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Re: Swinford v. World Aviation Systems, Inc.
C.A. No. 2108-VCN
Date Submitted: April 11, 2007

Dear Counsel:

A former employer and its former employee disagree over whether disputes arising out of their employment relationship must be arbitrated. Although issues of that nature are not that unusual, the question addressed in this post-trial letter opinion is. The former employee denies that he signed the employment agreement

calling for arbitration and accuses his former employer of having forged his signature to the employment agreement.

* * *

Defendant World Aviation Systems, Inc. ("WASINC"), headquartered in Nevada, is an employment services agency providing flight officers and flight engineers to the airline industry. Plaintiff Jeffrey J. Swinford ("Swinford") worked for WASINC as a flight engineer for flights from Hawaii to Japan.

Swinford brought this action primarily to avoid arbitrating in Nevada a dispute with WASINC over a $10,000 early termination liquidated damages provision in WASINC's standard form employment agreement.[1] Swinford maintains that he never signed any employment agreement with WASINC.

WASINC seeks a determination that Swinford signed the employment agreement, that it is binding upon Swinford, and that their dispute should be resolved through the arbitration proceeding which it brought in Nevada.[2]

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[1] Swinford also sought damages based on alleged broken promises as to travel expenses and other employment benefits. The damages claim was abandoned at trial. (Tr. 81). He continues to seek an award of attorneys' fees.

[2] WASINC also seeks an award of attorneys' fees.

* * *

Swinford, a resident of Delaware, was hired by WASINC as a flight engineer in April 2002. He promptly went to Japan for seven months of training. The parties dispute whether WASINC's standard form employment agreement was presented to Swinford while in Delaware or after he arrived in Japan. Swinford objected to certain travel benefits and retirement account funding provisions in the agreement.[3]

Swinford testified unequivocally that he never signed the WASINC employment agreement;[4] that he returned it, unsigned, to the mailbox outside the room of the WASINC supervisor at the hotel where he was staying during the

[3] The base for Swinford's job was in Hawaii. He would generally have ten days off each month. Thus, he would be flying back and forth between Hawaii and the East Coast. Travel was an ongoing source of friction between WASINC and Swinford. Swinford expected WASINC to pay the cost of flights between the West Coast and Hawaii. WASINC provided some travel passes that would allow for free flights, but on a standby basis. Reaching the West Coast was Swinford's responsibility, and, at times, he was unable to make the travel arrangements in a convenient or timely fashion.

[4] Tr. 50, 68 & 265.

training in Japan. WASINC, on the other hand, has in its files an employment agreement bearing the signature of "Jeffrey J. Swinford."[5]

The Employment Agreement imposes a $10,000 liquidated penalty if an employee, such as Swinford, terminates employment after less than three years of service (after completion of training).[6] The agreement also provides that all disputes arising under it are to be arbitrated before the American Arbitration Association (the "AAA").[7]

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[5] Ex. 14 (the "Employment Agreement"). Also, within WASINC's files was an addendum to the Employment Agreement, one dealing with retirement benefits, which also bears the signature of "Jeffrey J. Swinford." Ex. 20. Swinford also denies having signed the addendum. (Tr. 93).

[6] The Employment Agreement, at Art. XII, paragraph 5, provides: "THE PARTIES AGREE TO LIQUIDATED DAMAGES AS FOLLOWS . . . (a) if EMPLOYEE terminates this Agreement without cause, . . ., EMPLOYEE shall pay EMPLOYER $10,000 (TEN THOUSAND DOLLARS) . . ." The Employment Agreement does contain a line for the employee to initial his agreement to "abide by the liquidated damages provisions contained in this article." On the copy of the Employment Agreement supposedly signed by Swinford, his initials do not appear. Whether the absence of his initials has significance for the question of whether or not the liquidated damages provision may be enforced is not a question before the Court. That is a question, if the dispute is subject to arbitration, for the arbitrators to resolve.

[7] The Employment Agreement, by Art. XIII, paragraph 2, provides for arbitration of disputes as follows: "Any controversy between the EMPLOYER and the EMPLOYEE involving the construction or application of any of the terms, provisions, or conditions of this Agreement shall, on the written request of either party served on the other, be submitted to binding arbitration, and such arbitration shall comply with and be governed by the provisions of the AMERICAN ARBITRATION ASSOCIATION."

Swinford, nonetheless, worked for WASINC for approximately 2.5 years until he resigned in April 2005.[8] WASINC demanded payment of the $10,000 early termination liquidated damages, and, when payment was not forthcoming, it duly commenced an arbitration proceeding in Nevada. That resulted in this action.

* * *

The issue before the Court is purely a factual one: did Swinford sign the Employment Agreement?

Swinford testified without any reservation that he did not sign the agreement. Solely based on an assessment of his demeanor at the time he testified to that "fact," the Court has no reason not to believe that he was testifying to the truth as he then understood it. However, the Court's fact-finding function cannot be limited to that small moment in time.

The key to WASINC's contention that Swinford did, in fact, sign the Employment Agreement is the testimony of Gerald B. Richards ("Richards"), an experienced forensic document inspector and analyzer of handwriting. His

[8] Ex. 38.

testimony, totally credible and based on years of experience, was also unequivocal: he was of the opinion, at the highest degree of confidence one can have as a handwriting expert, that no one other than Swinford could have signed the Employment Agreement.[9] He explained his analysis:

> Q. [by Ms. Gattuso] And what was your opinion?
>
> A. [by Mr. Richards] Based on a examination of the questioned material in comparison with the known material, a side-by-side comparison, and in this case a microscopic examination, I found the questioned signatures to be very swiftly written, good line quality, no indications of suggestions of tremor, of broken lines, anything that would suggest that it was a simulation or a tracing. And, also, there are a number of characteristics within the signatures as compared with the – questioned signatures as compared with the known signatures that individually and in combination led me to the conclusion that the writer of the questioned signatures was Mr. Jeffrey Swinford, the writer of the known signatures.
>
> Q. Is your opinion based on a reasonable degree of scientific probability?
>
> A. Yes, it is.
>
> Q. What factors are critical to your conclusions?

[9] Richards worked as a document examiner for the Federal Bureau of Investigation for two decades. (Tr. 208-11). He clearly satisfies any standard required for an expert in this area.

> A. Well, the factors that are critical, again, is the – the quality of the signatures involved, particularly the questioned signatures; also, the characteristics I find in common between them that indicate that they were prepared by the same person.[10]

WASINC bolsters its position with the following:

1. During the course of this litigation, Swinford has denied signing several documents such as a W-4 form[11] and an authorization for a background check.[12] Yet, he now concedes that those signatures are his.

2. WASINC would not have allowed Swinford to begin work without having a signed agreement.[13]

3. It was unreasonable for Swinford to believe that he would be employed for 2.5 years without having signed an agreement and it was unreasonable for him to take those benefits without believing himself subject to the terms of the agreement.

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[10] Tr. 219-20; *see* Exs. 66, 71 & 77.
[11] Ex. 17; Tr. 78.
[12] Ex. 12; Tr. 82.
[13] Tr. 186. Implicit in Swinford's contentions is an allegation that someone employed by WASINC forged his signature. The most logical culprit, under Swinford's view, would be the person to whom he would have delivered the agreement in Japan—Ronald Mahan. Neither party, however, chose to call him as a witness at trial or to depose him before trial.

4. Swinford received disciplinary letters which referred to the Employment Agreement.[14] WASINC contends that, if he had not signed the Employment Agreement, he would have pointed that fact out when he received those letters.[15]

Thus, the Court is confronted with Swinford's testimony that he did not sign the Employment Agreement and with a credible and qualified handwriting expert's testimony that, in his opinion, the document bears Swinford's signature. Other evidence, recited above, tends to support WASINC's position, but it does so without independent compelling force.

* * *

I conclude, as a matter of fact and by a preponderance of the evidence, that Swinford did sign the Employment Agreement. I accept Richards' testimony. I reject Swinford's testimony, not because he did not testify as he believed the truth

[14] *E.g.*, Ex. 13.

[15] The disciplinary letters came near the end of Swinford's service with WASINC. Before those letters were sent to WASINC, Swinford had a conversation with the chief executive officer of WASINC, Steven Turner ("Turner"), and (at least according to Turner (Tr. 30)) told him that he had never signed any employment agreement. Interestingly, that did not prompt WASINC to provide Swinford with an executed copy of the Employment Agreement. Instead, it waited until the proceedings were commenced in Nevada to produce a copy for him.

to have been, but because he was mistaken. It is worth noting that he denied during the course of this litigation signing other documents which he did in fact sign.[16] I concede that it is not likely that one would forget something as important as signing an agreement, but there really is no other explanation for Swinford's testimony.

With the factual conclusion that Swinford signed the Employment Agreement, it follows that he is bound by it and that arbitration (as duly commenced by WASINC in Nevada) before the AAA is the agreed upon means for resolving disputes under the agreement.[17] That would include questions such as whether the liquidated damages provision is, in itself, valid and enforceable and whether WASINC is entitled to an award of liquidated damages.[18]

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[16] Swinford also objects to the signature on the Employment Agreement because his name is written out while he normally signs his name with just his first initial, as "J. Swinford." (Tr. 64, 95-96, 116). The record, however, demonstrates that it is not unusual for Swinford to sign his name fully, as "Jeffrey J. Swinford." *See, e.g.*, Exs. 11, 12, 17, 19 & 28.

[17] With this conclusion, it is not necessary to consider WASINC's alternative argument that Swinford is estopped from denying that he is bound by the Employment Agreement.

[18] Although the Employment Agreement recites that it is governed by Nevada law (Art. XVI, paragraph 6), that provision would not apply if Swinford did not sign the agreement. The parties have offered no guidance as to whether the law of Delaware, Nevada, or Japan would govern. Significantly, they have not suggested any differences among the various laws which could be chosen. Arbitration, of course, is a favored means of dispute resolution, and, where a duly executed agreement prescribes arbitration, it will generally be enforced. *See, e.g.*, *D.B. Horton,*

As a consequence of WASINC's having proved by a preponderance of the evidence that Swinford signed the Employment Agreement, Swinford's application or a declaration that he is not obligated to arbitrate any dispute in Nevada because he is not subject to the terms of the Employment Agreement fails.[19]

* * *

Counsel are requested to confer and to submit a form of order to implement this letter opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004); *Matria Healthcare, Inc. v. Coral SR LLC*, 2007 WL 763303, at *5 (Del. Ch. Mar. 1, 2007). Swinford has offered no reason, other than that he did not sign the agreement, as to why the arbitration clause of the Employment Agreement should not be enforced. *See* Tr. 13.

[19] Swinford is not entitled to an award of attorneys' fees because he is not a prevailing party. Although WASINC is entitled to its costs, its application for an award of attorneys' fees will be considered later.