

**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 BOYKO
)	
v.)	
)	
THE STANLEY WORKS, et al.)	MEMORANDUM IN SUPPORT OF
)	MOTION FOR LEAVE TO
)	SUBMIT EVIDENCE
Defendants.)	ON THE UNCONSCIONABILITY
)	OF ARBITRATION

The 93 Plaintiffs identified in paragraph 123 of the First Amended Complaint as “Declaratory Judgment Plaintiffs” are the same 93 Plaintiffs whose claims Stanley seeks to dismiss through its pending Motion to Compel Arbitration and Dismiss the First Amended Complaint. Those issues are fully briefed, and are currently before the Court. This memorandum is in support of Declaratory Judgment Plaintiffs’ emergency Motion for Leave to Submit Evidence on the Unconscionability of Arbitration. It is an emergency because Declaratory Judgment Plaintiffs’ request the Court withhold ruling until the evidence is submitted.

Of course, as Declaratory Judgment Plaintiffs argued previously, and still believe, it is premature for this Court to consider evidence – which was why Declaratory Judgment Plaintiffs

submitted no evidence with their opposition brief. Stanley has yet to explain why --if the pending motions are not, as Stanley claims, filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure-- it has not filed the Answer required by Rule 12(a). If Stanley's Motion to Compel Arbitration and Dismiss is not pursuant to Rule 12(b), Stanley is in default as to these 93 Plaintiffs, and at the very least, it has waived rights to assert any affirmative defenses. Thus the Court should ignore Stanley's evidentiary submissions.

However, if the Court is intending to consider the "evidence" submitted by Stanley as Exhibits 1 and 2 to its March 31, 2005 filing, Declaratory Judgment Plaintiffs hereby request an opportunity to correct the record.

On March 31, 2005, Stanley filed a reply brief in support of its Motion to Mompel Arbitration, attaching for the first time, alleged evidence (Exhibits 1 and 2) in support of Stanley's argument that the arbitration agreements were not procedurally unconscionable. Stanley's submissions are incomplete and misleading. Stanley misrepresented the meaning of the documents as to many of the Declaratory Judgment Plaintiffs, and those exhibits have been mischaracterized to this Court. So that the Court will not be misled in ruling upon Stanley's motion, Plaintiffs request 30 days to submit affidavits clarifying, correcting and/or contradicting the alleged evidence submitted by Stanley.

STATEMENT OF FACTS

Stanley -- although in possession of the complete universe of documents-- submitted incomplete materials to this Court. Plaintiffs have begun the laborious process of reviewing these submissions against their files, and already there are strange and contradictory items coming to light.

For example, presumably to save paper, Stanley submitted representative contracts (rather than the actual contracts) for groups of Declaratory Judgment Plaintiffs (which Stanley claims are similarly situated) and signature pages and acknowledgments, for only a select few. Thus, Stanley is asking this 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. For instance, one of these Declaratory Judgment Plaintiffs, Mr. Cox of Utah, is drafting an affidavit explaining his specific recollection that he received and signed no documents in advance. Mr. Cox's agreement, dated 10 days after Mr. Cox's acknowledgement, is the date when the agreement was signed by Stanley, not Mr. Cox. Mr. Cox's signature on the agreement had no date line. Mr. Cox will testify that he did not see any documents before signing, and that he was rushed through the signing process despite requesting time for review.

In fact, one of the documents submitted by Stanley, an acknowledgement signed by Mr. David Hickox shows that Mr. Hickox crossed out each of the documents on the acknowledgement form, and wrote "no" next to the entries. Mr. Hickox is preparing an affidavit explaining his circumstances of being forced to sign the acknowledgement form without receiving the documents allegedly received in advance according to the form.

Another Plaintiff will testify he was told by Stanley that the documents he was acknowledging receipt of were "obsolete," so he did not need to bother with having them reviewed.

Similarly, Exhibit 2 purports to set forth all of the Declaratory Judgment Plaintiffs' backgrounds. Several of those entries refer to resumes that are not attached. Also, there are

highly fact-specific and individual nuances raised by this narrow and incomplete submission. Plaintiffs recall that defendants indicated, during the March 15, 2005 status conference, they would submit all documents containing the personal information on each and every Plaintiff. Nevertheless, Stanley's submissions to this Court are incomplete and consist of the applications only. Stanley has yet to produce the entirety of its files containing the background information on each and every Plaintiff. Stanley's exhibits therefore present a misleading and incomplete picture to the Court. The Court must wonder why Stanley would present a selected glimpse of the information needed by the Court when Stanley is in possession of the entire picture. Declaratory Judgment Plaintiffs deserve an opportunity to complete the picture by submission of their evidence.

ARGUMENT

Plaintiffs originally assumed that the underlying Motion to Compel Arbitration would be decided on the pleadings, because it was filed in lieu of an Answer. The cases cited by Plaintiffs in their opposition, as well as authorities relied upon by Stanley in its reply, show that the Courts decide these motions on full evidentiary records.

In *Cooper v. MRM Investment Co.*, 367 F. 3d 493, 498 (6th Cir. 2004), the Court clearly made a number of detailed factual findings based on evidence, and although there was no record of it on appeal, there was an evidentiary hearing. In *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 573 (6th Cir. 2003), the Court cited further authority that "If the making of the arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof." In other words, it's clear that the factual issues surrounding

unconscionability of the arbitration provision ought to be “tried,” at least by affidavit submissions.

More importantly, the evidence submitted by Stanley, for the first time in its reply, is incomplete and misleading. Stanley has – at least as to some of the Plaintiffs with whom counsel have conferred so far – misrepresented the evidence. Accordingly, in the interests of justice, and to provide the Court with the benefit of being able to conduct proceedings based on fully honest evidence, Declaratory Judgment Plaintiffs request leave to submit evidence, in the form of affidavits, on the issue of unconscionability of arbitration.

Given that there are 93 Plaintiffs, Plaintiffs request thirty (30) days to confer with each client and obtain the needed signatures.

Respectfully submitted,

THE MAC TOOL LITIGATION GROUP

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CERTIFICATE OF SERVICE

The foregoing Motion for Leave to Submit Evidence on the Issue of the Unconscionability of Arbitration was filed electronically this 8th day of April, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

s/ Andre' F. Toce _____