are the arbitration clauses of Stanley's Distributor Agreements unconscionable?
3. Are the limitations on Plaintiffs' remedies in the arbitration clauses of Stanley's Distributor Agreements enforceable?
4. Are the shortened limitations periods on Plaintiffs in the arbitration clauses of Stanley's Distributor Agreements enforceable?
5. Are the provisions in the arbitration clauses of Stanley's Distributor Agreements that require the use of J.A.M.S./Endispute ("JAMS") enforceable?
6. Are the unenforceable provisions in the arbitration clauses of Stanley's Distributor Agreements severable?

## **SUMMARY OF ARGUMENT**

Stanley's motion is premature, because Plaintiffs are attacking the entire set of agreements, including the Distributor Agreements, as unconscionable. Plaintiffs have adequately pleaded unconscionability; whether the agreements are in fact unconscionable requires facts beyond the pleadings, and must await later determination. Stanley's attempts to introduce new factual material on a motion to dismiss are procedurally and evidentiarily infirm.

Moreover, the arbitration provisions are unenforceable as written, because of several infirmities: the exclusion of substantive remedies otherwise available to Plaintiffs under Ohio statutes; the cost-sharing provisions; the statute of limitations; and a biased arbitration service. The unenforceable provisions are not severable from the rest of the dispute. Accordingly, Plaintiffs should be allowed to proceed, at this stage, in this forum.

The 93 Plaintiffs identified in paragraph 123 of the First Amended Complaint as “Declaratory Judgment Plaintiffs” (hereinafter, “Plaintiffs”), submit this memorandum in opposition to the Motion to Compel Arbitration and Dismiss the First Amended Complaint filed by Defendant The Stanley Works (“Stanley”) on January 10, 2005.

### **LEGAL STANDARD FOR DETERMINING THIS MOTION**

Stanley repeatedly avoids the appropriate standard for deciding this motion.<sup>1</sup> For example, Stanley seeks to attack Plaintiffs’ allegedly “false, conclusory allegations.” Stanley’s Memorandum in Support of Motion to Compel Arbitration and Dismiss the First Amended Complaint as to Certain Plaintiffs, filed January 10, 2005 (“Stanley’s Memo”) at 9. Stanley elsewhere attempts to use *dicta* from another U.S. District Court judge to establish JAMS’ purported impartiality. Stanley’s Memo at 6 (“JAMS is ‘comprised of distinguished attorneys, including many former judges’”). These arguments violate the standard required of this Court in deciding a motion to dismiss. Indeed, the *dicta* on JAMS’ alleged impartiality is inadmissible on any motion under the rules of evidence.

The U.S. Court of Appeals for the Sixth Circuit has made clear the appropriate standard for this Court on this motion:

“The court must construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief. *Mayer v. Mylod*, 988 F. 2d 645, 637-38 (6<sup>th</sup> Cir. 1993). A court may not grant a Rule

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<sup>1</sup> Plaintiffs presume that this Motion was brought pursuant to Fed. R. Civ. Proc. Rule 12, even though Stanley does not so state. Presumably, this motion is brought under subsection (b)(6) – failure to state a claim – because the arbitration clause allegedly precludes plaintiffs from proceeding in this Court. See *Parsley v. Terminix Intl. Co.*, 1998 U.S. Dist. LEXIS 22891, \*5 n.2 (S. D. Ohio 1998) (Exh. E to Stanley’s Memo). If Stanley contends that this Motion is only a motion to compel arbitration, and is not a motion under Rule 12, then Stanley is in default for failing to file an Answer.

Stanley cites the unpublished decision in *Hensel v. Cargill, Inc.*, 1999 U.S. App. LEXIS 26600, \*10 (6<sup>th</sup> Cir. 1999) (Exh. C to Stanley’s Memo), for the proposition that this case may be dismissed under the Federal Arbitration Act. Stanley’s Memo at 5. *Hensel*, however, was clearly decided on the basis of an evidentiary record, referring, for example, to an affidavit by a defendant. *Id.*, at \*2.

12(b)(6) motion based on disbelief of a complaint's factual allegations. *Lawler v. Marshall*, 898 F. 2d 1196, 1199 (6<sup>th</sup> Cir. 1990)."

*Bovee v. Coopers & Lybrand*, 272 F. 3d 356 (6<sup>th</sup> Cir. 2001).

### **STATEMENT OF FACTS**

Stanley, relying on an unpublished Sixth Circuit decision,<sup>2</sup> on page 2, footnote 2, of its Memorandum, attaches "the most recent version of the [Distributor] Agreement" as Exhibit A to its motion. Stanley then represents in its brief that "Although Mac's distributorship agreement has been revised at various times, the dispute resolution provision generally has remained the same." Stanley's Memo at 2. The Distributor Agreement attached as Exhibit A to Stanley's Memo is a form that was not in effect until August 31, 2004. From the pleaded allegations in paragraphs 5 and 6 of the First Amended Complaint ("Am. Compl."), it is clear that none of the Plaintiffs signed the attached Distributor Agreement.

For example, some Plaintiffs signed earlier versions of the Distributor Agreement that had materially different dispute resolution clauses. Some of those differences include the use of a different dispute resolution provider; different time frames for the notice, responses, and meetings of the parties; and no exceptions to the use of the dispute resolution process and limitations periods for claims relating to promissory notes and/or security agreements in favor of Stanley or third parties (such as AMEX), among other terms. Accordingly, the document submitted by Stanley is irrelevant and does not provide a sufficient basis for this Court to rule upon this Motion.

Turning to the facts, Plaintiffs, by and large, "were either mechanics or salespeople who joined the labor force during or shortly after high-school." Am. Compl., ¶ 165. "They thus lacked

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<sup>2</sup> Sixth Circuit Local Rule 28(g), cited in the legend of each unpublished case, provides, in relevant part: "Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." Stanley is improperly citing unpublished decisions as none of the listed exceptions to Local Rule 28(g) apply here.

business acumen and experience at the time the agreements were executed, and Mac clearly had superior bargaining power.” *Id.*

Almost always, 17 or more different agreements (in addition to the Distributor Agreement) were presented to plaintiffs on the day of signing in a “cattle call” procedure immediately following orientation in Columbus, Ohio. *Id.*, ¶ 166. Mac drafted the agreements, did not explain the terms to Plaintiffs, and did not verbally invite Plaintiffs to seek counsel. *Id.*, ¶ 167.

The contracts of adhesion signed by the Plaintiffs (*Id.*, ¶ 156) were completely lopsided in favor of Stanley. *Id.*, ¶¶ 157-163. In particular, the dispute resolution clauses of the agreements favor Stanley over the Plaintiffs. Stanley did not disclose its relationship with JAMS, or the cost-splitting procedures. *Id.*, ¶¶ 128, 168. Stanley did not disclose the discovery limitations under JAMS’ rules. *Id.*, ¶ 169. The arbitration clause also severely limits Plaintiffs’ remedies under Ohio statutory law. ¶¶ 127, 170. Most important among those limitations is the requirement for commencing actions within one year, where Ohio law has a 15-year statute of limitations for breach of a written contract. *Id.*, ¶ 162. The one-year limitation period Stanley attempts to impose on Plaintiffs is even more egregious, in that it does not prevent Stanley from bringing certain actions against distributors beyond that period (the clause attempts to bar Plaintiffs from proceeding beyond that period, but not Stanley). Stanley’s Memo, Ex. A at 19 (§ 19.2(f)).

“Mac is, and has been since at least 1996, a ‘repeat player’ using the services of JAMS. JAMS cites work with Mac in its promotional materials on the internet.” Am. Compl., ¶ 126. Stanley does not disclose its relationship with JAMS to distributors prior to signing the agreement. Unlike AAA, JAMS is a for-profit entity owned by its own “neutrals.” See <http://www.jamsadr.com/welcome/welcome.asp> (“In 1999, JAMS was purchased by a visionary group of neutrals who had been with the predecessor organization.”); see also State of Delaware

record of Division of Corporations, [attached as Exhibit “A”]; thus, it is further misleading that the Distributor Agreements incorrectly refer to JAMS as “non-profit.” Stanley’s Memo, Ex. A at 19.<sup>3</sup>

## LAW & ARGUMENT

### STANLEY’S ARBITRATION CLAUSE IS UNCONSCIONABLE

As set forth in one of the cases cited by Stanley, unconscionability of the arbitration clause is an issue for this Court to decide.

“Although the FAA provides that arbitration agreements are valid, such provisions may be attacked under ‘such grounds as exist at law or in equity for the revocation of a contract.’ 9 U.S.C. § 2. Recognized defenses include fraud, duress and unconscionability. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L. Ed. 2d 902 (1996). . . . [W]hen a party attacks the arbitration provision by asserting that the provision itself is unconscionable, the enforceability of the arbitration provision is an issue for the Court. [Citation omitted.]”

*Parsley, supra*, at \*12-13.

Thus the Federal Arbitration Act provides that *only* when a court is “satisfied that the making of the agreement for arbitration . . . is not in issue,” should the court compel the parties to arbitrate. 9 U.S.C. § 4. In the Sixth Circuit:

“When considering a motion to stay proceedings and compel arbitration under the Act, a court has four tasks:

first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

*Stout v. J. D. Byrider*, 228 F. 3d 709, 714 (6<sup>th</sup> Cir. 2000).”

*Garrett v. Hooters-Toledo*, 295 F. Supp. 2d 774, 778-79 (N. D. Ohio 2003).

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<sup>3</sup> There is a small, related non-profit entity named the “JAMS Foundation.” That entity is not involved in resolving commercial disputes.

Thus, Plaintiffs assert that the first step – determining whether the parties agreed to arbitrate – is critical to a determination of this motion. However, it is premature for the Court, at this time, to determine that Stanley has established that Plaintiffs’ unconscionability defense is not valid. As pleaded, Plaintiffs have established unconscionability sufficiently to proceed.

The determination of unconscionability is a matter of state law, namely Ohio law. *Id.*, at 779; *Morrison v. Circuit City Stores, Inc.*, 317 F. 3d 646, 666 (6<sup>th</sup> Cir. 2003). As the Sixth Circuit recently confirmed:

“Under Ohio law, the unconscionability doctrine has two components:

(1) substantive unconscionability, *i.e.*, unfair and unreasonable contract terms, and (2) procedural unconscionability, *i.e.*, individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible. Both elements must be present to find a contract unconscionable.

*Jeffrey Mining Prods., L.P. v. Left Fork Mining Co.*, 143 Ohio App. 3d 708, 758 N.E. 2d 1173, 1181 (Ohio Ct. App. 2001) (quotation omitted); *accord Dorsey v. Contemporary Obst. & Gyn., Inc.*, 113 Ohio App. 3d 75, 680 N.E. 2d 240, 243 (Ohio Ct. App. 1996).”

*Id.* Here, Plaintiffs have plead both elements sufficiently, and Stanley has not refuted those elements.

Although the plaintiff in *Morrison* had difficulty establishing procedural unconscionability, Plaintiffs here have met the Ohio law standard. As the Sixth Circuit stated:

“In determining procedural unconscionability, Ohio courts look to ‘factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible.’ *Cross v. Carnes*, 132 Ohio App. 3d 157, 724 N.E. 2d 828, 837 (Ohio Ct. App. 1998).”

*Id.*

As set forth in the Amended Complaint, and as summarized in the Statement of Facts section above, Plaintiffs were in a weak bargaining position. Plaintiffs lacked education beyond

high-school. Although many were mechanics, mechanics generally work in a shop under the supervision of someone who runs the “business.” Thus, they lacked the business acumen to understand the terms of Stanley’s Mac Tool distributorship business, which requires evaluation of the economic viability of a mobile tool distributorship business. Stanley drafted the agreements, which were presented to Plaintiffs on a “take it or leave it” basis, with no ability to make alterations. Stanley did not explain the key terms in the ADR Clauses to the Plaintiffs, especially the cost-splitting, limitation of remedies, and exclusive arbitrator provisions.

As far as substantive unconscionability, as set forth in the Amended Complaint, and as will be clear from the Court’s reading of the Distributor Agreements, the agreements are completely one-sided, in favor of Stanley, unfair and unreasonable. Am. Compl., ¶¶ 158-163.

Therefore, Stanley cannot compel arbitration unless or until this Court can make individualized factual determinations that each of the 93 plaintiffs subject to this motion cannot make out an unconscionability defense. Stanley has not presented this Court with a record sufficient to do this, even though Stanley possesses information about each Plaintiffs’ background; from the applications for distributorships each Plaintiff filed with Stanley.

We now turn to specific provisions within the dispute resolution clauses, arguing in the alternative, that should this Court decide to compel arbitration, at the very least, these illegal provisions are unenforceable. Plaintiffs continue to assert the entire agreements, including the dispute resolution provisions, are unconscionable.

**STANLEY’S LIMITATIONS ON REMEDIES IS UNENFORCEABLE**

As Stanley’s Memo (at 7) acknowledges, the arbitration clause contains a limitation of damages precluding the arbitrator from awarding punitive, exemplary, indirect, special, consequential or incidental damages. Stanley relies on pre-2003 cases to argue that such limitations are valid and enforceable. Stanley’s Memo at 7-8. In a footnote, Stanley attempts to distinguish the

most recent cases, such as *Morrison, supra*, by asserting that the holding of *Morrison* and other cases on point are restricted to “only ... cases, unlike here, where plaintiffs allege violations of federal statutory law – generally, federal employment antidiscrimination law.” Stanley’s Memo at 8 n.5. That distinction is a false one.

Although *Morrison* involved a federal statutory claim, its language was not so restrictive.

As the Sixth Circuit said:

“We also conclude that the limitations that the Circuit City arbitration agreement places on the damages a claimant may recover from arbitration are unenforceable. It is well established that ‘a party does not forgo the substantive rights afforded by [a] statute [when she agrees to arbitrate a statutory claim but] only submits to their resolution in an arbitral, rather than a judicial, forum.’”

*Morrison, supra*, 317 F.3d at 670. Clearly, the language is intended to apply to state as well as federal statutes – arbitration should only be a change of forum, not a change of substantive rights. Many of Plaintiffs’ claims are under state statutes, such as ORC § 2315.21 (Am. Compl., ¶ 125), and §§ 1301.01 *et seq.* (*Id.*, ¶ 172), and “enforcement of the arbitration agreement would require [Plaintiffs] to forego [their] substantive rights to the full panoply of remedies” under the state statutes. *Morrison*, 317 F. 3d at 670.

Indeed, in discussing the enforceability of cost-splitting provisions, the Hon. James G. Carr of this District recently affirmed that the concept extends to non-statutory claims as well.

“The Supreme Court and the Sixth Circuit recognize a ‘prohibitive cost’ defense to a demand to enforce arbitration of federal statutory claims.

\* \* \*

As I explained previously in *Rickard v. Teynor’s Homes, Inc.*, 279 F. Supp. 2d 910, 915-16 (N. D. Ohio 2003), I agree with the court in *Ting*, ‘it is hard to conceive how an adhesive contractual provision which prevents someone from effectively vindicating her non-statutory legal rights would not be substantively unconscionable.’ *Ting [v. AT&T]*, 182 F. Supp. 2d 902, 933 (N.D. Cal. 2002)]. I will, therefore, apply the same substantive unconscionability analysis to both statutory and non-statutory claims.”

*Garrett, supra*, 295 F. Supp. 2d at 780 n.2.

As in *Morrison*, the limitation of remedies in the arbitration provision at issue “does more than limit [Plaintiffs’] potential monetary remedy ... by limiting ... awards. In addition, it also prevents the remedial principles of [the statute] from being effectuated....” 317 F. 3d at 672. For example, “The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.” *Julian v. Creekside Health Ctr.*, 2004 WL 1376214, \*2, 2004-Ohio 3197 (Ohio App. 7 Dist), ¶ 10 [Exhibit B], quoting *Moscovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 651, 635 N.E. 2d 331, 1994-Ohio-324; see also *Roberts v. Mason*, 10 Ohio St. 277, 280 (1859) (the power which punitive damages “confers upon a jury, may, in practice, operate as a salutary restraint upon the evil passions of bad men.”). That remedial, punitive and deterrent purpose would be frustrated by the limitations on liability imposed by this clause. Accordingly, the damages limitations provisions are unenforceable.

#### **STANLEY’S SHORTENED LIMITATIONS PERIOD IS UNENFORCEABLE**

Although not discussed in Stanley’s Memo, the time limitations in the “Resolution of Disputes” section of the Distributor Agreements are also unenforceable. There are multiple time limitations.<sup>4</sup> First, there is an unspecified time period before which Plaintiffs must send to Stanley a “written notice of the dispute.” Stanley’s Memo, Exh. A at § 19.2(b). Then, “If the matter has not been resolved within 60 business days of the disputing party’s written notice, or if the responding party will not meet and/or otherwise communicate within 30 days of the written response, either party may initiate mediation ....” *Id.*, § 19.2(c). Then, “If the matter has not been resolved pursuant to mediation within 60 business days of the initiation of such procedure, or if either party will not participate in a mediation, the controversy shall be settled by arbitration ....” *Id.*, §19.2(d). Then, with the express exception of claims by Stanley to recover on promissory notes executed by the distributors, “any and all claims, controversies or other disputes arising out of or relating to this

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<sup>4</sup> As discussed above, these terms are not the same for all Plaintiffs.

Agreement, the relationship between you and us or your operation of the Business, brought by any party hereto against the other, shall be commenced within one (1) year from the occurrence of the facts giving rise to such claim or dispute, or such claim or dispute shall be barred.” *Id.*, § 19.2(f).

Ohio law provides a fifteen year statute of limitations for breach of a written contract. ORC § 2305.06. There is a four-year statute for claims sounding in fraud and other torts. ORC § 2305.09(C). Thus, the time limitations under these agreements are unreasonable and unfair.

Moreover, the one-year limitation is particularly unconscionable because it exempts the main claims that Stanley would generally bring against a distributor, namely an action on their promissory notes.<sup>5</sup> Thus, because the provision is not bilateral, it should be unenforceable.

In addition to the insufficient time for bringing a well-supported claim under the agreement, the clause attempts to prevent Plaintiffs from invoking the continuing violation and tolling doctrines, including fraudulent concealment. The Ninth Circuit has struck down one-year limitations periods on the grounds that they deprived the plaintiff of the benefit of the continuing violation doctrine. *Ingle v. Circuit City Stores, Inc.*, 328 F. 3d 1165, 1175 (9<sup>th</sup> Cir. 2003); *Circuit City Stores, Inc. v. Adams*, 279 F. 3d 889, 894 (9<sup>th</sup> Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002); *see also, e.g., Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4<sup>th</sup> 1519, 60 Cal. Rptr. 2d 138, 152 (1997) (striking down one-year statute of limitation that expressly provides it is not subject to tolling).

In this District, the *Garrett* case involved a limitation requiring that claimants file a request for mediation within ten days of the day the claim arose. *Garrett*, 295 F. Supp. 2d at 781. Relying on another case finding a 30-day period unreasonable, the *Garrett* court found the provision “unreasonable and unfair” and therefore unenforceable. *Id.*, at 782.

The arbitration provision also provides a forum selection clause. Stanley’s Memo, Exh. A at § 19.2(d) (“...the place of arbitration shall be Columbus, Ohio.”). In *Garrett*, Judge Carr also found

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<sup>5</sup> This exemption was not included in some earlier versions of the Distributor Agreement.

a mediation requirement with a forum selection clause to be unenforceable. 295 F. Supp. 2d at 783.

As Judge Carr found after extensive analysis:

“There can be no doubt that the mediation requirement and the ADR Agreement as a whole are written to discourage potential claimants from pursuing their claims; the agreement’s rules impose burdens and barriers that would routinely deter former employees from vindicating their rights. Even if a former employee were able successfully to overcome these barriers, it appears to be very unlikely that she would prevail.

On balance, the agreement is unreasonable and unfair because it require[s] claimants to participate in a process designed to be, and which is, excessively and unjustifiably favorable to Hooters. The requirement to mediate, which must be undertaken before arbitration can be sought, is substantively unconscionable. The unconscionability of this precondition to arbitration renders the balance of the ADR Agreement unconscionable and unenforceable.”

*Id.* This case presents a nearly identical situation, and for those same reasons, the arbitration clause is unenforceable. At the very least, the provisions shortening the time limitations for Plaintiffs, and those provisions excluding many of Plaintiffs’ substantive remedies, are unenforceable.

#### **STANLEY’S COST-SPLITTING PROVISION IS UNENFORCEABLE**

Stanley does not dispute that requiring Plaintiffs to pay one-half of the arbitrator’s fees in advance is onerous and excessive, and that arbitration of this case will cost “thousands of dollars.” Am. Compl., ¶ 128. Instead, Stanley asserts that “The Sixth Circuit has held that excessive arbitration fees may invalidate arbitration agreements **only** in cases where plaintiffs are attempting to vindicate federal statutory rights.” Stanley’s Memo at 8, *citing Morrison, supra*.<sup>6</sup>

As explained above, however, on page 8, the “prohibitive cost” defense to enforcement of arbitration clauses extend to other state statutory and non-statutory claims as well. *Garrett, supra*, 295 F. Supp. 2d at 780. Since Plaintiffs’ allegations are presumed true, this Court must accept, at

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<sup>6</sup> The only post-*Morrison* case cited by Stanley, *Anderson v. Delta Funding Corp.*, 316 F. Supp. 2d 554, 565 (N.D. Ohio 2004), does not even cite *Morrison*. Moreover, it does not state that a cost-shifting defense is limited to only federal statutes like TILA. Instead, it says that unconscionability is a defense to any arbitration agreement. Thus the case is entirely inapposite.

this point, that “Plaintiffs, who have faced financial ruin from their association with Mac, do not have the ability to pre-pay arbitration costs and fees.” Am. Compl., ¶ 128.

The record on this issue at present is insufficient to determine as a final matter whether the cost-splitting provision is substantively unconscionable. Courts facing this situation have instead granted leave to plaintiffs to provide a detailed showing of the costs associated with arbitration and those personal financial records showing an inability to pay in advance. *Garrett, supra*, 295 F. Supp. 2d at 781.

The cost-splitting provision deprives Plaintiffs, as a practical matter, of their substantive rights, and accordingly is unenforceable. Thus, at the very least, leave should be granted to Plaintiffs to make a showing, after discovery is permitted on this issue, with regard to the costs of arbitrating these disputes. As the District Court said in *Rickard v. Teynor’s Homes, Inc.*, 279 F. Supp. 2d 910, 918 (N.D. Ohio 2003):

“Plaintiff will, however, be granted leave to amend to demonstrate that, given her financial condition and the terms of this Addendum, she has, if compelled to engage in arbitration in lieu of this suit, no redress for the vindication of her legal rights and this arbitration agreement is unconscionable.

[FN 8:] Because of the possibility that plaintiff may have no recourse to vindicate her legal rights, it is fair to grant plaintiff leave to produce the required information. If arbitration is supposed to allow litigants to avoid the formalities, expense, and delays inherent in the court system, its underlying policies will be defeated when arbitration agreements trigger costs depriving plaintiffs of a forum to vindicate their rights. As the court in *Mendez v. Palm Harbor Homes*, recently explained:

‘Avoiding the public court system to save time and money is a laudable societal goal. But avoiding the public court system in a way that effectively denies citizens access to resolving everyday societal disputes is unconscionable. Goals favoring arbitration of civil disputes must not be used to work oppression. When the goals given in support of contract clauses like this are used as a sword to strike down access to justice instead of as a shield against prohibitive costs, we must defer to the overriding principle of access to justice.’

[111 Wash.App. 446, 45 P.3d 594,] 605.”

Stanley's cost-splitting provision effectively deprives Plaintiffs of a remedy, and is therefore an unconscionable denial of access to justice.<sup>7</sup>

**STANLEY'S EXCLUSIVE USE OF J.A.M.S./ENDISPUTE REQUIREMENT IS UNENFORCEABLE**

Section 19.2 of the Distributor Agreement (Stanley's Memo, Exh. A) requires that both mediation and arbitration take place through J.A.M.S./Endispute ("JAMS"). Stanley does not deny that its Mac unit is a "repeat player" using the services of JAMS. Am. Compl., ¶ 126.

First, Stanley makes the specious argument that "while Mac may be a 'repeat player,' so are its distributors, who are responsible for half of JAMS overall arbitration and mediation fees. No bias is evident from this arrangement." Stanley's Memo at 5. Stanley ignores the obvious, that it is as a direct result of Stanley's Distributorship Agreements that JAMS has all of this business in the first place. If JAMS' decision angers a distributor, what impact would that have on JAMS? But if JAMS' decision angers Stanley, it could change all of its contracts, and switch thousands of potential future distributor cases to another set of arbitrators. Further, distributors are not afforded an opportunity to alter Stanley's Distributor Agreements to choose another dispute resolution service provider.

Stanley also attempts to introduce statements from other courts as evidence of JAMS impartiality. Such "facts," however, are not beyond dispute such that they are susceptible to judicial notice under Fed. R. Evid. Rule 201.<sup>8</sup> Moreover, Stanley has not complied with the proper

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<sup>7</sup> Stanley makes a bizarre argument that Plaintiffs "expect" class certification. Stanley's Memo at 9. While it is true that Plaintiffs expect some class will be certified, the actual allegation in the Complaint is that "If this action is certified as a class action, the costs per class member would be quite low." Am. Compl., ¶ 128. The allegation is a statement of fact, and reflects no expectation that this Court will certify a class. Accordingly Stanley's argument is specious. Of course, class certification will be addressed after resolution of the pending motions.

<sup>8</sup> Even if the Court were to take judicial notice of the JAMS rules submitted as Exhibit D, that would not convert this motion from one based on matters within the pleadings. Fed. R. Civ. Proc. Rule 12(b) provides that once "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." However, "We have taken a liberal view of what matters fall within the pleadings for purposes of Rule 12(b)(6). If referred to in a complaint and central to a claim, documents attached to a

procedures under that rule for requesting that this Court take judicial notice of JAMS' alleged impartiality. Accordingly, this Court should ignore the citations to the U.S. District Court for the Western District of Washington and the U.S. Court of Appeals for the First Circuit. Stanley's Memo at 6. In any event, the First Circuit case involved a motion to relieve a plaintiff from an arbitral judgment, which is a much different standard than this motion.

To the extent Stanley relies on *The Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 325 (6<sup>th</sup> Cir. 1998), that case arose on a much more developed factual record by cross-motions for summary judgment. Moreover, it is distinguishable. Although in *The Andersons*, the party moving to compel arbitration was a member of the association providing arbitration services, "it is also true that a number of farmer-owned cooperatives are also NGFA members." *Id.*, at 326. Moreover, *The Andersons* Court relied on the fact that "The parties choosing the arbitration panel have no pecuniary relationship with The Andersons, and, in addition to providing for other procedural safeguards, the NGFA rules provide that the arbitrators may not themselves have a commercial interest in a particular dispute." *Id.* While the JAMS rules do provide for disqualification on narrow grounds, JAMS (the organization) chooses the pool of arbitrators from which the parties select an arbitrator. Plaintiffs cannot determine from the opinion what "other procedural safeguards" existed in *The Andersons*.

Instead, the case at bar is like the more recent decision in *Floss v. Ryan's Family Steakhouses, Inc.*, 211 F.3d 306 (6<sup>th</sup> Cir. 2000). As described by that Court, the arbitration service provider, EDSI, selected a list of adjudicators from each pool of arbitrators. *Id.*, at 313-14 n.7. Although the process appeared facially reasonable, the Court expressed "serious reservations as to whether the arbitral forum provided under the current version of the EDSI Rules and Procedures is

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motion to dismiss form part of the pleadings. [Citation omitted.] At this preliminary stage in litigation, courts may also consider public records, matters of which a court may take judicial notice, and letters of decision of governmental agencies." *Armengau v. Cline*, 7 Fed. Appx. 336, 344; 2001 U.S. App. LEXIS 3578, \*\*16 (6<sup>th</sup> Cir. 2001) (Stanley's Memo, Exh. B). Thus, this motion remains one determined by matters within the pleadings.

suitable for resolution of statutory claims.” *Id.*, at 314. Specifically, “the neutrality of the forum is far from clear in light of the uncertain relationship between [the employer] and EDSI.” *Id.*

The record in that case did not reflect whether EDSI, in contrast to AAA, was a for-profit entity. JAMS is a for-profit entity owned by its neutrals, according to the web site cited by both parties. Still, the Sixth Circuit questioned whether an alleged financial relationship between the employer company and EDSI, compounded by EDSI’s pecuniary interest in retaining its arbitration services contract, might foster bias in favor of the employer client. Most significantly to this case, the Sixth Circuit found that “in light of EDSI’s role in determining the pool of potential arbitrators, any such bias would render the arbitral forum sufficiently unfair.” *Id.*, citing *Cole v. Burns Int’l Sec. Servs.*, 323 U.S. App. D.C. 133, 105 F. 3d 1465, 1482 (D.C. Cir. 1997) (“At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections.”). JAMS is not a sufficiently neutral forum with regard to Stanley’s Mac Tools division, and accordingly, provisions requiring the use of JAMS are unenforceable.

Furthermore, Stanley deceptively portrayed JAMS as a non-profit corporation in the Distributor Agreements, which is not true. Thus the agreement in the ADR provision was also procured by fraud and is, on that basis, unenforceable.

#### **STANLEY’S REFUSAL TO PARTICIPATE IS IRRELEVANT**

Stanley quibbles over allegations regarding participation in the arbitration process. Stanley’s Memo at 9. The allegation at paragraph 129 of the Amended Complaint is necessary to establish that there is an actual controversy over the arbitration provision, because the cause of action is for declaratory relief. While such an allegation is necessary to invoke this Court’s powers under the Declaratory Relief Act, the allegation is irrelevant to this motion to dismiss and compel arbitration.

Stanley also argues, in footnote 7 on that same page, the fact that Plaintiffs have given notice to Stanley of their claims, and are mediating a few cases constitutes an admission of the validity of the agreements. Obviously, Stanley cites no case authority for such an absurd proposition. There is nothing wrong with attempting non-binding mediation at any point in these proceedings (Plaintiffs assume that at some point this Court will encourage voluntary ADR methods to resolve this matter), and, according to the Distributor Agreements, Plaintiffs must give notice to Stanley in order to preserve any of their rights which they seek to enforce.

Finally, Stanley sets up a “straw man” argument about fraudulent inducement. Stanley’s Memo at 11. As set forth above, Plaintiffs are relying on unconscionability, not fraud-in-the-inducement, to attack the arbitration requirement.

#### **THE UNENFORCEABLE PROVISIONS ARE NOT SEVERABLE**

Recently, and since deciding *Morrison, supra*, the Sixth Circuit found that where a cost-splitting provision was invalid, it was appropriate to refuse to enforce the arbitration clause as a whole.

“Under the contrary approach, an employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreement it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter.”

*Cooper v. MRM Investment Co.*, 367 F. 3d 493, 512 (6<sup>th</sup> Cir. 2004) (quotations omitted). Of course, that case did not have a severability clause in the contract, but the Court approved the point as a matter of “public policy,” if not contract interpretation.

In another case, where there was a severability clause, the U.S. Court of Appeals for the Third Circuit used an eloquent analogy regarding trees:

“Severance is not an appropriate remedy in this case. The Hourly Employee Contract does contain a clause providing that the remaining agreement shall remain in force even if any provision is held to be invalid. Even taking this provision into account, we must still find that unconscionability permeates the agreement between plaintiffs and [employer] and thoroughly taints its central purpose of requiring the

arbitration of employment disputes. [Citation omitted.] Confronting only two illegal provisions, we emphasized that ‘[y]ou don’t cut down the trunk of a tree because some of its branches are sickly.’ *Spinetti [v. Service Corp. Int’l]*, 324 F. 3d [212,] 214 (3<sup>rd</sup> Cir. 2003). Plaintiffs in this case were given no real choice but to accept arbitration on [employer]’s terms. In addition to facing a burdensome requirement to pay the arbitrator’s fees and costs if unsuccessful, an employee must comply with an unreasonable time limitation, lose any rights to attorney’s fees, and give up the chance to receive any relief beyond either reinstatement or ‘net pecuniary damages.’ These draconian terms unreasonably favor [employer] to the severe disadvantage of plaintiffs and other St. Croix employees. The cumulative effect of so much illegality prevents us from enforcing the arbitration agreement. Because the sickness has infected the trunk, we must cut down the entire tree.”

*Alexander v. Anthony Int’l, L.P.*, 341 F. 3d 256, 271 (3<sup>rd</sup> Cir. 2003).

Likewise in this case, Plaintiffs are required to pay half the arbitrator’s fee in advance, to arbitrate in Columbus, Ohio, regardless of where they reside; to comply with unreasonable time limitations; give up rights to punitive damages, special damages, incidental damages, exemplary damages, indirect damages, consequential damages, and attorneys’ fees; use an arbitration service provider that is biased toward Stanley and misrepresented to be “non-profit”; and be restricted by limited discovery rules that also favor corporate defendants. While each of those provisions could conceivably be severed, the “sickness has infected the trunk,” and “permeates” the arbitration clause to such a degree that it should be stricken in its entirety.

### **CONCLUSION**

For all of the foregoing reasons, Stanley’s Motion to Compel Arbitration and Dismiss the First Amended Complaint as to Certain Plaintiffs must respectfully be denied.

Several of the Plaintiffs who are subject to this Motion were named as class representatives of a proposed class. Accordingly, *if* after developing the necessary record, the Court determines that arbitration should be required, Plaintiffs request that any such order provide that the arbitrator determine whether arbitration on a class-wide basis should be maintained.

**RESPECTFULLY SUBMITTED:  
THE MAC TOOL LITIGATION GROUP**

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### **CERTIFICATE OF SERVICE**

The foregoing Memorandum in Opposition to Defendants' Motion to Compel Arbitration and Dismiss the First amended Complaint as to Certain Plaintiffs was filed electronically this 27<sup>th</sup> day of February, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

s/Andre' F. Toce

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