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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBIN RODERICK,) Case No.: C04 2436 MHP
)
Plaintiff,) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF PETITION
vs.) CONFIRMING ARBITRATION AWARD
)
MAZZETTI & ASSOCIATES, INC., et al.) Date: October 3, 2005
) Time: 2:00 p.m.
Defendants.) Crtrm: 15, 18th Floor
) Judge: Honorable Marilyn Hall-Patel

Hovsepian v. Apple, Inc.

Doc. 1633 Att. 1

I.
THE BINDING ARBITRATION AWARD SHOULD BE CONFIRMED

This matter was sent to arbitration under Order of this Court. The Court Order compelling arbitration followed Robin Roderick's ("Roderick") initial demand for arbitration before the American Arbitration Association (AAA). After demanding arbitration, Mr. Roderick thereafter sought to abandon the arbitration and filed this action alleging both arbitrable and non-arbitrable claims. Defendant, Mazzetti & Associates, Inc. ("Mazzetti"), Mr. Roderick's former employer, then filed its motion to compel arbitration, made pursuant to the Arbitration clause contained in the "Mazzetti & Associates Stock Purchase Agreement" dated June 24, 1994 (to which Mr. Roderick subscribed in his "Agreement to be Bound" dated August 2, 1998), when Mr. Roderick purchased twenty (20) shares of the outstanding shares in Mazzetti

1 & Associates, Inc. These 20 shares represented less than one-half of one percent of the
2 outstanding company stock.

3 After three days of hearing, and extensive testimony, evidence and post-hearing
4 briefing, the Arbitrator, Joseph A. Lasky, issued a Tentative Award followed by a Final Award.
5 Copies of the Tentative and Final Award are attached to the Declaration of Mark J. Rice
6 attached herewith as Exhibits 1 and 2. A copy of the Final Award is already on file with the
7 Court. The award rejected Mr. Roderick's fiduciary duty claims, and declined his request for a
8 higher per share price. The Arbitrator awarded Roderick \$987.75 per share for his 20 shares
9 (\$19,755), plus interest from date of termination to date of award. On August 5, 2005,
10 Mazzetti had already made a settlement offer of \$987.75 per share. In effect, the Arbitrator
11 decided adversely to plaintiff.¹

12 In the arbitration, Plaintiff alleged that Mazzetti & Associates and its Board of Directors
13 violated and breached fiduciary duties towards Robin Roderick in various respects. See
14 Tentative Award at Rice Declaration, Exhibit 1 and 10. These fiduciary duty claims included
15 alleged fiduciary breaches over the pricing of the stock under the Stock Agreement; over
16 "independent management issues"; over creation of other later stock agreements in which Mr.
17 Roderick was not a party; and over execution of a June 23, 2004 "Severance And Stock
18 Purchase Agreement" with former Mazzetti President, William Mazzetti, Jr.

19 Specifically, Roderick claimed that the severance consideration in Mr. Mazzetti's
20 Severance Agreement was a "sham" and that the appraised ESOP stock price of \$987.75 per
21 share stated in that Severance Agreement should not be considered the fair market value of
22 the stock. (Roderick Post-Hearing Briefs, Exhibits 8 and 9). Instead, based on his fiduciary
23 duty theories, Mr. Roderick alleged that he should be awarded either \$1,250 per share or
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26 ¹ Though fully litigated, the stock dispute involved small prospects for plaintiff due to his very limited shareholding of 20
27 shares (less than one-half percent of the total company shares). Book value was \$907.00 and fair market value was between
28 \$951/share and \$987.75/share. That \$80 per share difference equals \$1,600 difference over 20 shares. Roderick sought
\$1,250/share - a potential top end "upside" of only \$5,340 more in total (\$267/per share x 20 shares) if Roderick prevailed.

1 \$2,365.35 per share for his 20 shares of stock. The latter figure of \$2,365.35 per share was
 2 based on Mr. Roderick's misunderstanding of his ESOP Participant Statement (prepared by
 3 outside ESOP administrator American Qualified Plans) "as if" an ESOP value for stock.

4 The Arbitrator rejected these claims in his Final and Tentative Awards. (Rice
 5 Declaration, Exhibits 1 and 2). Further, the Arbitrator found Roderick to be less than credible
 6 in his testimony that he was misled. In particular, the tentative award held at pages 10-11:

7 **Claims of Breach of Fiduciary Obligation And Independent Management.**

8 Roderick claims there was a breach of fiduciary obligation and independent
 9 management. The Arbitrator's review of these claims was limited to the
 10 valuation of the purchase price to be paid Roderick. One such claim is
 11 based on the allegation that the Mazzetti benefit form for the 2002 ESOP
 12 misled Roderick into believing his per share value was \$2,365.35 and
 13 therefore that is the price per share he should receive. The argument
 14 fails. He is a college graduate and for over thirty years has been
 15 employed as an electrical engineer. There were a series of meetings
 16 discussing the forms where questions were answered and sample forms
 17 discussed. The meanings of abbreviations were clarified including
 18 OIA - Other Investment Account (no shares) and CSA-Company Stock
 19 Account (showing shares owned by the ESOP). Roderick testified
 20 he knew there had been a total contribution of \$150,000 to the 2002 ESOP.
 21 By his argument if his per share value were \$2,365.35, his shares would
 22 have been valued at approximately \$47,000, almost one-third of the
 23 total. He was fully aware of the limited nature of his holding compared
 24 to the principal shareholders. Roderick testified he understood the
 25 \$150,000 was invested in some type of fund and that the plan was to
 26 eventually purchase company shares. The evidence does not support
 27 his view that he was misled.

17 Roderick argues there were a series of events planned and calculated
 18 by Mazzetti management to deprive minority shareholders of their
 19 rights. The burden of proof was not established by the evidence. The
 20 evidence established no breaches of fiduciary obligation or independent
 21 management regarding the valuation of the purchase price for Roderick's
 22 shares. The challenged activities in question, relative to the purchase
 23 price, were conducted to ensure the survival of Mazzetti and the smooth
 24 transition of management. Rice Declaration, Exhibit 1, pages 10 to 11.

21 After resisting arbitration, once in arbitration, Plaintiff pressed his stock valuation claims
 22 very broadly, asserting statutory, fiduciary duty and tort theories (rather than relying on the
 23 price term of the Stock Purchase Agreement itself). The Arbitrator addressed all of Claimant's
 24 claims, including the determination of the stock value owed Mr. Roderick under the 1994 Stock
 25 Purchase Agreement and whether a fiduciary duty was breached. In his 12 page tentative
 26 award, the Arbitrator addressed in detail the various breach of fiduciary duty and stock
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1 valuation theories asserted by Mr. Roderick. The Arbitrator rejected Plaintiff's breach of
2 fiduciary duty claims in the Tentative and Final Awards.

3 The Tentative Award outlined in great detail the Arbitrator's analysis and reasoning.
4 Specifically, the Arbitrator found less than credible, Mr. Roderick's testimony that Mr. Roderick
5 believed that the share value of this stock was \$2,365.35 per share based on his "OIA" Vested
6 Benefit Statement. Rather, Mr. Roderick alleged he misunderstood his "Other Investment
7 Account" (OIA) on his AQP ESOP statement, as representing a per share value of \$2,365.365.
8 Roderick failed to recognize that his "Other Investment Account or "OIA Account" was
9 expressly defined under the ESOP Plan documents as Investments of ESOP Assets in
10 something other than company stock. Rice Declaration, Exhibit 1, Pages 10. As the Tentative
11 Award also noted, the plan documents defined the OIA account, which was also explained to
12 company employees at several meetings led by the plan administrator, AQP.

13 In their initial briefs commenting on the Tentative Award, both parties accepted the
14 award.² Roderick asked for interest, which interest request was granted. Rice Declaration,
15 Exhibit 9. Roderick's request for fees was denied.

16 Subsequent to the final award issued on July 19, 2005, in accepting the award, both
17 parties complied with the final award. Within ten days after final award, Roderick tendered the
18 20 shares in exchange for \$987.75 per 20 shares, plus awarded interest.

19 Both parties accepted the tentative award but argued over whom, if anyone was
20 entitled to an award of costs and/or attorney's fees. Defendant /Respondent Mazzetti argued
21 that under California Code of Civil Procedure (CCP) §1284.3 and the applicable AAA
22 Employment Dispute Resolution Rules, neither party is entitled to recovery of costs or
23 attorney's fees as a "prevailing party". See Exhibits 3 and 4, Declaration of Mark J. Rice.
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26 ² Later, in his reply brief, Roderick seemed to vacillate, after Mazzetti sought CCP §998 expert fees due to its having made
27 CCP §998 offers rejected by Roderick, in excess of the award. However, Roderick's initial comments accepted and did not
28 challenge the award, only asking for interest and fees.

1 Mazzetti & Associates also argued that because of a later settlement offer made under CCP
 2 §998 (in excess of \$987.75/share), Mazzetti should be awarded its expert costs. The
 3 Arbitrator's final award denied that request at Section 8.

4 Conversely, Plaintiff Roderick, through his attorney, claimed that Claimant had "won"
 5 and should be awarded attorney's fees. This was notwithstanding the fact that the amount
 6 awarded, \$987.75 per share, had been previously offered on August 5, 2004 shortly after the
 7 June 23, 2004 ESOP Valuation by AQP that set that as the fair market value of the company
 8 stock at \$987.75. Rice Declaration, Exhibit 7. Throughout the arbitration, Roderick sought
 9 between \$1,250 and \$2,365.35/share on tort and fiduciary duty theories that the Arbitrator
 10 rejected. Also, CCP §1284.3 adopted the "American Rule" and precludes an award of fees or
 11 costs to either party in a consumer arbitration. The Arbitrator also denied Plaintiff's request for
 12 costs and attorney's fees.

13 Under AAA's, Employment Dispute Resolution Rules, other than the \$125 filing fee, the
 14 Employer pays the remaining AAA costs (administration and arbitration). (See Declaration of
 15 Mark J. Rice, Exhibit 4). As reflected in paragraph 6 of the Final Award, AAA's invoices totaled
 16 \$19,500, which during the course of proceeding, has been paid in full to AAA.

17 Based upon the above, Defendant Mazzetti & Associates hereby petitions this court for
 18 its order confirming the arbitration award. The Award is final and it is uncontested. The few
 19 narrow grounds to set aside as binding arbitral award do not apply here. The stock has been
 20 returned and the Award amount paid "in full," all within 10 days after Final Award.
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22 II.

23 CONCLUSION

24 For reasons stated below, the Final Award (attached to the Petition as Exhibit 1), which
 25 is on file with the Court, should be confirmed and made part of the Judgment of this Court. As
 26 part of the Order confirming the Award, the Arbitrator should be relieved of further obligation or
 27 jurisdiction based upon the final award and its confirmation as part of the Court Judgment.
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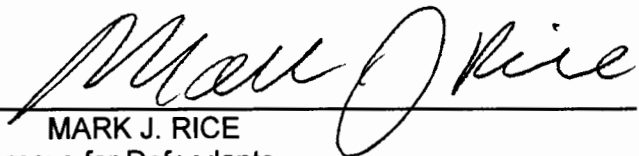
1 The issues decided in the Final Award and reflected in the tentative award, are res judicata
2 and Collateral Estoppel, and Plaintiff cannot relitigate them.

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4 Dated: August 29, 2005

Respectfully submitted,

5 McNEIL, SILVEIRA, RICE, WILEY & WEST

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7 By



MARK J. RICE

8 Attorneys for Defendants

9 MAZZETTI & ASSOCIATES, INC., WALTER VERNON,
10 ALBERT OSTROY AND ANGELICA GRAHAM
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