**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

ROBERT JEAN, et al.	)	CASE NO. 1:04 CV 1904
	)	
Plaintiffs,	)	JUDGE CHRISTOPHER A. BOYKO
	)	MAGISTRATE JUDGE DAVID S.
	)	PERELMAN
	)	
THE STANLEY WORKS, et al.	)	**PLAINTIFFS' OBJECTION TO**
	)	**MAGISTRATE JUDGE'S REPORT**
Defendants.	)	**AND RECOMMENDED DECISION**
	)	**ON STANLEY'S MOTION TO COMPEL**
	)	**ARBITRATION**

The 93 Plaintiffs ("Plaintiffs") who oppose The Stanley Works' ("Stanley") Motion to Compel Arbitration and Dismiss Claims[1] hereby submit the following specific objections, as provided by Federal Rules of Civil Procedure Rule 72, to the April 2, 2007 Report and Recommended Decision (CM/ECF # 113; hereinafter "Report") by the Honorable United States Magistrate Judge David Perelman, granting Defendant Stanley's Motion to Compel Arbitration. The primary objection is to Judge Perelman's analysis on pages 8 and 9 limiting Ohio's application of *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 666 (6th Cir. 2003) ("*Morrison*"), only to those cases where claims arise under Ohio's Consumer Sales Practices Act and are brought by consumers. That error of law then caused Judge Perelman to analyze the offending provisions of the arbitration clause as to whether they were substantively unconscionable, as opposed to appropriate analysis using the less stringent *Morrison* standard relating to impairment of rights in the arbitral forum.

When Your Honor decided to stay arbitration as to the majority of the Plaintiffs, who did not submit affidavits, we understood that to mean that *Morrison* would provide grounds to sever

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[1] 103 plaintiffs filed a First Amended Class Action Complaint (CM/ECF # 29 (12/28/04)) against defendants Stanley and Amex. Separately, Stanley filed a motion to dismiss ten of the plaintiffs who did not have arbitration clauses on failure to state a claim. That motion was sustained in part and denied in part. CM/ECF # 90 (07/05/06). Thus, those ten plaintiffs are not the subject of this motion, and are proceeding with discovery.

offending provisions despite a lack of procedural unconscionability. *See* August 28, 2006 Opinion and Order (CM/ECF #99). As Plaintiffs have argued repeatedly, including in the post-hearing brief, under Ohio law, which adopts *Morrison* with regard to state law[2] claims, certain provisions in the arbitration clauses deprive Plaintiffs of the ability to vindicate their state statutory claims, such as the fraud and contract remedies provided by Ohio's Uniform Commercial Code, and are therefore unenforceable as a matter of law.

STATEMENTS OF FACTS

Enough ink has been spilled (see Post-Hearing Brief, filed 12/15/06, at 1 n.1) on this motion to compel arbitration that we will not belabor the facts. The contracts of adhesion signed by the Plaintiffs were completely lopsided in favor of Stanley. In particular, the dispute resolution clauses of the agreements, quoted at length by Judge Perelman in his Report, overwhelming favor Stanley over the Plaintiffs.

Irrefutably, the arbitration clause severely limits Plaintiffs' remedies under Ohio statutory law. 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, and a discovery rule for fraud. Stanley did not disclose its relationship with JAMS, or the cost-splitting procedures. Stanley did not disclose the discovery limitations under JAMS' rules.

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. Stanley does not disclose its relationship with JAMS to distributors prior to signing the agreement.

At the Hearing before Judge Perelman, Plaintiffs put forth strong evidence of procedural unconscionability. For example, Kent Hadley, of Highland, Utah, has a disability called "central auditory processing disorder" that affects his ability to understand and retain information,

[2] Although Stanley has argued to the contrary, Plaintiffs' first amended complaint references Ohio statutes, such as R.C. § 2315.21, 1301.01, 1301.09, and many of the claims in this case are codified in the Ohio Revised Code.

whether presented auditorily or in writing. K. Hadley Decl. (CM/ECF #54) at 1:17-18; C. Hadley Decl. (CM/ECF # 55) at 2:10-14; Trans. at 30:20-31:10, 59:17-23. Carin Hadley, his wife of twenty years, is a Speech-Language Pathologist with 23 years' experience, including dealing with individuals that have this disorder. C. Hadley Decl. at 2:15-19; Trans. at 30:1-5, 52:19-20. Consequently, she often takes the role of reviewing and negotiating documents that her husband is to sign. C. Hadley Decl. at 1:22-27; Trans. at 32:18-33:5. Although Mr. Hadley signed an Acknowledgement on October 11, 2001, he does not recall receiving the disclosure book of contracts, because if he had, he would have given them to his wife to read. K. Hadley Decl. at 1:15-17; Trans. at 52:9-18. He was denied permission to call his wife when he was presented with the agreements to sign. Trans. at 53:8-16, 68:15-69:9. Once the Hadleys received a copy of the agreements from Mac, they complained to Mr. Kelsey, and tried to re-negotiate, but were told that the agreement was signed, and it was "a done deal for us." Trans. at 47:20-49:4.

Kelly Thompson of Anchorage, Alaska, worked in retail sales and outside vending before becoming a Mac Direct Sales Representative ("MDSR") on November 26, 2001. Thompson Decl. (CM/ECF # 66) at 1:12-15, 2:24-25; Trans. at 95:16-96:10, 101:23-102:6. On April 9, 2003, Dan Watkins, a Mac manager, called Mr. Thompson to inform him that the MDSR program was "no more," and urged him to convert to a distributor. Mac "Fedex"ed only the signature pages of the distributor agreement and related agreements to Mr. Thompson, which arrived on April 11. Thompson Decl. at 1:22-2:4; Trans. at 98:2-4. He was required to sign all of the signature pages, including the acknowledgement, and fax them back to Mac the same day, sending the originals back via FedEx. Thompson Decl. at 2:5-14; Trans. at 97:4-98:4. Because of the time difference between Alaska and Ohio, Mr. Thompson could not ask questions before he has to fax them back. Thompson Decl. at 2:15-22; Trans. at 101:5-22. Mr. Thompson was

under pressure to sign, because he had been fired, and needed to become a distributor immediately thereafter in order to continue operating his truck. Trans. at 98:22-99:21.

Henry "Danny" Deemer of Manns Choice, Pennsylvania, ultimately obtained two distributorships, the second run by Mr. Deemer's sister, as his employee. Deemer Decl. (CM/ECF # 59) at 1, ¶ 1; Trans. 194:19-197:4. Mr. Deemer did not even sign an acknowledgement before he was recruited to his first distributorship in March 2002, and he never received a contract before signing. Deemer Decl. at 1, ¶ 2; Trans. at 185:19-187:5. By the time Mac waived its requirement that Mr. Deemer have $10,000 in the bank, he was the last to sign agreements, under circumstances that did not allow him to review the agreements. Deemer Decl. at 1, ¶¶ 3-5; Trans. at 189:24-192:11, 198:5-20. In fact, he never received a set of signed copies of the agreements for the first truck. Trans. at 204:1-14. The agreements for his sister's route were presented to him on his truck, while on his route, for immediate signature by his district manager. Trans. at 197:8-198:2.

Plaintiffs object to Judge Perelman's findings that procedural unconscionability was not proven, as at least some of the Plaintiffs, from the foregoing examples, have clearly demonstrated procedural uncoscionability as a matter of law.

OHIO LAW REQUIRES THE SERVERANCE OF UNENFORCEABLE PROVISIONS

Since most if not all of the 93 Plaintiffs are to be ordered to arbitration, the Court should respectfully strike all provisions that are unenforceable as a matter of Ohio law. *See* August 28, 2006, Opinion at 6. Originally, the law of the Sixth Circuit and the State of Ohio were aligned – Ohio having adopted the *Morrison* line of cases, based on the U.S. Supreme Court's holding in *Gilmer*.[3] The Sixth Circuit's decision in *Stutler v. T.K. Constructors Inc.,* 448 F.3d 343 (6th Cir.

[3] *Gilmer v. Interstate/Johnson Lane Corp.* (1991), 500 U.S. 20, 28, 111 S.Ct. 1647, 114 L.Ed. 2d 26 (arbitration clauses are unenforceable to the extent that the clause deprives a claimant of substantive rights under state law).

2006) certainly changed the analysis regarding federal statutory rights, but the end result here, under state law claims, is the same.

The *Stutler* Court clearly decided – as a matter of federal law – that the Court's decisions in *Morrison* and *Cooper*[4] could not be extended to situations where plaintiffs' claims arise under state law. 448 F.3d at 347. Further, the Sixth Circuit, sitting as an *Erie*[5] Court, had to apply state law defenses to arbitration clauses, where the underlying claims are solely state law. *Id.* Both *Morrison* and *Cooper* involved the vindication of federal rights under Title VII.

Fortunately for the Plaintiffs, Ohio courts have adopted the substantive legal principles of *Morrison* and the Supreme Court decision in *Gilmer* that resulted in *Morrison*. In the leading case of *Eagle v. Fred Martin Motor Company,* 157 Ohio App. 3d 150, 160, 809 N.E. 2d 1161, 1169, 2004-Ohio-829 at ¶ 24 (Ohio App. (9 Dist.) 2004), Plaintiffs made claims under the Ohio Consumer Sales Practices Act, R.C. Chapter 1345 ("CSPA"), rather than federal law. The Court of Appeals found that CSPA claims could – as a general matter – be ordered into arbitration.

> "However, the United States Supreme Court has noted that statutory claims may be arbitrated so long as the claimant 'effectively may vindicate [his or her] statutory cause of action' through arbitration. *Gilmer,* [*supra.*] It is important to safeguard the statute's remedial and deterrent functions in the arbitration context. *See id.*"

Eagle, supra, 157 Ohio App. 3d at 162, 809 N.E. 2d at 1170 at ¶ 27. Even more importantly, the Ohio Court of Appeals adopted wholesale the reasoning in *Morrison*, when it was analyzing the issue of enforcing the cost-splitting provisions of the arbitration clause at issue in *Eagle.* 157 Ohio App. 3d at 166-69, 809 N.E. 2d at 1173-75 at ¶¶ 37-45. The *Eagle* Court determined that *Morrison* was consistent with pronouncements of the Ohio Supreme Court. 157 Ohio App. 3d at 166-69, 809 N.E. 2d at 1173-75 at ¶¶ 42-43.

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4 *Cooper v. MRM Investment Co.,* 367 F.3d 493 (6th Cir. 2004).

5 *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938).

Indeed, *Eagle,* 157 Ohio App. 3d at 167, 809 N.E. 2d at 1174 at ¶ 39, quotes with favor the following passage in *Morrison*:

> "A cost-splitting provision should be held unenforceable whenever it would have the 'chilling effect' of deterring a substantial number of potential litigants from seeking to vindicate their statutory rights."

The *Eagle* Court then addressed, among other issues, "the limitations on a consumer's right to redress" because of restrictive arbitration provisions. The *Eagle* Court declared that the federal decisions cited in Plaintiffs' opposition brief, were consistent with the law of the state of Ohio. 157 Ohio App. 3d at 176, 809 N.E. 2d at 1181 (¶ 67).

The Court reasoned with regard to the state statutory claim:

> "When an arbitration clause vanquishes the remedial purpose of a statute by imposing arbitration costs and preventing actions from being brought by consumers, the arbitration clause should be held unenforceable. ... *Gilmer,* [*supra*]. *See also Ting v. AT&T* (C.A. 9 2003), 319 F.3d 1126-1151-1152. " [Additional citations omitted.]

Id., at ¶ 68. Accordingly, Ohio substantive law on this issue is the same as the Sixth Circuit under *Morrison* and the United States Supreme Court under *Gilman.*

The majority opinion in *Stutler* found that "The Supreme Court of Kentucky has never considered the question of arbitration costs as a defense to arbitration, or a closely analogous question." 448 F.3d at 348. In contrast, *Eagle* cited an Ohio Supreme Court decision that affirmed a "trial court's determination to send the case to a jury rather than have it proceed to arbitration" based on the required prepayment of arbitration fees. 157 Ohio App. 3d at 168, 809 N.E. 2d at 1175 at ¶¶ 42-43, *citing Williams v. Aetna Fin. Co.,* (Ohio 1998), 83 Ohio St. 464, 466-67, 473, 700 N.E. 2d at 859.

Ohio law adopted the *Morrison* principles as a matter of state law. No one disputes that this Honorable Court is functioning as an *Eerie* Court applying the law of the State of Ohio. In

addition, the Federal Arbitration Act, as well as *Stutler,*[6] recognizes the availability of state law defenses to the enforcement of arbitration clauses. Accordingly, the arbitration clause in this case is unenforceable as a matter of Ohio law, because its enforcement would not merely provide the parties with an alternative forum, but would deprive plaintiffs of their substantive legal rights (and "vanquish the remedial purpose of a statute").

In response to this argument, Magistrate Judge Perelman incorrectly decided, based on *dicta* in *English v. Cornwell Quality Tools Company,* unreported, 2005 WL 3556281 (Ohio (App. 9) Dist. 2005), slip op., at 27-28, that there is a "distinction between enforcing an arbitration clause in actions under an Ohio remedial statute and actions involving non-consumer claims." Report at 9. Judge Perelman also noted that both cases cited by Plaintiffs arose under the Ohio CSPA. Report at 8. Oddly, *English* does not turn on the statute plaintiffs sued under, as those plaintiffs also raised CSPA claims. *English* does not cite any authority and can not serve to support Magistrate Judge Perelman's recommended conclusion that *Eagle* is limited to consumer plaintiffs only.

Instead, Judge Perelman's decision applied an incorrect and overly narrow view of what constitutes a "remedial statute" under Ohio law. As this Court previously recognized in ruling on Stanley's motion to dismiss directed against the other 10 plaintiffs, Plaintiffs have stated a claim for fraud and for breach of contract. Those claims are governed by "remedial statutes." Ohio R. C. § 1302.95, part of Ohio's version of the Uniform Commercial Code, provides: "Remedies for material misrepresentation or fraud include all remedies available under sections 1302.01 to 1302.98, inclusive, of the Revised Code for non-fraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy."

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6 *Id.,* at 346.

As the Ohio Supreme Court recognized nearly three decades ago, "[W]e take note of the stated purpose of the remedial provisions of the Uniform Commercial Code. R.C. 1301.06(A) provides that the remedies expressed in the code should be liberally administered…." *Goddard v. General Motors Co.,* 60 Ohio St.2d 41, 48, 396 N.E.2d 761, 765 (Ohio 1979). R.C. 1301.06(A) specifically mentions the remedies provided by Chapter 1302 as being liberally administered. "Liberal administration" is the *sine qua non* of an Ohio remedial statute, a term defined by R.C. section 1.11: "Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice."

Thus, when the court in *Eagle* applied *Morrison* as Ohio law, and discussed the remedial purposes of statutory claims as justification, the court did not intend to limit its holding to the CSPA only or to cases that only involved consumer plaintiffs. Clearly, *Eagle* applies to any remedial laws, including Plaintiffs' remedies under the UCC.

Therefore, Judge Perelman should not have analyzed the offending provisions of the arbitration clauses under the high standard of substantive unconscionability, but rather under the *Eagle* standard and recommended severly all provisions that effectively prevent plaintiffs from vindicating their statutory rights in arbitration. Under the proper standard, at the very least, all provisions limiting Plaintiffs' remedies in arbitration, and all provisions shortening the statute of limitations and eliminating tolling based on fraudulent concealment, should respectfully be stricken.

Accordingly, Plaintiffs respectfully request that this Honorable Court deny Stanley's Motion, at least in part, by refusing to enforce the offending provisions. Again, as Plaintiffs asserted in the original opposition brief, several of the Plaintiffs who are subject to this Motion were named as class representatives of a proposed class. Accordingly, Plaintiffs request that any

order granting the motion to compel arbitration 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 Plaintiffs' Post-Hearing Brief was filed electronically this 16th day of April, 2007. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

*s/ Joseph Arshawsky*___________