IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| In re Polyurethane Foam Antitrust Litigation | Case No. 1:10 MD 2196 |
| | ORDER GRANTING MOTION TO COMPEL ARBITRATION AND STAY CLAIMS |
| This document relates to: ALL CASES | |
| | JUDGE JACK ZOUHARY |

Defendant Mohawk Indus. Inc.'s ("Mohawk") Motion to Compel Arbitration and Stay Claims (Doc. 1221) is granted. The parties briefed the Motion (Doc. 1221-1, 1270, 1284), and this Court held an evidentiary hearing (Doc. 1296).

Filed in June 2014, Mohawk's Motion follows: this Court's February 2014 Order, granting Mohawk leave to amend its Amended Answer to include an arbitration defense as to absent members of the then-putative Direct Purchaser Class (Doc. 1035); the April 2014 Order, certifying a Direct Purchaser Class (Doc. 1115); and the May 2014 Order, denying Defendants' motion for stay pending resolution of Defendants' Federal Civil Rule 23(f) petition (Doc. 1169). *See also* Doc. 1224 at 18 (counsel for Mohawk providing advance notice of Mohawk's intent to file the Motion).

This Court examines Mohawk's Motion according to the legal standards concerning waiver and scope contained in the February 2014 Order, which resolved a similar Mohawk motion filed against Direct Action Plaintiff CAP Carpet, Inc. (*see* Doc. 1035 at 5–6, 7–9, 13, 17–20). Mohawk's arbitration defense, like the present Motion, applies only to absent members of the Direct Purchaser

Class ("Direct Purchasers") who entered into arbitration agreements with Mohawk ("Arbitration Customers") (*see* Doc. 1046 at 17).

In opposing the Motion, Direct Purchasers note they "disagree with Mohawk's arguments regarding the applicability of the arbitration agreements to this dispute," that this Court has "already ruled on this issue," and that Direct Purchasers "preserve their position in this regard" (Doc. 1270 at 9 n.1). For purposes of clarity, this Court notes Direct Purchasers never presented scope arguments to this Court (*see* Doc. 865 at 5–15) (arguing waiver). Instead, as they did in opposing the motion for leave to amend, Direct Purchasers only oppose the Motion on waiver grounds (*see id.* at 10–18). In any event, this Court reaffirms its conclusion that the Arbitration Customers' claims fall within the scope of the arbitration agreements (*see* Doc. 1221-1 at 3–4) (identifying the three operative arbitration agreements, all of which contain expansive "arising out of or relating to" language tied not just to disputes related to the credit agreement, but also to the purchase of Mohawk products).

Direct Purchasers spend the bulk of their briefing on identifying prejudice caused by Mohawk's delay in bringing this Motion. Direct Purchasers argue Mohawk: seeks to relitigate in arbitration the issues resolved in Direct Purchasers' favor in this Court, including to "revoke class certification for the majority of its customers" (Doc. 1270 at 12–15); gained access to discovery not likely available in arbitration (*id*. 15); caused Direct Purchasers to incur significant time and expense spent responding to Mohawk-specific issues (*id*. at 15–16; Doc. 1270-6); and should have brought this Motion years ago (*id*. at 17–18).

Again, this Court's review of Supreme Court and Sixth Circuit waiver doctrine shows the applicable legal standard is a demanding one, requiring resolution of doubt as to waiver in favor of preserving the arbitration agreements (*see* Doc. 1035 at 5). Moreover, the prejudice prong of waiver

analysis asks whether delay in asserting an arbitration defense is the cause of otherwise avoidable prejudice to the party opposing invocation of the defense (*see id*. at 8-9) (discussing *Johnson Assoc. Corp. v. H.L. Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012)).

The contours of the class and the nature of the class claims are dispositive of Direct Purchasers' prejudice arguments. Specifically, Direct Purchasers sought to lead a class that includes the Arbitration Customers, but also a substantial number of Mohawk customers who, because they did not purchase Mohawk products on credit obtained from Mohawk, did not enter into an arbitration agreement. Further, Direct Purchasers sue Mohawk according to a statutory framework that imposes joint and several liability on members of a price-fixing conspiracy.

Together, these two features of Direct Purchasers' suit ensured, even if Mohawk had more timely moved to compel arbitration, Mohawk would have (for example) sought reversal of this Court's class certification decision in the Sixth Circuit (Doc. 1270 at 14). In that alternate world, Mohawk also would have had access to the amount and type of discovery available under the Federal Civil Rules (and not likely available in arbitration), because it would be able to gather information relevant to its defenses against a class of non-Arbitration Customers only. To date, the only clear, quantifiable, and avoidable expenses identified by Direct Purchasers relate to expert analysis examining the specific transactions of Arbitration Customers.

Direct Purchasers repeatedly note that if this Court grants the Motion, Arbitration Customers may lose the benefit of a certified class. Likely the vast majority of the Arbitration Customers' claims will not be viable outside of a class action. But the law is what it is, sensible or not. And given this Court's conclusions about other forms of prejudice, binding precedent does not permit this Court to deny the Motion because this Court believes arbitration in this context is inefficient and wasteful, *see*

*Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–21 (1985) (unanimous), or would undermine effective enforcement of federal antitrust laws through the mechanism of a class action. *See Am. Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309–10 (2013).

This Court is bound by case law's pro arbitration bent, notwithstanding this Court's strong belief that neither Mohawk nor its customers who signed the credit agreement believed they were signing away any ability to litigate in federal court the existence of an unlawful antitrust conspiracy. Unfortunately, the law trumps a practical approach resolving these claims. Nor does the result here comport with the very reason a company like Mohawk claims it enters into arbitration agreements: namely, the efficient and inexpensive resolution of routine disputes. But here again, as reflected at the recent hearing (Doc. 1296 at 27–30), common sense plays no role. *See* CHARLES DICKENS, OLIVER TWIST Chapter 51 (1948) (colloquy between Brownlow and Bumble).

Mohawk's Motion to Compel Arbitration and Stay Claims is, reluctantly, granted.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

August 12, 2014