

**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.)	
)	
THE STANLEY WORKS, et al.)	DEFENDANT’S BRIEF IN
)	OPPOSITION TO PLAINTIFFS’
)	MOTION FOR LEAVE TO SUBMIT
Defendants.)	EVIDENCE REGARDING
)	UNCONSCIONABILITY

Plaintiffs’ most recent filing – their “emergency” and untimely motion for leave to submit evidence regarding the alleged unconscionability of their arbitration agreements with Stanley – constitutes a last, desperate attempt to avoid an unavoidable conclusion: the arbitration provisions at issue are fully enforceable. Plaintiffs freely agreed to arbitrate all disputes with Stanley when they signed up to be Mac Tools distributors. The arbitration provision in question is clear and comprehensible, and no plaintiff has alleged or shown that he or she did not understand its implications. Although it is plaintiffs’ burden to prove that the arbitration agreements are invalid, Stanley has been the only party to produce evidence, has complied with all of plaintiffs’ requests for evidence, and has shown, through the evidence, that the doctrine of unconscionability has no application to this case. As plaintiffs now admit, they were aware at the time of filing their opposition brief that they had the burden to produce evidence to counter

Stanley's motion. "The cases cited by Plaintiffs in their opposition ... show that the Courts decide these motions on full evidentiary records." (Plaintiffs' opposition brief at p. 4.) Nevertheless, they elected to stand pat and were satisfied at the status conference if Stanley filed the "applications" for the plaintiff distributors. It is now too late to revisit this subject, and their motion should be denied.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

In plaintiffs' statement of facts, they repeatedly and outrageously accuse Stanley and its counsel of misleading the Court and misrepresenting the evidence. However, Stanley has not misrepresented anything or misled anyone. Plaintiffs also accuse Stanley of submitting an "incomplete" factual record. But, as this Court will recall, during the March 15, 2005 status conference, it was plaintiffs' counsel who requested that Stanley place in the record all of plaintiffs' distributor "applications." This is precisely what Stanley did. Plaintiffs did not request that any other evidence be filed. In fact, plaintiffs' files do not contain any other relevant background information about plaintiffs beyond what is contained in the distributor applications. In some cases, there is personal and confidential financial information pertaining to plaintiffs' creditworthiness, which has nothing to do with unconscionability.

Moreover, at that same status conference, Stanley's counsel advised the Court and plaintiffs' counsel that they would be filing "representative arbitration agreements" to rebut plaintiffs' claim in their opposition brief that the arbitration agreements had "materially different dispute resolution clauses." (Plaintiffs' opposition brief at p. 2) There was no objection to that approach. Yet, plaintiffs have now conspicuously failed to point out any such material differences, since there are none. Instead, plaintiffs inexplicably complain that all agreements have not been filed despite plaintiffs' admission in their complaint that each signed a Mac Tools

distributor agreement with an arbitration clause. So what could be the point of filing all agreements, particularly when the chart in the front of Stanley's Exhibit 1 reflects which plaintiff signed which agreement?

Plaintiffs' brief erroneously and outrageously argues, "Thus, Stanley is asking the Court to take on faith Stanley's representation that each and every Declaratory Judgment Plaintiff signed an acknowledgement form at least 10 days before each signed their agreements with Mac. This is simply false." However, Stanley submitted the evidence for what it was, identifying it as acknowledgement forms "which are signed by 73 of the 93 plaintiffs." Stanley made no representation about whether the remaining 20 declaratory judgment plaintiffs did or did not sign acknowledgment forms.

As to plaintiffs' plan to submit an affidavit from plaintiff David Hickox, a search of Mr. Hickox's file revealed another acknowledgment form – which he signed, and which is not crossed out or otherwise negated – dated June 3, 2003, ten days before he signed his distributor agreement. Stanley inadvertently inserted the wrong form in Exhibit 2. (A copy of this documentation pertaining to Mr. Hickox is attached hereto as Exhibit A.)

The claim that plaintiff Gary Cox may not have executed his distributor agreement on February 19, 1996 because there is no date line next to his signature, and therefore his acknowledgment form signed on February 9, 1996 does not demonstrate that he received the distributor materials ahead of time is not supported by the form itself, and is contradicted by the documents in his file. The date on Mr. Cox's signature page is between his and Stanley's signatures, states that February 19, 1996 is the date both parties executed the distributor agreement in Columbus. Furthermore, other distributor documents in his file signed by Mr. Cox are clearly dated February 19, 1996 in the date line next to his signature, demonstrating that

February 19, 1996 was indeed his orientation date and that he could not have signed his agreement before then. In addition, to the extent there is any ambiguity about what Mr. Cox was told and what he believed, Mr. Cox's file also contains another form, initialed and dated by him, representing that he did not rely on any statements by anyone at Stanley that were not contained in his distributor agreement. (A copy of this documentation pertaining to Mr. Cox is attached hereto as Exhibit B.)

Plaintiffs also complain that resumes submitted to Stanley by some plaintiffs have not been filed. Of course, plaintiffs' counsel never asked that they be. To the extent there may be a few resumes, the same substantive information would be contained in the applications on file with the Court. Plaintiffs have not identified any instance where any information supposedly contained in any plaintiff's resume would make their already unpersuasive unconscionability argument persuasive. Finally, plaintiffs also criticize Stanley for submitting only a few of the 93 plaintiffs' distributor agreement signature pages, but this argument is a complete red herring. Plaintiffs were the ones who identified themselves in their amended complaint as "declaratory judgment plaintiffs," who "are signatories to Mac distributor agreements that purportedly require Declaratory Judgment Plaintiffs to ... exclusively use the services of J.A.M.S./Endispute ("JAMS") for both mediation and arbitration." (First Am. Compl. ¶ 125.) As such, these plaintiffs can hardly insinuate that they did not sign agreements to arbitrate.

It is notable that plaintiffs' request that Stanley submit their distributor applications was motivated by plaintiffs' claim that the applications would demonstrate procedural unconscionability, i.e., that plaintiffs were uneducated and inexperienced in business. As Stanley pointed out in its reply brief, in fact, the applications show the opposite – so much so that plaintiffs have now abandoned this argument. Instead, plaintiffs' "emergency motion" moves

the target to the supposed content of Stanley's files. In reality, however, plaintiffs do not want more evidence, and indeed, they have not identified anything in Stanley's records that would bear on the question of arbitrability. They just wish the evidence was different than it is. In any event, plaintiffs have also failed to show substantive unconscionability, and both are required.

In short, although it is plaintiffs' burden to put forth evidence showing unconscionability, they have not done so, and their only response to the evidence put forth by Stanley – which they requested – that disproves unconscionability is to argue that they now intend to find different evidence. Presumably, plaintiffs are searching (long after these issues were raised) for anything that will negate the inevitable force of plaintiffs' signed agreements and their competence and ability to understand what they were doing. Because the record demonstrates that no such evidence exists, these untimely efforts should not be availing.

RESPONSE TO PLAINTIFFS' LEGAL ARGUMENT

Plaintiffs' so-called "emergency motion" for the first time requests an opportunity to present evidence. Stanley respectfully submits that the time for plaintiffs to submit evidence regarding unconscionability or whatever defense they intended to present to the enforcement of plaintiffs' agreements to arbitrate was with their brief in opposition to Stanley's motion to compel arbitration. But, plaintiffs did not submit any evidence at that time, despite an express invitation to do so by Stanley in its motion to compel arbitration. Plaintiffs instead chose to rely solely on the allegations contained in their first amended complaint despite their recognition that the cases they cited in their court submissions, including Cooper v. MRM Investment Co., 367 F.3d 493 (6th Cir. 2004), require the party contesting arbitration to support their position with factual evidence.¹

¹ Plaintiffs' motion argues, for the second time without any supporting legal authority, that Stanley is in default for not answering the first amended complaint, or has waived its right to assert affirmative defenses. To

Plaintiffs' brief also represents that the district court in Cooper held an evidentiary hearing to determine the issue of arbitrability, but this is nowhere indicated in the record. The Cooper appellate opinion does refer to a "hearing" that was held below, but does not indicate that evidence was presented or heard at that hearing. In fact, the district court's docket indicates that an "oral argument" was held, not an evidentiary hearing. (A copy of the Cooper v. MRM Investment Co. lower court docket is attached hereto as Exhibit C.) Stanley does not contest that evidence is properly heard on a motion to compel arbitration, and Stanley submitted its evidence. Plaintiffs had their opportunity to submit evidence as well, and chose precisely what they asked Stanley to submit. They should not now be allowed to try to take advantage of that tactical decision by further delaying this Court's ruling upon the motion to compel arbitration.

reiterate: a motion to compel arbitration pursuant to the Federal Arbitration Act is an appropriate pre-answer responsive pleading. See, e.g., Wilkerson v. J.C. Bradford & Co., 1989 U.S. Dist. LEXIS 17057, *1 (D. Ky. 1989) (denying default motion because pre-answer motion to compel arbitration was "both practical and appropriate").

CONCLUSION

Because plaintiffs' eleventh-hour motion to submit evidence regarding the arbitrability of their disputes with Stanley is nothing more than an untimely and desperate attempt to postpone the inevitable, plaintiffs' motion should be denied. Plaintiffs passed upon their opportunity to present evidence in opposition to Stanley's motion to compel arbitration. Having presented no basis for the denial of Stanley's motion to compel, either factually or legally, plaintiffs now resort to wholly inappropriate and unwarranted attacks on the credibility of Stanley and its attorneys. These diversionary tactics cannot detract from the merits of this case – merits which reveal that no barrier to the enforcement of plaintiffs' signed arbitration agreements exists. There is simply no basis for finding procedural and substantive unconscionability. Nor have plaintiffs articulated any basis in their so-called emergency motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing brief in opposition to plaintiffs' motion for leave to submit evidence regarding unconscionability was filed electronically this 15th day of April 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

s/ Thomas S. Kilbane _____