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MAZZETTI & ASSOCIATES, INC.

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

ROBIN RODERICK,

Claimant,

vs.

MAZZETTI & ASSOCIATES, INC.

Respondent.
_____/

Case No.: 74 E 199 00295 04 JAS

RESPONDENT AND COUNTER-CLAIMANT MAZZETTI & ASSOCIATES, INC.'S REQUEST FOR CCP §998 FEES AND COSTS

I. RESPONDENT'S REQUEST FOR CCP §998 FEES AND COSTS

Respondent Mazzetti & Associates, Inc. ("Mazzetti") hereby seeks under CCP § 998, an award of AAA fees, and expert fees, incurred. Those out-of-pocket costs are tabulated and summarized on the attached declaration of Mark J. Rice filed herewith.

The Respondent submits no proposed corrections to the award.

This CCP §998 motion is based on the following facts, and negotiations prior to award which demonstrate that Claimant has not done better through a merits hearing, than previously offered by Respondent, and rejected by Claimant:

1. Claimant filed this arbitration. Claimant sought in that arbitration demand, the contract price for his 20 shares.

2. On or about June 21, 2001, Claimant through his counsel wrote AAA seeking to abandon his arbitration demand, and concurrently filed the Federal Action on June 21, 2001, forcing Respondent to file a motion to compel, which the Court granted, bringing the parties back to arbitration.

3. Claimant sought to abandon the arbitration altogether, and proceed on ERISA based theories in Federal Court. That Federal Complaint included a contention that the 1994 Mazzetti & Associates, Inc. Stock Purchase Agreement (SPA) that sets forth the arbitration clause and stock repurchase obligation and price formula, was an "ERISA plan" and hence, not subject to arbitration under 9th Circuit case law finding ERISA claims to be outside arbitration. The Federal Court rejected Claimant's argument, held that the 1994SPA was not an ERISA plan nor within ERISA jurisdiction, and held that Claimant was compelled to arbitrate pursuant to the terms of the SPA, and ordered that the parties arbitrate. In other words, Claimant lost his procedural maneuver to avoid arbitration, based on a faulty contention that the SPA was an ERISA plan, and an equally faulty contention that arbitration would violate his due process. The Federal Court rejected these claims, and also found that Claimant waived his objections to arbitration by filing the arbitration in the first place.

4. Two days after Mr. Roderick filed his Federal Complaint, the ESOP obtained an appraisal of the Company stock, as part of a transaction whereby the ESOP was acquiring 800 shares of company stock previously owned by the son of the founder, Bill Mazzetti, Jr., who had been President, resigned, and reached a Severance and Stock Purchase Agreement with the company, on June 23, 2004. In the ESOP appraisal performed by American Qualified Plans as of

June 23, 2004, it was determined that the fair market value of the company stock as of June 23, 2004, was $987.75/share. Recognizing that, such a stock value would have been offered to Claimant had the new ESOP previously owned stock, Respondent promptly offered Claimant the new ESOP valuation as of June 23, 2004 of $987.75/share for his twenty shares in settlement of the stock valuation issue, despite the fact that no such valuation, or ESOP owned stock existed at the time of Claimant's termination on November 24, 2004. See letter dated August 5, 2005 and attachment, at Rice dec. Ex. 4.

5. Claimant rejected the offer. Respondent expected Claimant would accept the new tender, insofar as Claimant's Federal action essentially prayed for such an ESOP valuation, so, this offer was exactly what Claimant sought. Claimant's theory was that he had mistakenly believed the ESOP already owned stock based on his misunderstanding of his OIA account statement, and therefore, he was entitled to an ESOP valuation, on the premise that he was told the ESOP owned stock and that, the ESOP "breached a fiduciary duty" in not acquiring company stock earlier, with the effect of depriving him of the difference between "book value" and ESOP FMV under the 1994 SPA.

6. The ESOP valuation was done in accordance with IRS Revenue Ruling 59-60 and Department of Labor Guidelines as required by ERISA. The ESOP valuation at $987.75 was provided to Claimant. Claimant should have accepted that valuation for his shares, but instead, refused that tender and offer. Claimant also refused to arbitrate. Claimant has even intimated through counsel that regardless of the arbitrator's ruling he will refuse to return his shares until the other, non-arbitral issues are settled or adjudicated.

7. After 3 days of hearing, and extensive briefing and effort, the arbitration concluded with a tentative award that determined that the fair market value of Claimant's stock

was $987.75/share, based on the same valuation done by the ESOP plan, and shared with Claimant, and offered to him, before the incurrence of substantial AAA fees and expert costs.

8. The arbitration award also found, as unreasonable and less than credible, Claimant's theory that he was entitled to $2365.35/share, based on Claimant's misunderstanding of his AQP participant's statement of his "Other Investment Account" ("OIA"), which amount was simply Claimant's pro-rata share of the initial $150,000 cash contribution made by Mazzetti on August 6, 2003, the day after the IRS had qualified the plan under ERISA. The arbitrator also found that Mr. Roderick attended employee meetings sponsored by Mazzetti in which the ESOP plan administrator, Todd Henry of AQP, led a discussion regarding the plan, explained the difference between OIA and CSA accounts, and distributed Summary Plan Descriptions which also made reference to these account differences, which were noted on the participant benefit statement by the acronym "OIA" (itself defined in the SPD and the Plan document).

9. The arbitrator also found that Claimant did not meet his burden of proof on submitting an alternative valuation, and did not meet his burden of proof to establish a breach of fiduciary duty, and did not meet his burden of proof to establish that the many other recited acts and obligations of Mr. Bill Mazzetti, were not genuine and additional consideration for his total severance package over and above the ESOP purchase of his stock at $987.75/share.

10. In short, Claimant's theories did not prevail.

11. While Respondent contended that book value of $907/share was the accurate contract measure, Respondent took a practical view both in negotiations and in the arbitration proofs in light of two facts: A) the small differences in per share value, that over the twenty shares in dispute were less than the anticipated cost of hearing; and B) the fact that the new 2002 ESOP later acquired company shares and had an evaluation, while a subsequent event, would

have been what Respondent would have offered had there been ESOP stock earlier at the time of his termination some 9 months earlier. Respondent also noted that it had offered fair market value several times once the ESOP acquired stock, to avoid the cost of the proceeding. As a practical matter, Respondent recognized that the difference between FMV and book value was negligible and approached the briefing, settlement offers, and contract interpretation in a sensible way to avoid needless litigation costs over small differences over only 20 shares. Respondent made it clear in its briefing that the Company recognized the anomaly of an unforeseen new ESOP, that did not yet have stock, and that the company would have adopted a practical construction that the new ESOP valuations would apply once the ESOP owned stock and had such valuations. Respondent has demonstrated this practical desire to avoid litigation costs and practical interpretation when it offered Mr. Roderick $987.75/share once the ESOP valuation was done, even if, when Mr. Roderick was terminated, the ESOP did not own stock nor have a stock valuation.

12. Respondent's efforts to work practically with Claimant on a solution to resolve the case, was met with evolving claims, shifting claim premises, and ever escalating demands, and a wasteful effort to turn a small stock valuation into a major litigation. Claimant went to great lengths to criticize and sought to exploit without credibility, every innocent or inadvertent misunderstanding, while putting on no affirmative appraisal evidence in his case in chief. And, Claimant had alleged the AQP valuation of $987.75, and anything done by Mr. Simonian, were suspect. To ensure fair market value was accurately determined as an alternative measure of contract stock price, and to determine if the AQP appraisal was in the ballpark, Respondent's counsel had little practical alternative than hiring an independent CPA and forensic expert to test the appraisal data, and an ERISA expert to address the claims associated with the AQP "OIA"

participant statements that Claimant misunderstood and made a cornerstone of this claim theories. Claimant's counsel hired Charles Wilhoite, an esteemed CPA and forensic appraiser, to undertake a comprehensive analysis of value and value methods. His appraisal, as of December 31, 2002, at $951/share, roughly corresponds and corroborates the AQP appraisal of June 23, 2004, of $987.75/share. Claimant went out of his way to simultaneously, challenge everything including the AQP appraisal – forcing Respondent to hire an appraisal expert – while also, putting forth no evidence on his own by way of appraisal.

13. New CCP §1284.3, and its underlying legislative history, submitted herewith, make it plain that for this arbitration, the "American Rule" applies and neither party is entitled to recover attorney's fees from the other, on the grounds of a contract clause providing the prevailing party recovers attorney's fees. That portion of the arbitration clause is stricken or blue lined as unenforceable in an arbitration governed by CCP 1284.3 and the AAA's Employment Dispute Resolution Rules. However, that statute does not do away with the separate statute, CCP §998, whereby an offer of compromise when made, can shift the burden of court costs and expert fees, where the party rejecting the offer does not do better at trial.

14. Claimant did not do better at hearing, than offered by Claimant, including CCP 998 offers made prior to hearing, which Claimant rejected.

15. In December 2004, once the court had ordered the parties back to arbitration, Respondent – in an effort to avoid needless costs – presented two alternative offers to save arbitration and expert fees: One, it offered to have the parties mutually select an appraiser to use ESOP methods, to appraise the twenty shares, with the result binding, and Respondent paying the appraiser's fees but otherwise, each side bearing own costs and fees. This would have no doubt resulted in a number between $987.75/share and Mr. Whilhoite's number $951/share, and saved

some $6600 in arbitration costs, and all of Mr. Garofo's fees in preparing and attending the hearing. This offer Claimant rejected. The offer was presented as a CCP 998 offer to Claimant. See Rice dec. Ex.'s 5-10.The fact Claimant rejected this offer, to essentially give him exactly what he had asked for before arbitration and in the Federal Complaint, is telling. It demonstrates that the arbitration was not about the stock value; it was a tactical "trial balloon" literally, for laying out pet theories in hopes one one stick, for later use in the nonarbitral stayed Federal part of the case.

16. Respondent's December 2004 offer presented another alternative: each side bear there own costs and fees, and Respondent would be paid $1264/share for his twenty shares, or again, more than he was asking for in his newest theory, of $1250/share based on his contention that such was what Bill Mazzetti received if one treated all the severance Mr. Mazzetti received as for stock, and ignored all the other consideration Mr. Mazzetti provided beyond return of shares. Claimant rejected this as well, by making two alternative demands – that Claimant be able to seek attorneys fees and costs based on the 998 offer, which Mazzetti would finance by paying for further AAA fees to hear a fee motion, and by refusing to accept partial payment by offset of the delinquent note. Rice dec., Ex's 5-8.

17. At that time, the fees and costs incurred where largely over the motion to compel arbitration, which Claimant lost. The offer was made with provision that the concededly unpaid and delinquent $6406 loan be a partial payment. So, the net would be $18, 874 (25, 280 – 6406). That offer was better than $1264/share as if a stock purchase payment under section 8 of the SPA, since it was 100% paid now, rather than 10% down and 90% over five years at prime rate interest of some 2.5%.

18. Claimant's response, was unreasonable; it claimed it "accepted" the offer, but not its two conditions and added new conditions– wanting $1264/share, or $25, 280 paid for the shares, not wanting to pay up the unpaid loan admittedly due, and wanting to make an attorney fee motion that Claimant had "won" by accepting the offer. Rice dec., Ex. 6. This 'acceptance' was not consistent with the offer, and was rejected. After several tries to convince Claimant's attorney that attorneys fees were not recoverable by either side under CCP §1284.3, Mazzetti determined that Claimant was bent on arbitrating, on the premise it was a "free shot" at Mazzetti, since it could not be forced to pay attorneys fees if it lost, and Mazzetti by the Employment Dispute Rules and dictates of CCP §1284.3, was fronting all the AAA fees. See Rice dec. Ex. 7, 8, 10.

As the authorities cited below indicate, CCP §998 and related case law exist, to avoid a lack of financial consequence to refusing to accept offers of compromise that are equal or better than what is obtained at hearing. CCP 998 is an authorized tool for a defendant and Respondent, to strike a balance, hedge the risk and high cost of a merits hearing, and shift the risk of costs and expert fees to a Claimant who does not fare better. It serves the salutary purpose, of making sure there is a cost incentive to accepting reasonable offers, and a cost consequence to rejecting reasonable offers. Respondent recognized that it would need to incur the AAA expense, and the expense of two critical experts, Mr. Whilhoite and Mr. Garofolo. It made the offers it did, to buy peace, and save these costs if the offer was accepted, and to recover those costs if Respondent's CCP 998 offer was not accepted, and Claimant did not obtain a higher share value than offered.

This proceeding was misused by Claimant as a free swing at the bat, a series of trial balloons and free discovery in hopes that the arbitration would serve as a platform for later Federal litigation. Such is an improper use of the arbitration. Claimant's misuse of the arbitration

as essentially a free deposition or discovery, was at great cost to Respondent who was required to respond to the Claims. The arbitrator can take into account Claimant's sandbag strategies, refusal to identify all its intended trial exhibits, and failure to produce much evidence in its case in chief. While the arbitration was ostensibly for purposes of setting a stock value per contract, Claimant never put forth any appraisal evidence of its own, and hired no expert. Claimant did acknowledge that Respondent's CPA appraiser, Mr. Whilhoite, was impressive, and he was.

The arbitrator's discretion to award CCP §998 fees is not lost by enactment of CCP §1284.3. That statute simply prohibits an award of fees and costs on a prevailing party basis by contract. It does not prohibit use of statutory procedures to shift costs, where, as here, the result could have been obtained, and was offered, without the extensive cost of this proceeding. Claimant prayed for an ESOP value in its Federal Complaint; but when offered that value, refused it. In the end, that ESOP value is what Claimant was awarded.

Conversely, Claimant made no CCP 998 offer. Claimant clearly did not win or prevail. Claimant refused to settle because he wanted a larger award - $1250/share or $2365.35, and a finding of breach of fiduciary duty which he would seek to use later. He did not achieve those central goals. Claimant is entitled to no fees or costs, given that its theories and claims for larger awards all failed. Respondent made it clear that the Stock Purchase Agreement lent itself to three potential outcomes – book value at $907/share; 2002 ESOP value of $951/share; and 2004 ESOP value of $987.75/share. The award fell within that range, the range Respondent offered long before the merits hearing and Claimant unreasonably rejected.

The Claimant will undoubtedly argue that consideration of the offset portion of the offer is outside of the arbitrator's jurisdiction. That cannot be true. The test is whether the offer was made, in good faith, and whether Claimant fared better. All case law under CCP 998

encourages courts and arbitrators to be practical in evaluating the 998 offers, against the statutory purpose – encouraging settlement when a good deal is offered and the net outcome is not better. The net outcome he is not better; whether or not Claimant can dance around or delay paying the loan, he owes it. It is unreasonable not to pay your debts when due. It is unreasonable not to permit voluntary offset of liquidated claims to resolve mutual accounts that are liquidated.

Really, what is Claimant saying here? He is saying that he can ignore the loan he owes. Can he ignore the loan in evaluating a settlement offer, as if the loan obligation does not exist? Not if he is reasonable. That is different that a determination that the undisputedly delinquent loan is arbitrable or not, or its determination mooted by the nature of the award. The issue here is whether the settlement offer was reasonable to trigger CCP 998's cost shifting.

Mazzetti has the right to pay over 5 years with 10% down, and its offer a year ago was 100%. So, Claimant can never do better than was offered no matter what procedural filibusters are raised over the delinquent loan. What Claimant fails to understand, is delaying paying a loan that is due is not to his advantage, since it has an interest rate and he is simply increasing his liability by delaying the offset.

Claimant's decision to pursue this hearing, despite its cost, cannot be viewed in a vacuum. Claimant rejected the very sums he initially demanded – an ESOP valuation; and then rejected even a higher, "ARM" type number. Claimant was unreasonable in his rejecting those offers. This in turn forced Mazzetti to incur the AAA fees, for both sides, and expert fees, to defend against Claimant's larger and more provocative claims, which were all defeated. No doubt, had Claimant realized it would lose on the fiduciary duty claims, and do no better than $987.75/share, it would have accepted the $987.75/share offer when made, and accepted the $1264/share offer when it was made. Because, both those are equal or better than the arbitration result.

Mazzetti throughout the proceeding made it clear to Claimant (and to arbitrator) that it was willing to pay $987.75 for the stock. Respondent offered that. Claimant used that offer, attached to declarations submitted in Federal Court, as its exhibits at hearing. Claimant rejected those settlement offers. Claimant sought and hoped to use the arbitration proceeding not to secure stock value, but as a springboard for his wrongful termination claims – at Mazzetti's expense. The arbitration was, and should have remained, about stock value. Claimant's claims continued to evolve, and change and Claimant did not meet his burden of proof. Case law provides consequences for proceedings that could have been avoided by acceptance of settlement offers that turn out to be equal or greater than the award – an award of costs and expert fees where a 998 offer has been made, as here.

II. LEGAL ARGUMENT

A. Lack of Fee Recovery Either Way by Statute.

As noted in Respondent's closing brief, the recently enacted CCP §1284.3 formerly adopts the "American Rule" for consumer arbitrations (including employment dispute arbitrations) and prohibits an arbitration clause from having an attorney fee shifting provision. The effect is to preclude an award of attorneys fees under a contract where in arbitration administered under the AAA employment dispute rules. See Rice dec., Ex's. 1, 2.

Respondent also made FMV offers to Claimant (i.e., above the contract book value) to avoid the cost of these proceedings. This approach was due to the fact that once the AAA employment rules applied, then CCP 1284.3 applies which expressly bars interpreting the 1994 attorney's fee portion of the contract arbitration clause to obligate the "loser pay" attorney's fees. See Legislative Intent Summary submitted herewith (in binder): "...by prohibiting 'loser pays' rules and by waiving provider fees when a consumer is unable to pay, AB 2915 softens the

financial blow of mandatory arbitration and allows consumers to enforce their legal rights. This Bill Adopts the "American Rule" for Attorney's Fees in Consumer Arbitrations." See letter of Assembly Member Wayne asking for the Governor's signature to the bill; see also Assembly Committee hearing synopsis on the bill made law: "Specifically, this bill prohibits "loser-pays" policies…" Rice dec., Ex. 2.

Once this became an arbitration governed by the Employment Dispute Resolution Rules and CCP §1284.3, Respondent recognized that there would not be a fee award in either direction, and that it would be compelled to pay the AAA fees in their entirety, other than Plaintiff's initial filing fee.Respondent recognized that offering of $987.75 per share was cost-effective for efficient litigation since it would avoid incurring AAA fees and extra costs if the offer is accepted. ESOP value is what Claimant was seeking in his federal complaint. Federal Complaint, ¶15:

"As a result of plaintiff's involuntary termination, he was ordered to sell back his company stock, but was offered less than the ESOP-stated value."

And, at ¶16:

"When querried, defendant asserted that even after 2 1/2 years, the Employee Stock Ownership Plan had never owned company stock and that therefore under the Stock Purchase Agreement, plaintiff was not entitled to the fair market value of his company's stock."

And, as stated in Mr. Roderick's Declaration in Federal Court at ¶3:

"The Stock Purchase Agreement's valuation formula is tied to the Company ESOP."

The Arbitrator, as well as the Court, has the inherent power to apply CCP §998's cost shifting provisions where appropriate in the interest of promoting substantive reasonable CCP §998 offers of compromise as made hereby by Respondent to Claimant.

CCP §998(c) (1) provides in pertinent part:

> "If an offer made by defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her costs and shall pay the defendant's costs from the time of the offer. In addition, and any action or proceeding other than eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay reasonable sum to recover the cost of the services of extra witnesses, who are not regular employees of any party, actually incurred and reasonably necessary and either, or both, for preparation or trial or arbitration, for doing trial or arbitration, of a case by the defendant."

The underlying purpose for CCP §998 is as with other fee shifting provisions, the "encouragement of efficient litigation." See *Pressley of Southern California v. Whelan* (1983) 146 CA3d 959 at 963, held that an attorney fee provision cost of an unsuccessful summary judgment motion was still awarded to a successful, prevailing party since to hold otherwise "would discourage the use of summary judgment" often and efficient means for disposing of litigation, in actions where the defendant has a strong case."

As held in *Heritage Engineering Construction v. City of Industry* (1998) 65 CA4th 1435, CCP §998 is a cost-shifting statute which encourages the settlement of actions by penalizing parties who fail to accept reasonable pre-trial settlement offers. See also *Meister v. Regents of University of California* (1998) 67 CA4th 437.

As held in *Mesa Forest Parks, Inc. v. St. Paul Mercury Insurance Co.* (1999) 73 CA4th 324, the purpose of CCP §998 is to encourage settlement by providing a strong financial incentive to a party whether it be a plaintiff or defendant, fails to achieve a <u>better result</u> than the party could have achieved by accepting his or her opponent's settlement offer. The basic premise

is that plaintiffs who reject reasonable settlement offers and then obtain less than the offer should be penalized for continuing the litigation.

The Legislature amended CCP §998 to include settlement offers made in the course of an *arbitration proceeding.* See also *Berg v. Darden* (2004) 120 CA4th 721, holding that the Legislature intended Section 998 to cover any circumstance by which the settlement would result in termination of the action as between the parties to the [998] agreement, including arbitration, interpreting the statute's provisions as applicable to settlement offers made, accepted or rejected in arbitrable disputes.

As noted in *Berg v. Darden, supra*, the statutory offers need not contain any "magic language" so long as it is clear the offer which must be written is made under CCP §998 and if acceptable results in the entry of judgment or alternative final disposition of the action legally equivalent to a judgment. Id.. *Darden* like here, involved a letter offer stating it was made to trigger CCP 998, which was held sufficient. The test under CCP §998 is where the offer is reasonable and made in good faith and whether the defendant or that plaintiff fared better at hearing than the offer or offers made. See *Nelson v. Anderson* (1999) 72 C4th 111.

See also *Weinberg v. Safeco Insurance Company of America* (2004) 114 CA4th 1075, where the Court of Appeal affirmed the superior court's award of prejudgment interest and costs under CCP §998 in favor of plaintiff where an arbitration award exceeded an offer made under Section 998. The court held that although the arbitration award was not a "judgment" within the meaning of Civil Code Section 3291, the judgment entered confirmed the arbitration under CCP §1287.4 was such a judgment.

Under CCP §998(e), the Court is to deduct the 998 costs against the award that the plaintiff would otherwise achieve:

> "If an offer made by defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the cost under this section from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the cost awarded under this section exceeds the amount of the damages awarded, the plaintiff in that amount shall be awarded to the defendant and judgment shall be awarded accordingly."

It should be noted that the CCP §998 offer here expressly provided that each party would bear their own costs and fees, and was limited to the stock issues and did not extend to plaintiff's federal non-arbitrable claims. See *Goodstein v. Bank of San Pedro* (1994) 27 CA4th 899, which held that section 998 properly called for a mutual release of settled claims while not requiring plaintiff to surrender all possible causes of action against defendant and requiring dismissal.

As held in *Evers v. Cornelson* (1984) 163 CA3d 310, CCP §998 seeks to penalize a litigant who, in refusing a reasonable settlement offer, caused the other party to suffer the expense of expert witnesses reasonably necessary in the preparation or trial of the case. See also *Culbertson v. RD Warner Co.* (1987) 190 CA3d 704.

III. SUMMARY OF COSTS AND FEES

See Cost Memorandum attached as Exhibit 10 to the Declaration of Mark J. Rice filed concurrently herewith. Respondent seeks the AAA fees paid after offer; the trial exhibit copying costs incurred after offer; Mr. Whilhoite's expert fees incurred after offer; and ERISA Consulting (Leonard Garofolo's company)'s fees after offer. The totals are summarized on the cost memorandum and itemizations attached thereto.

IV. THE EXPERTS GAROFOLO AND WILHOITE WERE NECESSARY AND THEIR EXPERT FEES SHOULD BE AWARDED

Claimant should have abandoned his claims arising from the AQP form, but would not. Nor would he acknowledge that ERISA requires use of Rev. Ruling 59-60 for ESOP stock

valuations. This resulted in a need to have testify Mr. Garofolo, the former Western Regional Director of PDVA, as well as Mr. Wilhoite who also covered stock valuation issues.

Mr. Garofolo, along with Mr. Wilhoite and Mr. Henry put into proper context the AQP statement, the concept of an ESOP valuation and Revenue Ruling Section 59-60, all of which were being challenged in various ways by the Claimant. Mr. Garofolo's testimony was cited by the Arbitrator in his tentative ruling and was helpful to the trier of fact and understanding the issues.

Mr. Garofolo's role was also important insofar as the court's order created a potentially "fine line" between what was subject to arbitration and related to ERISA and the ESOP versus what were "ERISA claims" and still within the court's jurisdiction and not arbitrable. The Arbitrator and the parties, to some extent, all struggled with finding that fine line that with the issues referring to arbitration - stock valuation and "independent management and administration," while leaving any ERISA-based cause of action for later determination. Mr. Garofolo's particular expertise, it is believed, was helpful in framing those issues and also showing Mr. Roderick's misunderstanding of his OIA account.

Mr. Wilhoite was acknowledged by Claimant as an excellent and authoritative forensic appraiser. Mr. Wilhoite's credentials were impeccable. Mr. Wilhoite provided considerable ground work and evaluation of the company's finances over several years which assisted in determining that the 2002 stock value was $951.00 per share, but this also corroborated the 2004 valuation of AQP at $987.75 per share within the ballpark.

It was noted that the June 23, 2004 AQP valuation of $987.75 per share was a "limited valuation" because it was a mid-year valuation. It was not as comprehensive as Mr. Wilhoite's. Mr. Roderick had stated in his federal declaration that he distrusted anything by the company

accountants, Mr. Simonian or anything associated with the ESOP (such as Mr. Henry). In an effort to have an independent review of the company's value, Mr. Wilhoite was selected and did an excellent authoritative job not criticized by the Claimant.

VI. CONCLUSION

For the reasons stated above, CCP §998 expert fees and AAA costs should be awarded in favor of Respondent and against Claimant.

Dated: June 20, 2005 Respectfully submitted,

McNEIL, SILVEIRA, RICE, WILEY & WEST

By: _____

MARK J. RICE

Attorneys for Respondent and Counter-Claimant

MAZZETTI & ASSOCIATES, INC.