Geoffrey M. Faust SBN 93738
3300 Morgan Territory Road
P.O. Box 751
Clayton, CA 94517

Attorney for Claimant Robin P. Roderick

(925) 673-1988

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

Robin P. Roderick, Claimant, vs. Mazzetti & Associates, Inc. Respondent	Case No. 74 E 199 00295 04 Claimant Robin Roderick's Comments on Statement of Decision/Declaration of Geoffrey M. Faust

Claimant Robin Roderick respectfully submits the following comments on the Statement of Decision.

Technical Corrections

Mr. Roderick identifies two issues as "errors in calculation, matters inadvertently omitted or objectively erroneous facts". Statement of Decision at 11-12.

1. Regarding Stock Certificate 47, Respondent withdrew the issue, which never had any basis in fact. See page 1, item 1 of the post evidentiary hearing order dated 3/18/05. As counsel for Mr. Roderick represented, Roderick would have testified that he does not have this certificate, that he has no memory of ever having had any stock other than the 20 shares *sub judice*, and that he has searched all his files and records for Stock Certificate 47, without finding it.
2. The Statement of Decision holds that Respondent should have tendered Claimant $987.75 per share for his shares on November 24, 2003, the effective date of Claimant's termination. Because these are contract "damages certain" and are vested in Claimant from the date certain of his termination, Claimant is entitled to pre-award interest from November 2003 to the date of award. California Civil Code §3287(a). This is a fair result, because Claimant's opportunity for equity appreciation in the stock ceased when he was fired in November 2003, triggering the stock buyback.

   California Civil Code §3289(b) provides a 10% interest rate, if the contract does not stipulate a rate. Here, the SPA is not a note or a loan with an ongoing interest payment, nor does the SPA stipulate an interest rate for breach of

the agreement. This would argue for the application of the §3289(b) rate of 10%. On the other hand, SPA, though in a different context, does name an interest rate if stock is repurchased over time with a promissory note. See SPA section 8.4(b), specifying Bank of America prime plus 1%. A Bank of America web site page showing the Bank of America prime rate during the relevant time is attached as Exhibit 1 to the Faust declaration.

If the 10% statutory rate applies, then the stock purchase price should accrue interest of $ 3009 between November 24, 2003 to June 3, 2005. If the Bank of America prime plus 1% rate applies, then the stock purchase price should accrue interest at 5% until November 24, 2004 (adding $987.75), and then at 6% until June 3, 2005 (adding $620.25). The total pre-award interest under this analysis would be $1608 through June 3, 2005.

Attorney fees, costs and arbitration fees and expenses

3. SPA section 7.1 provides that the arbitrator "shall have discretion to award costs and attorneys' fees to the prevailing party". With respect to costs, as noted in Judge Patel's order, Respondent, in its reply papers to Judge Patel, finally conceded that the Employment Rules apply. Under these rules, as well as under California due process case authority, Respondent as the employer is required to bear the arbitration costs. *O'Hare v. MRC* (2003) 107 Cal App 4th 267, 279-280 (AAA's Commercial Rules do not satisfy California due process standards, in light of arbitration costs imposed on employee). See Judge Patel's order at page 9, lines 18-20.

4. With respect to attorney's fees incurred in connection with the arbitration, Claimant is the prevailing party under the contract and should be awarded arbitration-related attorney's fees incurred, reserving the amount to future proof. Claimant achieved greater relief on the contract than did Respondent, as shown by a review of the Statement of Decision.

The "most significant and controlling issue" is whether the price tendered by Respondent for Claimant's twenty shares of stock was the proper one. Statement of Decision at 7. It was not, and Respondent breached the SPA on this issue. The only other arbitration issue raised by Claimant was for breach of fiduciary duty. The original thrust of this contention was that Respondent could not invoke book value, given Respondent's representations that there was an ESOP with Company stock in it and that the stock would be valued on an annual basis at fair market. This alternative theory was rendered moot when the Arbitrator decided on other grounds not to apply book value. Overall, Mr. Roderick as Claimant prevailed on his arbitration claim, because he gained the greater relief on the contract. This conclusion is reinforced when Respondent's counter-claim issues are considered. Respondent did not prevail on any issue. (As discussed above, the ruling on Certificate 47 is in error, because Respondent withdrew that issue; withdrawing this issue from adjudication is more akin to losing the issue than prevailing on it). Overall, Claimant prevailed on the contract and is eligible to apply for a fee award under the SPA.

This is an appropriate case to exercise discretion to award fees to Claimant. An award of fees helps to level the playing field by balancing the economic

inequality between the employer and the employee, between the corporation's management and a small shareholder. These are some of the same considerations that underlie the California due process jurisprudence. If an employee like Mr. Roderick could not look to the SPA as a source of attorney's fees should he prevail, then it is hard to see how a terminated employee who is forced to sue over the price of twenty shares of stock can ever afford a just outcome. What chance would Mr. Roderick have had, in light of Respondent's aggressive approach, without a competent attorney? How is such an attorney to be paid for the extensive time necessary to counter the employer-corporation's litigation tactics? Unfortunately, there is an asymmetry of incentives to litigate between Mr. Roderick and the corporation: this is the only time that Roderick will face this issue, whereas Mazzetti & Associates has a stake in its litigation position that will impact its 80 other employees, as well as approximately 20 small shareholders.

Respondent made an inadequate tender for Claimant's stock. That breached the agreement. Mr. Roderick made a demand through his attorney to settle, and later a demand to arbitrate the disagreement. Respondent refused to accept the AAA Employment Rules for the arbitration, attempted to force arbitration of non-arbitrable ERISA issues, and denied that the arbitrability issues ought to be sorted out by Judge Patel before the arbitration hearing, not afterwards. Accordingly, Mr. Roderick was forced to go to court to establish the ground rules for the arbitration. Judge Patel's 20-page order has been important to the arbitration process, and it was only obtained after extensive hearing and briefing practice. Yet, by opposing payment of Claimant's fees that were necessary to the

arbitration, Respondent is attempting to deprive Mr. Roderick of the real economic benefit of the SPA and its arbitration clause. Simply put, Mr. Roderick had no reasonable alternative but to hire an attorney to represent his interests. The costs required to obtain a just and equitable arbitration outcome should be borne by the party causing the extra cost, the Respondent.

5. On three occasions before the Statement of Decision, in connection with arbitration briefing and indexing of exhibits, Respondent has previewed an argument against any award of Claimant's attorney's fees, should Claimant be the prevailing party under the arbitration clause. Mr. Roderick assumes that Respondent will raise these arguments again, and that Claimant will have a chance to respond fully. Out of an abundance of caution, however, Claimant would not like to leave Respondent's previewed arguments unanswered. Thus, Mr. Roderick addresses Respondent's contentions here, albeit not exhaustively:

(a) The top paragraph of page 39 of Respondent's brief dated April 11, 2005 contends that the attorney's fee issue is governed by the California Arbitration Act, specifically CCP §1284.3, and that §1284.3 incorporates the American Rule prohibiting a fee award. These contentions are wrong: this proceeding is governed by the Federal Arbitration Act, federal Title 9, and thus the California Arbitration Act does not apply. See Judge Patel's order at page 4, lines 1-9. The FAA contains no provision like CCP §1284.3.

Moreover, §1284.3 does not apply by its own terms. The section is only designed to prevent attorney's fees in arbitration from being imposed on a consumer, not on an employer. This is in accord with the California due process standards for employer-employee arbitration discussed above. Respondent apparently assumes that identical standards must apply to an award of attorney's fees for either side. That simply isn't the case: instead, it is very common under both state and federal law to award attorney's fees to prevailing plaintiff's, but not to prevailing defendants, unless plaintiff's litigation posture was frivolous. *Christiansburg Garment v. EEOC* (1978) 434 U.S. 412, 417, 422; *Roa v. Lodi Medical Group* (1985) 37 Cal. 3rd 920, 932 FN 10; *People v. Hedgecock* (1986) 183 Cal. App. 3rd 810, 816 [upholding denial of fees to prevailing defendant under California Government Code §§ 91003(a) and 91012]. Note that in each case, the applicable standard is the tribunal's "discretion" to award fees or some word that connotes discretion, such as "may". Similarly, the AAA employment rules do not require a symmetrical standard for the award of arbitration expenses. See AAA Employment Rule 39, cited in Judge Patel's order at page 9, lines 18-20, which is asymmetrical as to liability for costs.

(b) Respondent repeated this argument against an attorney's fee award at page 4 of its Arbitration reply brief. This time the

argument was linked with the comment of a legislator that CCP §1284.3 prohibits "loser pay" provisions in consumer arbitration agreements, which the legislator characterized as the "American Rule". The unambiguous language of the Code section demonstrates that the quoted legislator is in error. A legislator's subjective expression of intent does not override the unambiguous language and plain meaning of the statute. But the statute does not apply anyway, as discussed at (a) above.

(c) Item 52 to Respondent's index of arbitration exhibits refers to "settlement offers, including CCP §998", evidently as a basis to deny Claimant's right to arbitration expenses. This contention is flawed for many reasons.

(i) CCP §998 does not apply to this proceeding—the Federal Rules of Civil Procedure and the AAA Employment Rules do. Neither set of rules provide for cost shifting, as CCP §998 does, in an arbitration forum. Further, imposing these costs on an employee violates the California due process standard. *O'Hare v. MRC* (2003) 107 Cal App 4th 267, 279-280.

(ii) Respondent did not satisfy the formal or procedural requirements of CCP §998. Specifically, the form of the offer was not one that Claimant could accept by filing an acceptance with the tribunal: the offer was simply

too convoluted. Moreover, Respondent failed to keep the offer open for 30 days as required. CCP §998 (b)(2). Further, Respondent improperly attempted to expand the scope of arbitrable issues by demanding settlement of the employee loan issue as part of its package settlement offer, even after Judge Patel issued an arbitration order that does not include the issue. Faust declaration at paragraph 6. It is an improper use of statutory settlement procedures to coerce a litigant to bundle arbitrable and non-arbitrable issues. It also renders the arbitrator's job impossible under CCP §998, because in order to determine whether the non-settling party did better than the settlement offer, the arbitrator would have to adjudicate the value of the non-arbitrable issue.

(iii) Most significantly, Respondent's offer was substantively inadequate, because it failed to include any provision for Claimant's attorney's fees or for interest on the unpaid purchase price, even though no offer was made until after litigating for the better part of a year, culminating in Judge Patel's 20-page order. Pre-offer interest and attorney's fees are awardable under CCP §998. *Bodell v. CSU* (1998) 62 Cal. App. 4th

1508, 1512; *Morin v. ABA* (1987) 195 Cal. App. 3rd 200, 206 (10% interest); *Harvard v. Gap* (1984) 156 Cal. App. 3rd 704, 713 (pre-offer attorney's fees must be considered under CCP § 998).

Because of the "discretion" language of SPA section 7.1, neither side could be certain of any fee award. Nevertheless, in the interest of settlement, counsel for Mr. Roderick repeatedly countered Respondent's proposals by offering to settle all arbitrable issues, except for the attorney's fee issue, which both sides could then reserve. Faust declaration at paragraph 5. Respondent refused, and then reiterated a tender at book value. This was not a reasonable settlement tactic, but rather an attempt to pressure Mr. Roderick, after the better part of a year of litigation, into settling cheaply by abandoning an opportunity for an award of attorney's fees.

Even giving Respondent every benefit of the doubt, its highest settlement offer was simply not enough money. Respondent's best offer was $1264 apiece for 20 shares, with no interest or attorney's fees, and Roderick being required to accept in full Respondent's counter-claim on the employee loan and also accept a setoff of

that claim. With the offset for the claimed employee loan, plus a deduction of post-offset interest claimed on that loan, the net settlement offer of $18, 873.72. The Statement of Decision sets the stock price at $987.75, or $19,755. Respondent's settlement offer, which was not made until December 2004, was, at best, worth $25,280. Thus, even if the employee loan were deemed arbitrable and valid to the penny as claimed by Respondent AND even if Claimant is not entitled to interest on the failed tender, nevertheless the maximum amount that can be deemed allocable to Claimant's arbitration fees and expenses is $5,525. At the same time, the lowest market rate reasonably attributable to Mr. Faust's time is $275 per hour, in an order that was affirmed by the 1st District Court of Appeal three years ago. Faust declaration at paragraph 7. Thus, Respondent's "998 offer" cannot be read as offering even the value of 20 hours of attorney time incurred by Claimant. After nearly a year of litigation including the work necessary to obtain Judge Patel's arbitration order, Respondent's offer was not even in the ballpark of a reasonable settlement proposal. As noted above, nevertheless, Claimant sought to carve out the

attorney's fees issue, so that the other issues might be settled, possibly setting the stage for a compromise on fees as the last remaining issue. Respondent declined to cooperate.

Based on the above, Claimant respectfully submits that CCP §998 has no bearing on the arbitration.

6. The Arbitrator should determine Claimant's entitlement to fees and costs, with Claimant to submit supporting documentation as to the appropriate amount. Mr. Roderick understands this procedure to be in accord with the Arbitrator's previous rulings. See page 2, item 5 of the post evidentiary hearing order dated 3/18/05.

DECLARATION OF GEOFFREY M. FAUST RE: STATEMENT OF DECISION

Geoffrey M. Faust declares:

1. I am the attorney for Claimant in this arbitration. As such, I have direct knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify to the same facts. Attached to this declaration as Exhibit 1 is a true copy of a page from the Bank of America's website, showing the Bank's prime rate history.
2. Claimant Robin Roderick seeks a determination that he is the prevailing party under the contract, on the grounds that Mr. Roderick achieved greater relief on the

contract than did Respondent. Under my attorney-client agreement with Mr. Roderick, I am required to look first to contract (i.e., the SPA) or any applicable statute for attorney compensation. As a secondary source of compensation, there is a contingency percentage, but unlike most contingency agreements, not on the total amount awarded, but only on the incremental amount obtained through litigation over what has been offered by Respondent before I was retained. On this basis, any litigated increase in the amount awarded in the price of Mr. Roderick's twenty shares of stock was never expected to be a significant source of attorney compensation. Instead, with respect to the contractual arbitration claim, I rely primarily on the SPA's attorney's fees clause as a source of payment for my time working on the matter, and then only if Claimant prevails.

3. Should Mr. Roderick be found the prevailing party, then the amount of attorney compensation will be based on the lodestar method: the product of a reasonable number of hours spent on the case times the relevant market's hourly rate for the attorney's services. *Serrano v. Priest (Serrano III)* (1977) 20 Cal. 3rd 25, 48 FN 23 (lodestar method is the starting point of every fee award). I have received compensation based on the loadstar method both in contingency and in pro bono cases; I understand this to be the normal method of determining a reasonable fee. Compare, *Fairchild v. Park* (2001) 90 Cal. App. 4th 919, 924 (contingency fee arrangement); *Beverly Hills Prop. v. Marcolino* (1990) 221 Cal. App. 3rd Supp. 7, 11-12 (pro bono). These attorney fees are deemed "incurred" even though the never had to pay them, because of the liberal construction given Civil Code §1717. *PLCM v. Drexler* (2000) 24 Cal. 4th 1084, 1088 (fees "incurred" by in-

house counsel); *Gilbert v. Master Washer* (2001) 87 Cal. App. 4th 212, 220 (member of law firm represented by another member "incurred" attorney's fees).

4. In this case, Respondent waited until a month after Judge Patel had already issued a comprehensive order on the arbitration issues before trying to settle the case. By that time, the arbitrable dispute had been in the attorney's hands for the better part of a year. The motion before Judge Patel involved heavy briefing, a hearing, and then the Judge calling for more briefing before issuing the very substantial order. In addition, I had already spent significant time on the arbitrable issues in communications with the client, in reviewing documents and in communicating with Mr. Rice. I had also already had extensive dealings with the AAA on the case, because the administrators who preceded Mr. Farris erroneously attempted to apply the Commercial Rules rather than the Employment Rules, and because these administrators would not wait for Judge Patel to rule on the arbitration issues before the AAA proceeded with its own procedures.
5. All these matters required an attorney's time. Respondent never offered anything in settlement to compensate Claimant for any of the attorney time spent on the case. Even when Mr. Roderick offered to settle around the issue, leaving it for later resolution, Respondent declined. In addition, Respondent declined to consider a settlement that did not include the non-arbitrable issue of the employee loan. Mr. Roderick's choice was either to oppose Respondent or to abandon his substantial rights.
6. In mid-December 2004, Respondent made a settlement offer equal to a $1264 per share price for the 20 shares. This totals more than the per share price per the

Statement of Decision, but the settlement offer is less favorable overall. Mr. Roderick would have been required to accept Respondent's counter-claim, calculated amount including interest, and accept Respondent's self-help remedy of setoff on the issue. There would be no interest paid on the amount paid to Claimant, notwithstanding that a proper tender should have been made over a year, earlier in November 2003. Most significantly, Mr. Roderick would have to abandon any claim to attorney's fees, notwithstanding that he had finally achieved through litigation the order from Judge Patel that allowed the arbitration to go forward in a way that did not jeopardize his rights. The total difference between what Respondent offered and the share payment under the Statement of Decision is about $5500--- and that is not counting the setoff of an even greater amount on the employee loan. Counting the setoff, the settlement offer is less than the Statement of Decision, even in raw dollars.

7. This settlement offer was not even a decent compromise, much less a valid CCP § 998 offer, in light of the attorney's time that Claimant had generated to that point in time. The lowest rate paid or awarded for my time in San Francisco litigation in recent years has been $275 per hour. This award was affirmed in *Green v. State of California* (1st DCA 2002) 2002 Cal. App. Unpub. LEXIS 9073, but it was a compromise rate so as not to be challenged by the State. All participants understood that the agreed rate was below the market rate for San Francisco. The present San Francisco market rate is probably significantly higher still. So what Respondent was offering, construed most favorably to its position, was compensation for about twenty hours of my work on the case.

8. I consider the time spent litigating the order from Judge Patel to have been reasonable and necessary, because no competent attorney would have let Mr. Roderick go forward with the arbitration under the scenario as planned by Respondent. The benefits of the due process protections of the AAA Employment Rules are important, yet until the matter was brought before Judge Patel, Mr. Roderick was not going to receive those benefits. Respondent insisted that the arbitration go forward before the Court had determined the issues of arbitrability; however, doing so would not only have jeopardized Mr. Roderick's rights, but also would have contributed to a less efficient arbitration hearing. Moreover, Respondent insisted on arbitrating the statutory ERISA issues, which was also an error. The Court's intervention was necessary to resolve this issue as well. All these issues had to be resolved in advance of the arbitration hearing. Respondent's aggressive litigation tactics made the process expensive, but no less necessary or reasonable. Putting the best spin on Respondent's offer, its offer to pay for about twenty hours of Claimant's attorney's time incurred, after litigating the matter through the Judge's order, is insufficient under CCP §998, because twenty hours is only a small percentage of the hours that I had already directly spent on the case by that point. The arbitrator should exercise his discretion under SPA section 7.1 to make a fully compensable award.

9. For these reasons, I request that Claimant be found the prevailing party and be found eligible for an award of arbitration attorney's fees and expenses in a reasonable amount, according to proof. From the arbitrator's previous order, I understand that there will be an opportunity to present time records and an

explanation of the specific time and amounts incurred, after any prevailing party determination.

I declare under penalty of perjury under the laws of the State of California that this declaration is true and that it was executed in Clayton, California on June 20, 2005.

_____

Geoffrey M. Faust
Attorney for Robin Roderick

Cc: Mark Rice (by email)