

**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>REPLY BRIEF IN SUPPORT OF</b>
THE STANLEY WORKS, et al.	)	<b>MOTION TO COMPEL ARBITRATION</b>
	)	<b>AND DISMISS THE FIRST AMENDED</b>
Defendants.	)	<b>COMPLAINT AS TO CERTAIN</b>
	)	<b>PLAINTIFFS</b>

**I. STANLEY’S MOTION IS BROUGHT PURSUANT TO THE FEDERAL ARBITRATION ACT, NOT FEDERAL RULE 12(B)(6), AND STANLEY MAY SUPPORT ITS MOTION WITH FACTS.**

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Plaintiffs accuse Stanley of “avoiding” (Op. Brief at 1) the appropriate standard for deciding its motion, and insist that the proper standard is that set forth by Federal Civil Rule 12(b)(6), such that Stanley cannot refer to matters outside plaintiffs’ complaint in support of its motion. This is incorrect because Stanley’s motion is made pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (Arb. Brief at 4-5.) *See, e.g., Cooper v. MRM Investment Co.*, 367 F.3d 493, 498 (6<sup>th</sup> Cir. 2004); *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 573 (6<sup>th</sup> Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6<sup>th</sup> Cir. 2003); *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6<sup>th</sup> Cir. 2000). As such, arbitration is presumptively appropriate unless plaintiffs demonstrate grounds upon which the arbitration

agreements should not be enforced. Anderson v. Delta Funding Corp., 316 F.Supp.2d 554, 558 (N.D. Ohio 2004). A plaintiff seeking to avoid arbitration cannot rest upon its pleadings. Id. But, because they have no evidence to support their claims of unconscionability, this is exactly what plaintiffs have done.<sup>1</sup> Moreover, facts from outside the pleadings are permissible in a motion to compel arbitration, which necessarily “effects a ‘summary disposition of the factual issue’ of the existence of an arbitration agreement.” Id. (internal citations omitted).

Nevertheless, Stanley will address each of the plaintiffs’ conclusory arguments for avoiding arbitration below.

## **II. THE AGREEMENTS TO ARBITRATE ARE NOT UNCONSCIONABLE.**

Faced with the reality that none of the bases alleged in their amended complaint is sufficient to prevent arbitration, plaintiffs now rely on the charge that their arbitration agreements are generically “unconscionable.” (Op. Brief at 4-5.) Ohio law requires proof of both procedural and substantive unconscionability, neither of which is present here. Rickard v. Teynor’s Homes, Inc., 279 F.Supp.2d 910, 915 (N.D. Ohio 2003).

### **A. The Agreements To Arbitrate Are Not Procedurally Unconscionable.**

Plaintiffs’ argument for procedural unconscionability centers on the allegations that plaintiffs generally are high school graduates and former mechanics or salespeople. (Op. Brief at 5-6.) Conspicuously absent is any authority to support plaintiffs’ erroneous contention that level of education and occupation determine whether entering into an agreement to arbitrate is procedurally unconscionable. There is no allegation in the complaint – let alone evidence – that

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<sup>1</sup> The case cited by plaintiffs for the proposition that “the appropriate standard for this Court on this motion” is that set forth in Rule 12(b)(6), Bovee v. Coopers & Lybrand, 272 F.3d 356 (6<sup>th</sup> Cir. 2001), does not deal with arbitration at all, but rather involved a motion to dismiss a securities complaint for failure to state a claim.

these 93 plaintiffs did not understand the perfectly clear arbitration provisions. In the representative arbitration agreements,<sup>2</sup> each of the 93 plaintiffs expressly acknowledged receiving his or her agreement “at least 5 business days prior to the date this Agreement is signed,” that each has “read and understood,” and that each “had the opportunity to ask questions about them and to consult with legal or other advisors.” (Agreement ¶ 22.<sup>3</sup>) Indeed, Written Acknowledgements of the Receipt by Prospective Distributor of the Mac Tools Distributor Agreement, which are signed by 73 of the 93 plaintiffs, are dated at least 10 days prior to the execution of the Distributor Agreement following the initial training program and are included in Exhibit 1, which has been filed manually with the Court. Moreover, unlike the cases discussed by plaintiffs, this was not a situation where current employees were given a take it or leave it agreement, but a situation where plaintiffs at the outset of the relationship elected to deal with Stanley as business partners in order that plaintiffs could become independent Mac Tools distributors.

In any event, the factors plaintiffs identify are insufficient to show procedural unconscionability under Ohio law. “[A]n admitted unsophisticated’ consumer may still be bound to an arbitration agreement’s provisions, and unequal bargaining power alone does not render an arbitration agreement unconscionable. See ABM Farms v. Woods, 81 Ohio St. 3d 498,

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<sup>2</sup> In fact, the 93 plaintiffs’ arbitration agreements are virtually identical and contain only minor discrepancies as to wording. A spreadsheet showing which plaintiffs signed which version of the agreement to arbitrate, and a copy of each version of the arbitration clause, has been filed manually as part of Exhibit 1 because Exhibit 1 is too voluminous to be filed electronically. The only relevant area in which the agreements differ is that the four plaintiffs who signed the earliest versions of the arbitration clause (L. Bowen, P. Price, C. Freyermuth, and G. Cox) agreed to arbitrate their claims with the Center for Public Resources, Inc. (“CPR”) rather than JAMS Endispute.

<sup>3</sup> A copy of this provision, as set forth in each version of the distributor agreement, is also included in Exhibit 1.

692 N.E.2d 574, 578 (Ohio 1998).” Anderson v. Delta Funding Corp., 316 F.Supp.2d 554, 565 (N.D. Ohio 2004). Judge O’Malley held in Anderson that “[t]he ‘cardinal rule’ is that, ‘in the absence of fraud or willful deceit, one who signs a contract which he has had an opportunity to read and understand, is bound by its provisions.’” Id. at 564 (internal citations omitted). In Anderson, the plaintiff – a self-proclaimed “elderly, unsophisticated consumer” – sought to avoid an arbitration clause, but her efforts were unavailing. Judge O’Malley compelled arbitration, even though the plaintiff did not have an attorney review the clause and claimed not to understand it. Id. at 566.

The result was the same in Raasch v. NCR Corp., 254 F.Supp.2d 847, 867 (S.D. Ohio 2003), in which another plaintiff, a retired employee seeking to enforce his purported rights under an employment contract with his former employer, argued that the arbitration clause contained in that agreement was procedurally unconscionable because it was non-negotiable. The court rejected this argument as well and remarked,

As long as an employer gives an at-will employee proper notice of a new policy, and can show that the employee understood the new policy, the Court is hard-pressed to conceive of how the policy, as long as it is not itself illegal, will not be enforceable as a term of the employee’s employment. While this might seem to convey the attitude that the employer can get away with anything, market economics, along with labor laws and, in some cases, organized labor, will usually (it is hoped) prevent an employer from becoming too draconian in its policies.

Id. at 867-68; see also Parsley v. Terminix International Co., 1998 U.S. Dist. LEXIS 22891, \*15-16 (S.D. Ohio 1998) (agreement to arbitrate not procedurally unconscionable even though plaintiff was unsophisticated, elderly consumer with no experience in the type of transaction at issue).

Plaintiffs seek to liken their case to those presented in Morrison v. Circuit City Stores, Inc., 317 F.2d 646 (6<sup>th</sup> Cir. 2003), and Garrett v. Hooters-Toledo, 295 F.Supp.2d 774 (N.D. Ohio 2003), with regard to the procedural unconscionability analysis. However, those two cases dealt with alleged Title VII violations whereas this case deals solely with common law claims. Nevertheless, in Morrison, a case in which a Circuit City Stores employee sought relief from her agreement to arbitrate, the district and appellate courts expressly determined that no procedural unconscionability was present, even though “the bargaining power was not equal, and the contract was drafted by Circuit City and was apparently not open to negotiation.” Morrison, 317 F.2d at 666. Garrett is distinguishable from both Morrison and this case in that not only did that case involve a plaintiff who was a low-level hourly employee, but the district court also found it important that the defendant required the plaintiff to sign the arbitration agreement after she had already been working at Hooters for three months, rather than at the beginning of the relationship. 295 F.Supp.2d at 784. The Garrett court was also troubled that the plaintiff was not entitled to counsel at mediation and that mediation was a mandatory prerequisite to arbitration. In stark contrast, here, mediation is voluntary and counsel are permitted to participate.

Plaintiffs’ opposition brief self-servingly argues, “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.” (Op. Brief at 6.) There is no need or requirement for any individualized evidentiary hearings – let alone 93. First, plaintiffs’ statement is directly at odds with their allegation that “whether the contracts signed by the distributors are unconscionable” is a “question of fact and law common to the Class.” (Am. Compl. ¶ 117.) Second, that position was rejected by the Sixth Circuit just last year in reversing

a district court's finding of procedural unconscionability. Cooper v. MRM Investment Co., 367 F.3d 493, 504 (6<sup>th</sup> Cir. 2004). There, like here, plaintiffs did not present evidence of factors such as age, education, business acumen, etc. The Sixth Circuit reversed since there was therefore "no basis for a negative answer to the crucial question ... [of] whether each party to the contract considering his obvious education or lack of it [had] a reasonable opportunity to understand the terms of the contract...." Id. (citing Morrison, 317 F.3d at 666).

Indeed, defendant is submitting herewith as Exhibit 2 a compendium of the applications of each of the 93 plaintiffs to become Mac distributors.<sup>4</sup> They show in general solid educational and business backgrounds. The vast majority had some education beyond high school and at least 20 of them had owned their own businesses before becoming Mac distributors. Many others had prior professional careers as police officers, nurses, sales managers, etc. prior to applying to Mac Tools. These were individuals looking for a "move up" to owning their own businesses. There is nothing in the record before this Court that supports a conclusion that any of them did not have a reasonable opportunity to understand the terms of the agreement.

Under Ohio law, "[T]he crucial question is whether each party to the contract, considering his obvious education or lack of it [had] a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print...?" Ohio Univ. Bd. of Trustees v. Smith, 132 Ohio App.3d 211, 724 N.E.2d 1155, 1161 (Ohio Ct. App. 1999). It is uncontrovertible here that plaintiffs had the opportunity to understand the terms of their agreements and that the arbitration provisions are not hidden in a maze of fine print.

Plaintiffs' arbitration agreements are therefore not procedurally unconscionable.

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<sup>4</sup> Exhibit 2 is also too voluminous for electronic filing and has therefore been manually filed as well.

**B. The Agreements To Arbitrate Are Not Substantively Unconscionable.**

Since Ohio law on unconscionability requires both procedural and substantive unconscionability and since procedural unconscionability is not present here, there is no requirement to address plaintiffs' arguments regarding substantive unconscionability. Nevertheless, Stanley will do so. Plaintiffs argue that their arbitration agreements are substantively unconscionable for four reasons: (1) they require plaintiffs to pay one-half of the arbitrator's fees up front; (2) the JAMS dispute resolution service is biased in favor of Stanley; (3) the agreements preclude plaintiffs from recovering punitive or consequential damages; and (4) they shorten the applicable limitations period to one year. In so arguing, plaintiffs merely assert that arbitration is improper and unfair and ignore the arguments contained in Stanley's motion to compel arbitration. This is argumentation without reasoning, which does not provide any basis for avoiding arbitration.

**1. The Cost-Splitting Provision Is Enforceable.**

Plaintiffs dispute the force of the plain language set forth by the Sixth Circuit in Morrison that

The Supreme Court has made clear that statutory rights, such as those created by Title VII, may be subject to mandatory arbitration only if the arbitral forum permits the effective vindication of those rights. "So long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (quotation omitted). If, then, the splitting or sharing of the costs of the arbitral forum under a particular arbitration agreement effectively prevents the vindication of a plaintiff's statutory rights, those rights cannot be subject to mandatory arbitration under that agreement.... The arbitration of statutory claims must be accessible to potential litigants as well as adequate to protect the rights in question so that arbitrate, like the judicial resolution of disputes, will 'further broader social purposes.' Gilmer, 500 U.S. at 28.

Morrison, 317 F.3d at 658 (emphasis added). The holding in Morrison, by its terms, is limited to cases involving federal statutory rights.

Moreover, Morrison held that the burden is on the party opposing arbitration to “demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum.” Id. at 663. In Green Tree Financial Corp. – Alabama v. Randolph, 531 U.S. 79 (2000), the Supreme Court held that where “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be presumptively expensive, that party bears the burden of showing the likelihood of incurring such costs.” Green Tree, 531 U.S. at 91-92. Here, plaintiffs have presented no evidence whatsoever on this point (or any other point); they have not met their burden, nor can they. Plaintiffs’ counsel have been participating in ADR with Stanley for many years and have resolved many disputes in this fashion. Furthermore, plaintiffs’ main complaint now seems to be that the JAMS’ rules require them to pay one-half of the arbitration costs in advance, not that they are required to pay half of JAMS’ fees. (Op. Brief at 10.) However, the JAMS’ rules do not actually support this contention; Rule 31(b) expressly provides that JAMS’ deposit requirement may be waived upon a showing of cause. In any event, plaintiffs have not presented any evidence of an inability to pay.

## 2. Plaintiffs Have Still Not Shown “Evident Partiality” By JAMS.

Plaintiffs’ opposition brief reiterates and emphasizes the unsupported factual allegations contained in their amended complaint relating to the alleged impartiality of JAMS, but does not contain any actual evidence relating to JAMS’ alleged bias. Again, it is plaintiffs’ burden to prove that the arbitration clause is unenforceable, not the other way around. Anderson, 316

F.Supp.2d at 558. And, again, the standard is “evident partiality,” and plaintiffs have not shown it. See The Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 325 (6<sup>th</sup> Cir. 1998).

Plaintiffs now insist, without support or analysis, that this case is analogous to Floss v. Ryan’s Family Steak Houses, Inc., 211 F.3d 306, 314 (6<sup>th</sup> Cir. 2000), in which the Sixth Circuit held that an arbitral tribunal was biased when the arbitration service controlled the pool of arbitrators, and the party seeking arbitration economically dominated the arbitration service (which is certainly not the situation here). Under the JAMS rules, however, JAMS selects an arbitrator only if the parties fail to choose one. In addition, Walker v. Ryan’s Family Steak Houses, Inc., 289 F.Supp. 2d 916, 924 (M.D. Tenn. 2003), clarified Floss, noting that the arbitration service in question in both cases (EDSI) received almost one-half of its annual income from fees paid by the defendant and therefore “relies on the favor of its employer-clients for its livelihood.” That is not the situation with regard to JAMS, a well known national powerhouse with approximately 200 neutrals with more than half being former judges. Plaintiffs have produced no evidence showing that Stanley exerts influence over JAMS in the same manner as Ryan’s Family Steak Houses did over EDSI. Nor do plaintiffs cite any legal authority for the proposition that a supposedly “for-profit” dispute resolution firm is inherently biased or that the individual credentialed arbitrators on its panels are biased.

As a matter of fact, this Court may take judicial notice that JAMS is a reputable, highly-regarded organization with a large number of former judges serving as neutrals, and Evidence Rule 208 permits the Court to do so whether requested to or not. As noted in Stanley’s motion to compel arbitration, other courts have noted JAMS’ expertise and impartiality, and plaintiffs have produced no evidence showing why these findings should be disregarded.

3. The One Year Time Limitation And Forum Selection Provision Are Both Reasonable And Enforceable.

Far from being illegal, time limitation provisions are expressly permitted under ordinary principles of contract law. See, e.g., Morrison v. Circuit City Stores, Inc., 70 F.Supp.2d 815, 827 (S.D. Ohio 1999) (finding one-year limitation provision “fair and reasonable”), aff’d, 317 F.3d 646, 666 (6<sup>th</sup> Cir. 2003); Reflective Vision, Inc. v. Pearle Vision Center, Inc., 1989 U.S. Dist. LEXIS 1016, \*18 (N.D. Ohio 1989) (sixty-day limitations provision in arbitration agreement enforceable). The case cited by plaintiffs, Garrett v. Hooters-Toledo, 295 F.Supp.2d 774, 778-79 (N.D. Ohio 2003), in support of their claim that this time limitation is unconscionable is distinguishable from the situation in this case, since the limitation in Garrett was only ten days, as opposed to a year in this case. As such, it hardly “presents a nearly identical situation” (Op. Brief at 10) to the facts of this case. Therefore, it does not invalidate plaintiffs’ arbitration agreements.<sup>5</sup>

Furthermore, plaintiffs’ insinuation that their distributor agreements contain “multiple time limits” (Op. Brief at 8) is inaccurate. The “unspecified time period before which Plaintiffs must send to Stanley a ‘written notice of dispute’” (Op. Brief at 8) is, in fact, one year from the occurrence of the facts giving rise to the dispute. (Agreement ¶ 19.2(f).) Once the dispute is initiated, there are set minimum periods before one can commence mediation or arbitration proceedings, but there is no bar date to initiating arbitration once the notice has been timely given.

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<sup>5</sup> Plaintiffs also cite three California cases in support of their contention that the contractual limitation provision in this case renders plaintiffs’ arbitration clause unconscionable. These cases provide no precedential value here, however, since they interpret California’s law of unconscionability, not Ohio’s.

Similarly, the forum selection provision of plaintiffs' distributor agreements does not render the arbitration clauses invalid. To the contrary, a contractual forum selection provision is presumptively valid. See, e.g., Shell v. R.W. Struge, Ltd., 55 F.3d 1227, 1231 (6<sup>th</sup> Cir. 1995) (enforcing forum selection clause providing for resolution of disputes in England); Moses v. Business Card Express, Inc., 929 F.2d 1131, 1138 (6<sup>th</sup> Cir. 1991) (enforcing forum selection clause providing for resolution of disputes in Alabama). The plaintiffs here have made no showing as to why this generally accepted principle should not prevail in this case. Garrett is inapposite since it required an out of state forum for mandatory mediation that would not be binding.

4. The Damages Limitation Provision Has Nothing To Do With The Arbitration Clause And Therefore Cannot Invalidate The Arbitration Agreement. It Is Allowable In Any Event.

Plaintiffs' opposition brief totally ignores the precedent set forth in Parsley v. Terminix International Co., 1998 U.S. Dist. LEXIS 22891, \*10-11 (S.D. Ohio 1998), which Stanley cited in its motion to compel. Parsley clearly establishes that contractual provisions that are not central to the contract's arbitration clause will not invalidate the arbitration clause. Id. Whether such provisions are themselves enforceable or unenforceable is an issue to be determined by the arbitrator. As such, this principle should be deemed to control that issue.

Moreover, like time limitations, damages limitation provisions are valid and enforceable. See, e.g., 00-1613, Detroit Typographical Union, Local 18 v. Detroit Newspaper Agency, 283 F.3d 779, 789 (6<sup>th</sup> Cir. 2002) (damages limitation provision enforceable); Nahra v. Honeywell, Inc., 892 F.Supp. 962, 969-70 (N.D. Ohio 1995) (provision limiting damages against defendant alarm company to \$10,000 or the amount of plaintiff's annual service charges, whichever was

less, enforceable under Ohio law); Berjian v. Ohio Bell Tel. Co., 54 Ohio St.2d 147, 375 N.E.2d 410, syll. at 1, 415 (Ohio 1978) (clause in advertising contract limiting recoverable damages to service fee enforceable under Ohio law). The Uniform Commercial Code expressly permits such limitations. See O.R.C. § 1302.93. “Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation of damages where the loss is commercial is not.” O.R.C. § 1302.93(C). Punitive damages are also excludable. See, e.g., PTG Logistics LLC v. Bickell’s Snack Foods, Inc., 196 F.Supp.2d 593, 607 (S.D. Ohio 2001) (agreement precludes punitive damages); State Farm Mut. Ins. Co. v. Blevins, 49 Ohio St. 3d 165, 551 N.E.2d 955, 959 (Ohio 1990) (same).

Plaintiffs erroneously insist that the Stanley arbitration provision is invalid under Morrison, which held, “a party does not forego the substantive rights afforded by a statute when she agrees to arbitrate a statutory claim but only submits their resolution in an arbitral, rather than a judicial forum.” (Op. Brief at 7, citing Morrison, 317 F.3d at 670.) According to plaintiffs, “Clearly, [this] language is intended to apply to state as well as federal statutes[.]” (Op. Brief at 7.) This, of course, implies that plaintiffs’ amended complaint purports to state claims under an Ohio or other state statute. In fact, however, the causes of action in plaintiffs’ amended complaint against Stanley are declaratory relief that plaintiffs’ arbitration clauses are invalid (Count I), breach of fiduciary duty (Count III), conversion (Count IV), unjust enrichment (Count V), breach of contract (Count VI), fraud (Count VII), tortious interference with business relations (Count VIII), injunctive relief (Count IX), fraud in the inducement (individual

plaintiffs' count), defamation (individual plaintiffs' count), and false imprisonment (individual plaintiffs' count) – all common law claims.<sup>6</sup>

### **III. PLAINTIFFS HAVE NOT SHOWN WHY SEVERENCE IS IMPOSSIBLE OR INAPPROPRIATE.**

Stanley strongly disagrees with plaintiffs' argument that any of the provisions of plaintiffs' arbitration agreements are unconscionable or otherwise unenforceable. However, if this Court disagrees, the proper remedy, as provided in Morrison, is to sever the unenforceable provision. See Morrison, 317 F.3d at 675 (en banc) (severing cost-splitting provision and enforcing arbitration); Scovill v. Sinclair Broadcast Group, Inc., 312 F.Supp.2d 955, 977 (S.D. Ohio 2004) (severing cost-shifting provision and enforcing arbitration); DeOrnellas v. Aspen Square Management, Inc., 295 F.Supp.2d 753, 766 (E.D. Mich. 2003) (severing cost-sharing and venue provisions and enforcing arbitration); Smith v. Beneficial Ohio, Inc., 284 F.Supp.2d 875, 880 (S.D. Ohio 2003) (severing fee-splitting provision and enforcing arbitration).

Moreover, contrary to plaintiffs' assertion at page 11 of their opposition brief, Cooper v. MRM Investment Co., 367 F.3d 493 (6<sup>th</sup> Cir. 2004), did not address the question of severability at all. Rather, that decision remanded the case to the trial court for a determination as to whether the cost-splitting provision in the AAA rules was impermissibly prohibitive. Id. at 511. It was silent on the issue of severability, and, in fact, that determination would have been premature. Id.

Unlike the agreement in Cooper, plaintiffs' distributor agreements expressly provide that severance is the appropriate result in case of invalidity:

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<sup>6</sup> Plaintiffs' reliance upon the Ohio Uniform Commercial Code and the Tort Reform Act is severely misplaced. Unlike Title VII, neither grants substantive rights. Indeed, the Uniform Commercial Code expressly recognizes the rights of parties to limit damages in their contracts. O.R.C. § 1302.93.

If any one or more of the provisions in this Agreement are held to be invalid, illegal or unenforceable in any respect for any reason, such invalidity, illegality, or unenforceability shall not affect any other provisions thereof, and any such provision shall be deemed severed from this Agreement. It is the intention of the parties that if any provision is held to be invalid, illegal or unenforceable, there shall be added in lieu thereof a valid and enforceable provision as similar in terms to such provision as possible.

(Agreement ¶ 16.) Furthermore, Supreme Court precedent dictates that any doubts as to arbitrability should be resolved in favor of arbitration. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Even if the arbitration clause has infirmities, the Court should cure them in accordance with this established precedent. Arbitration should not be denied wholesale.

Finally, the Sixth Circuit has cautioned against accepting plaintiffs' argument that alleged infirmities in the arbitration clause combine and taint the entire contract. To the extent an unenforceable provision can be severed from the remainder of the agreement, it should be. Morrison, 317 F.3d at 677-78.

### **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 all 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.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The foregoing Reply Brief in Support of Motion to Compel Arbitration and Dismiss the First Amended Complaint as to Certain Plaintiffs was filed electronically this 31st day of March, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

*s/ Thomas S. Kilbane* \_\_\_\_\_