

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MQVP, Inc.,
Plaintiff/Counter-Defendant/Appellant

Case No 07-cv-11791

v.

Honorable Paul V. Gadola

Nationwide
Defendant/Counter-Plaintiff/Appellee

**ON APPEAL FROM THE UNITED STATES BANKRUPTCY
COURT EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In the matter of:

Case No. 06-51141-MBM

MQVP Inc.,
f/k/a GVI Inc.,

Chapter 11

Debtor.

Hon. Marci B. McIvor

MQVP Inc.,

Plaintiff-Appellant,

v.

Adv. Pro. No.06-05635-MBM

Nationwide Mutual Insurance Company,

Defendant-Appellee.

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**SUMMARY OF THE CASE AND
REQUEST FOR ORAL ARGUMENT**

This is an appeal from an adversary proceeding to collect fees due under a written agreement. The agreement required Defendant-Appellee pay a 3% administrative fee while a participant in Plaintiff-Appellant's program. That fee was to be calculated using Defendant-Appellee's estimating data. Defendant-Appellee was never able to provide the data in the form necessary to determine the 3% administrative fees and terminated the program. Upon termination Plaintiff-Appellant demanded payment of the program fees of which Defendant-Appellee refused based on an unauthorized gratuitous "Proposal Letter" from a contract employee of Plaintiff-Appellant to an unauthorized manager of Defendant-Appellee.

Regardless that the agreement requires all modifications be in writing signed by authorized representatives of each party and considerable evidence that the "Proposal Letter" was not authorized, did not contain language that effectively amended the agreement and without consideration, the bankruptcy court ruled that the 3% administrative fee of the agreement was waived by the "Proposal Letter".

Plaintiff-Appellant believes oral argument is necessary based upon the uniqueness of the MQVP[®] program and will serve to aid the Court in its understanding of the program, the agreement and the relationship between the parties. Plaintiff-Appellant, therefore, requests oral argument of approximately 20 minutes.

CORPORATE DISCLOSURE STATEMENT
(Pursuant to FRCP, Rule 7.1(a))

Plaintiff, MQVP Inc., is a privately held Michigan corporation, with no parent corporations and there is no publicly held company holding 10% or more of the Plaintiff's stock.

TABLE OF CONTENTS

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT.....ii

CORPORATE DISCLOSURE STATEMENTiii

TABLE OF CONTENTS.....iv

TABLE OF AUTHORITIES.....v

JURISDICTIONAL STATEMENT AND STANDARD OF REVIEW.....1

STATEMENT OF ISSUES..... 2

STATEMENT OF THE FACTS..... 3

HISTORY.....3

RULING.....7

ARGUMENT I.....8

ARGUMENT II.....10

ARGUMENT III.....13

CONCLUSION..... 14

CERTIFICATE OF SERVICE..... 16

TABLE OF AUTHORITIES

Federal Cases

In re Teledyne Indus, Inc, 696 F2d 968, 971 (Fed Cir 1982)10, 11

Lincoln Electric Company v St Paul Fire and Marine Ins Co, 210 F3d 672
(6th Cir 2000) 12

State Cases

City of North Olmsted v Eliza Jennings, Inc, 91 Ohio App.3d 173, 180
(1993)9, 11, 12

Exact Software North America v Infocon Systems Inc, 2004 WL 952876.....12

Gibbs v Gibbs Not Reported in NE2d 1989 WL 67261
Ohio App.,1989).....9

Karl Kiefer Machine Co v Henry Niemes Inc (1948), 82 Ohio App. 310, 80
NE2d 183.....9

Parente v Day (1968), 16 Ohio App.2d 35, 45 O.O.2d 104, 241 N.E.2d
280 (1968)9

Prudential Ins Co of America v Joyce Bldg. Realty Co (1943), 44 Ohio
Law Abst. 481, 65 NE2d 5169

Rubino v Showalter 24 Ohio App.3d 232, 495 NE2d 31 (Ohio App,1985) 12

Weaver v Weaver 36 Ohio App3d 210, 522 NE2d 574 (Ohio App.,1987).....8,9

White Co v Canton Transp Co, 131 Ohio St. 190, 2 NE2d 501 (1936)9, 11

Federal Statutes

28 U.S.C. §158 1

Federal Rules

56 American Jurisprudence 1159

FRCP 56 14

**JURISDICTIONAL STATEMENT
AND STANDARD OF REVIEW**

Basis of Jurisdiction of this Court

On March 21, 2007, the bankruptcy court issued its Order, granting Defendant's Motion for Summary Judgment, dismissing Plaintiff's claims in their entirety, and denied Plaintiff's Motion for Summary Judgment. Plaintiff then filed its Motion for Reconsideration April 2, 2007; denied April 13, 2007. Defendant filed its timely Notice of Appeal on April 23, 2007, securing appellant jurisdiction pursuant to 28 U.S.C. §158. Entry of the appeal was placed on the docket on June 5, 2007.

Appeals of orders of a bankruptcy court to a district court are governed by 28 U.S.C. § 158(a). A party may appeal a final judgment, order, or decree to the district court as of right. See 28 U.S.C. § 158(a)(1). A final order of the bankruptcy court may be appealed by right under 28 U.S.C. § 158(a)(1). For purposes of appeal, an order is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp v United States*, 489 U.S. 794, 798, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989) the appellant court reviews findings of fact for clear error, and conclusions of law de novo. *In re Tirch*, 409 F3d 677, 680 (6th Cir 2005).

STATEMENT OF ISSUES

Issue I

Whether the bankruptcy court abused its discretion by waiving the written terms and conditions of an agreement without the requisite showing of consideration.

Plaintiff/Appellant says.....Yes

Defendant/ Appellee says.....No

Bankruptcy Court says.....No

Issue II

Whether the bankruptcy court abused its discretion by (i) misplacing the burden of proof on the party against whom waiver of contract is being imposed, (ii) relieving the party asserting waiver from its burden of proof of clear and convincing evidence, and then (iii) rendering judgment inconsistent with the weight of the evidence.

Plaintiff/Appellant says.....Yes

Defendant/ Appellee says.....No

Bankruptcy Court says.....No

Issue III

Whether the bankruptcy court abused its discretion by granting summary judgment where material issues of fact remain in dispute.

Plaintiff/Appellant says.....Yes

Defendant/ Appellee says.....No

Bankruptcy Court says.....No

STATEMENT OF FACTS

This is an appeal from an adversary proceeding to recover Debtor's assets ("Debtor's account receivable"), wherein Nationwide, a MQVP[®] program participating insurance company, withheld payment of fees due and payable for its participation in the MQVP[®] program.

History

On October 4, 1999, the aftermarket crash parts automotive repair industry was shaken by a multi-billion dollar class action verdict in *Avery v State Farm*, Not Reported in N.E.2d, 1999 WL 955543 (Ill Cir, 1999). The *Avery* ruling held that use of non-OEM parts (non-Original Equipment Manufacturer parts most of which were manufactured in Taiwan and exported to the U.S., using lower-grade materials and processes, commonly referred to as "Taiwan Tin") diminished the value of the car after repair, causing a chilling effect on the U.S. marketing and use of non-OEM parts. The most significant portions of this multimillion-dollar industry affected by this verdict consisted of insurance companies that authorized the use of non-OEM parts in the repair of their policyholders' cars; U.S. distributors and sellers of non-OEM parts; and manufacturers of non-OEM parts.

Nationwide, the fifth largest insurance company in the United States, wanted to continue to profit from the use of non-OEM parts in repairs, while shielding itself from potential class action suits like that of the *Avery* case. It, therefore, obtained the services of William J. Hindelang and embarked upon a consulting project to determine how it could do so. At the conclusion of the

consulting project, William advised that continued use of non-OEM parts could be accomplished by improving the manufacture of the “Taiwan Tin” parts to that of OEM standards, monitoring that quality and tracking those parts from manufacture to repair so as to prevent fraudulent substitution of parts with counterfeit parts. Nationwide, then, asked William to create such a program for Nationwide to use, and a corporation to administer his program. That program is the MQVP[®] program, administered by MQVP Inc. of which William J. Hindelang is the owner. Nationwide joined the MQVP[®] Program effective September 15, 2000¹.

In April and May of 2001, Nationwide amended the Agreement and Order, retroactively, to September 15, 2000 to include a 3% administration fee, stating: “[Nationwide] will pay Vendor [MQVP] 3% of the price, as supplied by the participating distributors, of eligible MQVP parts specified on all Nationwide, Allied, and/or other affiliate company collision repair appraisals. . . [Nationwide] shall pay this 3% administrative fee for MQVP starting 9/1/2000.” To determine the “3% of the price of eligible MQVP[®] parts specified on all Nationwide, Allied, and /or other affiliate company collision repair appraisals”, Nationwide was to require its contracted estimating service providers (CCC, Mitchell and Audatex) to provide to MQVP the appraisal data. But Nationwide was, at best, remiss in its commitments and obligations in obtaining the required data, instead content with paying a monthly minimum payment of which MQVP had no ability to reconcile against the amount actually owed. MQVP, however, made exhausting attempts

¹ While a participant in the MQVP Program, Nationwide enjoyed savings of approximately \$1.4 million per month using MQVP Program parts (non-OEM parts) .

to engage the estimating service provider companies to provide the required data; providing software programmers and sharing data for that purpose. Even so, these efforts were confounded with attempts by the estimating service providers to charge duplicate fees² and when they did provide data, it was corrupt. Although Nationwide reluctantly caused CCC data to eventually be provided, that data was never complete and Nationwide never caused Mitchell or Audatex to provide data, nor allowed MQVP access to Nationwide's data. To this day, MQVP is blocked from access to complete data necessary to fully reconcile the Nationwide account against its collision repair appraisals³.

Although Nationwide never seemed to have the time, energy or commitment to provide the requested data, the company found time to perform monthly audits of MQVP[®] and involve itself in compliance issues of other MQVP[®] participants. It also found the time and energy to conspire with fellow MQVP[®] program participating distributors, LKQ Corporation ("LKQ") and Keystone Automotive Industries Inc. ("Keystone"), in the summer of 2006 to create a competing program to replace MQVP[®] using virtually all of the MQVP[®] participating manufacturers (but excluding all other distributors that would compete with LKQ and Keystone⁴). That program is their "NWCPP", the Nationwide Crash Parts Program. Nationwide, Keystone, and LKQ⁵ began their conflicting NWCPP scheme in August 2006, while all three were participants in

2 CCC demanded fees for the re-creation of data it was already providing Nationwide.

3 MQVP, therefore, demanded payment from Nationwide for only that portion of outstanding fees that could be reconciled from the data that CCC had provided.

4 The NWCPP also lacks the proprietary software for complete traceability and prevention of substitution, the OEM-level quality assurances, or any attributes or carryover from the actual quality validation done by MQVP.

5 LKQ Corporation is the parent company of Global Trade Alliance and ABSCO, two MQVP[®] participants that have also withheld payment of fees in these proceedings.

the MQVP[®] program, all three were receiving MQVP[®] program services, all three were accruing MQVP[®] program participation fees, and all three were refusing to pay MQVP for services. So in hindsight, it should have been no surprise when Nationwide withheld fees in conjunction with most of the other MQVP[®] participants and notified MQVP Inc., of its intention to withdraw from MQVP[®] effective October 27, 2006.

On October 13, 2006, prior to Nationwide's exit from the MQVP[®] program, MQVP submitted an invoice for payment, of a portion of outstanding fees, including documentation (estimate service provider data) of the fee calculation per the Agreement. In response, in a fax delivered on the day the payment was to be due, October 20, 2006, Nationwide, for the first time, made claim that the Agreement was changed and produced in support thereof a June 14, 2002 letter ("Proposal Letter") from Ron Ritchie, a contracted employee of RSC.⁶

Mr. Hindelang had never seen the letter before, nor knew of its existence.⁷ As no payment, nor indication of contractual modification per the terms of the Agreement, was produced by Nationwide, MQVP filed an adversary proceeding to recover the past-due receivable.

⁶ The date of the Proposal Letter was within days of Ron Ritchie's termination of contracted employment with MQVP Inc.

⁷ It is significant to note that the Proposal Letter had not previously surfaced even though the terms of the settlement agreement between RSC and MQVP required that all contracts and documentation related to MQVP and the MQVP[®] program be turned over to MQVP; It was never produced in the subsequent arbitration proceedings; It was never produced in response to Requests for Production of Documents in the Oakland County Circuit Court Proceedings; It was never mentioned by Nationwide at any time following the separation of RSC and MQVP or in Nationwide's acknowledgment of its commitment to continue to participate in the MQVP[®] program in accordance with its Agreement; and it was not produced by Nationwide's counsel when reminding MQVP of the terms of the agreement and MQVP's obligation to comply with those terms.

Nationwide did not pay the \$39,900 monthly minimum payment for the last month of its participation in the MQVP Program, nor is it over due 3% obligations that have accumulated to approximately \$2,700,923.09 over the course of Nationwide's participation in the MQVP[®] Program (at the time the Complaint was filed).

Ruling

The parties filed cross motions for Summary Judgment on the issue of unpaid fees.

The bankruptcy court determined that the relationship of the parties is governed by the Agreement which was amended to include the "3% administrative fee", (Bkrptcy adversary proceeding transcript, at pages 19 and 20), and that the Agreement is governed by Ohio law. (Bkrptcy adversary proceeding transcript, at page 25).

Nationwide's position was that the Proposal Letter amended that Agreement to obligate Nationwide to monthly payments of only \$35,000.

MQVP's position was that the newly surfaced Proposal Letter was, at best, an unauthorized gratuitous "proposal" between managers possessing no authority to amend agreements and, since no written amendment was created and signed by the parties as required by the written terms and conditions of the Agreement, the Agreement was not effectively amended.

The Bankruptcy court heard oral argument on March 21, 2007, and immediately entered her Order indicating the Proposal Letter effectively amended the Agreement due to waiver. Surprisingly, in her sweeping ruling declaring that

Nationwide had no further obligations to MQVP, Nationwide was not even required to make its final payment the court concluded was Nationwide's obligation as a result of the purported amendment.

MQVP, then, timely filed its Motion for Reconsideration. The court instructed Nationwide to file a response and, on April 13, 2007, denied MQVP's Motion for Reconsideration. Thereafter, MQVP filed its Notice of Appeal on April 23, 2007.

Argument I

Consideration is an essential element for waiver of a written agreement which must be shown by clear and convincing evidence. Failure to do so is fatal to the defense of waiver.

Relying almost exclusively on *Weaver v Weaver* 36 Ohio App3d 210, 522 NE2d 574 (Ohio App.,1987), the bankruptcy court stated the conditions in which a contract provision may be waived.

The essential elements of a waiver are "(1) an existing right, benefit, or advantage; (2) actual or constructive knowledge of the existence of such right, benefit, or advantage; and (3) an intention to relinquish the right". (Bkrptcy adversary proceeding transcript, at page 25).

In so doing, the bankruptcy court completely glossed over another element confirmed in the *Weaver v Weaver* case, supra: The essential element of consideration. Specifically, the *Weaver* court noted that its findings included the "requisite consideration required for a waiver based on an agreement" citing the Ohio Court of Appeals case of *Parente v Day* (1968), 16 Ohio App.2d 35, 45

O.O.2d 104, 241 N.E.2d 280 (1968) (“Where the waiver is based upon an agreement, consideration is also necessary. *Prudential Ins Co of America v Joyce Bldg. Realty Co* (1943), 44 Ohio Law Abst. 481, 65 NE2d 516; *Karl Kiefer Machine Co v Henry Niemes Inc* (1948), 82 Ohio App. 310, 80 NE2d 183; 56 *American Jurisprudence* 115, Waiver, Section 15 et seq.; 20 *Ohio Jurisprudence* 2d 465, Estoppel and Waiver, Section 7”). See also *Gibbs v Gibbs* Not Reported in NE2d 1989 WL 67261 (Ohio App.,1989) (“We agree with the appellee that the claim of modification is unsupported by legal consideration and thus *Weaver v Weaver* (1987), 36 Ohio App.3d 210, 522 NE2d 574, is inapposite”).

In this regard, as with all the elements of waiver of a contractual requirement, the party asserting the waiver must show “a clear, unequivocal, decisive act by the other party of such a purpose it amounts to an estoppel on that party's part”, *City of North Olmsted v Eliza Jennings, Inc*, 91 Ohio App.3d 173, 180 (1993) citing the Ohio Supreme Court in *White Co v Canton Transp Co*, 131 Ohio St. 190, 2 NE2d 501 (1936). In the *White Co v Canton Transp Co* case, the Ohio Supreme Court cautioned “When such waiver, if in fact there was a waiver, comes after a breach of the original contract by the party claiming the benefit of the waiver, it should receive not only careful but serious consideration at the hands of the courts, as such an arrangement is diametrically opposed to sound business principles”, *id* at 505. The issues of whether consideration is a requirement to waiver and whether the burden of proof necessary to establish waiver is by clear, unequivocal, decisive act are issues of law to which the

appellant court reviews de novo. The issue of whether Nationwide carried that burden is an issue of fact to which the appellant court reviews for clear error. *In re Tirch*, 409 F3d 677, 680 (6th Cir 2005).

In the bankruptcy proceedings, Nationwide has argued that MQVP waived two contractual requirements: (a) The requirement that any amendment to the Agreement be made in writing, signed by an authorized representative of the parties; and (b) The requirement that Nationwide pay a 3% administration fee.

Nationwide did not, however, provide a shred of evidence that it provided consideration for the waiver by MQVP of these contractual requirements. There was absolutely no evidence, offer of evidence, or other showing that requisite consideration was provided for the waiver of the 3% administrative fee, nor did the bankruptcy court make such a finding.

Accordingly, consideration is an essential element of waiver of a written agreement and must be established by clear and convincing evidence. The failure to do so is absolutely fatal to a party's ability to rely on same. Indeed, such a showing was not made in the adversary proceedings and the bankruptcy court made no such findings. The bankruptcy courts ruling must, therefore, be reversed.

Argument II

The burden of establishing waiver by clear and convincing evidence is on the party claiming waiver (Nationwide), not the party against whom the waiver is asserted (MQVP).

In its analysis as to whether MQVP waived its contractual right to a “3% administrative fee”, the bankruptcy court concluded that the Proposal Letter, “while the letter does not expressly state that Plaintiff [MQVP] waives the percentage fee agreement, the implication is plain and entirely consistent with Plaintiff’s post-letter conduct”. (Bkrptcy adversary proceeding transcript, at page 27). The court followed with “Plaintiff proffers no evidence that it expected additional payments or that there was an ongoing dispute...nor does plaintiff provide any evidence that Nationwide had an ongoing obligation...” (Bkrptcy adversary proceeding transcript, at page 27).

Irrespective that its is undisputed that the Agreement is the controlling document containing the “3% administrative fee” and that “plaintiff”, MQVP, produced affidavits and other admissible evidence to dispute the validity of the Proposal Letter, the burden of establishing wavier is on the party claiming waiver. That party is Nationwide. See *City of North Olmsted v Eliza Jennings, Inc*, 91 Ohio App.3d 173, 180 (1993) citing the Ohio Supreme Court in *White Co v Canton Transp Co*, 131 Ohio St. 190, 2 NE2d 501 (1936) and Nationwide must satisfy that burden clearly, unequivocally and decisively. *City of North Olmsted v Eliza Jennings, Inc*, supra. The issue of which party has the burden of establishing waiver is an issue of law to which the appellant court reviews de novo. *In re Tirch*, 409 F3d 677, 680 (6th Cir 2005).

The only offer of evidence by Nationwide was the Proposal Letter and an affidavit of a Nationwide representative. The Proposal Letter, by its express terms, is a “Proposal” to which the court admits “does not expressly state that

Plaintiff [MQVP] waives the percentage fee agreement” (and did not address the requirement of mutual written consent to modify the Agreement), and the affidavit addressed only accounting issues, nothing more.⁸ Clearly, Nationwide did not carry its burden of establishing waiver on the part of MQVP by clear, unequivocal and decisive acts. Instead, the bankruptcy court erroneously placed the burden on MQVP to establish it did not waive the Agreement. Even so, MQVP produced evidence to refute the alleged waiver with affidavits of MQVP’s President and Finance Manager, each confirming Nationwide’s obligation for the “3% administrative fee” and disputing the alleged amendment; e-mails confirming discussions regarding obtaining information necessary to calculate the “3% administrative fee”; documents confirming the attempted takeover of MQVP resulting in the creation of the un-authorized Proposal Letter; and e-mails confirming the protocol for amending the Agreement (the bankruptcy judge at first declined to review these last e-mails, but did eventually review them during oral argument when proffered by bankruptcy counsel).

Regardless, the bankruptcy court, relying on the Proposal Letter (the only evidence produced by Nationwide) and completely discounting all the evidence produced by MQVP, concluded the Agreement was modified through waiver and supported her ruling with unsupported findings that included: Although MQVP

⁸ Nationwide, likewise, did not produce or offer any evidence to establish that it would suffer injury or would be otherwise prejudiced if the Agreement was not deemed modified. See *Exact Software North America v Infocon Systems Inc*, 2004 WL 952876, a case from the Northern District of Ohio citing *Lincoln Electric Company v St Paul Fire and Marine Ins Co*, 210 F3d 672 (6th Cir 2000). Although Nationwide argued some of the points for waiver, oral argument does not constitute evidence. *Rubino v Showalter* 24 Ohio App.3d 232, 495 NE2d 31 (Ohio App,1985) (“An argument does not constitute evidence. There was no evidence submitted to the trial court to support the contention that there had been substantial compliance with the agreement”) and *In re Teledyne Indus, Inc*, 696 F2d 968, 971 (Fed Cir 1982) (“attorney argument is not evidence”).

did not have actual knowledge of the Proposal Letter, it had constructive knowledge (completely discounting affidavits, evidence of dispute and evidence that the signer had no authority); MQVP did not provide any evidence that Nationwide had an ongoing obligation (completely discounting the e-mail attempts to obtain data necessary to calculate the 3% fees); and, surmising on her own, without proof of any sort, that Nationwide would suffer injury if the modification was deemed invalid.

Accordingly, the burden of establishing waiver was on Nationwide. Nationwide did not produce a shred of evidence to establish the effect of its Proposal Letter and did not produce any other evidence to support consideration, prejudice or other issues. Thus the bankruptcy court committed error as follows: (a) It incorrectly placed the burden of establishing waiver (or non-waiver) on MQVP, the party against whom the waiver is being enforced; (b) It did not hold Nationwide, the party asserting waiver, to the “clear, unequivocal, decisive” burden in establishing waiver; and (c) It incorrectly found for Nationwide in the face of conflicting evidence that disputed Nationwide’s claim of waiver, defeated its burden of clear, unequivocal, decisive showing and established issues of fact remaining in dispute to which summary judgment is inappropriate.

Argument III

There remained genuine issues of material fact in dispute rendering summary judgment inappropriate.

FRCP 56 (c) generally allows for summary judgment where “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law”.

As indicated above, MQVP Inc., produced admissible evidence in the form of affidavits, e-mails, contracts and other documents refuting the claims of Nationwide. In turn, Nationwide proffered one document (the Proposal Letter vehemently contested by MQVP) and an affidavit that did little in support of Nationwide’s claims. The evidence produced by MQVP Inc., refutes the material allegations that the agreement was amended by waiver, clearly leaving issues of material facts in dispute.

According, reversal of the bankruptcy courts ruling is required to address and resolve through credible testimony and evidence the disputed facts and issues.

CONCLUSION AND RELIEF REQUESTED

Wherefore, Plaintiff-Appellant, MQVP Inc., respectfully seeks this Courts concurrence and remand as follows:

- (a) Under Ohio law, a party seeking to rely on waiver of the written terms and conditions of an agreement bears the burden of establishing such waiver;
- (b) The essential elements of a waiver are (1) an existing right, benefit, or advantage, (2) actual or constructive knowledge of the existence of such right, benefit, or advantage, (3) an

intention to relinquish the right, and (4) where the waiver is based upon an agreement, consideration is also necessary;

- (c) That burden must be established by a clear, unequivocal, decisive act by the other party of such a purpose it amounts to an estoppel on that party's part;
- (d) Defendant-Appellee, Nationwide Mutual Insurance Company, is the party asserting waiver and is the party charged with the burden of establishing waiver;
- (e) Defendant-Appellee, did not establish such burden by a clear, unequivocal, decisive act of MQVP Inc., of such a purpose it amounted to an estoppel; and
- (f) There remained genuine issues of material fact in dispute regarding the issue of waiver, amendment and interpretation of contract to the extent Summary Judgment was inappropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Maryann Kostiuk, hereby certify that on June 20, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF system.

I, Maryann Kostiuk, caused to serve a copy of the foregoing; to James A. Plemmons and Dawn R. Copley of Dickinson Wright PLLC by depositing said copies in the U.S. Mail, with proper postage prepaid there upon, on June 20, 2007, addressed to:

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