

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 9450

Speedway Motorsports International, Ltd.,)
)
 Plaintiff,)
)
 v.)
)
 Bronwen Energy Trading, Ltd., Bronwen)
 Energy Trading UK, Ltd., Dr. Patrick Denyefa)
 Ndiomu, BNP Paribas (Suisse) SA, BNP)
 Paribas S.A., Swift Aviation Group, Inc.,)
 Swift Air, LLC, and Swift Aviation Group,)
 LLC,)
)
 Defendants.)

**DEFENDANT BNP PARIBAS S.A.'S
REPLY BRIEF IN FURTHER SUPPORT
OF ITS MOTION TO DISMISS
CROSS-CLAIMS OF SWIFT AVIATION
GROUP, INC.**

Pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure, defendant BNP Paribas, S.A. (“BNPP France”) has moved the Court for entry of an Order dismissing the Cross-claims of Swift Aviation Group, Inc. (“Swift”) on the following grounds:

1. Swift’s alleged claims against BNPP France are subject to the following forum selection and choice of law provisions contained in the Third Party Letter of Credit Agreements signed by Swift as “Applicant” and sent to BNPP France, attached to Swift’s Cross-claims: **“This Agreement is governed by and shall be construed in accordance with French Law. Any disputes arising hereunder or in connection herewith shall be exclusively submitted to the commercial court of Paris, France.”**
2. Litigation of the same documents and facts at issue in Swift’s Cross-claims is currently pending in the Commercial Court of Paris, in accordance with the forum selection and choice of law provisions contained in the Third Party Letter of Credit Agreements.

PRELIMINARY STATEMENT

In its response to BNPP France’s motion to dismiss, Swift makes several arguments that bear reply, namely: (i) that its cross-claims (the “Cross-claims”) against BNPP France are not governed by the Paris, France, forum selection clause (the “Forum Selection Clause”) because BNPP France is not a signatory to the Third Party Agreements; (ii) Swift’s Cross-claims are not

sufficiently connected to the Third Party Agreements; and (iii) the Forum Selection Clause is unfair and unreasonable, and would deny Swift its day in court due to France's discovery rules.

To the contrary:

- (1) BNPP France does not have to be a signatory to the Third Party Agreement signed by Swift as "Applicant" and addressed to BNPP France in order to enforce the Forum Selection Clause to which Swift agreed;
- (2) Swift's Cross-claims are clearly in connection with the Third Party Agreements;
- (3) The Forum Selection Clause does not violate the public policy of North Carolina.

LEGAL ANALYSIS

1. BNPP France Does Not Have to be a Signatory to the Third Party Agreements Signed by Swift and Addressed to BNPP France in Order to Enforce the Forum Selection Clause to Which Swift Agreed

The fact that BNPP is not a signatory to the Third Party Agreements, which are signed by Swift and Bronwen and addressed directly to BNPP France, does not mean that BNPP cannot enforce the Forum Selection Clause to which Swift agreed. There are a plethora of common law principles under which a non-signatory to a contract can enforce provisions of such contract, including a forum selection clause. See e.g., Ellen v. A.C. Schultes, 172 N.C.App. 317, 320, 615 S.E.2d 729, 732 (2005) ("[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.") quoting Washington Square Securities, Inc. v. Aune, 385 F.3d 432, 435 (4th Cir.2004); Brown v. Centex Homes, 171 N.C.App. 741, 615 S.E.2d 86 (2005) (non-signatories to an arbitration agreement may be bound by or enforce an arbitration agreement executed by other parties); Manpower of Guilford Co., Inc. v. Hedgecock, 42 N.C.App. 515, 257 S.E.2d 109 (1979) (finding former employer's signature was not necessary to render covenant not to compete enforceable); Inter. Paper v. Schwabedissen Maschinen & Anlagen, 206 F.3d

411, 416-17 (4th Cir.2000); James C. Greene v. Great American, 321 F.Supp.2d 717, 719-720 (W.D.N.C. 2004) (non-signatory may enforce arbitration clause, based on multiple cases holding same where claims are intertwined with contract containing arbitration clause); Brantly v. Republic Mortgage, 424 F.3d 392, 395-396 (4th Cir.2005) (explains intertwined claims test for nonsignatory enforcement of arbitration provision: “When each of a signatory's claims against a nonsignatory “makes reference to” or “presumes the existence of” the written agreement, the signatory's claims ‘arise out of and relate directly to the [written] agreement,’ and arbitration is appropriate.”), citing MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir.1999); Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 (9th Cir.1998) (allowing nonsignatories to enforce forum selection clause where they are “transaction participants” because the alleged conduct of the non-signatories is so closely related to the contractual relationship that the forum-selection clause applies to all defendants); Bugna v. Fike, 80 Cal.App.4th 229, 233, 95 Cal.Rptr.2d 161, 164 (2000) (“For [a non-signatory defendant] to demonstrate that it was ‘so closely related to the contractual relationship’ that it is entitled to enforce the forum selection clause, it must show by specific conduct or express agreement that (1) it agreed to be bound by the terms of the purchase agreement, (2) the contracting parties intended [defendant] to benefit from the purchase agreement, or (3) there was sufficient evidence of a defined and intertwining business relationship with a contracting party.”), quoting Bancomer, S.A. v. Superior Court, 44 Cal.App.4th 1450, 1461, 52 Cal.Rptr.2d 435 (1996).

Even non-signatory “transaction participants” may enforce a forum selection clause where their conduct is so closely related to the transaction that the forum-selection clause applies. See Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 no. 5 (9th Cir.1988); see also Accelerated Christian Educ., Inc. v. Oracle Corp., 925 S.W.2d 66, 75 (tex.App.-Dallas

1996) (adopting transaction participant analysis); “[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses. This is especially true where the party is a third party beneficiary of the disputed contract and it is foreseeable that dispute resolution would occur in a foreign jurisdiction.” Clinton v. Janger, 583 F.Supp. 284 (1984), citing Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir.1983).

In the present case, the Third Party Letter of Credit Agreements were signed by Swift and Bronwen and addressed directly to BNPP France. The Agreements continuously refer to BNPP France as “You,” and make clear that the Agreements, addressed to BNPP France and signed by Swift and Bronwen, set forth various terms of the relationship between BNPP France, Swift and Bronwen:

- Now, in **consideration** of the foregoing, each of the Undersigned **hereby confirms** to **YOU** that it is unconditionally and irrevocably obligated to the Bank on a joint and several basis for any liabilities that may arise from the issuance by the Bank of the Letter of Credit.
- Without limiting in any way the joint and several liability of each Undersigned for all liabilities in respect of the Letter of Credit, each Undersigned irrevocably request, and irrevocably agree that **YOU** may issue the Letter of Credit indicating the name of [Swift] alone as the applicant therein.....
- Each of the Undersigned hereby acknowledges that **YOU** would not consider issuing the Letter of Credit in the absence of among other things, this letter. Each of the undersigned hereby jointly and severally holds **YOU** harmless from, and agrees to indemnify **YOU** for any and all claims, liabilities, damages, losses, costs and reasonable expenses (including legal fees and expenses) which **YOU** may incur in respect of the Letter of Credit or the Transaction. This indemnity shall survive the expiration of the Letter of Credit.

Cross-claims, Ex. 2, 3, 4, 5, 6 (emphasis added).

Under a number of common law principals, BNPP France is entitled to require Swift to bring its claims in Paris, France, in accordance with the Forum Selection Clause to which the

parties agreed.

2. Swift's Cross-claims are Clearly In Connection With the Third Party Agreements

Despite attaching all of the Third Party Agreements to its Cross-claims and continuously referencing and quoting the Agreements in its allegations and causes of action against BNPP France, Swift now takes the position that its Cross-claims are not sufficiently related to the Third Party Agreements to be governed by the Forum Selection Clause contained therein, and the clause was not intended to cover Swift's tort claims. This argument is without merit in light of the broad language of the Clause at issue: "Any disputes arising hereunder or in connection herewith shall be exclusively submitted to the commercial court of Paris, France" (emphasis added).

In fact, the very case cited by Swift in support of its argument—Busse v. Pacific Cattle, 896 S.W.2d 807—makes clear that this forum-selection language is broad. The Busse court was examining a narrow forum selection clause. In contrast to the broad language of the Forum Selection Clause at issue in the case at bar, the clause in Busse was expressly limited to the subject agreement and the rights and obligations in the agreement: "This agreement and the rights and obligations of the parties arising hereto shall be construed in accordance with the laws of the State of Iowa with venue in [certain Iowa counties]." The Busse court even distinguished a case cited by the plaintiff on the basis that the Busse clause was limited, and did not apply to "any action": "[T]he case of *Brock v. Entre Computer Centers, Inc.*, 740 F.Supp. 428 (E.D.Tex.1990), involved a provision that applied to 'any action' and was not limited to actions arising under the contract itself."

Moreover, while Swift cites Busse for the proposition that a forum selection clause does not apply to a tort action alleging that the plaintiff was induced by misrepresentations to enter the

contract, the Court of Appeals that decided Busse has recently rejected it on this very point. In Deep Water v. Shell International, 234 S.W.3d 679 (2007), the plaintiffs made the same argument Swift is making, but the Court rejected the argument, based on the narrow nature of the Busse clause, and the fact that Texas now follows the federal analysis of forum selection clauses:

The Deep Water Parties assert that a forum-selection clause applies only to the construction of rights and liabilities under the contract in which the clause is found, citing *Busse v. Pacific Cattle Feeding Fund No. 1, Ltd.*, 896 S.W.2d 807, 812-13 (Tex.App.-Texarkana 1995, writ denied). *Busse* predates the Texas Supreme Court's adoption of the federal analysis for forum-selection clauses, and *Busse* involved a narrow forum-selection clause that covered only the construction of the parties' rights and obligations under the contract in which the clause was contained. *Busse v. Pacific Cattle Feeding Fund No. 1, Ltd.*, 896 S.W.2d 807, 812-13 (Tex.App.-Texarkana 1995, writ denied). *Busse* is not on point.

Deep Water, 234 S.W.3d at 691, n. 5.

In contrast to the narrow Busse clause, the Forum Selection Clause at issue applies to “any dispute” arising “in connection” with the Third Party Agreements. An analysis of Swift’s Answer, allegations and causes of action against BNPP France makes clear that Swift’s alleged claims against BNPP France are “in connection with” the Agreements:

- “These Defendants admit that BNP (Paris) issued letters of credit to KPC on behalf of SAG Inc. in connection with the provisions of the Third Party Letter of Agreements attached as Exhibits 2, 3, 4, 5 and 6 with a separate letter of credit for each spot contract. These Defendants further admit that the letters of credit were issued to KPC by BNP Paribas (Paris) in the name of SAG, Inc., and are attached to this Amended Answer as Exhibits 10, 11, 12, 13 and 14.” (Answer ¶ 64).
- “Relying on BNP Paribas (Paris)’s representations regarding the capabilities of Bronwen and because BNP Paribas (Paris) required SAG, Inc. to use Bronwen as a condition of funding and establishing the financial infrastructure necessary to operate the spot contracts, SAG, Inc. entered into a series of Third Party Agreements with Bronwen subject to the approval of BNP Paribas (Paris) and which were submitted to BNP Paribas (Paris).” (Cross-cl., ¶ 24).
- “BNP Paribas (Paris) knew, as a consequence of the Third Party Letter of [Credit] Agreements that it induced SAC, Inc. to execute, that SAG, Inc. had not control

over the rights or obligations of the spot contracts and that BNP Paribas (paris), as SAG, Inc.'s named attorney-in-fact was required to protect and otherwise guard SAG, Inc.'s interests." (Cross-Cl., ¶ 60).

- "Upon information and belief, BNP Paribas (Paris)'s representations were reasonably calculated to induce SAG, Inc. to: (i) enter into a contract giving Bronwen all of its rights and obligations under the spot contract; (ii) enter into Third Party Letter of Credit Agreements with Bronwen; (iii) relinquish control over the financing and operation of the spot contracts; (iv) relinquish the right to profits resulting from operation of the spot contracts; and (v) appoint BNP Paribas (Paris) as SAG, Inc.'s attorney-in-fact." (Cross-Cl., ¶ 60).

Swift entered all of the Third Party Letter of Credit Agreements, addressed to BNPP France, attached the Agreements to its Cross-claims, and cites the Agreements extensively throughout its allegations and causes of action against BNPP France. Swift cannot now reasonably argue that its claims are not sufficiently connected to the Agreements for it to be bound by the Forum Selection Clauses contained in all of the Agreements.

3. The Forum Selection Clause Does Not Violate the Public Policy of North Carolina

Swift also attempts to carry the heavy burden in North Carolina of avoiding the Forum Selection Clause on the ground that it is unreasonable, unfair and overreaching, and would deny Swift its day in Court due to the nature of litigation in France. The law will not permit one to take and hold the fruits of what was done for him, in this case the issuance by BNPP France of the letters of credit, and at the same time repudiate its components. See Sugg v. North Carolina Agricultural Credit Corp., 196 N.C. 97, 144 S.E. 554 (1928).

Surprisingly, in support of its public policy argument, Swift cites the North Carolina Supreme Court's decision in Perkins v. CCH Computax, Inc., 333 N.C. 140, 423 S.E.2d 780 (1992), as well as the U.S. Supreme Court's decision in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S.Ct. 1907, 1916 (1972). Neither of these cases supports Swift's arguments. In Perkins, our Supreme Court roundly endorsed the enforcement of forum selection clauses,

citing and quoting the U.S. Supreme Court's decision in Bremen:

In recent years, there has been an abundance of state and federal cases enforcing forum selection clauses. The leading case in this area is *Bremen*. In *Bremen*, the United States Supreme Court enunciated a standard for the enforceability of forum selection clauses. The Court held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 10, 92 S.Ct. at 1913, 32 L.Ed.2d at 520. The Court further held that the forum selection clause in the contract should be enforced "absent a strong showing that it should be set aside ... [, a] show [ing] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15, 92 S.Ct. at 1916, 32 L.Ed.2d at 523. Additionally, the Court held that a forum selection clause should be invalid if enforcement would "contravene a strong public policy of the forum in which suit is brought." *Id.*.....

Recognizing the validity and enforceability of forum selection clauses in North Carolina is consistent with the North Carolina rule that recognizes the validity and enforceability of choice of law and consent to jurisdiction provisions. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30. For the foregoing reasons, we embrace the modern view and hold that forum selection clauses are valid in North Carolina. A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable.

Perkins, 333 N.C. at 144, 146, 423 S.E.2d at 783, 784 (emphasis added).

Similarly curious is Swift's reliance on St. Andrews Presbyterian College v. Southern Ass'n of Colleges and Schools, Inc., No. 07-CV-640, 2007 SL 4219402, *8 (M.D.N.C. 2007) for the argument that the forum selection clause is a result of overreaching. Although Judge Tilley summarized the Dove Air decision in his St. Andrew's decision, His Honor ultimately declined to follow Dove Air, instead holding that the facts in Dove Air—including the fact that the plaintiff was in severe financial difficulty when the contract was entered, the defendant drafted the contract, etc.—did not exist in St. Andrews, and noting, "[I]n the Fourth Circuit, a forum selection clause is presumptively valid." St. Andrews at *7-*8, discussing Dove Air, Inc. v.

Bennett, 226 F.Supp.2d 771 (W.D.N.C. 2002). It is also ironic that Swift argues, on one hand, that BNPP France has no right to enforce the Forum Selection Clause because BNPP France is not a party or signatory to the Agreements, yet now also argues that the Agreements are overreaching due to power granted to BNPP under the Agreements that it signed and submitted to BNPP as "Applicant." Swift Brief, pp. 13-14.

There was no unequal bargaining power or overreaching here. Swift and BNPP France are both large, sophisticated businesses who were negotiating at arm's length, with equal bargaining power. Swift applied for Letters of Credit to be issued on its behalf. No one forced Swift to enter these transactions. Contrast Bell Atlantic Tricon Leasing Corp. v. Johnnie's Garbage Serv., 113 N.C.App. 476, 439 S.E.2d 221 (1994) (agreement unfair and unreasonable where court noted bargaining power was far from equal; defendant was a 79-year-old man who ran a small family business; there was no bargaining over the terms of the contract between the parties; forum selection and consent to jurisdiction provisions in fine print on back of contract under "Miscellaneous" provisions); also contrast Cox v. Dine-A-Mate, Inc., 129 N.C.App. 773, 501 S.E.2d 353 (1998) (forum selection clause in employment contract held unfair and unreasonable, and product of unequal bargaining power, where employee was told he must sign contract if he wanted to keep his job, and received no consideration in exchange for signing).

Swift also argues that enforcement of the Forum Selection Provision would violate the public policy of North Carolina by depriving Swift of its right to conduct civil discovery. To prevail in its argument, Swift would have to demonstrate that enforcement of the Forum Selection Clause would be so unreasonable that "trial in the contractual forum will be so gravely difficult and inconvenient that [its] will for all practical purposes be deprived of [its] day in court." Bremen, 407 U.S. at 18. Swift cannot merely argue that convenience favors an

alternative forum; the Forum Selection Clause must leave the plaintiff essentially without remedy. See Bremen at 19.

It is important to note that Swift does not argue that it is precluded from bringing its Cross-claims as counterclaims in the French Litigation. Rather, Swift tries to argue that France's discovery rules would not allow Swift to effectively pursue its claims. Not surprisingly, Swift does not cite any authority for the proposition that litigation in a forum with substantially different discovery rules amounts to denial of one's day in Court. Swift is asking the Court to reach a broad holding that litigation in France is a denial of a United States corporation's day in Court. One can only imagine the impact of such a holding on international transactions. The Court should not accept such an argument.

CONCLUSION

Swift should not be allowed to avoid the Forum Selection Clause to which it agreed in all of the Third Party Letter of Credit Agreements it signed and addressed to BNPP France, and attached to its Crossclaims. North Carolina law heavily favors the enforcement of such provisions.

This 11th day of December, 2008.

/s/Edward B. Davis

William K. Davis (N.C. State Bar No. 1117)
Edward B. Davis (N.C. State Bar No. 27546)
Attorneys for defendant BNP Paribas S.A.
BELL, DAVIS & PITT, P.A.
227 West Trade Street, Suite 2160
Charlotte, NC 28202
Telephone: 704/227-0400
Facsimile: 704/227-0178
Email: wdavis@belldavispitt.com
ward.davis@belldavispitt.com

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 9450

Speedway Motorsports International, Ltd.,)
)
Plaintiff,)
)
v.)
)
Bronwen Energy Trading, Ltd., Bronwen)
Energy Trading UK, Ltd., Dr. Patrick Denyefa)
Ndiomu, BNP Paribas (Suisse) SA, BNP)
Paribas S.A., Swift Aviation Group, Inc., Swift)
Air, LLC, and Swift Aviation Group, LLC,)
)
Defendants.)
)

RULE 15.8 CERTIFICATION

Pursuant to B.C.R. 15.8, I hereby certify that Defendant BNP Paribas, S.A.'s reply brief in support of its motion to dismiss Swift's Cross-claims complies with B.C.R. 15.8.

This the 11th day of December, 2008.

/s/ Edward B. Davis
Edward B. Davis (N.C. State Bar No. 27546)
Attorney for Defendant BNP Paribas S.A.

OF COUNSEL:

BELL, DAVIS & PITT, P.A.
227 West Trade Street, Suite 2160
Charlotte, NC 28202
Telephone: 704/227-0400
Facsimile: 704/227-0178

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this brief in the above-entitled action upon the addressee(s) listed below by:

() Hand-delivering a copy thereof to the attorney(s);

or

(X) Depositing a copy hereof in a postpaid wrapper in a post office or official depository by first class mail under the exclusive care and custody of the United States Post Office Department properly addressed to the addressee(s) below;

or

() Facsimile.

This the 11th day of December, 2008.

/s/Edward B. Davis
Edward B. Davis

Addressee(s):

Michael G. Adams
Jami J. Farris
William L. Esser IV
Parker Poe Adams & Bernstein, LLP
Three Wachovia Center, Suite 3000
401 South Tryon Street
Charlotte, North Carolina 28202
(704) 372-9000
(704) 334-4706 facsimile
Attorneys for the Plaintiff

Dana C. Lumsden, Esq.
Hunton & Williams LLP
Bank of America Plaza, Suite 3500
101 South Tryon Street
Charlotte, North Carolina 28280
Counsel for BNP Paribas (Suisse) SA

Bronwen Energy Trading, Ltd.
c/o CCCP, Inc.
Cophthallm, P.O. Box 2342
Roseau, St. George, 0012
Commonwealth of Dominica

James P. Cooney, III, Esq.
Debbie W. Harden, Esq.
Womble Carlyle Sandridge & Rice, PLLC
301 South College Street
One Wachovia Center, Suite 3500
Charlotte, North Carolina 28202-6037
Counsel for the Swift Defendants

Bronwen Energy Trading, Ltd.
Cophthall, P.O. Box 2331
Roseau, St. George, 0152
Commonwealth of Dominica

Bronwen Energy Trading UK, Ltd.
Patrick Ndiomu, Director
46 Mt. Pleasant Road
London NW10 3EL, England

Dr. Patrick Denyefa Ndiomu
46 Mt. Pleasant Road
London NW10 3EL, England