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FILED
Superior Court Of California
County Of Los Angeles

SEP 29 2017

herri R. Carter Executive Officer
By: *[Signature]* Deputy
Gloriana Roberts

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

10
11 SOUTHWEST TRADERS, INC., a
12 corporation,

13 Plaintiff,

14 v.

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

17 Defendants.

18
19 DAZ SYSTEMS, INC., a corporation

20 Cross-Claimant

21 v.

22 SOUTHWEST TRADERS, INC., a
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.

Dept.: 31

Judge: Hon. Samantha P. Jessner

Reservation ID 170929254982

Action Filed: 4/22/13

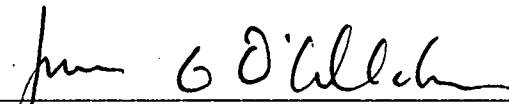
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1 **TO THE HONORABLE COURT, ALL PARTIES AND THEIR**
2 **ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that on November 8, 2017, at 8:30 a.m. or as soon as the
4 matter may be heard thereafter, in Department 31 of the above-captioned Court, located at
5 111 N. Hill Street, Los Angeles, California, 90012, Plaintiff SOUTHWEST TRADERS,
6 INC. (hereinafter "Plaintiff" or "SWT") will move for this Court to vacate the Honorable
7 David A. Horowitz's (Ret.) ruling which granted Defendant DAZ SYSTEMS, INC.'S
8 Motion for Summary Judgment or Summary Adjudication in ADRS Case No. 13-5598-JZ.
9 This motion will be made on the ground that the rights of Plaintiff were substantially
10 prejudiced by the misconduct of the arbitrator.

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

15 DATED: September 29, 2017 GIRARDI | KEESE

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17 By: 
18 JAMES G. O'CALLAHAN
19 Attorneys for Plaintiff,
20 SOUTHWEST TRADERS, INC.

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10/02/2017

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

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).

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

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

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

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;
(c) set forth or have attached a copy of the award and the written opinion of
the arbitrators, if any.

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

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

13 C.C.P., §1286.2.

14 **IV. LEGAL ARGUMENT**

15 **A. Plaintiff's Rights Were Substantially Prejudiced By the Arbitrator's** 16 **Premature Weighing of Evidence By Way of Motion for Summary** 17 **Judgment Which Acted As A Substitute for Trial**

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

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.

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**

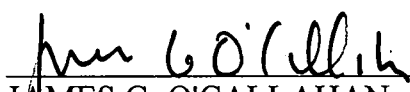
23 If the arbitrator is to rule on an MSJ/MSA, he must consider the Plaintiff's
24 Undisputed Material Facts. California Code of Civil Procedure Section 437c(b)(3) grants
25 a party opposing a motion for summary judgment with the right to "set forth plainly and
26 concisely any other material facts the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

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: 
22 JAMES G. O'CALLAHAN
23 Attorneys for Plaintiff,
24 SOUTHWEST TRADERS, INC.
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DECLARATION

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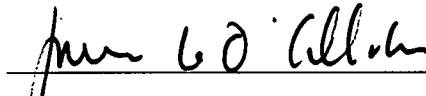
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1 ADR Services, Inc.

2 9. On June 16, 2017, the arbitrator ruled that Defendant's MSJ/MSA were
3 granted in full. The arbitrator served a "Ruling: Motion for Summary Judgment, or
4 Summary Adjudication" to that effect on June 21, 2017.

5 10. A true and correct copy of the Ruling is attached herewith as **Exhibit "D"**.

6 I declare under the penalty of perjury under the laws of the State of California that
7 the foregoing is true and correct and that this Declaration was executed on this 29th day of
8 September, 2017 in Los Angeles, California.

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11 JAMES G. O'CALLAHAN
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10/02/2017

10/02/2017

STANDARD CONSULTING AND SERVICES AGREEMENT

THIS STANDARD CONSULTING AND SERVICES AGREEMENT ("Agreement") is made and entered into November 30, 2009, by and between DAZ SYSTEMS, INC., a California corporation, ("DAZ"), and SOUTHWEST TRADERS, INC. ("CUSTOMER").

RECITALS

WHEREAS, DAZ is in the business of providing professional consulting, software and engineering services; and

WHEREAS, CUSTOMER is in need of certain professional consulting, software and/or engineering services, which services DAZ is desirous of providing to CUSTOMER.

NOW THEREFORE, in consideration of the mutual agreements and covenants contained herein, the parties agree as follows:

AGREEMENT

1. Services and Deliverables. CUSTOMER hereby retains DAZ, and DAZ hereby accepts retention by CUSTOMER, to provide the specific services (the "Services"), and to deliver the specific deliverables (the "Deliverables"), as described in Exhibit A to this Agreement and the Attached Statement of Work dated 11/30/09.

2. Performance of Work.

2.1 DAZ shall perform all work hereunder in a professional manner.

2.2 DAZ shall perform the Services and provide the Deliverables in accordance with the timetable for performance set forth in Exhibit A.

2.3 CUSTOMER, at no cost or charge to DAZ, shall timely make available to DAZ, all necessary personnel, data and documentation, and such space (including telephone, computer and desk space) at CUSTOMER's site(s), as reasonably required by DAZ in order for DAZ to timely complete the performance of the Services and to provide the Deliverables hereunder.

3. Compensation and Expenses.

3.1 In consideration for the Services and the Deliverables provided hereunder by DAZ to CUSTOMER, CUSTOMER shall pay DAZ the compensation set forth in Exhibit A.

3.2 CUSTOMER shall reimburse DAZ for all of its travel, meals, lodging and other direct expenses incurred in connection with its performance of the Services and its providing of the Deliverables hereunder, which expenses are outside the scope of the compensation provided for in Exhibit A. In the event the CUSTOMER has discounts or reduced rates at a local hotel, DAZ agrees to take advantage of said discounts or reduced rates. DAZ shall comply with Customer's Travel Policy and Per Diem assuming they are not unreasonable. DAZ shall utilize Southern California resources for the core ERP project located in Temecula to minimize travel expenses.

3.3 CUSTOMER shall pay or reimburse DAZ (at DAZ's sole discretion) for all federal, state and local sales, excise, use and similar taxes based upon payments made hereunder by CUSTOMER to DAZ.

3.4 CUSTOMER shall pay DAZ for all Services and Deliverables and shall reimburse DAZ for all expenses per the guidelines established in Section 3.2 of this agreement. Said invoices are due upon receipt from invoice date.

4. **Acceptance and Warranty.** CUSTOMER shall evaluate all Custom Developed Services and Deliverables provided hereunder by DAZ and shall submit a written acceptance or rejection (accompanied by detailed explanation) thereof to DAZ, within ten (10) calendar days after CUSTOMER's receipt thereof, or the same shall be deemed to have been accepted by CUSTOMER without reservation. Conformity to written specifications or design criteria (or lack thereof) shall solely determine CUSTOMER's right to accept or reject any Services or Deliverables. If properly rejected, DAZ's sole obligation shall be to either promptly fix the Services or Deliverables in order that they meet the written functional specifications or design criteria therefore, or to notify and explain to CUSTOMER that the Services or Deliverables comply with the written functional specifications or design criteria therefore. If DAZ notifies CUSTOMER that the Services or Deliverables comply with the written functional specifications or design criteria therefore, and CUSTOMER does not so agree, then the parties shall attempt to reach an agreement regarding that issue. If they do not reach an agreement within thirty (30) calendar days, then either party may thereafter terminate the negotiations and require that the issue be submitted to arbitration in Los Angeles County, California, in accordance with the rules of the American Arbitration Association. DAZ makes no other representations or warranties with respect to the Services or Deliverables, whether written, oral, express, implied or statutory, including, without limitation, any warranty of merchantability or fitness for any particular purpose.

5. **Proprietary Rights.**

5.1 **DAZ Proprietary Property.** All inventions, discoveries, ideas, developments, technology, computer programs and software, formulas, designs, processes, techniques, know-how and works of authorship, including all modifications, enhancements and/or improvements thereto, whether patentable or copyrightable, or not, (collectively "Inventions"), made, conceived, reduced to practice or developed by DAZ, at any time or from time to time (whether before, during or after the term of this Agreement), solely or jointly with others, including as a result of the work performed hereunder for CUSTOMER, shall be the sole and exclusive property of DAZ to the fullest extent permitted by law; and, DAZ shall own all rights, title and interests in and to all patent rights, copyrights, mask works, trade secrets and other intellectual property rights and/or interests (collectively "Rights") related to, or associated with, such Inventions. CUSTOMER hereby assigns to DAZ all Inventions and Rights to the fullest extent permitted by law.

5.2 **DAZ Background Information.**

5.2.1 "DAZ Background Information" means that portion of DAZ's own proprietary property that is specifically incorporated by DAZ into the Deliverables or which is required in order to enable the Deliverables to operate in the intended environment.

5.2.2 In consideration of CUSTOMER's full performance under this Agreement, and upon receipt by DAZ of full payment of all monies due hereunder by CUSTOMER to DAZ, DAZ shall convey to CUSTOMER a non-exclusive, perpetual, non-transferable, fully-paid, worldwide, irrevocable right and license to use the DAZ Background Information.

5.2.3 Except as expressly provided for in Section 5.2.2 of this Agreement, CUSTOMER shall acquire absolutely no rights, title or interests whatsoever in or to any of the DAZ Background Information or any other "Confidential Information" or proprietary rights or interests or trade secrets of DAZ. The DAZ Background Information shall be "Confidential Information" of DAZ under the provisions of Section 7 of this Agreement; provided, however, that CUSTOMER may use the DAZ Background Information as is reasonably necessary in order to enable the Deliverables to operate in the intended environment.

6. **Relationship of Parties.** This Agreement shall not constitute either party as the agent or legal representative of the other party for any purpose whatsoever nor shall either party hold itself out as such. This Agreement creates no express or implied relationship of joint venturers, partners, employer and employee, associates or principal and agent between the parties, and both parties are acting as independent contractors and principals for their own accounts. Neither party is granted any right or responsibility for or on behalf of the other or otherwise to bind the other. In providing the Services and Deliverables hereunder, DAZ shall have sole responsibility for all persons employed by it in connection with the performance of such Services and Deliverables; and, DAZ shall solely determine the methods, details and means of performing the Services and providing the Deliverables hereunder.

7. Confidential Information.

7.1 DAZ and CUSTOMER may each have access to, and become acquainted with, various confidential and/or proprietary information (whether reduced to writing or not) of the other, including, but not limited to, information regarding products, businesses, operations, modes and methods of conducting business and producing and marketing products, employee, customer, vendor and referral source lists, the salaries and terms of compensation of employees and consultants, trade secrets, copyrighted and non-copyrighted computer software programs and other matters, techniques of operation, financial and business structure, and weaknesses, if any, and ideas, intelligence, designs, concepts, know-how, data, processes, improvements, inventions, technology, works of authorship, compilations of information and other information of a confidential and/or proprietary nature, (hereinafter collectively referred to as "Confidential Information"). CUSTOMER and DAZ hereby acknowledge and agree that all Confidential Information of the other party shall be deemed to be highly confidential to such other party, shall constitute the other party's trade secrets and shall remain the sole and exclusive property of the other party and that the first party shall have no proprietary rights, title or interests therein. CUSTOMER and DAZ shall not reveal or disclose or cause to be revealed or disclosed any Confidential Information of the other, either directly or indirectly, to any other person or entity (other than their own employees and contractors as reasonably necessary for the performance of the Services and the delivery of the Deliverables hereunder) and CUSTOMER and DAZ, respectively, shall not use or appropriate any Confidential Information of the other in any way, directly or indirectly, either during the term of this Agreement, or at any time thereafter, except in accordance with the scope of this Agreement, and subject to all of the terms and conditions of this Agreement. CUSTOMER and DAZ shall each treat the Confidential Information of the other with at least the same degree of care and safeguards that it takes with its own Confidential Information.

7.2 Notwithstanding the foregoing, neither CUSTOMER nor DAZ shall have any obligation to keep confidential or refrain from disclosing information disclosed by the other party which is (i) part of the public domain at the time of its disclosure by the other party, or thereafter becomes part of the public domain through no act or failure to act on the part of the receiving party; or (ii) lawfully and properly in such first party's possession at the time it is disclosed to it and is not then subject to restrictions against disclosure by such first party; or (iii) lawfully and properly revealed to such first party by any third party not under an obligation of confidentiality to the other party; or (iv) independently developed by the first party without access to the other party's Confidential Information.

7.3 Upon termination of this Agreement for any reason, or at any other time that CUSTOMER or DAZ demands, the other party shall promptly deliver to the requesting party all Confidential Information (copies and originals) of the requesting party as may be in the other party's possession or under its control. CUSTOMER and DAZ shall each honor and abide by the terms of this Agreement notwithstanding the termination of any business relationship between CUSTOMER and DAZ.

7.4 The terms and provisions hereof shall be retroactive to the date that CUSTOMER or DAZ shall have first gained access to, received or come into contact with, any Confidential Information of the other party.

7.5 In the event of a breach or threatened breach of any of the provisions hereof, CUSTOMER and DAZ, respectively, without limiting its rights, shall each be entitled to an injunction restraining the other party from revealing or disclosing, in whole or in part, any and all Confidential Information protected hereunder.

8. Termination of Agreement.

8.1 CUSTOMER may terminate this Agreement at any time "for cause" (as hereinafter defined) upon giving DAZ at least thirty (30) business days advance written notice thereof; provided, however, that if DAZ shall cure or commence to cure (and thereafter diligently pursue steps appropriate to cure) such default within such time period, then, and in that event, CUSTOMER's notice of termination shall be of no further force and effect. The term "for cause" shall mean a refusal, failure or neglect by DAZ to perform any of its material obligations under this Agreement.

8.2 Upon a termination of this Agreement, DAZ shall be paid for all Services and Deliverables, including all expenses, incurred, performed or delivered through the effective termination date, and all work in process and work completed will be delivered to CUSTOMER upon payment in full therefore.

8.3 DAZ may terminate this Agreement upon giving written notice thereof to CUSTOMER, if CUSTOMER fails to pay any fees, compensation or expenses to DAZ in accordance with this Agreement; provided, however, that if CUSTOMER shall cure such default within five (5) business days after the giving of such written notice, then, and in that event, DAZ's notice of termination shall be of no further force or effect.

9. **Indemnification.** DAZ shall defend, indemnify and hold harmless CUSTOMER, including its officers, directors, employees and agents, from and against any and all claims, actions, liabilities, damages, costs or expenses resulting from the breach by DAZ of any or all of its representations, warranties, covenants or agreements hereunder; PROVIDED HOWEVER, that Section 10 of this Agreement sets forth CUSTOMER's exclusive remedy with respect to infringement claims, and Section 11 of this Agreement sets forth an overall limitation of liability for DAZ. CUSTOMER shall provide prompt written notice to DAZ of any claim, suit or proceeding from which CUSTOMER seeks indemnification, and CUSTOMER shall assist DAZ, at CUSTOMER's own expense, in defending any such claim, suit or proceeding.

10. **Infringement.** Should the Deliverables become, or in DAZ's reasonable opinion be likely to become, the subject of a claim of infringement of a United States patent, copyright or other intellectual or property right, DAZ may (i) procure for CUSTOMER the right to continue using the Deliverables, or (ii) replace or modify the Deliverables so as to make them non-infringing and providing substantially similar functionality, or at its option, (iii) terminate this Agreement and refund to CUSTOMER all compensation previously paid by CUSTOMER to DAZ hereunder with respect to the infringing Deliverables. DAZ shall have no liability for any claim of infringement to the extent that such claim is based upon (i) use of other than an approved release of the Deliverables, (ii) use or a combination of the Deliverables with non-DAZ programs or data if such infringement would be avoided by not using or combining the Deliverables with such non-DAZ programs or data, or (iii) use of the Deliverables in a manner other than as represented to DAZ. Notwithstanding anything contained in this Agreement to the contrary, DAZ shall not be liable for any claims, losses, damages, charges or expenses, whether direct or indirect, to the extent relating to any allegation or claim of infringement of any non-U.S. patent, copyright or other intellectual or property right or interest.

11. **Limitation of Liability.** DAZ shall not be responsible or liable to CUSTOMER for any special, indirect, incidental or consequential damages, whether or not the possibility of such damages has been disclosed to DAZ or could have been reasonably foreseen by DAZ arising under this Agreement, whether in contract or tort (including negligence and strict liability) and including, but not limited to, lost profits, loss of use, lost data or other economic loss. DAZ's cumulative liability to CUSTOMER for all claims, actions, damages, losses, liabilities, costs and expenses arising out of, or connected with, this Agreement (arising from any cause of action whatsoever), or the sale, delivery or use of any Services or Deliverables furnished hereunder, and whether based upon breach of contract, tort, strict liability, warranty, negligence or otherwise, shall in no case exceed the amounts paid by CUSTOMER to DAZ with respect to the Services and/or Deliverables or parts thereof which form the basis for such claim, action, damage, loss, liability, cost or expense, which in no event, shall exceed the sum of all monies paid hereunder by CUSTOMER to DAZ.

12. **Non-solicitation and Non-interference.** Except as otherwise agreed to in writing between CUSTOMER and DAZ, CUSTOMER and DAZ agrees not to, either during the term of this Agreement or during the two (2) year period following any termination of this Agreement, solicit, hire, use, employ, contract with, compensate or take away, or attempt to solicit, hire, use, employ, contract with, compensate or take away, directly or indirectly, in any manner whatsoever, any employee(s) or former employee(s) and/or independent contractor(s) or former independent contractor(s) (or any of their present or former employees) of Customer and DAZ and/or any of its affiliates, either for CUSTOMER's and DAZ's own purposes or for any other person or entity. CUSTOMER and DAZ hereby acknowledge and agree that Customer and DAZ's damages would be extremely difficult if not impossible to ascertain and determine in the event that CUSTOMER or DAZ should breach the aforementioned prohibition and that, as a result thereof, CUSTOMER or DAZ shall be immediately liable to Customer or DAZ for liquidated damages in the amount of Fifty Thousand Dollars (\$50,000.00) for and as a result of each such breach.

13. **Survival.** Sections 3, 4, 5, 6, 7, 8.2, 9, 10, 11, 12, 13, 14 and 15 shall survive any termination or expiration of this Agreement.

14. **Notices.** All notices hereunder shall be in writing, and shall be personally delivered or transmitted by telecopier, telex, overnight delivery, or cable or transmitted by postage prepaid, registered or certified mail with return receipt requested, as elected by the party giving such notice, to the party to be notified at the appropriate address for such party as hereinafter set forth, or such other address as such party last provided to the other by written notice:

SOUTHWEST TRADERS, INC.:

Jeff Allen, President
Southwest Traders, Inc.
27711 Diaz Road
Temecula, CA 92590
Fax: (951) 699-5717

DAZ SYSTEMS, INC.:

Walter H. Zipperman, President
DAZ Systems, Inc.
880 Apollo Street, Suite 201
El Segundo, CA 90245
Fax: (310) 640-9900

Notices shall be deemed to have been given: (i) on the third business day after posting, if mailed, (ii) on the date of receipt if delivered personally, (iii) on the next business day after transmission if transmitted by telecopier, telex, overnight delivery or cable and appropriate evidences of receipt have been received, (iv) or on the date shown on the Return Receipt Card signed by an employee or authorized agent of the party to be served, if sent by registered or certified mail.

15. **Miscellaneous.**

15.1 **Integration and Binding Effect.**

15.1.1 This Agreement contains the entire agreement between DAZ and CUSTOMER and supersedes any and all prior and contemporaneous agreements, representations, and understandings of the parties relating to the subject matter hereof. No oral understandings, statements, promises or inducements contrary to the terms of this Agreement exist. No amendment, variation or modification of this Agreement shall be binding unless executed in writing by CUSTOMER and the President of DAZ.

15.1.2 No waiver of any provision of this Agreement shall be deemed to be a waiver of any other provision, whether or not similar; and, no such waiver shall constitute a continuing waiver. No waiver of any provision hereof, or the granting of any consent contemplated hereby, shall be valid unless in writing and signed by the party against whom enforcement of any such variation, modification, waiver or consent is sought.

15.1.3 Each individual executing this Agreement on behalf of a party to this Agreement individually represents and warrants that he or she has the authority to do so and the power to enter into this Agreement on behalf of such party and to bind the party for whom he or she is signing.

15.2 **No Assignment.** Neither party shall have any right or ability to assign, transfer or sublicense any obligations or benefit under this Agreement without the written consent of the other (and any such attempt shall be void), except that a party may assign and transfer this Agreement and its rights and obligations hereunder to any third party who succeeds to substantially all of its business or assets.

15.3 **Severability.** If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

15.4 **Construction.** Headings herein are for convenience of reference only and shall in no way affect interpretation of this Agreement. Unless the context clearly requires otherwise, (i) the plural and singular numbers shall each be deemed to include the other; and (ii) the masculine, feminine, and neuter genders shall each be deemed to include the others. No provision of this Agreement shall inure to the benefit of any third parties so as to constitute

any such person a third-party beneficiary of this Agreement. This Agreement shall be construed without regard to any presumption or rule requiring construction against the drafting party.

15.5 Further Acts. The parties hereby each agree to execute such other documents and perform such other acts as may be necessary or desirable to carry out the purposes of this Agreement.

15.6 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument. Signatures executing this Agreement may be delivered by facsimile transmission.

15.7 Attorneys' Fees. If any action at law or equity, including an action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, which may be set by the court in the same action or in a separate action brought for that purpose, and costs, including expert's witnesses fees and out-of-pocket costs, in addition to any other relief to which that party may be entitled, subject to the limitation of liability provisions set forth in Section 11.

15.8 Force Majeure. Any delays in or failure of performance by either CUSTOMER or DAZ, other than payment of money, shall not constitute a default if and to the extent that those delays or failures of performance are caused by occurrences (collectively, "Force Majeure Conditions") beyond the reasonable control of CUSTOMER or DAZ, as the case may be. These occurrences include, without limitation: Acts of God or a public enemy; expropriation or confiscation of facilities; compliance with any order or request of any governmental authority; acts of war; rebellion or sabotage or resulting damage; fires, floods, explosions and accidents; labor difficulties or riots or strikes or other concerted acts of workmen, whether direct or indirect; acts of third parties; transportation difficulties, inability to obtain equipment, materials or qualified labor sufficient to fill orders; or any other causes, whether or not of the same class or kind as these, which are not within the control of CUSTOMER or DAZ, respectively, and which by the exercise of reasonable diligence, CUSTOMER or DAZ, respectively, is unable to prevent. Force Majeure Conditions shall not relieve a party of liability in the event of its failure to use reasonable diligence to remedy the problem.

15.9 California Law. This Agreement shall be governed by, interpreted under, and construed in accordance with, the laws of the State of California, without regard to its conflicts of law provisions thereof.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed by their respective officers as of the date first written above.

DAZ Systems, Inc.

By: 

Name: Walter H. Zipperman

Title: President

Date: 12/11/11

CUSTOMER: Southwest Traders, Inc.

By: 

Name: Jeff Allen

Title: President

Date: 11/30/2009

10/02/2017

EXHIBIT A

DUTIES OF DAZ

Description of duties that DAZ is going to perform and referenced in the Statement of Work. The Statement of Work dated November 30th, 2009 is attached to this agreement.

RATE SCHEDULE

Name of Personnel Provided:

Project Manager

Billing Rate:

\$175 per hour, \$1400 typical day

Name of Personnel Provided:

Oracle Functional Consultant

Billing Rate:

\$150 per hour, \$1200 typical day

Name of Personnel Provided:

Technical Consultant

Billing Rate - blended:

\$100 per hour, \$800 typical day

Name of Personnel Provided:

DBA

Billing Rate - blended:

\$120 per hour, \$960 typical day

The attached PDF details the anticipated DAZ and Customer labor for this project.



Southwest Traders
Phased Staffing 11.2

Client acknowledgement: _____

A handwritten signature in black ink, appearing to be 'JCH', written over a horizontal line.

10/02/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/01/13

DEPT. 17

HONORABLE Richard E. Rico

JUDGE A. ORTIZ

DEPUTY CLERK

HONORABLE
12

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. ELLIS, C.A.

Deputy Sheriff

NONE

Reporter

8:31 am BC506710

Plaintiff

Counsel

K. BRUCE, (X)

SOUTHWEST TRADERS INC

VS

Defendant

C. SARGENT, (CT. CALL)

DAZ SYSTEMS INC ET AL

Counsel

NATURE OF PROCEEDINGS:

PETITION OF DAZ SYSTEMS, TO COMPEL ARBITRATION AND
STAY THE PENDING ACTION;

The matter is called for hearing on defendant DAZ
Systems, motion to compel arbitration and stay the
pending action.

The court's tentative is adopted as its order as
follows:

Southwest Traders, Inc. ("plaintiff") brought this ac
action against DAZ Systems, Inc. ("DAZ") and Systems
Technology Associates ("STA") for (1) Negligence; (2)
Breach of Contract; (3) Breach of Express Warranties;
(4) Breach of the Implied Covenant of Good Faith and
Fair Dealing; (5) False Promise; (6) Fraudulent Deceit
and Intentional Misrepresentation; (7) Negligent
Interference with a Contract (8) Negligent
interference with Prospective Economic Relations; (9)
Intentional Interference with Prospective Economic
Relations; (10) Intrusion into Private Affairs and
Conspiracy to Commit Intrusion; (11) False
Advertising; (12) Unfair Business Practices; and (13)
Fraudulent Concealment. Plaintiff claims that
defendants used inside information to underbid an
information technology contract and warranty agreement
that defendants never intended to fulfill, the
requested millions of dollars in additional payment
and never fulfilled the contract.

10/02/2017 10:10:13

EXB

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/01/13

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A. ORTIZ

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JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. ELLIS, C.A.

Deputy Sheriff

NONE

Reporter

8:31 am

BC506710

Plaintiff

Counsel

K. BRUCE, (X)

SOUTHWEST TRADERS INC

VS

Defendant

Counsel

C. SARGENT, (CT. CALL)

DAZ SYSTEMS INC ET AL

NATURE OF PROCEEDINGS:

DAZ moves to compel arbitration on the grounds that on 11/29/09, plaintiff and DAZ entered into a Standard Consulting and Services Agreement for DAZ to provide plaintiff certain services and deliverables. (Complaint paragraph 16; Arnold Declaration, Exhibit 1.) Section 4 of the agreement provides:

ACCEPTANCE AND WARRANT. CUSTOMER shall evaluate all Custom Developed Services and Deliverables provided hereunder by DAZ and shall submit a written acceptance or rejection (accompanied by detailed explanation) thereof to DAZ within ten (10) calendar days after CUSTOMER's receipt thereof, or the same shall be deemed to have been accepted by CUSTOMER without reservation. Conformity to written specification or design criteria (or lack thereof) shall solely determine CUSTOMER's right to accept or reject any Services or Deliverables. If properly rejected, DAZ's sole obligation shall be to either promptly fix the Services or Deliverables in order that they meet the written functional specification or design criteria therefore, or to notify and explain to CUSTOMER that the Services or Deliverables comply with the written functional specifications or design criteria therefore. If DAZ notifies CUSTOMER that the Services or Deliverables comply with the written functional specifications or design criteria therefore, and CUSTOMER does not so agree, then the parties shall attempt to reach an agreement

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ELECTRONIC RECORDING MONITOR

C. ELLIS, C.A.

Deputy Sheriff

NONE

Reporter

8:31 am BC506710

Plaintiff

Counsel

K. BRUCE, (X)

SOUTHWEST TRADERS INC

VS

Defendant

C. SARGENT, (CT. CALL)

DAZ SYSTEMS INC ET AL

Counsel

NATURE OF PROCEEDINGS:

regarding that issue. If they do not reach an agreement within thirty (30) calendar days, then either party may thereafter terminate the negotiations and require the THE ISSUE BE SUBMITTED TO ARBITRATION IN LOS ANGELES COUNTY CALIFORNIA, IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION. DAZ makes no other representations or warranties with respect to the Services or Deliverables, whether written oral, express, implied or statutory, including, without limitation, any warranty of merchantability or fitness for any particular purpose.

(Arnold Declaration; Exhibit 1, p.2, section 4.)

Further, DAZ claims that defendant David Gilles, currently an employee of DAZ and former employee of plaintiff, separately signed an arbitration agreement with plaintiff and joins in on this arbitration petition. (Gillies Declaration paragraph 3, Exhibit A.) This agreement provides that plaintiff and Gilles agreed to arbitration "all disputes that may arise out of the employment context." (Id.)

DAZ argues that the complaint concerns the Services and/or Deliverables being non-complaint with plaintiff's expectations. Thus, the parties' contract requires arbitration of this dispute. Also, the Gilles agreement requires arbitration of all disputes related to his employment. The claims alleged in this

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C. ELLIS, C.A.

Deputy Sheriff

NONE

Reporter

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Plaintiff

Counsel

K. BRUCE, (X)

SOUTHWEST TRADERS INC

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DAZ SYSTEMS INC ET AL

Counsel

NATURE OF PROCEEDINGS:

action tie directly to actions Gilles purportedly took as plaintiff's employee. (Complaint paragraphs 13, 14, 20, 36.)

In opposition, plaintiff argues that the arbitrations agreement does not encompass the allegations in the complaint. Also, even if some of the claims are arbitrable, those that are not must be resolved in court before the others can be arbitrated. Further, even if the court finds that the allegations are to be within the arbitration provision. DAZ has waived and/or repudiated its right to arbiter by not commencing arbitration as the contract requires. In the alternative, if the court finds that the claims are arbitrable, and that DAZ still has the right to demand arbitration, then the petition is the first attempt by DAZ to negotiate with plaintiff, then the 30-day period of informal resolution is required before DAZ can demand arbitration.

In the complaint, it is alleged that plaintiff decided to upgrade its distribution software and computer system in February 2009 and solicited proposals form various business solutions technology companies. (Complaint paragraph 12.) Plaintiff hired defendant Gillies to run a request for proposal process. (paragraph 12.) Third party Retalix submitted a proposal, which plaintiff was considering. (paragraph 12.) Oracle expressed an interest in the contract and indicated that in order for plaintiff to use the Oracle software. (paragraph 13.) DAZ submitted

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Deputy Sheriff

NONE

Reporter

8:31 am

BC506710

Plaintiff

Counsel

K. BRUCE, (X)

SOUTHWEST TRADERS INC

VS

Defendant

Counsel

C. SARGENT, (CT. CALL)

DAZ SYSTEMS INC ET AL

NATURE OF PROCEEDINGS:

a proposal. (paragraph 13.) Unbeknownst to plaintiff, Gillies was secretly sharing information, including the Retalix bid, with DAZ to ensure that DAZ underbid the lowest offer and secured the contract. (paragraph 13.)

DAZ intended to take advantage of its secret relation with Gillies in order to intentionally underbid competing proposals and induce plaintiff to enter into a contract. (paragraph 14.) "DAZ has intentionally quoted a price and scope to work that it knew would not provide SWT with the system it needed with the intention of continuing 1:0 wrongfully up-sell SWT after securing the contract by demanding additional payment for work that should have been included in DAZ'S bid and/or DAZ had represent to be covered by warranty, until SWT finally had received and paid for the system that it needed." (paragarph 14.) The parties entered into the contract on 11/30/09. (paragraph 16, Exhibit 1.) There are numerous allegations of how DAZ breached the agreement, including that "DAZ never was able to sucessfully implement the system that it had contracted with SWT to deliver and failed to ever complete the final phase of the project..." (paragaraph 20, see also paragraphs 14-24.) Plaintiff suffered various losses. (paragraphs 25-31.) DAZ refused to resolved its failure to implement the Oracle system for plaintiff and has instead continued to demand payment for services that should have been performed under the argeement. (paragraph 32.) Plaintiff terminated the agreement on 1/17/12.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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Deputy Sheriff

NONE

Reporter

8:31 am

BC506710

Plaintiff

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SOUTHWEST TRADERS INC

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DAZ SYSTEMS INC ET AL

NATURE OF PROCEEDINGS:

(paragraph 33.) Claims based on the foregoing allegations seem to clearly fit under the terms of the arbitration agreement.

However, there are also other allegations of wrongdoing that are not covered by the arbitration agreement. For instance, it is alleged that DAZ also breached the non-solicitation and non-interference clause of the agreement by hiring Gillies and using the confidential information which Gillies gave to plaintiff. (paragraphs 34-36.)

The complaint contains causes of action for: (1) negligence; (2) breach of contract; (3) breach of express warranties; (4) breach of the implied covenant of good fair dealing; (5) false promise; (6) fraudulent deceit and intentional misrepresentation; (7) negligent interference with a contract; (8) negligent interference with prospective economic relations; (9) intentional interference with prospective economic relations; (10) intrusion into private affairs and conspiracy to commit intrusion; (11) false advertising; (12) unfair business practices; and (13) fraudulent concealment.

The first through third causes of action for (1) negligence; (2) breach of contract; (3) breach of express warranties are covered under the arbitration agreement because they are based on DAZ's alleged failure to implement the subject system.

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C. ELLIS, C.A.

Deputy Sheriff

NONE

Reporter

8:31 am

BC506710

Plaintiff

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DAZ SYSTEMS INC ET AL

Counsel

NATURE OF PROCEEDINGS:

Part of the fourth cause of action for breach of the implied covenant of good fair dealing is covered by the arbitration agreement (paragraphs 79-80) and part of the claim is not (paragraphs 77-78, concerning DAZ's alleged relationship with Gillies).

The fifth through thirteenth causes of action are not covered by the arbitration agreement. They are based on DAZ's alleged fraud (false representations that it had the skills, knowledge, and experience to implement the software) and based on DAZ's secret relationship with Gillies.

Thus, the court will GRANT the motion to compel arbitration as to the first, second, third, and part of the fourth causes of action and STAY this action pending arbitration.

Plaintiff also makes the argument that if some claims are arbitrable, the non arbitrable claims must be heard by a judge before the other claims can be arbitrated. (Opposition p. 5.) Plaintiff cites no authority for the proposition that the claims must be litigated first before arbitration can commence.

Plaintiff also makes the argument that DAZ waived its right to arbitration under the contract. This argument is unpersuasive because there is no indication that DAZ waived any rights to compel arbitration. After the filing of this lawsuit on 4/22/13, counsel for DAZ contacted plaintiff's counsel

10/02/2017 10:10:2013

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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Plaintiff

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SOUTHWEST TRADERS INC

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DAZ SYSTEMS INC ET AL

NATURE OF PROCEEDINGS:

regarding arbitration on 6/21/13, which plaintiff refused. (Motion- Sargent Declaration paragraphs 2-3, Exhibits 1 and 2.)

Further, plaintiff argues that if DAZ has not waived its right to initiate arbitration, then the court should treat the motion to compel arbitration as the first notice by DAZ triggering the 30 day informal negotiations period. (Opposition p. 7.) First of all, it has been over 30 days since the petition to compel arbitration was filed. It seems that in light of plaintiff's allegations, attempts to resolve these issues have already failed prior to the filing of this action. Even if not, the parties are always free to resolve the matter on their own at any time.

GILLIES

The petition to compel arbitration is not brought by Gillies. It is stated very briefly that Gillies "joins in" on DAZ's petition. However, there is very little discussion about the claims against Gillies and the arbitration agreement. (Motion pp. 2-3.) Plaintiff's opposition fails to address this issue at all. However, it does appear that the claims against Gillies are subject to arbitration. The arbitration agreement between plaintiff and Gillies is fairly broad and relates to any disputes that may arise out of the employment context. Clearly the claims against Gillies relates to the "employment context."

10/10/2013
10/02/2017

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/01/13

DEPT. 17

HONORABLE Richard E. Rico

JUDGE

A. ORTIZ

DEPUTY CLERK

HONORABLE
12

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. ELLIS, C.A.

Deputy Sheriff

NONE

Reporter

8:31 am

BC506710

Plaintiff

Counsel

K. BRUCE, (X)

SOUTHWEST TRADERS INC

VS

Defendant

Counsel

C. SARGENT, (CT. CALL)

DAZ SYSTEMS INC ET AL

NATURE OF PROCEEDINGS:

It is noted however that the arbitration agreement submitted by Gillies is unsigned. He has declared that "to the best of [his] recollection, [he] executed an Arbitration Agreement with SWI" but that he only has an unsigned copy in his possession. (Gillies Declaration paragraph 3.) It is unclear whether this is sufficient. The issue has not been sufficiently addressed by any of the parties.

The petition to compel arbitration is only be granted as to DAZ and denied subject to further argument as to Gillies.

DAZ's petition to compel arbitration is GRANTED as to the first, second, third, and part of the fourth causes of action. The action is STAYED as to the remaining claims. Gillies' "joinder" to DAZ's petition to compel arbitration is DENEIED without prejudice.

Notice waived.

10/01/2013

10/02/2017

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8 DAVID GILLIES

9
10 ALTERNATIVE DISPUTE RESOLUTION SERVICES, INC.

11 SOUTHWEST TRADERS, INC., a corporation,
12 Claimant;

13 v.

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

17 Respondents.

18 DAZ SYSTEMS, INC., a corporation,

19 Cross-Claimant;

20 v.

21 SOUTHWEST TRADERS, INC., a corporation,

22 Cross-Respondent.

ADRS Case No. 14-5289-DAH

**MOTION FOR SUMMARY JUDGMENT BY DAZ
SYSTEMS, INC.**

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INTRODUCTION

Should a party which agreed to a settlement in which it received the benefit of over \$1 million of work be able to renege on the settlement, and the settlement have no force or impact whatsoever protecting the other party, which faithfully performed the settlement terms for six months? Of course not. Should the protections of a limitation of liability clause that sophisticated entities negotiated for and agreed to in writing be disregarded on claims which are really in the nature offsets against those monies owed? Of course not. DAZ Systems, Inc. moves for summary judgment to enforce the Settlement Agreement it had with SWT, or alternatively, moves for summary adjudication consistent with the Limitation of Liability in its written agreement with SWT.

STATEMENT OF FACTS

1. DAZ Systems, Inc. ("DAZ") has become well-known for its success in the business of implementing Oracle eBusiness suite software, providing integration services for said software, and reselling Oracle software to commercial customers. Zipperman Decl., ¶¶2-3, Ex. B. DAZ is one of the most highly regarded Oracle value-added partners and has received multiple awards for its successful implementations throughout the United States. *Id.*, ¶2.

2. Southwest Traders, Inc. ("SWT") is in the trucking and delivery logistics business with warehouses in multiple locations throughout California and other states. *Id.*, ¶5.

3. SWT elected to directly purchase the relevant computer software directly from Oracle and to directly purchase the relevant computer hardware directly. DAZ was neither a reseller nor did it make any commissions or receive any compensation for the sales of software and/or hardware which were chosen by SWT with the parties it elected to do business. *Id.*, ¶3; Gillies Decl., ¶16.

4. DAZ and SWT's agreement for DAZ's work implementing SWT's Oracle System is the 2009 Standard Consulting and Services Agreement ("CSA" or the "Agreement"), and a November 2009 Statement of Work ("SOW"), that Exhibit A to the CSA. Zipperman Decl. Exs. C-D; see Gillies Decl., ¶¶32-34. As explicitly stated in the SOW, SWT was responsible for procuring any and all hardware and third party software for the implementation:

- 1 (a) Items Out of Scope: "2. Installation of hardware, network equipment (cables, etc.),
2 and PC workstations," *id.*, Ex. D at p. 15 (Project Scope – Items Out of Scope), § 2
3 (b) Items Out of Scope: "4. Additional costs due to quality and/or performance issues
4 with third party software, *id.* at § 4.
5 (c) "All Server software will be installed on appropriate hardware by Southwest Traders,
6 Inc. This includes 3rd party software such as Veritas, EMC, etc.," *id.*, at p. 24
7 (Software Installation, Hardware and Software Environment), § 1;
8 (d) "Southwest Traders, Inc. is responsible for ensuring the availability and reliability of
9 the hardware, operating systems, and network configuration prior to installation of the
10 Oracle software and for the duration of the project," *id.* at § 3.

11 See Gillies Decl., ¶¶35–36. DAZ also states it does not have control over third party software
12 and hardware used by said customer as it pertains to the SOW: "[t]he reliability and robustness
13 of hardware, third party software and Oracle Applications and databases . . . are not within the
14 control of DAZ." Zipperman Decl., Ex. D at p. 22 (Project Assumptions), § 8. The role of DAZ
15 was as was specifically set forth in the Agreement and the associated SOW.

16 5. The Agreement states that ". . . DAZ's sole obligation shall be to either promptly
17 fix the Services or Deliverables in order that they meet the written functional specifications or
18 design criteria therefore, or so notify and explain to CUSTOMER that the Services or
19 Deliverables comply. . . ." Zipperman Decl., Ex. C, ¶4.

20 6. DAZ obtained the relationship with SWT because Oracle recommended DAZ to
21 its client (SWT) and introduced DAZ to SWT. Zipperman Decl., ¶4; Gillies Decl., ¶20. SWT
22 was a sophisticated client who negotiated all aspects of who would do what and in chose to
23 divide responsibilities so that hardware was with one company (STA), computer software was
24 with another company(Oracle) and services were with DAZ. Zipperman Decl., ¶4; Gillies Decl.,
25 ¶¶32–34.

26 7. As set forth in the CSA and SOW, DAZ entered into an agreement with SWT at
27 the end of 2009 (specifically November 30, 2009) when SWT had seven warehouses, in
28

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1 Tolleson, Temecula, Houston, Stockton, Dallas, Fresno, and Denver. Zipperman Decl., Ex. D at
2 p.3 (Project Overview).

3 8. Almost immediately SWT ran into hardware issues with STA (whom SWT also
4 sued) and software issues with Oracle (which SWT also asserted claims against). Zipperman
5 Decl., ¶5; Gillies Decl., ¶¶44–47.

6 9. From the start, STA had mismatched the computer hardware and other equipment
7 required to achieve success with an enterprise-class software system such as that provided by
8 Oracle and certain finger-pointing occurred by and between SWT, STA as to hardware and STA
9 and Oracle as to software and at one point even the original equipment manufacturer (HP) was
10 part of the controversy. Zipperman Decl., ¶5; *see* Gillies Decl., ¶48. During this time DAZ was
11 providing services to SWT and at no time in 2009, 2010, or even into 2011 did SWT assert any
12 claims against DAZ (and SWT paid without dispute the list of invoices billed by DAZ through
13 that period of time as shown in the Zipperman Decl., Exhibit E). Zipperman Decl., ¶5; Gillies
14 Decl., ¶¶61–62.

15 10. Over time, as between SWT, STA, HP, and Oracle, they came to realize that the
16 communication board protocol selected by SWT with the help of STA was incompatible with the
17 Oracle database software selected by SWT with the help of Oracle. Zipperman Decl., ¶6; Gillies
18 Decl., ¶¶48–53. DAZ had no role in any of this and no complaint was ever levied by SWT
19 against DAZ for any of these hardware or software issues and no fault was found with any of the
20 billing that SWT paid to DAZ. Zipperman Decl., ¶6. Furthermore, during the operation of the Go
21 Live process for the accounting and billing applications, SWT was notified by both Oracle and
22 DAZ that the hardware was inadequate to support the ongoing operations. Zipperman Decl., ¶6;
23 *see* Gillies Decl., ¶¶48. DAZ recommended SWT purchase additional network switches and
24 hardware disk space. SWT eventually purchased the network switches but refused to purchase
25 the additional disk needed to run the operation. Zipperman Decl., ¶6. There were numerous
26 conversations with SWT to this affect and the Director of IT agreed that additional hardware was
27 needed. *Id.* However, SWT Senior Management chose to ignore this request and could not scale
28 properly to service their business needs. *Id.*; Gillies Decl. ¶¶54–60.

1 11. As it turned out, continuing issues existed with the computer hardware that SWT
2 selected with STA's assistance; neither STA nor SWT were able to scale properly, and these
3 issues continued to generate problems throughout the course of the relationship (and for which
4 litigation was filed by SWT against SWT in the Los Angeles Superior Court in Case Number
5 BC506710). Zipperman Decl., ¶7, Ex. F; see Gillies Decl., ¶¶53, 61–62.

6 12. In accordance with the Agreement, and specifically in accordance with the SOW,
7 and the express scope of work set forth therein, DAZ did successfully install multiple Oracle
8 modules. Zipperman Decl., ¶8. At the point of testing certain modules, it became clear to DAZ
9 that there were continuing hardware issues and continuing other problems that would have to be
10 resolved before "go live" (where things move from the "sandbox" to the actual "live production
11 system" occur) and DAZ recommended against the "go live" decision that SWT made via its
12 President (Jeff Allen, who signed the Agreement) that SWT should (and did) simply assume the
13 risk of doing so. *Id.*; Gillies Decl., ¶¶54–58. This is a client decision and one that rarely (if ever)
14 gets made as against the recommendation of DAZ and DAZ had SWT sign off that it was
15 expressly accepting the risk thereof as set forth in the Zipperman Declaration, Exhibit F.
16 Zipperman Decl., ¶8.

17 13. DAZ continued to believe that more testing was needed and that more "sandbox"
18 work should be done before taking the risks that Mr. Allen (who later was fired by CEO Ken
19 Smith for so doing) took on behalf of SWT. *Id.*, ¶9. Indeed, Mr. Allen decided for SWT to put
20 timing both ahead of testing and ahead of quality that could have been obtained through more
21 "sandbox" activities which could have "shaken out" all issues well before any trucker or logistics
22 person at SWT were confronted with "computer glitches" and the like. *Id.*; see Gillies Decl.,
23 ¶¶54–58

24 14. DAZ CEO Walt Zipperman personally discussed numerous times with Greg Fazio
25 and with David Gilles (who was then working for SWT and who later resigned from SWT and
26 who was hired, with the consent of SWT, by DAZ to continue to work for DAZ on the Oracle
27 implementation at SWT), each of whom also believed it was a flawed idea for the first "Go-
28

1 Live” to occur and that Mr. Allen had vetoed their vote on the matter as well. Zipperman Decl.,
2 ¶10; Gillies Decl., ¶¶48, 56.

3 15. DAZ’s recommendations to Jeff Allen and to the entire SWT team could not have
4 been clearer the “go-live” should not have occurred and that more “sandbox” testing was
5 required and confirmations by emails and in ink-signed writings (one of which SWT CFO Mr.
6 Biedermeier signed using the script “Mickey Mouse” as shown in Exhibit G) were ignored.
7 Zipperman Decl., ¶11.

8 16. Knowing the risks of this “going live”, SWT’s former president, Jeff Allen,
9 ignored precautions and continued with the “going live” and the result turned out to be a disaster
10 for SWT in terms of invoicing that did not print correctly which, it was learned, slowed the
11 accounts receivable and collection cycle for SWT. *Id.*, ¶ 12. DAZ called out that the invoice that
12 client gets paid is not readable should be fixed prior to going live. *Id.* SWT ignored that
13 recommendation, specifically Mike Biedermeier and Jeff Allen of SWT ignored DAZ on this
14 point. *Id.* DAZ was not responsible for this decision nor did DAZ cause any of the underlying
15 problems which gave rise to this. Mr. Allen stated specifically that he viewed the invoices as
16 being “intelligible enough” to justify billing, invoicing and collecting even though he did not
17 apparently check on that with Mr. Smith (CEO of SWT) or with any of SWT’s customers (one,
18 some or several of which apparently disagreed with that assessment). *Id.* In all events, DAZ was
19 against SWT taking the risk that Jeff Allen elected to take on behalf of SWT. *Id.*

20 17. DAZ worked in good faith to help SWT resolve the issues and DAZ continued to
21 do so even in the face of SWT slowing payments to DAZ and then stopping payments altogether.
22 *Id.* ¶13; see Gillies Decl., ¶¶62–66. On June 13, 2011, SWT made a written settlement offer to
23 “absolve DAZ of any liability” on two conditions, which DAZ accepted in writing on July 5,
24 2011. Zipperman Decl., ¶13, Ex. H. The terms of the Settlement were that DAZ continued to
25 provide services and other support while DAZ wrote down over \$497,000 in bad debt of billings
26 and was willing to also write off additional invoices (that now total over \$475,000 further
27 without accrued interest) so long as SWT timely paid the adjusted balances on its account.
28 Zipperman Decl., ¶13, Ex. H. In furtherance of this negotiation and settlement, SWT’s CEO,

1 Ken Smith, and Mr. Zipperman spoke at least five times, after DAZ's written acceptance, on July
2 6, 2011, and throughout the six months that DAZ performed the conditions of the Settlement
3 Agreement (on September 30, 2011, November 17, 2011, December 17, 2011, and December 20,
4 2011). Zipperman Decl., ¶13.

5 18. While DAZ performed, SWT failed and refused to do so. It stopped payments,
6 and did not respond to Mr. Zipperman's calls and emails. *Id.*, ¶13. Accordingly, by mid-January
7 2012—all support and service work by DAZ transferred back to SWT. *Id.*

8 19. The Agreement also provides that "DAZ may terminate this Agreement upon
9 giving written notice thereof to [SWT], if [SWT] fails to pay any fees, compensation or expenses
10 to DAZ in accordance with this agreement[,] provided that SWT fails to cure the default within
11 five business days. Zipperman Decl., Ex. C., ¶8.3. After DAZ was terminated the Agreement in
12 January 2012 by SWT, DAZ did not hear from SWT until the Superior Court litigation was filed
13 in 2014: there was no cure by SWT. Zipperman Decl., ¶¶13, 19.

14 20. Because the Agreement contains a detailed arbitration clause, the Superior Court
15 agreed with DAZ's Petition to Compel Arbitration and this matter was put before ADR Services,
16 Inc. *Id.*, ¶14.

17 ARGUMENT

18 The claims against DAZ are without merit, the settlement achieved in 2011 bar all the
19 claims, and the express acceptance provisions in Paragraph 4 of the Agreement, the termination
20 provisions of Paragraph 8 of the Agreement, the limitation of liability provisions under
21 Paragraph 11 of the Agreement, and the integration clause of Paragraph 15 of the Agreement all
22 bar any of the remedies which SWT is now wrongly claiming against DAZ.

23 I. AN ENFORCEABLE SETTLEMENT AGREEMENT REQUIRES SUMMARY JUDGMENT.

24 A. DAZ Accepted a Settlement 25 Proposed by SWT Which DAZ Performed Under.

26 Summary judgment is proper on the grounds that SWT settled the claims alleged in its
27 First Amended Complaint. Specifically, the Settlement Agreement offered on June 13, 2011 in
28 Ken Smith's letter provided:

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1 1. Southwest will absolve DAZ of any liability, including potential insurance
2 subrogation claims, so DAZ may focus on fixing Southwest's system and
3 delivering the items for which Southwest contracted, provided that:

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

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

8 Zipperman Decl., Ex. H; *see* Am. Compl., ¶ 21. This was an offer for settlement to DAZ with
9 two conditions, for support and payment.

10 "In order to constitute a contract, the acceptance of an offer must be communicated to the
11 offeror." *Coml. Cas. Ins. Co. v. Ind. Acc. Com.*, 116 Cal. App. 2d 901, 907 (1953). "A contract in
12 writing takes effect upon its delivery to the party in whose favor it is made, or to his agent." Cal.
13 Civ. Code § 1626; accord *Estate of Klauenberg*, 32 Cal. App. 3d 1067, 1071 (1973). DAZ
14 accepted this offer by communicating acceptance in its July 5, 2011 response in writing by CEO
15 Walt Zipperman, who wrote "We at DAZ appreciate the effort that you have made to have an
16 open discussion about the ORACLE Implementation at Southwest and we welcome a non-legal
17 approach; we accept your letter as a statement that Southwest has no intention of filing suit
18 against DAZ and it simply wants to work together with DAZ to resolve outstanding matters,"
19 Zipperman Decl., Ex. H.

20 Moreover, "[p]erformance of the conditions of a proposal, or the acceptance of the
21 consideration offered with a proposal, is an acceptance of the proposal," Cal. Civ. Code § 1584
22 (2016). DAZ performed both of the conditions Mr. Smith stated. DAZ and SWT agreed for DAZ
23 to provide SWT support while SWT arranged for the hardware needed for scalability and for
24 DAZ to write down over \$497,000 in bad debt billings, and additional invoices now totaling
25 \$475,000, before interest. Zipperman Decl., ¶ 13, Ex. H and Ex. E. DAZ performed on the terms
26 of SWT's settlement offer for over six months, from July 2011 through mid-January 2012. *Id.*,
27 ¶ 13. Mr. Zipperman and Mr. Smith spoke at least five times over that period, on July 6, 2011,
28 September 30, 2011, November 17, 2011, December 17, 2011, and December 20, 2011 to further
this mutual resolution. *Id.*

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1 The parties' accord ended not because of DAZ, but when SWT failed to perform its end
2 of the bargain, failing to pay the adjusted balances on its account, and refusing to respond to
3 DAZ. Zipperman Decl., ¶¶13, 19. DAZ performed the conditions of SWT's settlement proposal,
4 resulting in an enforceable Settlement Agreement in addition to the written acceptance.

5 The communication of acceptance, and performance by DAZ, resulted in an enforceable
6 Settlement Agreement where SWT absolved DAZ of any and all liability.

7 **B. SWT's Claims Are Within the Scope of**
8 **The Agreement Absolving DAZ of Liability.**

9 Despite this Settlement Agreement absolving DAZ of all liability, SWT brought this
10 action on April 22, 2013 and filed an amended complaint on October 10, 2013. SWT's claims are
11 based on alleged conduct that occurred before SWT's offer and DAZ's performance. SWT's
12 causes of action allege a failed implementation of an Oracle system by November 2010, Am.
13 Compl., ¶¶21–22, resulting in "six straight months of losses from November of 2010 through
14 April of 2011," Am. Compl., ¶22. These allegations are squarely within the scope of its
15 settlement agreement to "absolve DAZ of any liability." Zipperman Decl., ¶15. The settlement
16 bars litigation in the first place and the arbitration clause barred litigation against DAZ as well
17 but SWT ignored both and now seeks to claim against DAZ matters that were all expressly
18 accepted by Mr. Allen as President of SWT.

19 **II. THE SETTLEMENT ENTITLES DAZ TO SUMMARY JUDGMENT;**
20 **FAILING THAT, DAZ WILL SEEK AMOUNTS OWED UNDER THE INVOICES.**

21 As a result of this enforceable Settlement Agreement and performance by DAZ, DAZ is
22 entitled to enforcement of the Agreement through the grant of summary judgment as to of all
23 SWT's claims in DAZ's favor. The Appendix presents a selection of communications
24 documenting DAZ's meetings, letters, and emails throughout 2011 to resolve the dispute, during
25 which time SWT never took up on its 30-day right to resolve in arbitration during contract
26 performance, resulting in waiver of all further remedies. Zipperman Decl., Ex. C at p. 2
27 (Acceptance and Warranty), § 4. By refusing to make timely payments (and especially after
28 negotiating a compromise thereof as set forth above), the services and support by DAZ
terminated in accordance with Paragraph 8.3 of the Agreement in January 2012.

1 At this time, in the interests of swift resolution, DAZ is willing, for purposes of this post-
2 settlement motion, to walk away from financial collection of the invoices SWT was supposed to
3 pay. However, absent summary judgment in DAZ's favor based on the Settlement Agreement,
4 which is preferable before substantial, additional legal fees and costs are incurred by DAZ, DAZ
5 reserves all rights to seek payment of all past amounts owed, including all amounts that
6 represented the compromise which DAZ made as an act of goodwill towards SWT, which SWT
7 accepted. Zipperman Decl., ¶20.

8 **III. THE LIMITATION OF LIABILITY CLAUSE IN THE AGREEMENT**
9 **ALSO REQUIRES SUMMARY ADJUDICATION ON SWT'S DAMAGES CLAIMS.**

10 The Agreement contains a clear "Limitation of Liability" at paragraph 11. It also contains
11 an express waiver of consequential damages in that same paragraph. *Id.* These both act as strict
12 limits on DAZ's liability that are further grounds for the summary judgment requested here.

13 **A. The Consequential Damages Waiver Bars All Lost Profits.**

14 The "No Consequential Damages" clause limits DAZ's liability to direct damages and
15 bars recovery for "any special, indirect, incidental or consequential damages, whether or not the
16 possibility of such damages has been disclosed to DAZ or could have been reasonably by DAZ
17 arising under this Agreement, whether in contract or tort. . . ." Zipperman Decl., Ex. C at p. 4
18 (CSA § 11). The clause also specifically calls out "lost profits" as being waived and includes any
19 claims brought in "tort" as subject to this agreed limit. *Id.*

20 Such clauses are enforceable under California law, and the only question is whether the lost
21 profits are direct or consequential damages. *Coremetrics, Inc. v. AtomicPark.com, LLC*, 2005 U.S.
22 Dist. LEXIS 40484, *20 (N.D. Cal. Dec. 7, 2005). In *Coremetrics*, citing *Tractebel Energy*
23 *Marketing v. AEP Power Marketing*, 487 F.3d 89 (2d Cir. 2007), the Court discussed how lost profits
24 are consequential when they relate to "collateral business arrangements" and direct damages "when
25 profits are precisely what the non-breaching party bargained for." Here, of course, SWT's claims for
26 lost profits are classic consequential damages, all based on a set of assumptions about third party
27 contracts had SWT received what it claimed it bargained for. All such damages were expressly
28 waived under the negotiated contract with respect to both claims in contract and in tort; accordingly,

as to both the fraud and contract verdict, the lost profits were waived as a matter of law and the Arbitrator should summarily adjudicate that SWT cannot recover on the lost profits theory.

**B. At Minimum, the Limitation of Liability Clause
Bars Damages in Excess of the Amounts SWT Actually Paid to DAZ.**

Generally, "a limitation of liability clause is intended to protect the wrongdoer defendant from unlimited liability." 1 WITKIN, SUMMARY OF CAL. LAW (10th ed. 2005) Contracts, § 503, pp. 552-554. "[L]imitation of liability provisions have long been recognized as valid in California." *Markborough Cal. v. Super. Ct.*, 227 Cal. App. 3d 705, 714 (1991). With respect to claims for breach of contract, limitation of liability clauses are enforceable unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy. *Id.* Unconscionability does not exist here, where both parties were sophisticated business engaged in an arms-length transaction. Zipperman Decl., ¶4. This was a negotiated commercial contract between sophisticated parties.

"Such a clause should be enforced in a high-risk, low-compensation service when enforcement is what the parties expected." *H. S. Perlin Co. v. Morse Signal Devices*, 209 Cal. App. 3d 1289, 1297 (1989). The law appreciates that the limitation of liability is expressly part of the benefit of the parties' bargain under such circumstances, and this case demonstrates precisely why. DAZ expected its total gross upside to be \$1,295,378, and bargained for that limitation of liability against the risk that a contract of this size could threaten DAZ's business and other customers. Zipperman Decl., Ex. D at p. 27 (Project Fees). In fact, the amounts ultimately paid to DAZ by SWT were \$2,280,136.80, but DAZ was not paid for \$1,356,996.82 worth of services and deliverables on the project. Priscilla Men Decl., Ex. A; Zipperman Decl., Ex. E.

This negotiated commercial contract between sophisticated parties agreed that:

DAZ's cumulative liability to [SWT] for all claims, actions, damages, losses, liabilities, costs and expenses arising out of, or connected with, this Agreement (arising from any cause of action whatsoever) shall in no case exceed the amounts paid by [SWT] to DAZ with respect to the Services and/or Deliverables or parts thereof which form the basis for such claim, action, damage, loss, liability, cost or expense, which in no event shall exceed the sum of all monies paid hereunder by [SWT] to DAZ.

Zipperman Decl., Ex. C at p. 4. Under California law, a "limitation of liability provision operates as a limitation on the maximum amount recoverable; the plaintiff must of course still plead and

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1 prove his or her actual loss or damages.” 1 WITKIN, SUMMARY 10th (10th ed. 2005) Contracts, §
2 677, p. 760; *id.*, § 503 (“actual damages, within the limited amount, must be proved.”).

3 All the damages sought on contract or ordinary negligence theories are “arising out of, or
4 connected with, this Agreement” and therefore subject to this bargained-for clause. Additionally,
5 the balance of the claims sound in contract regardless of how SWT tries to paint its “complaint”
6 as filed in the Superior Court as stayed because of this arbitration. *See* Zipperman Decl., Ex. C.

7 The limitation of liability was a negotiated term, expressly part of the bargain the parties
8 struck, and enforceable under California law. There is no evidence that puts this case beyond the
9 scope of the limit of liability; accordingly, at minimum, summary adjudication should issue limiting
10 DAZ’s damages to the amounts it paid under the contract, or the portion of the \$2,280,136.80 paid
11 relating to the services and deliverables that form the basis of SWT’s claims.

12 CONCLUSION

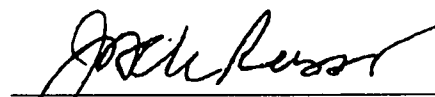
13 DAZ and SWT settled this dispute at great cost to DAZ which wrote down/wrote off
14 what amounts to over \$1M of potential receipts. This is not a trivial write down, and is consistent
15 with the parties’ complete settlement absolving DAZ of liability. Accordingly, summary
16 judgment consistent with the parties’ settlement is appropriate. Alternatively, summary
17 adjudication should enforce the Limitation of Liability protections for which parties negotiated.

18 The claims against DAZ are entirely without merit, and the settlement achieved in 2011
19 bar all opposing claims. In any event, the express acceptance provisions in Paragraph 4 of the
20 Agreement, the termination provisions of Paragraph 8 of the Agreement, the limitation of
21 liability provisions under Paragraph 11 of the Agreement, and the integration clause of Paragraph
22 15 of the Agreement all bar any of the remedies which SWT is now wrongly claiming against
23 DAZ.

24 Dated: December 23, 2016

Respectfully submitted,
COMPUTERLAW GROUP LLP

25
26 By:


27 Jack Russo
Christopher Sargent

28 Attorneys for Respondent and Cross-
Claimant DAZ SYSTEMS, INC.

10/02/2017

Honorable David A. Horowitz (Ret.)
ADR SERVICES, INC.
915 Wilshire Boulevard, Suite 1900
Los Angeles, California 90017
(213) 683-1600 PH
(213) 683-9797 FAX

IN THE MATTER OF THE BINDING ARBITRATION BETWEEN

**SOUTHWEST TRADERS, INC., a
Corporation,**

Claimant,

VS.

DAZ SYSTEMS, INC., a Corporation, and
SYSTEMS TECHNOLOGY ASSOCIATES,
a Corporation; DAVID GILLIES, an
Individual,

Respondents.

ADRS Case No. 14-5289-DAH

RULING: MOTION FOR SUMMARY JUDGMENT, OR SUMMARY ADJUDICATION.

DAZ Systems, Inc. brings a Motion for Summary Judgment "to enforce the Settlement Agreement it had with Southwest Traders, Inc., or alternatively, Moves for Summary Adjudication consistent with the Limitation of Liability in its written agreement with Southwest Traders, Inc.

A hearing was conducted by Hon. David A. Horowitz (Ret.), the Arbitrator, on May 24, 2017, at ADR Services, Inc., 915 Wilshire Blvd., Suite 1900, Los Angeles, California 90017.

1 Southwest Traders, Inc. (SWT) was represented by James G. O'Callahan Esq. of
2 GIRARDI/KEESE. DAZ Systems, Inc. (DAZ) was represented by Jack Russo Esq. and
3 Christopher Sargent Esq. of COMPUTERLAW GROUP LLP.

4 5 **UNDISPUTED FACTS**

6
7 Respondent in its Moving Papers listed twenty (20) undisputed material facts with the
8 heading of "Statement of Facts." Claimant filed "Responses to Defendant DAZ Systems, Inc.'s
9 Undisputed Material Facts.

10 UD Fact No. 1 – Respondent objects to Smith declaration regarding that SWT was told
11 that in order for SWT to use the Oracle software system, SWT would need to hire DAZ . . . The
12 objection is sustained – hearsay. Fact No. 1 is Undisputed.

13 UD Fact No. 2 & 3 – Undisputed.

14 UD Fact No. 4 – Fact presents and quotes the agreements between the parties; Claimant
15 presents other facts that do not dispute the words of the agreements – Fact No. 4 is Undisputed.

16 UD Fact No. 5 – Undisputed.

17 UD Fact No. 6 – Objection to Smith declaration regarding that SWT was told that in order
18 for SWT to use the Oracle software system, SWT would need to hire DAZ . . . is Sustained –
19 hearsay and contradiction to deposition testimony. Fact No. 6 is Undisputed.

20 UD Fact No. 7 – Undisputed.

21 UD Fact No. 8 – SWT attempts to dispute the UD by stating facts that do not relate to the
22 undisputed fact presented. Fact No. 8 is Undisputed.

23 UD Fact No. 9 – the "facts" presented by SWT do not dispute the facts presented by DAZ.
24 Fact No. 9 is Undisputed.

25 UD Fact No. 10 – SWT disputes this fact by the deposition of Gillies where he stated that
26 it was only after there was a failure that anybody at DAZ was critical of the hardware. Further,
27 Smith declares that he did not receive any written notice of verbal communications from DAZ
28

1 personnel advising that the go live date be deferred, nor did he receive information from SWT
2 personnel that DAZ advised that the go live date be deferred.

3 The Undisputed Fact states that, during the operation of the Go Live process for the
4 accounting and billing applications, SWT was notified by both Oracle and DAZ that the hardware
5 was inadequate – to support Go Live, states that DAZ recommended that SWT purchase
6 additional network switches and hardware disk space, that SWT eventually purchased the network
7 switches but refused to purchase the additional disk; the Director of IRT for SWT agreed – but
8 senior management of SWT ignored it and could not scale properly.

9 SWT does not present declarations or testimony of persons in charge of the project, e.g.,
10 Jeff Allen, or others that would have received the communications as alleged by DAZ in Fact No.
11 10. The fact that Smith, personally, did not receive the communications does not dispute the facts
12 as presented by DAZ. Fact. No. 10 is Undisputed.

13 UD Fact No. 11 – DAZ disputes this fact by asserting that Smith did not receive
14 communication from DAZ advising that the go live date be deferred; nor was he advised by any
15 employee of SWT that the go live date be deferred. DAZ also argues that DAZ has no
16 documentation to support its' assertion that Jeff Allen and the SWT team was advised that the
17 "go-live" should not have occurred. Indeed, it appears from the testimony that DAZ lost boxes of
18 documents when they moved from one location to another and does not have the written backup
19 of notifications to Jeff Allen relating to the go live determination.

20 SWT has failed to present any declarations, testimony, or documents concerning Jeff
21 Allens' notifications, views, or determination of whether the go live should go forward. The fact
22 that Smith did not receive notice or any advice from DAZ does not dispute the facts as asserted by
23 DAZ. Fact No. 11 is Undisputed.

24 UD Fact No. 12 – The Fact states that DZ did successfully install multiple Oracle
25 modules; that it became clear to DAZ that there were continuing hardware issues to be resolved
26 before "go live"; DAZ recommended against it; and the decision to go live was made by Jeff
27 Allen of SWT, who signed the Agreement. SWT states that within hours of going live, the new
28

1 system crashed and continued to crash. Smith then presents SWT's loss of customers and its
2 damages from the system failures.

3 In the "Go-Live Readiness Review" prepared by DAZ, apparently in November 2010, and
4 given to Jeff Allen, the President of SWT, it contains a "No-Go" advice to SWT in 9 separate
5 categories. Zipperman declares that DAZ recommended not to "Go-Live" until the continuing
6 hardware issues and continuing other problems were resolved; and that Jeff Allen decided to
7 proceed; and signed off on the decision. SWT has not adequately disputed the facts as stated in
8 Fact No. 12. Fact No. 12 is Undisputed.

9 UD Fact No. 13 – inadequately disputed. Fact No. 13 is Undisputed.

10 UD Fact No. 14 – inadequately disputed. DAZ was dealing primarily with Jeff Allen, the
11 President of SWT and the person who signed the Agreement. The fact that Smith did not receive
12 any written or verbal communications from DAZ personnel; or that he was not informed that any
13 DAZ personnel advised that the go live date be deferred, or that Smith attended a meeting
14 immediately before the "Go-Live" date and did not hear any advice from DAZ personnel to delay
15 the date, does not dispute the facts as presented by SWT. Fact No. 14 is Undisputed.

16 UD Fact No. 15 – inadequately disputed. Fact No. 15 is Undisputed.

17 UD Fact No. 16 – inadequate disputed. Fact No. 16 is Undisputed.

18 UD Fact No. 17 – DAZ claims that, on June 13, 2011, SWT made a written settlement
19 offer to "absolve DAZ of any liability" on two conditions, which DAZ accepted in writing on July
20 5, 2011. DAZ cites Exhibit H.

21 SWT (Smith) reviews all of the problems with the project and concludes with the
22 following: "That said, I suggest the following solution to our impasse:

23 1. Southwest will absolve DAZ of any liability, including potential insurance subrogation
24 claims, so DAZ may focus on fixing Southwest's system and delivering the items for which
25 Southwest contracted, provided that:

26 a. DAZ cooperates with Southwest and its team to help bring Southwest a faster
27 resolution within an agreed upon time frame; and
28

1 b. We further discuss payment terms for work which is/was outside the scope of the
2 original contract and not warranty work." Exh. H to DAZ motion.

3 DAZ (Zipperman) responded to the SWT letter on July 5, 2011. Exh H. It states as
4 follows: "We at DAZ appreciate the effort that you have made to have an open discussion about
5 the ORACLE Implementation at Southwest and we welcome a non-legal approach; we accept
6 your letter as a statement that Southwest has no intention of filing suit against DAZ and it simply
7 wants to work together with DAZ to resolve outstanding matters. If I am wrong, at all, in this
8 basic premise, you should let me know because I do not understand "insurance subrogation" to
9 involve any form of legal action against DAZ and the matters of recovering for losses at
10 Southwest are matters between Southwest and its insurers. (To make this point even more clear,
11 in our signed Agreement including the Statement of Work that was agreed to in writing and that
12 makes very clear that DAZ is not responsible for any of the damages that you have asserted in
13 your letter; I believe you understand all this but the premise of DAZ's continuing work and our
14 continuing dialogue is really that Southwest understands and accepts this basic premise.)"

15 SWT does not dispute that the letters were sent; nor does it dispute that the letters of the
16 parties are not accurate.

17 SWT attempts to dispute Fact No. 17 by stating that, in January 2011, the parties
18 discussed outstanding issues, including payment to DAZ; by June 2011, DAZ still had not
19 implemented two modules but was requesting \$200,000 on top of the \$2.2 million already paid to
20 them; eight months had passed since the failing of the new system and SWT still did not have the
21 functionality it had with the Mark System; in August 2011, though the new system was running to
22 some capacity, it was struggling; by December 2011, all modules were still not operational.

23 SWT does not dispute that the letters and emails were written and received by the parties.
24 SWT does not dispute the fact the DAZ wrote down over \$497,000 in bad debt of billings and
25 was willing to also write off additional invoices (that now total over \$475,000 further without
26 accrued interest) so long as SWT timely paid the adjusted balances on its account; SWT does not
27 dispute the fact that SWT's CEO, Ken Smith and Mr. Zipperman spoke at least five times, after
28

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1 DAZ's written "acceptance," on July 6, 2011, and throughout the six months that DAZ performed
2 the conditions of the "Settlement Agreement."

3 The factual assertions in Fact No. 17 are Undisputed.

4 UD Fact No. 18 – "While DAZ performed" is a legal conclusion, not a fact. The fact that
5 SWT stopped payments, and did not respond to Mr. Zipperman's calls and emails and, by mid-
6 January 2012 – all support and service work by DAZ transferred back to SWT is Undisputed.
7 Fact No. 18 is Undisputed.

8 UD Fact No. 19 – Undisputed. UD Fact No. 20 – Undisputed.

10 DISCUSSION

11
12 DAZ brings this Summary Judgment Motion on the basis that the parties entered into an
13 enforceable, written "Settlement Agreement" or agreement in 2011; that DAZ performed the
14 conditions of the agreement proposed by SWT; that SWT breached the agreement by failing to
15 pay the adjusted balances on its account and refusing to respond to DAZ; and that, pursuant to the
16 "Settlement Agreement," SWT absolved DAZ of any and all liability.

17 As part of the "Settlement Agreement" DAZ agreed to "write down over \$497,000 in bad
18 debt billings", and "additional invoices now total \$475,00 before interest." DAZ states, in its
19 Moving Papers, that "At this time, in the interests of swift resolution, DAZ is willing, for
20 purposes of this post-settlement motion, to walk away from financial collection of the invoices
21 SWT was supposed to pay." "However, absent summary judgment in DAZ's favor based on the
22 Settlement Agreement . . DAZ reserves all rights to seek payment of all past amounts owed,
23 including all amounts that represented the compromise which DAZ made as an act of goodwill
24 towards SWT, which SWT accepted." Zipperman Decl., para 20.

25
26 SWT entered into a Standard Consulting and Services Agreement (CSA) together with a
27 Statement of Work (SOW) on November 30, 2009. Zipperman Decl., Exh C & D. "DAZ'S
28

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1 implementation of the following Oracle Modules is the primary DAZ deliverable of this project."

2 Exh D.

3 Oracle, STA and HP provided the hardware and software for the project. The project
4 went forward and, in November 2010, a decision by SWT (Allen) was made to "Go-Live." That
5 is, where things move from the "sandbox" to the actual "live production system." DAZ presents
6 facts that it warned SWT not to go forward at that time with a go-live process; that it should wait
7 and perform more testing that could have been obtained through more "sandbox" activities which
8 could have "shaken out" all issues well before any trucker or logistics person at SWT were
9 confronted with "computer glitches" and the like.

10 SWT responds by evidence showing that Smith (CEO of SWT) did not receive any
11 notification or communication from DAZ that the Go-Live process should not go forward. SWT
12 presented no evidence from Allen (Pres. of SWT) regarding why he made the decision to go
13 forward and he was the decision maker for SWT.

14 According to all parties, the results of the "Go-Live" procedures were a disaster. The
15 new system was not working. In the letter/email, sent by Smith (SWT) to Zipperman (DAZ) on
16 June 13, 2011, Smith details the results of the implementation of the new, Oracle system.
17 Zipperman, in his response, discusses the issue and problems concerning the new system and how
18 to correct those problems.

19 On June 13, 2011, Smith sends a letter/email to Zipperman. He details all the problems
20 and difficulties that have occurred, including the losses SWT has suffered as a result of the poor
21 system that was put in place. He suggests the following solution "to our impasse:"

22 "1. Southwest will absolve DAZ of any liability, including potential insurance
23 subrogation claims, so DAZ may focus on fixing Southwest's system and delivering the items for
24 which Southwest contracted, provided that:

25 a. DAZ cooperates with Southwest and its team to help bring Southwest a faster
26 resolution within an agreed upon time frame; and, b. we further discuss payment terms for work
27 which is/was outside the scope of the original contract and not warranty work." Exh. H to DAZ
28 motion.

1 On July 5, 2011, Zipperman responds to Smith. He states as follows: "We at DAZ
2 appreciate the effort that you have made to have an open discussion about the ORACLE
3 Implementation at Southwest and we welcome a non-legal approach; we accept your letter as a
4 statement that Southwest has no intention of filing suit against DAZ and it simply wants to work
5 together with DAZ to resolve outstanding matters. If I am wrong, at all, in this basic premise, you
6 should let me know because I do not understand "insurance subrogation" to involve any form of
7 legal action against DAZ and the matters of recovering from losses at Southwest are matters between
8 Southwest and its insurers. (To make this point even more clear, in our signed Agreement
9 including the State of Work that was agreed to in writing and that makes very clear that DAZ is
10 not responsible for any of the damages that you have asserted in your letter; I believe you
11 understand all this but the premise of DAZ's continuing work and our continuing dialogue is
12 really that Southwest understands and accepts this basic premise.)" Exh. H to DAZ motion.

13 After July 5, 2011, based on the Undisputed Facts, DAZ cooperated with SWT to
14 implement the new system. Meetings and calls were had between Smith and Zipperman. Joint
15 decisions were made on how to move forward. DAZ and SWT cooperated in reaching
16 agreements on the terms of SWT payments to DAZ.

17 At some point SWT did not respond to calls by Zipperman to Smith and payments to DAZ
18 stopped. By January 2012, all support and service work by DAZ transferred back to SWT.

19
20 SWT argues that the letters/emails exchanged between the parties was not a "settlement
21 agreement" and should not be enforced pursuant to section 664.6. It was not "signed" by the
22 parties and a lawsuit against DAZ had not been filed. The issue presented is not what the
23 agreement is called. Rather, the issue is whether the parties reached an enforceable agreement.

24 Further, SWT went to great lengths to describe the damages and losses it had sustained
25 and offered a "solution" to DAZ, i.e., it would absolve DAZ of any liability if certain conditions
26 were met. DAZ, in its response, responded to SWT's description of the problems and accepted
27 the "solution," i.e., the offer made by SWT. The agreement can be informally described as a
28 "Settlement Agreement," but, in reality, it is an agreement.

1 SWT argues that the offer does not provide the requisite terms to constitute an offer. First,
2 Smith's requirement that "DAZ cooperate with Southwest and its team to help bring Southwest a
3 faster resolution with an agreed upon time frame," does not provide a definite time for when the
4 resolution should come about. Second, Smith's statement that the parties should "further discuss
5 payment terms for work which is/was outside the scope of the original contract and not warranty
6 work" is not definite enough to constitute an offer.

7 Cal. Lettuce Growers v. Union Sugar Co., 45 Cal.2d 474, 481 (1955) provides that the law
8 "does not favor but leans against the destruction of contracts because of uncertainty; and it will, if
9 feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if
10 that can be ascertained." An agreement to use best efforts to achieve a common objective is a
11 closed, discrete, and actionable proposition. Copeland v. Baskin Robins, 96 Cal.App.4th 1251;
12 Cabld & Computer Tech. Inc. v. Lockheed Sanders, 214 F.3rd 1030. In this circumstance, the
13 parties were required to bargain in good faith for the purpose of reaching an agreement.

14 In this matter, DAZ documented its efforts to cooperate with Southwest. There were
15 meetings and joint decisions made during the period in question. There were agreements made
16 concerning payment terms made between SWT and DAZ. There was no requirement that
17 SWT's system be completely "fixed."

18 By December 2011, all modules were still not operational. At that time, DAZ employees
19 no longer were on the SWT premises working on the implementation. Smith Decl., para 30.
20 SWT stopped payments, and did not respond to Zipperman's calls and emails. By mid-January
21 2012, all support and service work by DAZ transferred back to SWT.

22 "... performance of the conditions of a proposal, or the acceptance of the consideration
23 offered with a proposal, is an acceptance of the proposal," Cal. Civ. Code section 1584. DAZ
24 performed both of the conditions SWT stated in his offer. DAZ and SWT agreed for DAZ to
25 provide SWT support while SWT arranged for the hardware needed for scalability and for DAZ
26 to write down over \$497,000 in bad debt billings, and additional invoices now totaling \$475,000.
27 DAZ performed for over 6 months, from July 2011 thru December or January 2011.
28

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1 Concerning the "Settlement Agreement" or agreement, an offer was made by SWT; DAZ
2 accepted the offer; there was consideration; and SWT breached the agreement by failing to make
3 payments and failing to respond to DAZs' efforts to perform.

4 SWT agreed to "absolve DAZ of any liability . . . "

5 SWT cannot recover on any of its causes of action against DAZ.

6 **RULING: DAZ MOTION FOR SUMMARY JUDGMENT IS GRANTED.**

7
8 DAZ brings an alternative Motion for Summary Adjudication to limit DAZ's liability and
9 barring recovery of consequential damages. The motion is primarily based on the enforceability
10 of paragraph 11 of the CSA. Zipperman Decl., Ex. C, para 11.

11 Paragraph 11 provides as follows: "11. DAZ shall not be responsible or liable to
12 CUSTOMER (in this case SWT) for any special, indirect, incidental or consequential damages,
13 whether or not the possibility of such damages has been disclosed to DAZ or could have been
14 reasonably foreseen by DAZ arising under this Agreement, whether in contract or in tort
15 (including negligence and strict liability) and including, but not limited to, lost profits, loss of use,
16 lost data or other economic loss . . . "

17 Paragraph 11 further states: "DAZ's cumulative liability to CUSTOMER for all claims,
18 actions, damages . . arising out of, or connected with, this Agreement arising from any cause of
19 action whatsoever . . . shall in no case exceed the amounts paid by CUSTOMER to DAZ with
20 respect to the Services and/or Deliverables . . which in no event, shall exceed the sum of all
21 monies paid hereunder by CUSTOMER to DAZ." The Arbitrator believes that it is Undisputed
22 that SWT has paid approximately \$2.2 million to DAZ pursuant to the CSA.

23
24 SWT argues that the consequential damages waiver and limitation of liability is
25 unconscionable, and thus, SWT's claim for consequential damages should not be dispensed with
26 on summary adjudication.

27 SWT claims that Paragraph 11 is procedurally unconscionable. Procedural
28 unconscionability "arises from an inequality of bargaining power which result in no real

1 negotiation and 'an absence of meaningful choice'." *A & M Produce Co., supra*, 135 Cal.App.3d
2 at p. 486. "... courts have begun to recognize that experienced but legally unsophisticated
3 businessmen may be unfairly surprised by unconscionable contract terms," and "even large
4 business entities may have relatively little bargaining power, depending on the identity of the
5 other contracting party and the commercial circumstances surrounding the agreement." *Id.* At
6 489-90. SWT states that there was no negotiation of Paragraph 11 of the Standard Consulting and
7 Services Agreement. Further, Smith was largely unaware that such a clause even existed until the
8 litigation was initiated.

9 Both parties to the Agreement are sophisticated, experienced companies. The Agreement
10 is a commercial contract. SWT had David Gillies, Mike Bredemeier, VP of IT, and Jeff Allen,
11 President of SWT negotiating on behalf of SWT. The fact that Smith, the CEO of SWT, was
12 unaware that such a clause even existed does not go to an argument that Paragraph 11 was not
13 "negotiated." The person in charge of the negotiations was Jeff Allen; SWT has presented no
14 declaration or evidence from Jeff Allen. The Declaration of Smith contains numerous statements
15 that are objectionable on the basis of hearsay and lacking in foundation.

16 SWT also argues that Paragraph 11 is procedurally unconscionable because it is far from
17 conspicuous. A review of the CSA shows that the identification of the Limitation of Liability
18 provision is in bold and the type is the same font as the rest of the contract. There was no
19 requirement of DAZ to enhance the format.

20 SWT claims that provision is substantively unconscionable. "The substantive element of
21 the unconscionability analysis focuses on overly harsh or one-sided results." *Gatton v. T-Mobile*
22 *USA, Inc.* (2007) 152 Cal.App.4th 571,586. Particularly, a "contractual term is substantively
23 suspect if it reallocates the risks of the bargain in a objectively unreasonable or unexpected
24 manner." *A & M Produce Co., supra*, 135 Cal.App.3d. at P. 487.

25 Further, argues SWT, its damages are enormous compared to the restriction of what they
26 have paid DAZ, i.e., \$2 million +. They cannot obtain anything approaching full recompense for
27 the harm created by DAZ.
28

1 The Agreement was fully negotiated between sophisticated, experienced, and well
2 financed companies. It was a commercial contract. There was no coercion, no demands by DAZ,
3 and SWT never questioned the Limitation of Liability provision.

4 The Agreement required economic decisions to be made by both parties. Both parties had
5 to evaluate the risks and potential damages that might ensue if the contract was entered into.
6 Paragraph 11 is not unconscionable.

7 Paragraph 11 is a valid and enforceable provision of the Agreement.

8
9 **DAZS' ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION IS GRANTED.**
10 **PARAGRAPH 11, LIMITATION OF LIABILITY, OF THE AGREEMENT IS VALID**
11 **AND ENFORCEABLE AND LIMITS THE LIABILITY OF DAZ SYSTEMS, INC.**

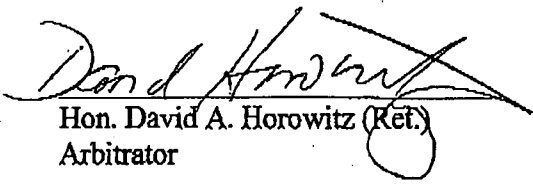
12
13 **RULING**

14
15 **DAZ MOTION FOR SUMMARY JUDGMENT – GRANTED. THERE ARE NO**
16 **TRIABLE ISSUES OF MATERIAL FACT. Respondent, DAZ Systems, Inc. is entitled to**
17 **Judgment.**

18
19 **ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION IS GRANTED.**
20 **THERE ARE NO TRIABLE ISSUES OF MATERIAL FACT. PARAGRAPH 11,**
21 **LIMITATION OF LIABILITY, OF THE AGREEMENT IS VALID AND**
22 **ENFORCEABLE AND LIMITS THE LIABILITY OF DAZ SYSTEMS, INC.**

23
24 **It is so ORDERED.**

25
26 This 16th day of June 2017.

27
28 
Hon. David A. Horowitz (Ret.)
Arbitrator

PROOF OF SERVICE

State of California
County of Los Angeles

I certify that I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 915 Wilshire Boulevard, Suite 1900, Los Angeles, California 90017.

On June 21, 2017, I served the foregoing document described as the **RULING: MOTION FOR SUMMARY JUDGEMENT, OR SUMMARY ADJUDICATION** on the interested parties in this action as follows:

James G. O'Callahan, Esq.
GIRARDI | KEESE
1126 Wilshire Boulevard
Los Angeles, California 90017
jgocallahan@girardikeese.com

Jack Russo, Esq.
Christopher J. Sargent, Esq.
COMPUTERLAW GROUP
401 Florence Street
Palo Alto, California 94301
csargent@computerlaw.com
jrusso@computerlaw.com

 X **BY CERTIFIED U.S. MAIL**, I placed a true copy of the document described above in a sealed envelope and caused such envelope with postage thereon to be placed in the United States mail at Los Angeles, California.

 BY FACSIMILE, I caused such to be faxed to the attorneys on June 21, 2017

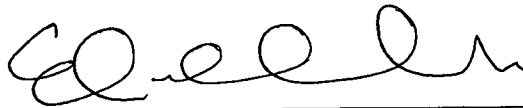
 X **BY E-MAIL OR ELECTRONIC TRANSMISSION**: I caused a copy of the document(s) to be sent from e-mail address elvira@adrservices.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

 BY PERSONAL SERVICE, I caused such envelope to be delivered by hand to the attorneys on June 21, 2017.

 X **STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

 FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 21, 2017 at Los Angeles, California



Elvira Camacho

10/02/2017

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SERVICE LIST
Southwest Traders v. Daz
BC506710

Jack Russo
Christopher Sargent
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Attorneys for Defendant, DAZ Systems,
Inc. and David Gillies

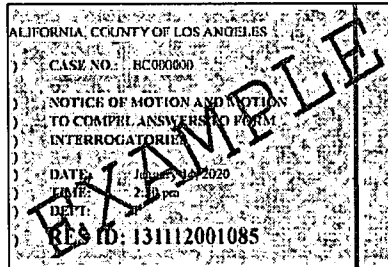
Hon. David A. Horowitz (Ret.)
ADR Services, Inc.
12508 Milbank Street
Studio City, California 91604

10/02/2017

THIS IS YOUR CRS RECEIPT

INSTRUCTIONS

Please print this receipt and attach it to the corresponding motion/document as the last page. Indicate the Reservation ID on the motion/document face page (see example). The document will not be accepted without this receipt page and the Reservation ID.



RESERVATION INFORMATION

Reservation ID: **170929254982**
Transaction Date: September 29, 2017
Case Number: BC506710
Case Title: SOUTHWEST TRADERS INC VS DAZ SYSTEMS INC ET AL
Party: SOUTHWEST TRADERS INC (Plaintiff/Petitioner)
Courthouse: Stanley Mosk Courthouse
Department: 31
Reservation Type: Motion to Vacate or Alter Arbitration Award
Date: 11/8/2017
Time: 08:30 am

FEE INFORMATION (Fees are non-refundable)

First Paper Fee: Party asserts first paper was previously paid.

Description	Fee
Motion to Vacate or Alter Arbitration Award	\$60.00
Total Fees:	Receipt Number: 1170929K5634 \$60.00

PAYMENT INFORMATION

Name on Credit Card: James OCallahan
Credit Card Number: XXXX-XXXX-XXXX-9997

A COPY OF THIS RECEIPT MUST BE ATTACHED TO THE CORRESPONDING MOTION/DOCUMENT AS THE LAST PAGE AND THE RESERVATION ID INDICATED ON THE MOTION/DOCUMENT FACE PAGE.