

POZZUOLO RODDEN TRIAL TEAM WINS \$4.1 MILLION BINDING AWARD FOR FORMER CEO WRONGFULLY FIRED BY PUBLICLY TRADED COMPANY

*POZZUOLO RODDEN, P.C.
COUNSELORS AT LAW
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200/FAX 215-977-9663
www.pozzuolo.com*



JUNE 2010 NEWSLETTER

REPORT FROM COUNSEL

HOW NOT TO TERMINATE AN EXECUTIVE LEVEL EMPLOYEE

It has been an exciting month for Pozzuolo Rodden for two reasons.

First, Joe Pozzuolo is proud to announce his son, Jeffrey, receiving dual JD/MBA degrees from Temple University Beasley School of Law and Fox School of Business. He received the Benjamin L. Winderman Award from the Law school for academic excellence in the JD/MBA program and graduated with high honors from the Business School. Jeffrey also graduated

magna cum laude from the University of Pennsylvania with a BS in Economics (Finance and Accounting) from the Wharton School and a BA in Mathematics from the College of Arts and Sciences. He has studied abroad in Rome and Japan while attending law school. Jeffrey will be joining the firm as an associate following his bar exam this summer.

Secondly, our office is proud to announce its representation of Louis D. Paolino, Jr. in the \$4.1M award by an arbitration panel of the American Arbitration Association for his wrongful dismissal as CEO of Mace Security International, Inc. This binding award is in addition to a favorable ruling last December by the Delaware Court of Chancery establishing Mr. Paolino's right to advancement of attorneys' fees and expenses under the indemnification provisions of the corporation's bylaws. The Delaware Court of Chancery held that Mr. Paolino was entitled to an advancement of attorney fees during the pendency of the same proceeding and mandatory attorney fees upon a verdict in favor of Mr. Paolino. The trial team of this office also successfully defended Mr. Paolino in all of the claims of Mace Security International, Inc. against Mr. Paolino.

In an effort to educate our business clients on the proper procedure to dismiss a senior employee, we have republished the opinion of the three-member arbitration panel who awarded this \$4.1 million award after an 18 day trial. Hopefully, this opinion will provide our clients with some instructive real world direction on how not to dismiss a senior employee. The opinion follows below:

**AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL**

In the Matter of the Arbitration Between

RE: 14 116 Y 00901 08

Louis D. Paolino, Jr.

Claimant

And

Mace Security International, Inc.

Respondent

AWARD OF ARBITRATORS

We, the undersigned Arbitrators/ Bernard D. Beitch, Esquire, George R. Freund and Clyde A. Szuch, Esquire, having been designated in accordance with the Employment Agreement entered into by the above-named parties dated August 21, 2006, and having been duly sworn and having duly heard the proofs and allegations of the Parties, FIND as follows:

(A) Claimant was an experienced and successful chief-executive officer at other companies. He engineered the structure of Respondent as a publicly traded company by combining privately held businesses with a traded shell corporation. He ran the enterprise for several years, collegially with the Board of Directors, until a threatened proxy fight by a hedge fund shareholder was settled by replacing some Board members with three newly designated individuals.

(B) Thereafter, the relationship between the Board and the Chief Executive Officer (Claimant) became contentious. The principal of the hedge fund through the new Board members attempted to achieve various goals, including limiting the compensation of Claimant and attempting to terminate his employment. In August of 2006, Claimant strenuously insisted that the Board of Directors enter into a new Employment Agreement to replace the one that was expiring in that month. After execution, the agreement was somewhat modified at the Board's behest. Thereafter, the independent directors considered attempting to set aside the Agreement because of the pressured nature of the negotiations. The failure to proceed with any such attempt and actions taken acknowledging existence of the Agreement in various SEC filings and in acting in accordance with its terms over a long period constituted a ratification.

(C) The newly constituted Board, which had only limited experience in operating an enterprise of the nature of Respondent, disagreed with some of Claimant's plan for the future success of the Company. It, partly at the behest of the hedge fund principal, was focused on cost cutting while the Claimant wanted to try to achieve success in part through further expansion in the Internet business. He stated that, while open to guidance on cost cuts which could reasonably be achieved, he was concerned about resulting decreases in the viability and expansion of the businesses. Eventually, the independent directors of Respondent (as opposed to its Board of Directors) issued a written directive to the Claimant to cut costs by a specified amount. Claimant responded in writing, questioning the independent directors' authority to so act and arguing the difficulty of damage-free reduction in costs. It is noted that the ordered actions which the Claimant said were impossible could not be achieved. The replacement Chief Executive Officers and the Board were unable to cut costs without damaging revenues and profits.

(D) The independent directors in a series of secretive meetings decided to carry out the termination of Claimant's employment. They circulated the notice of a meeting of the Board of Directors stating as the purpose the furtherance of steps and approaches which had been suggested by Claimant, while the real sole purpose of the meeting (which was not mentioned at all) was to terminate his employment. Because of the apparent movement of the independent directors in the direction of his plans for betterment of the business telegraphed by the notice, Claimant sent directives to the managers of the various company divisions directing them to come up with immediate plans to cut costs in sums equivalent to that which the independent directors wished to achieve.

(E) During the brief Board meeting, without any preliminary discussion or opportunity to protest, Claimant's employment was terminated. His request for the reason was refused during the meeting. He was told that he would receive a written statement in that regard which was sent the next day and that he would not be paid the severance payment called for under his Employment Agreement.

(F) Under the terms of his Employment Agreement, a termination by Respondent without cause would result in entitlement to severance pay. Cause was defined as "causing material harm to the Company by Employee engaging in willful misconduct or a felony." It went on to state that "... material harm is caused to Company if the Company incurs expenses of Five Hundred Thousand Dollars (\$500,000.00) or more." To invoke this clause, Respondent was required to send written notice of termination which "... must specify the nature of the willful misconduct or felony." None of the reasons cited by the Board of Directors in their subsequent letter constituted willful misconduct and they were all matters that the Board had been well aware of much prior to the termination. The only possible exception was the purported failure to cut costs which had never been a formal Board directive, nor had the Claimant ever refused outright to do so but, instead, had enlisted the Board's guidance in achieving the result.

(G) If the Board had given appropriate notice and stated the reason(s) for termination, the Claimant would have been able to show that he had commenced compliance. Delaware law, which is controlling by stipulation of the parties, requires that the CEO of a corporation be given formal notice of the intended purpose of a meeting to terminate his employment for the very purpose of permitting such discussion and defenses. If Claimant had been given an opportunity to do so, it is possible that the Board would not have then taken the action to terminate his employment (which under Delaware law was not effective). The Employment Agreement provides for a severance payment formula which is stipulated to be equivalent to the sum of Three Million Eight Hundred Fifty-One Thousand Dollars (\$3,851,000.00) in the event that Respondent terminated Claimant's employment without cause. This is a negotiated severance amount to be made no matter when employment is terminated during the term of the agreement. It is not based upon the remaining employment period and we find that there is no requirement of mitigation.

(H) The claim for additional stock options is barred by the prior settlement of that claim by the parties. The rescission of One Million Seven Hundred Sixty-Nine Thousand Six Hundred Eighty-Two (1,769,682) stock option grants at the Board of Directors' meeting of October 9, 2008 was improper and invalid based upon our finding that the termination of employment was not for cause. Those options will be ordered restored and Claimant given a period of days to exercise some or all of them, notwithstanding their stated expiration dates.

(I) The false statements asserting termination for cause were libelous. Claimant made no credible proof of actual damages and we will award nominal damages only, in the sum of One Thousand Dollars (\$1,000.00).

(J) Respondent did not meet its burden of proof with respect to the counterclaim asserting Claimant's alleged conversion of company property, nor was there any credible calculation of alleged damages. Any finding in Respondent's favor on that claim would be mere conjecture.

(K) No basis for imposition of punitive damages exists.

(L) Both parties agreed to submit Claimant's Sorbanes-Oxley claim to this panel and we conclude that we have jurisdiction to hear and determine it. We find that Claimant's actions were not protected activity under that Law and that the actions which he claimed to fall within the purview of that Act did not constitute a reason for the termination of his employment.

(M) Both parties requested counsel fees and expenses. The Claimant prevailed on a substantial portion of his claim and in defending the counterclaim. Thus, we will grant his application while denying Respondent's request in this regard. The administrative fees of the American Arbitration Association and the compensation and expenses of the Arbitrators will be shared equally. They will not be ordered reallocated in part or in whole pursuant to the indemnification provided for under the Memorandum Opinion of the Delaware Chancery Court dated December 8, 2009 in the matter of Louis D. Paolino, Jr. v. Mace Security International, Inc., C.A. No. 4462-VCL. This is because that indemnification relates only to the counterclaim which was but a minor part of this proceeding and not capable of ready calculation.

Accordingly, we AWARD as follows:

1. Respondent shall pay Claimant the sum of Four Million One Hundred Forty-Seven Thousand Nine Hundred Twelve Dollars (\$4,147,912), representing severance pay in the sum of Three Million Eight Hundred Fifty-One Thousand Dollars (\$3,851,000) and interest.
2. Respondent shall restore 1,769,682 of stock options wrongfully rescinded, in accordance with their terms, except that Claimant shall have until July 15, 2010 to exercise some or all of them. Any options not exercised by that date shall expire and thereafter be null and void.
3. Respondent shall pay Claimant the sum of One Thousand Dollars (\$1,000.00) on his defamation claim.
4. We find against Respondent on its counterclaims.
5. We find against Claimant on his Sorbanes-Oxley claim.
6. Jurisdiction of this matter will be retained by the Arbitrators for the limited purpose of determining and assessing the amount of Claimant's counsel fees and expenses. The Claimant shall file and serve a calculation of his counsel fees and expenses within 20 days of the date of receipt of this Award. The counsel fee calculation shall include hourly rates and time expended by each professional and shall be supported by counsel's Affidavit of Reasonableness. Respondent shall then have 20 days from the date of service of the fee and expense calculation to file and serve its written objections. The Claimant shall then have 15 days after receipt to file and serve a response. The Arbitrators shall then have 30 days within which to issue a Supplemental Award dealing with the amount of counsel fees and expenses.
7. This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. Any claims not expressly granted herein are hereby denied.
8. This Award may be executed in any number of counterparts, each of which shall be deemed as original and all

of which shall constitute one and the same instrument.

Date _____

Bernard D. Beitch, Esquire

Date _____

George R. Freund

Date _____

Clyde A. Szuch, Esquire

Please visit our website: www.pozzuolo.com

Publications

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: [http://pozzuolo.com/Pubs Articles.shtml](http://pozzuolo.com/Pubs%20Articles.shtml)

Corporate/Tax

Design Buy-Sell Agreements For Maximum Utility

Deferred Compensation Rewards And Retains Key Employees

How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool

Protecting A Client's Business From Unfair Competition Using Restrictive Covenants

Money Purchase Pension Plan Falls Out Of Favor

Why An Employment Contract Is Mandatory

What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs

Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules

How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend

Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business

How To Look, Act And Sound Like A Professional Corporation

How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations

How to Structure a Suitable Buy-Sell Agreement

Estate Planning

The Limited Liability Company -A Sophisticated Tool For Estate Planning

Diversify Strategies For An Effective Estate Plan

Use Wills To Maximize Family Protection And Minimize Tax

Six Proven Estate Planning Techniques

Divorce Raises The Need For Performing An Estate Planning Review

Divorce and Estate Planning

Remarriage Situations Can Raise Special Estate Planning Considerations

College Funding Tool Offers Estate Planning Advantage

Drafting The Durable Power Of Attorney For Wealth Protection Purposes

Why Living Wills Advance Directives Are An Essential Part Of Estate Planning

Special Needs Trust - An Estate Planning Tool For The Disabled

Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples

To unsubscribe to this newsletter email: info@pozzuolo.com

YOU ARE RECEIVING THIS EMAIL COURTESY OF YOUR RELATIONSHIP WITH POZZUOLO RODDEN, P.C. IF YOU DO NOT WANT TO RECEIVE THIS MONTHLY NEWSLETTER, PLEASE ADVISE.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.