The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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ELECTRONIC RECORDS AND SIGNATURES

Aerotek Inc. v. Boyd[2]

At issue in *Aerotek Inc. v. Boyd*, is the efficacy of an online hiring application's security procedures used to effectuate a Mutual Arbitration Agreement (MAA) between employees and their employer, Aerotek.[3] Also at issue, is whether an alleged signatory's simple denial that he signed a MAA is enough to prevent the electronic signature from being attributed to him.[4] The Texas Supreme Court cited the Texas Uniform Electronic Transactions Act (the "Act")[5] to show that in the event an alleged signatory denies his or her electronic signature on a contract, the enforceability of that signature depends on proof of the efficacy of "the security procedure applied to determine the person to which the… electronic signature was attributable."[6]

In this case, four employees were hired to work for one of Aerotek's clients and were terminated soon after starting work for the client.[7] All four employees then filed a lawsuit against Aerotek for racial discrimination and retaliation.[8] Aerotek filed a motion to compel arbitration.[9] Aerotek attached to its motion each employee's electronically signed and timestamped Electronic Disclosure Agreement and MAA which the employees had completed as part of Aerotek's online hiring application.[10] In response to Aerotek's motion, the employees submitted almost identical affidavits stating that while they had completed Aerotek's hiring application, they denied that they ever signed or were presented the MAAs during the hiring process or otherwise.[11]

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Devon Davis, a Washington and Lee law student, for her research and drafting assistance.
[2] *Aerotek, Inc. v. Boyd*, No. 20-0290, 2021Tex. LEXIS 425 (Tex. February 23, 2021).
[3] *Id*. at *2.
[4] *Id*.
[5] Tex. Bus. & Com. Code ch. 322 (West 2021).
[6] *Aerotek, Inc.*, 2021 LEXIS 425 at *2 (quoting Tex. Bus. Com. Code § 322.009(a) (West 2021)).
[7] *Aerotek, Inc.*, 2021 LEXIS 425 at *5.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.

In light of the fact issue created by the signed MAAs bearing each employee's electronic signature and the employee's affidavit denying the employee's signature on the MAA, the trial court conducted an evidentiary hearing on Aerotek's motion to compel arbitration.[12] Aerotek presented evidence that the employees had seen and signed the arbitration agreement with printed copies of the MAAs showing computer generated stamps recording the date and time each employee signed the MAA.[13] Aerotek's program manager testified how Aerotek's online hiring application was designed and how it worked.[14] The program manager gave an in-court demonstration of the electronic hiring application and explained how there was no possible way that the employees could have completed their applications without executing the MAA.[15]

Aerotek's program manager also explained how the security procedures of the online hiring application complied with the Act's Section 322.002(13).[16] The application required employees to enter unique personal identification information, user ID, password, and security questions to register for a personal account.[17] All of this information was not available to Aerotek which prevented Aerotek from altering the content of the hiring application once a candidate submitted the application, including the MAA.[18] Each candidate could not submit the application without electronically signing the MAA.[19] The employees offered only their affidavits as evidence which the trial court accepted as sworn testimony.[20]

Despite evidence to the contrary, the trial court believed the employees and denied Aerotek's motion to compel.[21] A divided panel of the Dallas court of appeals affirmed, finding that Aerotek had not conclusively established the MAAs' validity.[22] The appellate court denied Aerotek's motion for rehearing en banc over a dissent joined by four Justices, and the Texas Supreme Court granted Aerotek's petition for review.[23]

In discussing its standard of review, the Texas Supreme Court stated, "[w]e must defer to the trial court's factual findings that the [e]mployees did not sign the MAAs if that finding is supported by evidence."[24] This "[e]vidence is conclusive only if reasonable people could not differ in their conclusions,"[25] and evidence cannot be disregarded when it "demonstrates 'physical facts that cannot

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[12] *Id*.
[13] *Id*.
[14] *Id*. at *6.
[15] *Id*. at *6-7.
[16] *Id*. at *11-12.
[17] *Id*. at *13.
[18] *Id*. at *14.
[19] *Id*.
[20] *Id*. at *8.
[21] *Id*. at *8, 10.
[22] *Id*. at *9.
[23] *Id*. at *10.
[24] *Id*. (internal quotations omitted) (quoting *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (citing *In re Labatt Food Serv., L.P*., 279 S.W.3d 640, 642-643 (Tex. 2009) (orig. proceeding))).
[25] *Aerotek, Inc*., 2021 LEXIS 425 at *11 (internal quotations omitted) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005)).

be denied.'"[26] The Supreme Court concluded that Aerotek's evidence had conclusively established the hiring applications' security procedures described in Tex. Bus. & Com. Code § 322.009(a).[27]

The employees chose to rely on their affidavits which admitted that each of them had completed Aerotek's online hiring application, but that they somehow did not see or sign the MAA included in the application.[28] Beyond the affidavits, the employees relied on mere argument that Aerotek's evidence fell short.[29] The court found that "[u]nder Section 322.009's framework for electronic-signature attribution, once Aerotek proved its security procedures, the burden shifted to the [e]mployees to demonstrate how their electronic signatures could have wound up on the MAAs without their having placed them there themselves."[30]

The employees could have requested forensic tests of the hiring application to show that it did not operate as the program manager described.[31] However, they did not, and arguments[32] and mere denials did not suffice for evidence to support the employees' contentions.[33] Aerotek's evidence of the security procedures for its online hiring application and its operation was such that "reasonable people could not differ in concluding that the [e]mployees could not have completed their hiring applications without signing the MAAs."[34]

Without the employees offering evidence that the security procedures lacked integrity or effectiveness and considering Aerotek's evidence of the hiring applications security procedures, the Texas Supreme Court held that "Aerotek conclusively established that the [e]mployees signed, and therefore consented to, the MAAs."[35] The court found that "attribution cannot be cast into doubt merely by denying the result that reliable [security] procedures generate."[36] Thereby, the court found that the trial court erred in denying Aerotek's motion to compel arbitration, reversed the judgment of the court of appeals, and remanded the case to the trial court for further proceedings.[37]

OBSERVATIONS

1. Motions to compel arbitration are subject to "summary" hearings under both 9 U.S.C. §4 (by "petition") and Texas Civil Practices & Remedies Code §171.021 (by "application").

2. But motions to compel can become complicated evidentiary proceedings, even to the extent of a jury trial, regarding the existence and scope of the arbitration agreement in question.

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[26] *Aerotek, Inc.*, 2021 LEXIS 425 at *20 (quoting Boyd's dissent and *City of Keller v. Wilson*).
[27] *Aerotek, Inc.*, 2021 LEXIS 425 at *18 ("[T]he only way a person could access each Employee's information was through a secret combination of unique user ID, password, and security questions known only to the Employee.").
[28] *Id*. at *13.
[29] *Id*. at *18.
[30] *Id*. at *19-20.
[31] *Id*. at *16.
[32] *Id*. at *18; *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983) ("When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence."; *see also Cary v. State*, 507 S.W.3d 761, 766 (Tex. Crim. App. 2016) (noting that "arguments are not evidence" in a legal-sufficiency analysis).
[33] *Aerotek, Inc.*, 2021 LEXIS 425 at *20.
[34] *Id*.
[35] *Id*. at *23.
[36] *Id*.
[37] *Id*.

3. Electronic records and signatures do have both federal (Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ch. 96) and Texas state (The Texas Uniform Electronic Transactions Act, TBCC ch.322) statutory support.

4. But how the movant establishes a valid electronic signature to an arbitration agreement pursuant to TBCC §322.009(a) is explained in *Aerotek.*

5. *Aerotek* also provides a detailed explanation of how *Aerotek* as employer used exclusively an online employment application and "onboarding" process for hiring its thousands of employees.

6. The four employees, appearing only by affidavits, admitted that each of them completed the online employment application and "onboarding" process used by *Aerotek* but denied they ever saw, signed, or were presented with the "Mutual Arbitration Agreement" during the online employment process although it was a required document in the online process.

7. *Aerotek* presented trial court testimony by employees involved in the online application process but did not offer a technical software witness from the software vendor.

8. The appellate review ultimately focused on the legal sufficiency of the evidence provided to the trial court that denied the employer's motion to compel.

9. All the Texas Supreme Court Justices except for Justice Jeffrey Boyd (who dissented) found that *Aerotek* had established conclusively that the employees' electronic signatures were valid and spelled out why.

10. *Aerotek* provides helpful direction for any movant required to establish the validity of the non-movant's electronic signature to an arbitration agreement.