



Linda L. Marshall, OSB No. 83279
marshall.l@comcast.net
Attorney at Law
PMB 408
3 Monroe Parkway Suite P
Lake Oswego, OR 97035
Telephone: (503) 699-2082
Facsimile: (971) 269-2888

Attorney for Plaintiff Max Zweizig

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

**NORTHWEST DIRECT TELESERVICES,
INC.**, an Oregon corporation,

Plaintiff,

v.

MAX ZWEIZIG,

Defendant.

CASE NO. 3:11-CV-910-PK

DECLARATION OF LINDA L. MARSHALL
IN SUPPORT OF DEFENDANT'S CROSS
PETITION FOR AN ORDER VACATING
IN PART AND CONFIRMING IN
PART THE OPINION AND ORDER
AND ARBITRATION AWARD

1. I make this declaration in support of Defendant's Cross-Petition for an Order Vacating in Part and Confirming in Part the Opinion and Order and Arbitration Award (hereinafter "Defendant's Cross Petition").

Declaration of Linda L. Marshall in Support of Defendant's Cross-Petition for an Order Vacating in Part and Confirming in Part the Arbitration Award - 1

Linda L. Marshall
PMB 408
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Suite P
Lake Oswego, OR 97035
(503) 699-2082 Fax (503) 697-8477



1 2. I represented Max Zweizig in the underlying arbitration from
2 November 2009 through the present. I make this declaration on personal knowl
3 and am competent to testify to the matters stated herein.

4 3. I hereby certify that Exhibits A through E are full, true, and correct
5 copies of the original documents.

6 4. I attended all of the evidentiary hearings in the underlying
7 arbitration, which were held on May 24 through May 28, June 1, September 20, 21, 22
8 and 25, October 26, and November 5, 2011. Attached as Exhibits F and G
9 respectively are Max Zweizig's Post-Hearing Brief Re Claims Asserted by Zweizig (Ex
10 G) and Zweizig's Post-Hearing Reply (Ex F).

11 5. Northwest Direct Teleservices, Inc. ("NDT") asserted five claims
12 against Max Zweizig under the rules and procedures of the Arbitration Service of
13 Portland. *Northwest Direct Teleservices, Inc. v. Max Zweizig*, ASP No. 050511-1.
14 Zweizig asserted two counterclaims against NDT in the arbitration proceeding.
15 Zweizig's first counterclaim was for retaliatory discharge in violation of the Oregon
16 Whistleblower Act, ORS 659A.230. His second counterclaim was for common law
17 wrongful discharge.
18

19 6. Portland attorney William B. Crow acted as the single arbitrator in
20 the underlying arbitration. The parties conducted discovery, filed motions, and
21 presented documentary and testimonial evidence in ten days of hearings between June
22 24, 2011 and November 5, 2011. After the close of the evidence, the parties submitted
23 post-hearing briefs. In both his post-hearing brief and reply, Zweizig requested costs
24 and reasonable attorney fees pursuant to ORS 659A.885(1), which sets forth the
25

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1 remedies for violation of ORS 659A.230.

2 7. On April 5, 2011, Crow rendered a decision in the Opinion
3 Order and Arbitration Award in favor of Zweizig and awarded him \$75,375.00 against
4 NDT. Crow dismissed all of NDT's claims except for one claim that arose during the
5 arbitration proceeding for the payment of arbitration transcripts. Crow awarded NDT
6 \$4,316.94 on that claim only. Despite Zweizig's request for costs and reasonable
7 attorney fees and without any explanation, Crow denied Zweizig's request. A copy of
8 the Arbitration Award is attached as Exhibit A.

9 8. Zweizig is a citizen of the State of New Jersey, residing in the City
10 of Woodbury, Gloucester County, New Jersey. The records of the Oregon Secretary
11 of State, Corporation Division, show that NDT is a corporation organized and existing
12 under the laws of the State of Oregon, with its principal place of business in West Linn,
13 Oregon. In the underlying arbitration here, NDT sought in excess of \$596,844.94.

14 9. The underlying arbitration was conducted pursuant to the
15 Employment Agreement between NDT and Zweizig. A copy of the Employment
16 Agreement is attached as Exhibit B.

17 10. The underlying arbitration took place in Portland, Oregon. All
18 evidentiary hearings were conducted in Portland. On March 31, 2011, Crow issued his
19 decision in the "Opinion and Order" (Ex C) from his office in Portland. On April 5,
20 2011, Crow issued the Arbitration Award from his office in Portland. I received the
21 Arbitration Award in my office in Lake Oswego, Oregon.

22 11. The record in the underlying arbitration proceeding shows that as
23 of 2001, NDT together with affiliated corporate entities, all owned by Timothy C. Rote,

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1 NDT owned and operated telemarketing "call" centers in Eugene, Oregon, and
2 Dyersville, Iowa. It relied heavily on computers, IT processes, and IT professionals
3 to manage the dialer that made calls from call lists, provided the script for the
4 telemarketers, accumulated data about each call, recorded data concerning sales
5 made, tracked the time each telemarketer worked on each campaigns, and prepared
6 reports and invoices for NDT and its customers.

7 12. The record in the underlying arbitration shows that in August 2001,
8 Rote hired Zweizig to begin September 1, 2001 as NDT's IT Director. Zweizig's
9 employment was subject to the Employment Agreement. A copy of the Employment
10 Agreement is attached as Exhibit B.

11 12. The record in the underlying arbitration shows that on October 22
12 or 23, 2003, Zweizig received an email with an attachment, a spreadsheet, which led
13 Zweizig to believe that someone at NDT was billing clients for hours not worked. He
14 forwarded the spreadsheet to Rote and asked Rote to investigate what Zweizig
15 believed to be an illegal conduct. When Zweizig had not heard from Rote by October
16 28, 2003 he became concerned that perhaps Rote was himself involved in illegal fraud.
17 Zweizig hired an Oregon attorney, James Egan (now Linn County Circuit Court Judge)
18 to advise him how to protect himself from being implicated in the illegal activity.

19 14. The record in the underlying arbitration shows that on October 28,
20 2003, on behalf of Zweizig, Egan sent a letter to the Oregon Department of Justice with
21 a copy by email to Rote. In the letter, Egan stated that Zweizig had come across
22 information that led him to believe that someone in the company might be engaged in
23 an unlawful billing practice. The following day on October 29, 2011, Rote began to

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1 reassign Zweizig's duties. Brent Kawiuk, Vice President of Client Services for
2 sent Rote a barrage of emails containing information derogatory of Zweizig as
3 were gathering documentation to discipline or discharge Zweizig. Rote terminated
4 Zweizig's employment 16 days later.

5 15. The record in the underlying arbitration shows that on March 18,
6 2004, Zweizig filed a complaint in the Superior Court of New Jersey for Gloucester
7 County, *Max Zweizig v. Timothy Rote and Northwest Direct Teleservices, Inc. et al*, Civil
8 No. 04-2025, asserting a claim under the New Jersey whistleblower statute and a claim
9 for common law wrongful discharge. NDT removed the case to the US District Court
10 for New Jersey. However, the federal court determined that removal was not proper
11 and remanded the case to state court. On March 23, 2006 the New Jersey state court
12 dismissed the case leaving the controversy to be resolved through arbitration in
13 Multnomah County.

14 16 The record in the underlying arbitration shows that on April 15,
15 2011, Zweizig filed Motions to Reconsider, Modify, and Correct Arbitration Award
16 ("Motion to Reconsider") seeking prevailing party remedies. A copy of Zweizig's Motion
17 to Reconsider is attached as Exhibit D.

18 17. With the agreement of Crow, I did not serve a detailed statement of
19 costs and attorney fees on behalf of Zweizig. NDT also filed post-award motions.

20 18. On May 27, 2011, Crow notified the parties by email that he had
21 denied all motions for reconsideration. A copy of Crow's decision denying the Motion
22 to Reconsider is attached as Exhibit E. Crow's ruling states that "I find that the conduct
23 of each of the parties contributed to an improvident increase in the time and expense of
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1 attorneys involved in this arbitration.” Ex E. The finding is not based on the r

2 There was no evidence in the record that Zweizig contributed to an increase in

3 and expense of attorneys. In fact, there was no evidence in the record of any cost or

4 expense of attorneys.

5 19. The records of the Circuit Court for the State of Oregon, County of
6 Clackamas, show that on July 15, 2011, Timothy C. Rote, the owner and CEO of NDT
7 submitted *pro se* Plaintiff’s Petition to Modify or Vacate Arbitration Award, Clackamas
8 Circuit Court Case No. CV11070441.

9 20. On July 24, 2011, I received an email from Tim Rote with Plaintiff’s
10 Petition as an attachment.

11 21. On July 26, 2011, I accepted delivery of a package containing a
12 CD, which contained Plaintiff’s Memorandum in Support of Motion to Modify or Vacate
13 Arbitration Award (“Memorandum”) and some 2,238 pages of exhibits. When I
14 checked with the Clerk of the Clackamas Circuit Court, I learned that Rote had not filed
15 the Memorandum or any of the exhibits in the state court action.

16 22. On August 1, 2011, I removed the action to federal court based on
17 diversity jurisdiction. I filed Plaintiff’s Petition with the Notice of Removal, but did not
18 file the Memorandum and exhibits because they were not part of the state court file.

19 23. After Crow issued the Arbitration Award, Rote filled a complaint
20 against Crow with the Oregon State Bar. I have checked with the investigator handling
21 the complaint, ant the Bar complaint against Crow is still under investigation.

22 I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO
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24

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1 THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND
2 MADE FOR POSSIBLE USE AS EVIDENCE IN THE ABOVE-CAPTIONED CA
3 IS SUBJECT TO PENALTY FOR PERJURY.

4
5 DATED: August 26, 2011.

6 *Linda L. Marshall*

Digitally signed by Linda
Marshall
DN: cn=Linda Marshall, o=Linda
Marshall, Atty. At Law, ou,
email=marshall.l@comcast.net,
c=US
Date: 2011.08.26 16:11:18
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8 Linda L. Marshall OSB No. 832793
marshall.l@comcast.net
9 Telephone: (503) 699-2082
Attorney for Defendant Max Zweizig

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3 Monroe Parkway
Suite P
Lake Oswego, OR 97035
(503) 699-2082 Fax (503) 697-8477



CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Declaration of Linda Marshall in Support of Defendant's Cross-Petition for an Order Confirming in Part and Vacating in Part the Opinion and Order and Arbitration Award** on the following named person on the date indicated below by:

- Electronic Delivery
- First Class Mail
- Facsimile
- Hand Delivery

to said person a true copy thereof, and addressed to said person at the addresses indicated below:

Jeffrey I. Hasson
12707 NE Halsey St.
Portland, OR 97230
hasson@dhlaw.biz
Of Attorneys for Plaintiff

DATED: August 26, 2011.

Linda L. Marshall
Digitally signed by Linda Marshall
 DN: cn=Linda Marshall, o=Linda Marshall, Atty. At Law, ou, email=marshall.l@comcast.net, c=US
 Date: 2011.08.26 16:10:32 -07'00'

Linda L. Marshall
OSB No. 83279
marshall.l@comcast.net
(503) 699-2082

Attorney for Defendant Max Zweizig

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