ICDR (INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION)

ICDR Case No. 50-2013-00-1179

VFM LEONARDO, INC. V. ICE PORTAL, INC.

FINAL AWARD

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25 March 2015

Tribunal:
Herbert K. Stettin (Sole arbitrator)

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Final Award

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration agreement entered into between the above-named parties dated October 27, 2010, and having heard the proofs presented by the parties, and having issued a Partial Final Award on October 22, 2014 subsequently modified on November 14 as indicated below, does hereby FIND and AWARD, as follows:

FINDINGS

[1]. The content of the October 22, 2014 Partial Final Award, as modified by my Order dated November 14, 2014, pursuant to an unopposed Motion for Correction submitted by Respondent/Counter-Claimant, is hereby incorporated by reference as though fully set forth herein and remains in full effect.

[2]. On November 13, 2014, as the prevailing party, VFM Leonardo, Inc. ("Claimant") submitted its Verified Motion for Fees and Costs (the "Motion"), seeking to recover its attorneys' fees and costs incurred in this litigation pursuant to Paragraph 23 of the parties' October 27, 2010 Settlement Agreement. Paragraph 23 states:

> 23. ARBITRATION. Any controversy or claim (in law or in equity) between ICE and VFM whatsoever, including any future dispute of any kind between ICE and VFM, any allegation that either Party's conduct violates any statute, rule or law, any controversy or claim arising out of or relating to this Agreement or any alleged breach hereof, any issues pertaining to the arbitrability of any controversy or claim, and any claim that this Agreement or any part hereof is invalid, illegal, or otherwise voidable or void, shall be submitted to binding arbitration. The arbitration panel shall have the power and authority to determine whether any particular claim or matter is subject to arbitration. Said arbitration shall be administered by the American Arbitration Association ("AAA") in accordance with the AAA Commercial Arbitration Rules (except as set forth in this Agreement). Judgment upon any award rendered may be entered in any court having jurisdiction thereof. The Parties agree that for any controversy or claim arising out of or relating to this Agreement or any alleged breach hereof, Judge Herbert Stettin shall be the sole arbitrator and the arbitration shall take place in Miami, Florida. For any other controversy or claim (or in the event Stettin is not available or is unwilling to serve as to the foregoing type of dispute), including, but not limited to, any claim under any antitrust laws or for tortious interference, the parties will select three arbitrators (and have communications with each of the arbitrators) strictly in accordance with the AAA Commercial Arbitration Rules, including R-17 and R-18(a), and all three arbitrators shall be neutrals who must be free from any conflict of interest and with whom there shall be no *ex parte* communication except as allowed by those rules. The arbitration before a three-member arbitration panel shall take place in Chicago, Illinois, unless agreed to in writing otherwise. No arbitrator in the three-member panel shall reside in the State of Florida or have resided there for any substantial part of the last ten (10) years. In the event the controversy or claim involves any

allegation of any violation of antitrust law, each arbitrator must have served as counsel, judge, or arbitrator in at least two antitrust cases within the preceding ten (10) years. In any arbitration pursuant to this paragraph, the prevailing party shall be entitled to an award of its reasonable attorneys' fees, expert fees and costs that it incurred in connection therewith. Moreover, punitive damages shall not be awarded by the arbitration panel upon a party prevailing on any claim or counterclaim regardless of whether such otherwise would have been available by statute or common law had the case been litigated in a court of law.

[3]. On November 26, 2014, ICE Portal, Inc. ("Respondent") submitted a Verified Response in Opposition to Claimant's Verified Motion for Fees and Costs (the "Opposition"). In its opposition papers, Respondent argues that the parties entered into a new agreement to arbitrate the case, evidenced by a series of emails between counsel in December 2013. This new agreement does not include a prevailing party right to fees and costs. My review reflects that those emails concern only an understanding limited to the selection of the undersigned as the sole Arbitrator in this matter and to hold the hearing in Miami, Florida. They neither refer to a new arbitration agreement nor to abandonment of the prevailing party's right to attorneys' fees, expert fees and costs incurred in the arbitration. Respondent does concede that Claimant is entitled to the fees and costs it incurred in defending against Respondent's counterclaim, which includes a claim for breach of the Settlement Agreement, because it is a claim which is properly asserted under Paragraph 23. Respondent also objects to Claimant's counsel's hourly rates (both blended and individually) on the ground they are not reasonable. Respondent does not challenge the number of hours Claimant's counsel expended on this matter to properly perform the work.

[4]. After considering the parties' submissions (the Motion and Opposition, Claimant's Reply in Support of the Motion, Respondent's Surreply in Support of the Opposition, and the parties' Supplemental Briefs) together with argument of counsel and evidence presented during the January 16, 2015 hearing, I find that the email exchange simply modified the Settlement Agreement and did not change the right to prevailing party fees and costs.

[5]. There is no credible evidence which suggests that the parties' intended to make a new arbitration agreement. The changes agreed upon constitute only a modification of Paragraph 23 for the convenience of the parties and to reduce expenses. It was not a new agreement. Florida law provides that the terms of a contract not otherwise abrogated by a modification remain in effect. *See, e.g., Franz Tractor Co. v. J.I. Case Co.,* 566 So. 2d 524, 526 (Fla. 2d DCA 1990) ("All terms of an original contract not abrogated by a modification remain in effect.").

[6]. Respondent relies heavily upon *Okeechobee Resorts, LLC v. #2 Cash Pawn, Inc.,* 145 So. 3d 989 (Fla. 4th DCA 2014) for the proposition that parties to a written contract containing a "no oral modification" clause cannot be amended "by nothing other than 'a subsequent oral agreement' or alternatively - by a course of dealing". 145 So. 3d at 995.

[7]. However that may be, it is irrelevant to the issue before me because the parties modified their agreement by a written agreement - the email exchange in December 2013 - which was executed by authorized agents - their attorneys. The law recognizes that email agreements and signatures are sufficient writings to constitute a valid contract modification. An agent's name on an email (in

this case, that of Patrick O'Connor on behalf of Respondent) satisfies the requirement in Paragraph 23 of a written consensual amendment.

[8]. I find that the emails between the attorneys for the parties in December, 2013, modifying the Settlement Agreement are a written instrument signed by the parties as required by Paragraph 25 of the same. *Dubai World Corp.* v. *Janbert,* No. 09-14314-CIV, 2011 WL 579213 at 11-12 (S.D. Fla., Feb. 9, 2011) ("In Florida signed emails meet the written requirement of the statute of frauds.") *See also, Cloud Corp. v. Hasbro, Inc.,* 314 F.3d 289, 296 (7th Cir. 2002) ("the sender's name on an email satisfies the signature requirement of the statutes of frauds."). Both federal and state statutes recognize that electronic signatures have the same legal effect as a handwritten signature. *See,* 15 U.S.C. §7001(a); Fla. Stat. 668,004.

[9]. And of course the parties treated the modification as part of Paragraph 23. For example, in its Answering Statement, Respondent requested its attorneys' fees and costs in connection with its defense against Claimant's causes of action, separate and apart from Respondent's later-filed counterclaim which sought fees as part of its own claims for affirmative relief.

[10]. In the Surreply to the Fee Motion and at the January 16, 2015 hearing, Respondent argued that because its defense against Claimant's causes of action was grounded upon a breach of the Settlement Agreement, hence properly subject to Paragraph 23 (including the prevailing party fee provision), it did not waive its position that a new arbitration agreement had been entered into by its request in its Answering Statement for an award of fees and costs. This does not convince me of Respondent's waiver of the defense that a new Arbitration Agreement was in effect.

[11]. The parties' filings subsequent to the Answering Statement consistently reflect they proceeded under Paragraph 23. In the Joint Pre-Trial Stipulation, the parties identified Paragraph 23 as the sole basis for my jurisdiction over this matter. Although the parties reserved the right to brief the issue of entitlement to fees in that Stipulation, Respondent's arguments against Claimant's entitlement to fees, based upon a new arbitration agreement, are in direct contradiction to the statement of jurisdiction to which Respondent agreed. In the Joint Pre-Trial Statement, Respondent was on notice that Claimant was proceeding under Paragraph 23 in requesting its fees and costs if it prevailed in this Arbitration. Respondent did not raise an objection to this until its post-trial Opposition to Claimant's fee request. As such, I find Respondent is estopped from now claiming otherwise. Claimant's reliance on Respondent's conduct and the prejudice which would result is shown in several ways. If Respondent had timely raised the issue of the existence of a new arbitration agreement without a prevailing party fee provision, Claimant could have sought to withdraw this Arbitration and re-file its claim before a three-member panel in Chicago. Claimant could also have pursued a claim for punitive damages against Respondents; a claim which is waived by Paragraph 23. Claimant could also have argued in this case that its claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA") was not duplicative of its tortious interference claims since that statute provides an independent basis for the award of prevailing party fees and costs. The October 22, 2014, Partial Final Award denied such relief on the ground the FDUPTA claim was duplicative of the claim brought under the Settlement Agreement.

[12]. Additionally, the claims and defenses before me in this matter were based on the same core set of facts. I find they were inextricably intertwined such that recovery of all fees and costs incurred in the arbitration as a whole is appropriate without the need to parse out which fees and costs were

incurred in connection with each individual claim. Claimant's cause of action was based on Respondent's misrepresentation to clients that Respondent had the right to access the VScape Lite platform on their behalf, and its subsequent improper access of VScape Lite. Respondent's defense and its counterclaim were based on Respondent's contention that it had the right to access the VScape Lite platform, and had the right to make those representations. I conclude that in order to prevail on its affirmative claims, Claimant necessarily had to prevail on Respondent's defenses and counterclaim. The issues were tried together and everyone relied on evidence covering both the claim and the defenses and counterclaim.

[13]. The remaining issue is whether the attorneys' fees and costs requested by Claimant are reasonable. Claimant offered the testimony of an expert witness that the overall fees which Claimant incurred were reasonable and necessary for the work performed in the Arbitration. Although this evidence is unrebutted as to the number of hours expended, it is contested as to the reasonableness of the hourly rates billed.

[14]. In this case, it was clearly reasonable for Claimant to engage the law firm of Greenberg Traurig since it had previously represented Claimant in litigation against Respondent which resulted in the parties' 2010 Settlement Agreement. Greenberg Traurig's attorney's fees claimed are US$705,464.00, inclusive of US$68,549.50 incurred to prove entitlement to and the amount of the award, together with US$16,362.50 in expert fees to prove the amount of fees, totaling US$721,826.50. Claimant also seeks US$135,907.83 in costs. The grand total is US$857,734.33. This is more than 8-14 times the amount of the US$100,000.00 award of compensatory damages.

[15]. An award of fees and costs which exceed the compensatory damages recovered in a case is appropriate in those instances where the circumstances are such that the fees and costs incurred were necessary to properly represent the client's interests.

[16]. That happened in this case. The parties' history is one of disputes involving competition for clients. This case is the latest iteration. In addition, the consequences of the Award to both parties exceed the amount awarded.

[17]. I have carefully considered the issue of the reasonableness of the hourly rates charged and conclude that they are commensurate with other attorneys of similar skill and experience in comparable disputes.

[18]. Nevertheless, I find that an award of US$500,000.00 in attorney's fees is a reasonable fee in this case in light of all of the circumstances.

[19]. In arriving at my conclusions I have carefully considered each of the following factors:

a. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;

b. The likelihood, if apparent to the client, that the acceptance of this particular employment would preclude other employment by the attorneys or their firm;

c. The fee customarily charged in the locality for similar legal services;

d. The amount involved and the results obtained;

e. The time limitations imposed by the client or by the circumstances;

f. The nature and length of the professional relationship with the client;

g. The experience, reputation, and ability of the attorneys performing the services; and

h. Whether the fee is fixed or contingent.

I award Claimant costs of US$135,907.83, as reasonable and necessary for the prosecution of the case.

I award Claimant the costs of US$10,000.00 for the expert witness fees of Robert Josephsberg.

Award

[20]. For the reasons set forth above, I hereby Award as follows:

A. The content of the October 22, 2014 Partial Final Award, as modified by my Order dated November 14, 2014, is hereby incorporated by reference as though fully set forth herein and remains in full effect.

B. As provided in the October 22, 2014 Partial Final Award, Claimant is entitled to recover US$94,000.00 from Respondent as damages for tortious interference with Claimant's business relationship with Genares and Vantage.

C. As provided in the October 22, 2014 Partial Final Award, Claimant is entitled to recover US$6,000.00 from Respondent representing the costs of enforcing its VScape Lite service rights.

D. Claimant shall recover US$500,000.00 in attorneys' fees, US$135,907.83 as costs incurred in the case, and US$10,000.00 as an expert witness fee.

E. The administrative fees and expenses of the International Centre for Dispute Resolution, totaling US$20,950.00, and the compensation and expenses of the Arbitrator, totaling US$35,750.00 shall be borne entirely by the Respondent. Therefore, Respondent shall reimburse Claimant the sum of US$27,375.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Claimant, upon demonstration by Claimant that these incurred costs have been paid.

F. This Final Award is in full and complete settlement and satisfaction of any and all issues submitted by the parties, and any claim not specifically addressed herein is deemed denied.

I hereby certify that, for the purposes of Article I of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award is made in Miami, Florida, United States of America.