

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

In the matter of the Arbitration between

DR. MICHAEL WEINER, an individual pka
MICHAEL SAVAGE, and SAVAGE PRODUCTIONS, INC.,
a Nevada corporation,

Claimants / Counter-Respondents,

vs.

THE ORIGINAL TALK RADIO NETWORK, INC.
dba TALK RADIO NETWORK, INC.,
an Oregon corporation,

Respondent / Counter-Claimant.

No.: 74 140 00254 11 SIM

AWARD

We, the undersigned Arbitrators, having been designated in accordance with the Arbitration Agreement dated December 20, 2002, and having been duly sworn and having heard the proofs and allegations of the parties, hereby make the following Award:

PARTIES, PLEADINGS, and PROCEDURAL HISTORY

The parties to this Arbitration are Claimants / Counter-Respondents Dr. Michael Weiner, professionally known as Michael Savage ("Weiner") and Savage Productions, Inc. ("SPI") and Respondent / Counter-Claimant The Original Talk Radio Network, Inc. ("OTR"). The operative pleadings are (1) Amended Demand for Arbitration, dated May 16, 2011; (2) Response of The Original Talk Radio Network, Inc., dated June 10, 2011; (3) Counterclaim of The Original Talk Radio Network, Inc. (entitled "Restated Arbitration Demands"), dated June 10, 2011; and (4) Response to Counterclaim, dated July 5, 2011.

This matter was submitted to arbitration after the March 14, 2011, order of the United States District Court for the Northern District of California, the Honorable Susan Illston, Judge Presiding, granting OTR's motion to compel arbitration. The parties, through their counsel, stipulated to the arbitrability of their claims and counterclaims and waived any and all objections

to the jurisdiction of the American Arbitration Association. A hearing was conducted on January 23 and 24, 2012, on the issue of whether OTR has matched the Courtside Term Sheet (as discussed more fully below). Additionally, the parties were afforded the opportunity to submit evidence bearing upon Claimants' motion for judgment on the pleadings seeking an adjudication in favor of Claimants of the first cause of action of Claimants' Amended Demand for Arbitration. In an Interim Award dated March 21, 2012, the panel denied Claimants' motion for judgment on the pleadings (with a dissenting opinion by arbitrator Robert M. Nau) and ruled that OTR effectively matched the Courtside Term Sheet. The Interim Award is incorporated herein as though set forth in full.

The hearing on all remaining issues was scheduled for August 13, 2012, and subsequent dates as necessary. The parties, through their counsel, agreed to a procedure whereby all direct testimony was to be submitted by declaration with all witnesses to be available at the hearing for cross-examination and redirect examination, either in person or by video conference. The agreed-upon procedure was more fully set forth in the panel's May 29, 2012, Report of Further Preliminary Hearing and Scheduling Order ("Report and Scheduling Order").

The hearing was conducted on August 13, 2012. The parties submitted declaration testimony and evidence at the hearing and had the opportunity to cross-examine each of the opposing party's witnesses. The parties also submitted post-hearing briefs in accordance with the briefing schedule agreed upon at the hearing.

FACTS

Weiner, who is professionally known as Michael Savage, is a well-known radio talk show host. Since 1999, OTR has syndicated Weiner's show, "The Michael Savage Show," nationwide. In December 2002 Weiner and OTR entered into a written agreement ("Host Agreement" – Exhibit 3) governing their syndicate/host relationship. The Host Agreement was extended in writing in January 2008 and again in November 2008 for a term extending through December 31, 2010. The Host Agreement contained a "Right to Match" provision pursuant to which OTR held a right to match the terms of any contract Weiner was prepared to enter into for his rendering of services in the radio broadcast industry after the expiration of the Host Agreement. Exhibit 3, ¶ 19.

In November 2010, Courtside, LLC ("Courtside"), another radio syndicator, made an offer for Weiner's services as reflected in a term sheet ("Courtside Term Sheet" – Exhibit 8).¹ The Courtside Term Sheet contemplated that Weiner would host his radio talk show and that Courtside would syndicate the show for a two-year term commencing January 1, 2011. In accordance with paragraph 19 of the Host Agreement, the Courtside Term Sheet was presented to OTR by Weiner's counsel. OTR communicated to Claimants, through counsel, that it was exercising its right to match the offer reflected in the Courtside Term Sheet. A dispute arose

¹ The parties to the Courtside Term Sheet were Courtside, on the one hand, and Weiner and SPI (Weiner's "loan-out" corporation), on the other hand. While both SPI and Weiner are identified as Claimants in this arbitration, for purposes of this Award, there is no meaningful distinction between the two.

between the parties as to whether OTR effectively exercised its right to match. Notwithstanding that dispute, Weiner continued hosting his talk show, and OTR continued to syndicate the show nationwide, through 2011 and to the present day. As noted above, and as reflected in the Interim Award of March 21, 2012, this panel found that OTR's exercise of its right to match the Courtside Term Sheet was effective.

By its exercise of the right to match, OTR agreed to continue its syndicator/talk show host relationship with Weiner for a two-year term commencing January 1, 2011, under the basic terms outlined in the Courtside Term Sheet.² In particular, OTR agreed to pay SPI semi-annually an amount equal to 50% of its "adjusted gross receipts" from the exploitation of Weiner's talk show (less all unrecovered advances to SPI). Exhibit 8, ¶ 3.³

Notwithstanding the continuing syndicator/host relationship, numerous disputes persisted between the parties. Some of those disputes relate to activities and events predating the Courtside Term Sheet and the exercise thereof, and some of the disputes relate to activities and events in 2011 and/or 2012.

CLAIMS

The issues remaining to be adjudicated after the issuance of the Interim Award, as described in the Report and Scheduling Order, are:

All claims, whether arising by contract, tort, or statute, in connection with any party's alleged non-performance of any and all agreements between the parties including, but not limited to, any agreement resulting from the matching of the Courtside Term Sheet.

The specific claims of the parties are numerous, and in many cases not clearly articulated, so that it would be impossible to list each of them here. However, to a certain extent, they can be summarized as follows:

Claimants assert that they have not been properly compensated, both under the compensation formula of the Host Agreement in effect through 2010 and under the matched Courtside Term Sheet compensation formula in effect since January 1, 2011. At the same time, Claimants assert that they have been damaged by a loss of ad revenue generated by "The Michael Savage Show" resulting from OTR's failure to properly promote the show and from other contractual breaches of OTR.

² As noted by the District Court in its order granting OTR's motion to compel arbitration and previously by this panel, the contractual relationship between the parties continues to be governed by Oregon law.

³ The terms "adjusted gross receipts" and "gross receipts" are defined in paragraph 3 of the Courtside Term Sheet. The same paragraph also provides for how and when advances are to be paid to SPI.

Respondent asserts that it has suffered damage in the form of lost ad revenues resulting from offensive statements made on the air by Weiner, from the failure on the part of Weiner to properly read advertising copy, from general belligerence on Weiner's part directed to employees, advertisers, and others, and from various other purported actions and conduct of Weiner. In addition to its contract based claims, OTR alleges copyright infringement on the part of Weiner on the grounds that he published one or more books utilizing text from his on-air broadcasts to which OTR claims copyright ownership.

DISCUSSION

The declarations offered by both sides were lengthy and the evidence voluminous. However, with very few exceptions, the testimony was unpersuasive, lacking in credibility, self-serving, lacking in foundation, highly speculative, unreliable hearsay, and not the least bit probative of the elements of any claim arising under contract, tort, or statute.

For example, each side claims to have been damaged over the years by a loss of ad revenue from Weiner's show. However, Claimants offered no competent, credible evidence that any purported loss of ad revenue was caused by OTR's failure to properly promote the show, nor did they establish by way of competent, credible evidence any quantification of such purported loss of revenue. Conversely, Respondent asserts loss of ad revenues as a result of two offensive comments made by Weiner on the air. Even if one were to assume that those comments are actionable, Respondent proved neither that the comments caused any advertisers to withdraw nor the quantification of any alleged loss of revenue.⁴

The panel finds that the only claim supported by competent, credible evidence is the one by Claimants for compensation during the second half of 2011. Respondent has acknowledged in writing the amount of \$745,543.80 as "the revenue sharing balance due on Friday, February 29, 2012, under the Match Contract formula for the second half of 2011 (after deducting amounts which had been paid to date)." Exhibit 737. OTR withheld payment of that amount to Claimants on the ground that it was offset by OTR's own claims against Weiner/SPI. Since all of OTR's claims in its counterclaim are rejected, it is found that the amount of \$745,543.80 is due and owing by OTR to Claimants as of February 29, 2012. Interest is recoverable on that amount at the rate of 9% pursuant to Oregon Revised Statutes 82.010 from February 29, 2012, to the date of this Award.

⁴ OTR relies exclusively on the testimony of its Chief Operating Officer, William Crawford, on the issue of lost ad revenues. His self-serving declaration does not provide competent, credible evidence of the reason any particular advertiser may have left the show. It is based on speculation that, but for Weiner's conduct, certain advertisers would have continued to buy air time. His testimony also ignores the possibility, which the panel believes to be quite reasonable, that some or even all of any lost revenue would have been replaced by buys from advertisers that are attracted to a program as popular and as controversial as "The Michael Savage Show."

The panel also finds that this breach by OTR is material and that, per Claimants' election, any and all agreements between the parties (including, but not limited to, the Host Agreement, as extended, and any agreement based upon the matched Courtside Term Sheet) and any future obligations arising thereunder shall be and hereby are terminated. *See, generally*, Restatement (Second) of Contracts, §§ 235-243; *Pollock v. D. R. Horton Inc.-Portland*, 190 Or.App.1, 16-17 (2003) ("whether there is a material breach is ordinarily a question of fact"); 1 Witkin Summary 10th (2005) Contracts § 926.

On all other claims, the panel finds that the parties failed to meet their burden of proof as to their respective claims, and accordingly all other claims by the parties against each other are hereby denied.⁵

AWARD

1. Respondent OTR shall pay to Claimants Weiner and SPI the sum of \$745,543.80, plus interest thereon at the rate of 9% per annum from February 29, 2012, to the date of this Award in the amount of \$38,788.70.
2. Within 60 days of the date of this Award, OTR shall pay to Claimants any and all compensation due and owing under the formula set forth in paragraph 3 of the Courtside Term Sheet for the period of January 1, 2012, to the date of this Award.
3. Within 60 days of the date of this Award, Respondent OTR shall deliver to Claimants all archived tapes and other "recordings" of "The Michael Savage Show" as that term is defined in paragraph 14 of the Host Agreement.
4. Except as otherwise set forth in this Award, any and all agreements between the parties (including, but not limited to, the Host Agreement, as extended, and any agreement based upon the matched Courtside Term Sheet) and any future obligations arising thereunder are hereby terminated.
5. The administrative filing and case service fees of the AAA, totaling \$33,500.00, shall be borne as follows: entirely by The Original Talk Radio Network, Inc.. The other administrative fees of the AAA, totaling \$600.00, shall be borne as follows: entirely by The Original Talk Radio Network, Inc.. The fees and expenses of the arbitrator(s), totaling \$129,244.78, shall be borne as follows: entirely by The Original Talk Radio Network, Inc..

Therefore, The Original Talk Radio Network, Inc. shall reimburse Claimants an additional sum of \$79,122.42, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Claimants. Otherwise, the parties shall bear their own attorney's fees and costs.

⁵ As an additional example, OTR's copyright claim fails from the outset as OTR neither alleged nor proved the requisite copyright registration under 17 U.S.C. § 411.

This Award is in full settlement of all claims between the parties submitted in this arbitration. All claims not expressly granted herein are hereby denied.

DATED: September 27, 2012



ROY G. RIFKIN



RICHARD J. IDELL



ROBERT M. NAU