

**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 KATHLEEN O'MALLEY
)	
v.)	
)	
THE STANLEY WORKS, et al.)	MEMORANDUM IN SUPPORT OF
)	MOTION TO COMPEL ARBITRATION
)	AND DISMISS THE FIRST AMENDED
Defendants.)	COMPLAINT AS TO CERTAIN
)	PLAINTIFFS

INTRODUCTION

The Stanley Works (“Stanley”) is a worldwide producer of tool products and security solutions for professional, industrial and consumer use. Stanley’s Mac Tools (“Mac”) division is a leader in the professional hand tool industry. Mac manufactures professional grade tools at advanced manufacturing plants across America. Those tools are sold throughout the United States by a network of independent distributors who call on commercial users, such as auto shops, mechanics and factories. Mac tools have been sold by independent business men and women for more than sixty years. At all relevant times, between 1500 and 2000 of these independent business people had contracts with Mac to distribute tools.

Plaintiffs are 103 current and former distributors of Mac Tools. In their 12-count First Amended Complaint, plaintiffs attempt to state a myriad of tort and contract claims, both

individually and on behalf of a purported class of all Mac distributors. All of plaintiffs' alleged claims arise out of, or are related to, their individual distribution agreements with Mac.

Each of the 103 plaintiffs separately contracted with Mac and has an agreement setting forth the parties' rights and obligations. And, 93 of the 103 plaintiffs and putative class representatives have agreements with Mac that require all disputes to be submitted to ADR, including final, binding arbitration.¹ In Count I of the First Amended Complaint, these "declaratory judgment plaintiffs" seek a declaration that the arbitration clauses in their agreements with Mac are not enforceable. As shown below, these efforts are without merit and the Court should compel each of the 93 plaintiffs with ADR clauses to arbitrate all of their claims. Because all of the claims of these 93 plaintiffs are subject to the arbitration provisions in their agreements, the Court should dismiss all of the claims filed by these plaintiffs.

BACKGROUND

Mac Tool distributors are entrepreneurs who purchase tools from Mac and resell them to their customers, commercial purchasers in a variety of industries (First Amended Complaint ("Am. Compl.") ¶¶ 15, 17). Each Mac Tool distributor plaintiff has a written agreement with Mac that governs his or her business relationship. Ninety-three plaintiffs have contracts with Mac that have dispute resolution provisions that include binding arbitration. (Am. Compl. ¶ 123.) Although Mac's distributor agreement has been revised at various times, the dispute resolution provision generally has remained the same.² The parties' contracts provide, except for

¹ The other ten named plaintiffs do not have arbitration provisions in their agreements with Mac. Concurrently with this motion, Mac is filing a motion to dismiss all of the claims of these additional ten plaintiffs.

² Although not attached to plaintiffs' first amended complaint, plaintiffs' distributorship contracts are deemed part of the pleadings and may be considered by the Court because plaintiffs refer to them in their complaint, and they are central to plaintiffs' claims. Armengau v. Cline, 7 Fed. Appx. 336, 344 (6th Cir. 2001) (Exhibit B).

disputes relating to promissory notes and/or security agreements, that the dispute resolution provisions are “the only procedure for the resolution of any and all controversies, disputes or claims of any nature whatsoever arising out of or related to this Agreement or any agreement” between Mac and the distributor. (Distributorship Agreement ¶ 19.2 (emphasis in original); the most recent version of the Agreement is attached hereto as Exhibit A).

The agreement provides a framework for resolving disputes between Mac and a distributor. Step one consists of informal negotiation between the parties. Step two, which is optional, is mediation. The third and final step is binding arbitration, as follows:

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 by a sole arbitrator in accordance with the J.A.M.S./Endispute Arbitration Rules and Procedures. Any mediator or arbitrator shall be mutually selected by you and us or, if you and we cannot agree, by J.A.M.S./Endispute, Inc. in accordance with the J.A.M.S./Endispute Rules and Procedures. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §§ 1-16. Courts of the State of Ohio or any U.S. District Court located therein will have such jurisdiction over enforcement of arbitration and/or enforcement of the Agreement. Judgment upon the award rendered by the arbitrator may be entered by any state or federal court in Ohio having jurisdiction thereof. Unless the parties agree otherwise in writing, the place of arbitration shall be in Columbus, Ohio. The arbitrator is not empowered and shall not, award punitive, exemplary, indirect, special, consequential or incidental damages or any other damages in excess of any limit on direct damages set forth in this Agreement, whichever is lower. If either party is required to compel arbitration, that party shall be reimbursed for the costs and expenses incurred therewith.

(Agreement, ¶ 19.2(d) (emphasis in original).)

Even though plaintiffs entered into the distributorship agreements voluntarily and purport to seek the benefits of those agreements, they also seek a declaration that the arbitration clause is invalid. The declaratory judgment plaintiffs cite four alleged (but insufficient) bases to avoid

the arbitration: (1) Mac is a repeat user of the dispute resolution service chosen by the agreement (Am. Compl. ¶ 126); (2) the distributorship agreements limit recoverable damages (Am. Compl. ¶ 127); (3) plaintiffs must pay half of the arbitrator's fees (Am. Compl. ¶ 128); and (4) Mac has refused to proceed with the ADR proceedings (Am. Compl. ¶ 129). Elsewhere in the complaint, plaintiffs make unsupported, conclusory allegations that the arbitration clause is unconscionable (Am. Compl. ¶¶ 165-168) and that Mac somehow fraudulently induced plaintiffs to enter into the distributorship agreements. (Am. Compl. ¶¶ 191-196).

As a matter of law, none of plaintiffs' reasons to avoid arbitration is valid. Accordingly, Mac respectfully requests that this Honorable Court compel arbitration as to all claims brought against Mac by the 93 ADR plaintiffs. In addition, pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, Mac respectfully requests that the First Amended Complaint be dismissed as to these 93 plaintiffs.

LAW AND ARGUMENT

THE ARBITRATION CLAUSE IN THE DISTRIBUTORSHIP AGREEMENTS BETWEEN PLAINTIFFS AND MAC IS VALID AND SHOULD BE ENFORCED.

The Federal Arbitration Act provides that an arbitration clause in a transaction involving commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. When a court is "satisfied that the making of the agreement for arbitration... is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. The Federal Arbitration Act establishes a liberal policy favoring arbitration agreements, and any doubts regarding arbitrability should be resolved in favor of arbitration over litigation. See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); Fazio v. Lehman Bros., Inc., 340 F.3d 385, 392 (6th Cir. 2003). In addition, pursuant to 9 U.S.C. § 3, if

any claims are referable to arbitration, a court must stay any remaining claims. However, “litigation in which all claims are referred to arbitration may be dismissed.” Hensel v. Cargill, Inc., 1999 U.S. App. LEXIS 26600, *10 (6th Cir. 1999) (Exhibit C).

A. Plaintiffs Do Not Allege, and Cannot Show, Evident Partiality on the Part of Their Agreed-to Arbitrators.

Alleged arbitrator bias may preclude arbitration only where a tribunal is shown to be “evidently partial” – where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. The Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 325 (6th Cir. 1998). That situation does not exist here.

The dispute resolution rules and procedures selected by plaintiffs and Mac in their agreements is that of J.A.M.S./Endispute. (“JAMS”). JAMS stands for Judicial Arbitration & Mediation Services, and its arbitrators are accomplished attorneys and former judges. Pigford v. Glickman, 185 F.R.D. 82, 96 n.6 (D.D.C. 1999).³ Notwithstanding their arbitrators’ credentials, the declaratory judgment plaintiffs claim that they “do not view JAMS as a truly neutral decision maker” because Mac is a “repeat player” using JAMS’ arbitration services, and because JAMS “cites work with Mac in its promotional materials on the internet, highlighting the substantial contribution of Mac money to JAMS” (Am. Compl. ¶ 126.) First, it is only the individual arbitrator who is the “neutral decision maker” – not JAMS as an organization. Second, plaintiffs ignore what they plead 2 paragraphs later – that Mac and the distributors have agreed to each pay ½ the cost of arbitration. (Am. Compl. ¶ 128). So, 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.

³ Only if the parties do not mutually agree on a mediator or arbitrator, do they turn to JAMS for selection in accordance with the JAMS rules.

JAMS is one of the largest arbitration service providers in the United States, and its impartiality is beyond reproach, as at least one federal court has recognized. See Luna v. Household Finance Corp., 235 F.Supp.2d 1166, 1181 (W.D. Wash. 2002) (JAMS is “comprised of distinguished attorneys, including many former judges. The parties have presented no evidence and the Court knows of no evidence that impugns the impartiality of the women and men who resolve disputes outside of traditional judicial forums.”). JAMS procedural rules themselves provide relief if a party believes that an arbitrator is biased. (See JAMS Comprehensive Arbitration Rules and Procedures (“JAMS Rules”), 15(i).)⁴

In The Andersons, the Sixth Circuit held that evident partiality was not shown simply because the party seeking to compel arbitration was a dues-paying member of the arbitration service. Id. at 326 (affirming trial court’s grant of summary judgment). The same result should prevail here, particularly since Mac is not solely responsible for paying JAMS’ fees. See also MCI Telecomms. Corp. v. Matrix Communs. Corp., 135 F.3d 27, 35 (1st Cir. 1998) (relationship between JAMS and JAMS customer that involved “substantial financial and reporting ties between them” insufficient to relieve plaintiff from arbitral judgment on grounds of bias). Nothing pled by plaintiffs shows evident partiality on the part of JAMS and/or its neutrals, and there is no basis for plaintiffs to avoid arbitration. See Id.

B. The Damage Limitation Provision that Plaintiffs Agreed to Does Not Invalidate the Arbitration Clause.

In order to further their business relationships, plaintiffs and Mac agreed to limit the damages they could recover from one another:

⁴ Found at <http://www.jamsadr.com/rules/comprehensive.asp>, and attached hereto as Exhibit D.

You and we agree that, in the event of a dispute or claim with or against the other, each party shall be limited to the recovery of any actual direct damages sustained by it, subject to any limit on direct damages set forth in this Agreement.

(Agreement ¶ 20.2.) This limitation of damages is reiterated in the arbitration clause:

The arbitrator is not empowered and shall not, award punitive, exemplary, indirect, special, consequential or incidental damages or any other damages in excess of actual direct damages or in excess of any limit on direct damages set forth in this Agreement, whichever is lower.

(Agreement ¶ 19(d) (emphasis in original).) Now, the declaratory judgment plaintiffs argue that agreeing to limit their remedies (in return for Mac's agreement to limit its remedies against plaintiffs) somehow invalidates the arbitration clause. It doesn't.

The Southern District addressed an identical situation in Parsley v. Terminix Intl. Co., 1998 U.S. Dist. LEXIS 22891, *10-11 (S.D. Ohio 1998) (Exhibit E). Terminix's customer agreement included a clause limiting damages that was restated in the agreement's arbitration clause. Finding that "there is no nexus between the arbitration requirement and the limitation of liability," the court held that the damages limitation did not invalidate the parties' agreement to arbitrate, and left to the arbitrators the determination whether there was any issue with the damages limitation. Id.

Furthermore, the damages limitation provision is enforceable in any event. It has long been the case that parties "bargain for arbitrability clauses – and either party is free to insist on language limiting the possible remedies available to an arbitrator." 00-1613, Detroit Typographical Union, Local 18 v. Detroit Newspaper Agency, 283 F.3d 779, 789 (6th Cir. 2002) (upholding arbitration award). Under Ohio law, which applies here (see Agreement ¶ 19.1), the parties to a contract may agree to limit available remedies. See Lakotish v. Cincinnati Milacron

Co., 1984 U.S. App. LEXIS 13891, *14 (6th Cir. 1984) (upholding contractual limitation on implied warranty damages) (Exhibit F).⁵ Plaintiffs have pled no basis to avoid arbitration.

C. The Declaratory Judgment Plaintiffs' Alleged Arbitration Expenses are Not a Basis to Avoid Arbitration.

The declaratory judgment plaintiffs' agreement to pay half the arbitration fees does not constitute a basis to avoid arbitration either. A claim that arbitration fees are greater than costs of litigation cannot be used to avoid arbitration of a commercial dispute like the one in this case. 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. See Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003) (en banc) (arbitration cost analysis appropriate for litigants "seeking to vindicate their federal statutory [employment law] rights in the arbitral forum"); see also Anderson v. Delta Funding Corp., 316 F.Supp.2d 554, 567 (N.D. Ohio 2004) (compelling arbitration when not shown that arbitration costs would prevent plaintiff from vindicating rights under TILA); Raasch v. NCR Corp., 254 F.Supp.2d 847, 858 (S.D. Ohio 2003) (fee-shifting analysis applies because U.S. Supreme Court has held "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function").⁶ The declaratory

⁵ The ability to contractually limit remedies has been circumscribed only in cases, unlike here, where plaintiffs allege violations of federal statutory law – generally, federal employment anti-discrimination law. See, e.g., Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 670 (6th Cir. 2003) (en banc) (Title VII; enforcing arbitration anyway); Trumbull v. Century Mktg. Corp., 12 F.Supp.2d 683, 688 (N.D. Ohio 1998) (Title VII).

⁶ Even in federal statutory cases, fee-splitting does not per se invalidate an agreement to arbitrate. Morrison, 317 F.3d at 658. Rather, the party opposing arbitration must show that the projected costs of arbitration are so much greater than litigation that requiring arbitration would deter them and similarly situated individuals from vindicating their federal rights. Id. at 663-64. That is not the case here anyway.

judgment plaintiffs here are not asserting any federal causes of action and cannot avoid arbitration based on their agreement to share costs.

Declaratory judgment plaintiffs also mistakenly presume that arbitration will be more costly than litigation because they “expect” class certification. (Am. Compl. ¶ 128.) That expectation is not justified, since each distributor has his or her own unique circumstances and purported claims that would prevent class certification anyway. See Shaver, et al. v. Sohio, 737 N.E.2d 645 (Ohio Ct. App. 1993). In any event, JAMS rules allow the consolidation of parties’ arbitrations (in appropriate circumstances) and the assessment of a single fee. See JAMS Rule 31.

D. A “Refusal” to Proceed with the ADR Process (Even if it Occurred) is No Basis to Avoid Arbitration.

Based only upon false, conclusory allegations, the declaratory judgment plaintiffs contend that Mac “has refused to proceed with the ADR process under the [distributorship] Agreements.” (Am. Compl. ¶ 129.) This is simply not true.⁷ Even if it were, this would not prevent plaintiffs from arbitrating and receiving an arbitral award if they were entitled to one. Proceeding with a JAMS arbitration does not require the active participation of both parties. If a party refuses to participate, the JAMS arbitrator can proceed without the unwilling party and make an award against the party in default. (JAMS Rule 5(c). Obviously, as this motion makes plain, Mac is desirous of using and completing the ADR process to which the parties agreed. This Court should compel that result.

⁷ Indeed, as plaintiffs apparently recognize the weakness of their attempt to avoid arbitration, many of these very same plaintiffs already have initiated ADR under their Distributor Agreements and Mac is participating. Plaintiffs’ actions alone constitute an admission of the validity of their agreements to arbitrate and provides the Court with yet another basis to compel arbitration of plaintiffs’ claims. See October 24, 2004 Letter from Andre Toce, attached hereto as Exhibit G.

E. Neither the Mediation Clause Nor JAMS's Discovery Procedures Render Arbitration Unconscionable.

Plaintiffs incorrectly claim that the arbitration clause is unconscionable, in part for reasons that have already been discussed and disposed of: purported bias, damages limitation, and cost. “Under Ohio law, a contract clause is unconscionable where one party has been misled as to its meaning, where a severe imbalance of bargaining power exists, or where the specific contractual clause is outrageous.” Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party.” Rickard, 279 F.Supp.2d at 915; see also Anderson, 316 F.Supp.2d at 564 (compelling arbitration). Not able to plead any of these elements, plaintiffs also contend that the arbitration clause is unconscionable because (1) mediations under the agreements have been held in New York City and (2) the JAMS Rules limit written discovery to “relevant” evidence and permit only one deposition of the opposing side.⁸ (Compl. ¶¶ 162-164.) These two additional arguments do not show unconscionability.

First, the agreements plainly do not require mediation in New York City. Thus, while the agreement notes that JAMS is headquartered in New York (Agreement ¶ 19.2(c), mediation under the agreement can take place anywhere.⁹ Second, the agreement does not require mediation at all. While one party “may” initiate mediation, the other party is not penalized for refusing mediation and moving directly to arbitration. (Agreement ¶ 19.2(c), (d) (emphasis added).)

⁸ Plaintiffs buried these allegations in Count VI of the First Amended Complaint, not as part of Count I challenging the validity of the agreement to arbitrate. Still, these contentions are easily refuted.

⁹ In fact, it was plaintiffs’ counsel in this action (who have represented other distributors historically), not Mac, who requested that mediations take place in New York. Both Mac and its mediation counsel are located in Columbus, Ohio. And Columbus, not New York, is the agreed-upon location for arbitration (Agreement ¶ 19.2(d)), unless the parties agree otherwise.

Plaintiffs' purported concerns about JAMS' discovery rules similarly are not justified. One district court in the Sixth Circuit has noted JAMS' flexibility in structuring discovery to ensure a "full and fair exploration of the issues in dispute." See Wilks v. The Pep Boys, 241 F.Supp.2d 860, 865 (M.D. Tenn. 2003) (compelling arbitration). JAMS Rule 17(c) provides, "The necessity of 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' witness." Finally, it is hard to conceive how plaintiffs could be prejudiced by discovering that which is "relevant," let alone how such a rule could render an entire agreement to arbitrate unconscionable.

F. Plaintiffs' Allegation that the Distributor Agreements as a Whole Were Fraudulently Induced Does Not Justify Invalidating the Arbitration Clause.

In a last ditch attempt to avoid arbitration, plaintiffs claim that Mac fraudulently induced them to enter into the distributorship agreements. (Am. Compl. ¶¶ 191-196.) Setting aside the fact that this "fraud" is insufficiently pled under Fed. R. Civ. P. 9, this argument still is as unavailing as all the others.

The Sixth Circuit has repeatedly held that only fraudulent inducement as to the arbitration clause itself – as distinguished from the agreement in general – can invalidate an arbitration clause. See Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 576 (6th Cir. 2003) (reversing district court's denial of motion to compel arbitration); Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 937 (6th Cir. 1998) (reversing trial court's order vacating arbitration award); Arnold v. The Arnold Corp., 920 F.2d 1269, 1279 (6th Cir. 1990) (affirming order compelling arbitration). Plaintiffs here never allege that the arbitration clause was fraudulently induced. In fact, the Sixth Circuit rejected the very contention plaintiffs make here and compelled arbitration under the distribution contract of one of Mac's competitors.

Wasil v. Snap-On Tools Corp., 1991 U.S. App. LEXIS 30214, *5 (6th Cir. 1991) (Exhibit H).

Plaintiffs have no basis to avoid the arbitrations to which they agreed.

CONCLUSION

For the foregoing reasons, defendant The Stanley Works respectfully requests that the Court compel arbitration as to all claims of the so-called 93 “declaratory judgment plaintiffs.” In addition, because of the claims of these 93 plaintiffs are referable to arbitration, Stanley respectfully requests the Court dismiss the First Amended Complaint as to these 93 plaintiffs in its entirety.¹⁰

Respectfully submitted,

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¹⁰ The Distributorship Agreements expressly provide for reimbursement of a parties’ costs and expenses in compelling arbitration. (Agreement ¶ 19.2(d)). Accordingly, Mac reserves its right to seek its costs and expenses in the future.

CERTIFICATE OF SERVICE

The foregoing Memorandum in Support of Motion to Compel Arbitration and Dismiss the First Amended Complaint as to Certain Plaintiffs was filed electronically this 10th day of January, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

s/ Thomas S. Kilbane _____