

1 GIRARDI | KEESE
JAMES G. O'CALLAHAN, State Bar No. 126975
2 1126 Wilshire Boulevard
Los Angeles, California 90017
3 Telephone: (213) 977-0211
Facsimile: (213) 481-1554
4

5 Attorneys for Plaintiff
6
7

FILED
Superior Court Of California
County Of Los Angeles

SEP 29 2017

herri R. Callan Executive Trial Clerk
By: *[Signature]* Deputy
Gloria Roberts

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES
10

11 SOUTHWEST TRADERS, INC., a
corporation,

12 Plaintiff,

13 v.

14 DAZ SYSTEMS, INC., a corporation; and
15 SYSTEMS TECHNOLOGY
ASSOCIATES, a corporation; DAVID
16 GILLIES; and DOES 1-100,

17 Defendants.

18 DAZ SYSTEMS, INC., a corporation

19 Cross-Claimant

20 v.

21 SOUTHWEST TRADERS, INC., a
22 corporation

23 Cross-Respondent
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Case No. BC506710

**PLAINTIFF'S MOTION TO VACATE
ARBITRATOR'S RULING ON
DEFENDANT DAZ SYSTEMS, INC.'S
MOTION FOR SUMMARY
JUDGMENT OR SUMMARY
ADJUDICATION; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF;
DECLARATION OF JAMES G.
O'CALLAHAN**

Filed concurrently with [Proposed] Order

Date: November 8, 2017
Time: 8:30 a.m.
Dent.: 31
Judge: Hon. Samantha P. Jessner

Reservation ID 170929254982

Action Filed: 4/22/13

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**TO THE HONORABLE COURT, ALL PARTIES AND THEIR
ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on November 8, 2017, at 8:30 a.m. or as soon as the matter may be heard thereafter, in Department 31 of the above-captioned Court, located at 111 N. Hill Street, Los Angeles, California, 90012, Plaintiff SOUTHWEST TRADERS, INC. (hereinafter "Plaintiff" or "SWT") will move for this Court to vacate the Honorable David A. Horowitz's (Ret.) ruling which granted Defendant DAZ SYSTEMS, INC.'S Motion for Summary Judgment or Summary Adjudication in ADRS Case No. 13-5598-JZ. This motion will be made on the ground that the rights of Plaintiff were substantially prejudiced by the misconduct of the arbitrator.

The motion will be based upon this notice, the attached memorandum in support and declaration of James G. O'Callahan and exhibits attached thereto, the files and records in this action, and any further evidence and argument that the Court may receive at or before the hearing.

DATED: September 29, 2017 GIRARDI | KEESE

By: 

JAMES G. O'CALLAHAN
Attorneys for Plaintiff,
SOUTHWEST TRADERS, INC.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 The instant action arises from a dispute wherein the Defendant DAZ SYSTEMS,
4 INC. (hereinafter "Defendant" or "DAZ") failed to fulfill its duties and obligations to
5 Plaintiff SOUTHWEST TRADERS, INC. (hereinafter "Plaintiff" or "SWT") to upgrade
6 Plaintiff's business solutions technology to a warehouse management system ("WMS") so
7 Plaintiff would not lose the business of its customers including Starbucks, Popeyes, Jamba
8 Juice, Cinnabon, and Carvel Corporation. Defendant moved for summary judgment and
9 summary adjudication in ADRS Case No. 13-5598-JZ on the grounds that (i) Plaintiff was
10 precluded from bringing claims against DAZ because the parties entered into a "settlement
11 agreement" prior to the filing of the instant action barring Plaintiff from suit; and (ii)
12 Plaintiff was prohibited from collecting the full scope of damages flowing from DAZ's
13 failures pursuant to a limitation of liability clause in a standard agreement. Defendant
14 alleged twenty undisputed material facts in the body of its memorandum of points and
15 authorities. Plaintiff opposed Defendant's MSJ and proffered 25 undisputed material facts
16 as well as responses to Defendant's purported undisputed material facts.

17 On May 24, 2017, the Hon. David A. Horowitz (Ret.), acting in his capacity as
18 arbitrator, held a hearing on Defendant's MSJ at the Downtown Los Angeles office of
19 ADR Services, Inc. On June 16, 2017, the arbitrator ruled that Defendant's MSJ/MSA was
20 granted in full. The arbitrator served a "Ruling: Motion for Summary Judgment, or
21 Summary Adjudication" to that effect on June 21, 2017. His ruling states in part that
22 "SWT cannot recover on any of its causes of action against DAZ." (Ruling at p. 10). This
23 ruling flies in the face of California law and substantially prejudices the Plaintiff because:
24 (i) the arbitrator prematurely assumed the role of the factfinder when he should have been
25 merely determining if there were triable issues of material fact; (ii) the arbitrator violated
26 the arbitration agreement and the 10/1/13 order of the court that mandated that Plaintiff's
27 first through third and partially fourth causes of action were covered by the arbitration
28 agreement, and thus, Plaintiff had a right to have *all* of its causes of action subject to the

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1 arbitration agreement adjudicated; and (iii) the arbitrator's Ruling was incomplete because
2 it did not rule on Plaintiff's undisputed material facts. As such, Plaintiff respectfully
3 requests that this Court vacate the arbitrator's ruling pursuant to California Code of Civil
4 Procedure Sections 1283.4 and 1286.2, subparts (3) and (4) .

5 **II. FACTUAL AND PROCEDURAL SUMMARY**

6 SWT is a supply chain solution distributor that supplies food and food-related
7 products to restaurant franchises such as Starbucks, Popeyes, Jamba Juice, Cinnabon and
8 Carvel Corporation. Control over warehouse stocking, delivery schedules, and
9 refrigeration temperatures throughout delivery is necessary to its business operations. In or
10 around 2008, at least one of SWT's potential customers requested that SWT upgrade its
11 business solutions technology to a warehouse management system to better track data code
12 dates, delivery dates, and received dates.

13 David Gillies was hired to report to Mike Bredemeier, Vice President of IT at SWT,
14 in or around April 2009, to address the advancement of SWT's warehouse management
15 system. Gillies facilitated the hire of DAZ for this purpose.

16 In November 2009, DAZ proffered a Standard Consulting and Services Agreement¹
17 and Statement of Work (SOW) detailing that the project would be accomplished in four
18 phases with completion dates of May 3, 2010, June 1, 2010, July 1, 2010 and September 1,
19 2010, respectively. The first three implementation-phases largely involved DAZ's
20 implementation of modules in the different regions serviced by SWT, while the fourth and
21 final phase consisted of implementing the final two modules, namely, the Oracle
22 Enterprise Resource Planning ("ERP") application and Oracle Transportation Manager
23 ("OTM") and linking up all of the previously implemented modules including final

24 _____
25 ¹ The Standard Consulting and Services Agreement provided in part that "[i]f DAZ notifies
26 CUSTOMER that Services or Deliverables comply with the written functional
27 specifications or design criteria therefore, and CUSTOMER does not so agree...either
28 party may thereafter terminate negotiations and require the issue be submitted to
arbitration in Los Angeles County, California, in accordance with the rules of the
American Arbitration Association." (p. 2, ¶ 4).

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1 integration of the Oracle Business Intelligence and Labor Management Module ["OBIA"]
2 to create an integrated platform across all of the Oracle system modules.

3 DAZ promised in its SOW that "[t]hese services will result in the replacement of
4 the Mark system per the [quoted] Project Schedule and [] Project Fees", and specifically
5 stated that DAZ's successful and complete implementation of the Oracle Modules was the
6 primary DAZ deliverable of the SWT project. SWT relied on DAZ to successfully
7 implement the Oracle system in order to assist SWT with the following goals, pursuant to
8 page two of the SOW:

9 a. Continue its growth by realizing the automation Oracle E-Business Suit
10 provides and leveraging a new Warehouse management system, the Oracle Enterprise
11 Resource Planning ("ERP") system, and the Oracle Transportation Manager ("OTM");

12 b. Increase its visibility and accuracy of data as its products move through the
13 distribution process, all the way through the business to Financials;

14 c. Implement a viable, scalable, and easy to use enterprise wide solution;

15 d. Maintain a predictable cost structure around its customers and partners; and

16 e. Maintain an internal capability to evaluate and manage vendor, business
17 process, and project management;

18 f. Satisfy its expectation of being able to leverage Oracle's unmodified best
19 practices in the initial implementation (with the sole exception of the Pallet Building
20 Extension); and

21 g. Leverage better tools for integration to Starbucks and other key customers.

22 DAZ's launch of its program was unsuccessful.

23 After 5:00 p.m. on or around November 10, 2010, Zipperman, DAZ's
24 representatives met with SWT's for 15-30 minutes at the SWT offices. DAZ's
25 representative articulated that everything would be alright, and that the problems with the
26 system would be addressed. In January 2011, the parties again discussed outstanding
27 issues, including payment to DAZ and remaining implementation work. By June 2011,
28 DAZ still had not implemented two modules but was requesting \$200,000.00 on top of the

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1 \$2,200,000.00 already paid to them. Eight months had passed since the failing of the new
2 system and SWT still did not have the functionality it had with its old system.

3 In June 2011, SWT sent DAZ a letter which outlines the issues that remained with
4 the new system as of June 13, 2011. The last two pages read in relevant part:

5 Southwest will absolved Daz of any liability, including potential insurance
6 subrogation claims, so DAZ may focus on fixing Southwest's system and
delivering the items for which Southwest contracted, provided that:

7 a. DAZ cooperates with Southwest and its team to help bring Southwest
8 a faster resolution with an agreed upon time frame; and

9 b. we further discuss payment terms for work which is/was outside the
scope of the original contract and not warranty work.

10 DAZ responded: "we accept your letter as a statement that Southwest has no
11 intention of filing suit against DAZ...." DAZ attempted to rationalize the delay in
12 addressing some of the ongoing issues by labeling some as "low priority." DAZ did offer
13 to "assist SWT working with Oracle on the deadlocks." DAZ also noted that "there is a
14 plan in place to review and make a decision which way to move forward" regarding the
15 OTM system.

16 Sometime before June 2011, in the midst of DAZ's purported and failed attempt at
17 correcting the problems with its implementation of the Oracle software, DAZ hired SWT's
18 Senior Director of IT, David Gillies, in direct violation of a Non-solicitation and Non-
19 interference clause in DAZ's Standard Consulting and Services Agreement.

20 In August 2011, though the new system was running to some capacity, it was
21 struggling. By December 2011, all modules were still not operational. At that time, DAZ
22 employees no longer were on the SWT premises working on the implementation. SWT's
23 business suffered as a result.

24 Plaintiff filed the instant action on April 22, 2013. After Defendant compelled
25 arbitration, the court stayed the state court action upon arbitration. The Court ordered that
26 Plaintiff's "first through third causes of action for (1) negligence; (2) breach of contract; (3)
27 breach of express warranties are covered under the arbitration agreement because they are
28 based on DAZ's alleged failure to implement the subject system. Part of the fourth cause

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1 of action for breach of the implied covenant of good faith and fair dealing is covered by
2 the arbitration agreement...." (Order to Compel Arbitration and Stay Pending Action,
3 10/01/13 at pp. 6-7 (Ellis, J.)).

4 Defendant moved for summary judgment and summary adjudication in ADRS Case
5 No. 13-5598-JZ on the grounds that (i) Plaintiff was precluded from bringing claims
6 against DAZ because the parties entered into a "settlement agreement" prior to the filing of
7 the instant action barring Plaintiff from suit; and (ii) Plaintiff was prohibited from
8 collecting the full scope of damages flowing from DAZ's failures pursuant to a limitation
9 of liability clause in a standard agreement. Defendant alleged twenty undisputed material
10 facts in the body of its memorandum of points and authorities. Plaintiff opposed
11 Defendant's MSJ and proffered 25 undisputed material facts as well as responses to
12 Defendant's purported undisputed material facts.

13 On May 24, 2017, the Hon. David A. Horowitz (Ret.), acting in his capacity as
14 arbitrator, held a hearing on Defendant's MSJ at the Downtown Los Angeles office of
15 ADR Services, Inc. The hearing consisted of oral argument from the parties' counsel
16 whereby no witnesses were examined.

17 On June 16, 2017, the arbitrator ruled that Defendant's MSJ/MSA was granted in
18 full. The arbitrator served a "Ruling: Motion for Summary Judgment, or Summary
19 Adjudication" to that effect on June 21, 2017. It only discusses Plaintiff's cause of action
20 for breach of contract. Though it references Defendant's purported Undisputed Material
21 Facts, it neglects to mention altogether the specifics of Plaintiff's Undisputed Material
22 Facts, of which there are 25. His ruling states that "SWT cannot recover on any of its
23 causes of action against DAZ." (Ruling at p. 10).

24 **III. LEGAL STANDARD**

25 In California, "any party to an arbitration in which an award has been made may
26 petition the court to confirm, correct, or vacate the award." Cal. Code of Civ. Proc.
27 ("C.C.P."), §1285. "A petition to vacate an award or to correct an award shall be served
28 and filed not later than 100 days after the date of the service of a signed copy of the award

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1 on the petitioner." C.C.P., § 1288.

2 A petition under this chapter shall: (a) set forth the substance of or have
3 attached a copy of the agreement to arbitration unless the petitioner denies
4 the existence of such an agreement; (b) set forth the name of the arbitrators;
5 (c) set forth or have attached a copy of the award and the written opinion of
6 the arbitrators, if any.

7 C.C.P., §1285.4. The Court shall vacate the award if it determines any of the following
8 occurred during the course of the arbitration:

9 (1) The award was procured by corruption, fraud or other undue means. (2)
10 There was corruption in any of the arbitrators. (3) The rights of the party
11 were substantially prejudiced by misconduct of the neutral arbitrator. (4) The
12 arbitrators exceeded their powers and the award cannot be corrected without
13 affecting the merits of the decision upon the controversy submitted. (5) The
14 rights of the parties were substantially prejudiced by the refusal of the
15 arbitrator to postpone a hearing upon sufficient cause being shown therefore
16 or by the refusal of the arbitrators to hear evidence material to the
17 controversy or by other conduct of the arbitrators contrary to the provisions
18 of this title.

19 C.C.P., §1286.2.

20 **IV. LEGAL ARGUMENT**

21 **A. Plaintiff's Rights Were Substantially Prejudiced By the Arbitrator's
22 Premature Weighing of Evidence By Way of Motion for Summary
23 Judgment Which Acted As A Substitute for Trial**

24 A neutral's sole function on a motion for summary judgment is issue-finding, not
25 issue determination. The neutral must determine whether there is a triable issue of
26 material fact as to any material fact. (CCP §437c (c); *Zavala v. Arce* (1997) 58
27 Cal.App.4th, 915, 926). Summary judgment is a "drastic measure that deprives the losing
28 party of a trial on the merits It should therefore be used with caution, so that it does
not become a substitute for trial." (*Daniels v. DeSimone* (1993) 13 Cal.App.4th 600, 606-
607, quoting *Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1093; see also *Cottle v. Superior
Court* (1992) 3 Cal.App.4th 1367, 1397). The moving party must show that under "no
possible hypothesis within the reasonable purview of the allegations of the complaint is
there a material questions of fact which requires examination by trial If the Defendant
does not satisfy its burden as the moving party, the Motion must be denied, and it is

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1 unnecessary for the court to consider the Plaintiff's opposition, if any." (*Chevron U.S.A.,*
2 *Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548). When testimony is contradicted,
3 there is a triable issue of fact for the jury to consider, and the motion for summary
4 judgment must fail as a matter of law. (*Willard v. Hagemeister* (1981) 121 Cal.App.3d
5 406, 412-14).

6 The arbitrator overstepped his bounds when ruling on the MSJ by permitting the
7 MSJ to transform into a trial where he was the ultimate arbiter of both issues of law and
8 fact. One of the Defendant's arguments was that Plaintiff was precluded from bringing
9 claims against DAZ because the parties entered into a "settlement agreement" prior to the
10 filing of the instant action. Defendant's characterized unexecuted emails exchanged by the
11 parties' representatives to be a settlement agreement immunizing Defendant from suit. The
12 arbitrator went beyond determining if there were triable issues of material fact as to the
13 creation and performance of a 'settlement agreement'; he assumed the intent of the parties
14 and determined that performance was fulfilled despite a difference of opinion between the
15 parties about what the agreed performance was, i.e. the obligation to make the new
16 warehouse management system fully operational versus merely trying to do so. He
17 determined that "[t]here was no requirement that SWT's system be completely 'fixed'" for
18 Defendant to fulfill its contractual obligations even though Plaintiff's C.E.O. specified in
19 his purported settlement offer that DAZ should "'deliver[] the items for which Southwest
20 contracted"; namely, the operation of the warehouse management system. (Ruling at pp.
21 7, 9). Additionally, though Gillies – who now works for the Defendant – testified that it
22 was only *after* the unsuccessful launch of the program that he learned of Defendant's
23 dissatisfaction with hardware (testimony that directly disputes Defendant's evidence), the
24 arbitrator ignored this and found that Defendant informed Plaintiff *before* the launch. That
25 is not the arbitrator's task; he should limit his findings on a motion for summary judgment
26 to ones of law. *Daniels v. DeSimone* (1993) 13 Cal.App.4th 600. Had the Plaintiff known
27 that the arbitrator was using the MSJ/MSA hearing as a substitute for trial, the Plaintiff
28 would have produced witnesses and evidenced their credibility.

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1 **B. The Arbitrator Did Not Render a Ruling On All Causes of Action**
2 **Covered By the Arbitration Agreement, So He Cannot Determine As a**
3 **Matter of Law that None of Plaintiff's Causes of Action Are Colorable**

4 "An arbitrator's powers derive from, and are limited by, the agreement to arbitrate."
5 Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert (2011) 194 Cal.App.4th 519,
6 528 (internal quotation marks omitted). "It has been held that where the record shows that
7 an issue has been submitted to an arbitrator and that he totally failed to consider it, such
8 failure may...justify[] vacation of the award." Rodrigues v. Keller (1980) 113 Cal.App.3d
9 838, 841. The Court ordered that Plaintiff's "first through third causes of action for (1)
10 negligence; (2) breach of contract; (3) breach of express warranties are covered under the
11 arbitration agreement because they are based on DAZ's alleged failure to implement the
12 subject system. Part of the fourth cause of action for breach of the implied covenant of
13 good faith and fair dealing is covered by the arbitration agreement...." (Order to Compel
14 Arbitration and Stay Pending Action, 10/01/13 at pp. 6-7 (Ellis, J.)). The Defendant's
15 MSJ/MSA touched on a purported 'settlement agreement,' but it did not mention all of the
16 Plaintiff's causes of action covered by the arbitration agreement. Even though the
17 arbitrator declined to address the full breadth of Plaintiff's causes of action against
18 Defendant and none of the causes of action were directly put at issue in Defendant's
19 MSJ/MSA, the arbitrator ruled that "SWT cannot recover on any of its causes of action
20 against DAZ." (Ruling at p. 10).

21 **C. The Arbitrator Neglected to Rule on Plaintiff's Undisputed Material**
22 **Facts and Render a Complete Written Ruling**

23 If the arbitrator is to rule on an MSJ/MSA, he must consider the Plaintiff's
24 Undisputed Material Facts. California Code of Civil Procedure Section 437c(b)(3) grants
25 a party opposing a motion for summary judgment with the right to "set forth plainly and
26 concisely any other material facts the opposing party contends are disputed." Plaintiff sets
27 forth 25 such facts. The Ruling declines to specify whether each of the Plaintiff's material
28 facts are undisputed.

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1 This failure also violates California Code of Civil Procedure Section 1283.4,
2 which requires that an arbitration award "shall be in writing and signed by the arbitrators
3 concurring therein. It shall include a determination of all the questions submitted to the
4 arbitrators the decision of which is necessary in order to determine the controversy."
5 C.C.P., § 1283.4. To determine the controversy here, the arbitrator was required to rule on
6 Plaintiff's undisputed material facts which were submitted to the arbitrator for the purpose
7 of determining whether any triable issues of material fact exist as to this controversy. The
8 failure to render a complete and written ruling as to all of the issues submitted to the
9 arbitrator renders the ruling incomplete, and thus, deficient.

10 **V. CONCLUSION**

11 Arbitrators have wide discretion to decide issues which resolve cases, but that
12 discretion is not unfettered. Arbitrators are held to the terms of the applicable arbitration
13 agreement and must render complete rulings all issues submitted to arbitration. Here, the
14 arbitrator failed to do that. Moreover, he acted outside his authority to determine an
15 MSJ/MSA by using the proceeding as a substitute for a full-blown arbitration. For the
16 foregoing reasons, Plaintiff respectfully requests that this Court vacate the arbitrator's
17 "Ruling: Motion for Summary Judgment, or Summary Adjudication."

18 DATED: September 29, 2017 GIRARDI | KEESE

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20
21 By: James G. O'Callahan
22 JAMES G. O'CALLAHAN
23 Attorneys for Plaintiff,
24 SOUTHWEST TRADERS, INC.
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DECLARATION