IN THE MATTER OF THE ARBITRATION OF

MOUNTAIN AIR, LLC; HOLLY H. LARSEN and IDAHO MOUNTAIN AIR, LLC,	)	
Claimants and Counter-respondents,	)	
vs.	)	**ARBITRATOR'S DECISION AND AWARD**
BRUNDAGE MOUNTAIN AIR, INC., and DAVID S. EATON,	)	
Respondents and Counter-claimants.	)	

INTRODUCTION

This arbitration came on for hearing before Arbitrator W. Anthony Park on June 17, 2008, in Boise, Idaho, at the offices of Huntley Park, LLP. John L. Runft appeared on behalf of Claimants and Counter-respondents Mountain Air, LLC, Holly H. Larsen and Idaho Mountain Air, LLC. Barry D. Wood and Dana M. Herberholz appeared on behalf of Respondents and Counter-claimants, Brundage Mountain Air, Inc., and David S. Eaton.

Claimants originally brought an action in Fourth Judicial District Court in Valley County, Idaho alleging Respondents' breaches of an agreement to purchase the assets of Radio Station KMCL-AM, Donnelly, Idaho, including the acquisition of the authorizations issued by the FCC for the operation of the station. Respondents moved the Court for a stay of the District Court

action and for an order referring the matter to arbitration, which the Court granted. The parties then selected W. Anthony Park as the Arbitrator. The Arbitrator issued a Pre-Hearing Order on May 2, 2008, following a telephonic pre-hearing conference. The parties proceeded to hearing pursuant to the terms of the Pre-Hearing Order; the hearing concluded on June 20, 2008, at 3:30 p.m. The parties presented post-hearing briefs to the Arbitrator and the matter is now fully submitted.

After considering the evidence, both oral and written, and having considered the argument of counsel, the Arbitrator now issues his Decision and Award as follows:

DECISION AND AWARD

FACTUAL BACKGROUND

1. In 2007, and for several years prior, Respondent Brundage Mountain Air, Inc. ("BMA") was the owner of Radio station TMCL-FM and TMCL-AM, operating in McCall, Idaho with facilities licensed by the Federal Communications Commission ("FCC"). BMA appears to be a closely-held corporation, the stock of which is owned by Respondent David Eaton ("Eaton"). In 2006, BMA agreed to sell the FM facility and authorizations to an entity known as "FM Idaho Company, LLC" ("FM Idaho"). This sale was consummated by an agreement dated September 14, 2007. BMA also desired to sell the AM station in a transaction separate and distinct from the sale of the FM station. In that regard, Eaton and David Combes ("Combes") began discussions in the spring of 2007, concerning a possible purchase of the AM facility by Combes. The discussions continued from late spring through the summer, culminating with an agreement for the sale of the McCall AM station and related assets, together

with six acres of real property located in McCall. The sales agreements were between BMA as seller and Claimant Mountain Air, LLC ("Mountain Air") as buyer for the radio station, and between BMA and Idaho Mountain Air, LLC ("Idaho Mountain Air") for the real property.

2. Combes had "babysat" the radio station in 2007 while Eaton and his wife took a trip to China. Eaton and Combes had known each other for a long time, it would appear primarily in a professional capacity. Combes was (and still is) the principal operator of another radio station, KIOJ in Parma, Idaho. The total purchase package discussed, including radio station licenses, assets relating thereto and the real property upon which the radio station tower was located was a sales price of $300,000. This was broken down as $250,000 for the real property and $50,000 for the FCC license and physical assets of the radio station.

3. Eaton testified that Combes did not have sufficient assets to buy the properties on his own, so he said that he would try to find a buyer. Combes did in fact locate a willing buyer, Respondent Holly H. Larsen ("Larsen"). Ms. Larsen formed two companies, Idaho Mountain Air, LLC, and Mountain Air, LLC. Idaho Mountain Air, LLC was the entity which purchased the real property pursuant to a Real Estate Contract dated September 24, 2007. The seller was Brundage Mountain Air, Inc. (Cl Bates Ex 003). This Agreement contemplated dividing the $300,000 total purchase price into $250,000 for the real property, and $50,000 for the "license transfer of KMCL-AM Radio". The Agreement was accompanied by a Warranty Deed (Cl Bates Ex 013), dated September 25, 2007, signed by David Eaton, individually. The Deed purported to transfer to Idaho Mountain Air, the real property consisting of approximately six acres, upon which the tower for the radio station was located. Accompanying the Deed was a Promissory

Note dated September 25, 2007, pursuant to which Idaho Mountain Air agreed to pay $50,000 to David Eaton. (Cl Bates Ex 019). Finally, Eaton also signed a Bill of Sale dated September 25, 2007, in favor of Mountain Air (Cl Bates Ex 020). This Bill of Sale purported to transfer to Mountain Air certain equipment appearing to be equipment owned by the radio station. The Bill of Sale had as a footnote "to be transferred at the time the FCC license is granted to Mountain Air, LLC (Holly Larsen)" (Cl Bates Ex 020).[1]

4. After the real estate sales documents referred to above were executed, Mountain Air and BMA entered into two other agreements, both made effective on or about October 1, 2007: Asset Purchase Agreement ("APA") (Cl Bates Ex 124), and Time Brokerage Agreement ("AM-TBA") (Cl Bates Ex 157). Both of these agreements purported to deal with the sale of the radio station assets and FCC authorizations to Mountain Air. The AM-TBA, which is apparently typical in the industry, purports to deal with the circumstances between Seller and Buyer pending the approval of the transfer of the radio station license to the Buyer by the FCC. The TBA allows the buyer ("Broker") to avail itself of the radio programming and air time during the pendency of the license transfer. In other words, the license remains in the name of the seller while the transfer approval is sought, but the agreement still gives the buyer ("Broker") the right to run the station and the programming, to collect the revenues, pay the expenses, and so forth. The TBA imposes a duty on the Broker to reimburse to the licensee the cost of the air time and other related costs of operation. The licensee then has the duty to broadcast the programs

[1] It seems obvious that none of the parties to these transactions reflected in the Real Estate Purchase and Sale Agreement documents had the benefit of legal counsel prior to or at the time of execution.

selected by the Broker. After the license transfer is approved by the FCC, the closing process set out in the APA takes place. The TBA, by its terms, then expires and the Broker becomes the licensee. In this case, BMA and Mountain Air made the AM-TBA specifically subject to the FM-TBA which BMA had earlier entered into with FM Idaho (Cl Bates Ex 146). The FM-TBA was to be assigned to Mountain Air by BMA and Mountain Air agreed to assume BMA's duties. (Cl Bates Ex 158, paragraph 2). The assignment was, however, "subject to the consent of FM Idaho."

5. According to FCC regulations, the Licensee under a TBA must maintain two employees on-site. One is the manager and the other is not.

6. Following the execution of the APA and the AM-TBA, Mountain Air took over operation of the McCall AM radio station. The parties agreed that the effective date would be October 1, 2007. All new revenues generated by sales after October 1 would belong to Mountain Air. All sales revenues generated prior to October 1, 2007, would belong to BMA. The AM-TBA required Mountain Air, as broker, to pay to BMA, as licensee, the costs of operating the McCall AM station. Mountain Air was also required to reimburse to BMA the salaries and benefits of David Eaton and Susan Eaton. Under the AM-TBA, David Eaton was the manager of the station and Susan Eaton was a "shared employee". Under the FM-TBA, David Combes was the manager and Susan Eaton was the shared employee. The expenses in this regard were spread between the FM-TBA and the AM-TBA. Mountain Air had specifically assumed the obligations of BMA under the FM TBA. The expenses associated with the combined FM and AM-TBAs were approximately $12,500, while the expenses attributable only

to the McCall AM TBA were approximately $7,000 to $8,000. It soon became clear that this bifurcated obligation was very confusing to and not clearly understood by Larsen. BMA submitted its first bill to Mountain Air as reflected in Cl Bates Ex 210, which showed an "LMA fee of $5,000". The $5,000 LMA fee, when broken down, included David Eaton's salary and benefits for the month of October. The October billing (Ex 210) also included Susan Eaton's salary for October in the amount of $3,229.50. Cl Bates Ex 167, which was Attachment 1 to Schedule A of the TBA AM, entitled "Anticipated Monthly Expenses for KMCl AM" showed a total of only $4,000 for salaries for manager and staff and total monthly expenses of only $7,475. Apparently, Larsen had never had adequately explained to her the fact that by assuming the duties of BMA under the FM TBA, her company was obligated to also pay the amounts reflected in Cl Bates Ex 210. This confusion and misunderstanding led to bad feelings and acrimony. Several meetings were held over the ensuing weeks and months. Larsen was relying to a great degree on Combes for guidance and explanation of the meaning and thrust of the agreements which she had executed on behalf of her company.

7. Notwithstanding the misunderstanding, Mountain Air paid the billings for October (Cl Bates Ex 210), November (Cl Bates Ex 212) and December (Cl Bates Ex 214).[2] These billings were ultimately replaced with three new billings for October, November and December (Cl Bates Ex 215, 216 and 217), which broke out the salaries. By this time, Ms.

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[2] These three billings all showed the $5,000 "LMA Fee" for $5,000. Both Eatons testified that Combes had instructed them to show it as a lump sum rather than breaking out the salary and benefits payable to David Eaton. He said it would make it easier for Ms. Larsen to understand.

Larsen understood what was included.

8. The next event of note was the notification from the FCC that the McCall AM license transfer had been approved, which came on January 16, 2008 (Cl Bates Ex 355). Pursuant to the terms of the APA, the closing was to take place within 10 business days from the approval of transfer of the license, APA, paragraph 11, (Cl Bates Ex 134). Barry Wood, counsel for Respondent, initially set the closing for 10:00 a.m. on January 31, 2008. By that date, Mountain Air and Larsen had retained John Runft as counsel for Claimants. Although the parties disagree about whether she was entitled to do so or not, neither Larsen nor any other representative of Mountain Air appeared at closing at 10:00 a.m. on January 31, 2008.

9. Mountain Air did not pay the January 2008 expenses, nor did it tender $50,000 to BMA, either at a closing or at any other time.

10. The APA stated in Section 3 (Cl Bates Ex 128) that the buyer had deposited with the Escrow Agent the entire purchase price of $50,000. This deposit was to be held and disbursed by the Escrow Agent pursuant to the terms of the contract. This deposit was never made by Mountain Air.

11. Beginning on the January 31, 2008 date, counsel for the parties engaged in lengthy written email colloquies (Resp Bates Exs 1022-1044) in which each advised the other of various breaches of the agreements. Counsel for Mountain Air put counsel for BMA on notice of an alleged breach by BMA with respect to the height of the tower for the McCall AM station. Counsel asserted that the tower was only 85 feet tall and was supposed to be 125 feet (Resp Bates Ex 1023-1025). BMA submitted its "Engineering STA" (Cl Bates Ex 357), apparently on

or about February 29, 2008. BMA sought special temporary authority ("STA") to operate the tower at a height of approximately 85 feet instead of the 125 feet earlier required and explained the need for it in Exhibit 16 attached to the "STA" (Cl Bates Ex 362). By letter dated March 6, 2008 (Cl Bates Ex 363), the FCC notified Barry Wood that the special temporary authority had been granted but that the authority would expire on September 6, 2008.

12. The consent of FM Idaho to the assignment of BMA's rights under the FM-TBA to Mountain Air was never given.

The above recitation of facts does not purport to identify the various factual disputes between the parties. To the extent that those disputes are relevant, they will be dealt with in the "Analysis" section below.

ANALYSIS

ALLEGED BREACHES

Both sides allege that the other has breached the relevant contracts in various ways. Mountain Air alleges that BMA breached the AM TBA by not permitting Claimant direct access to the revenues and collections. Mountain Air also alleges that BMA breached the APA by not providing a tower that met FCC requirements.

BMA alleges that Mountain Air breached the APA and/or the Am-TBA by: (1) not depositing the $50,000 in escrow as contemplated by the APA; (2) by not paying the January LMA charges; (3) by not appearing at closing; and (4) by filing a lawsuit in district court instead of proceeding directly to arbitration.

REMEDIES SOUGHT

Mountain Air asks, as its primary remedy, for the Arbitrator to order specific performance pursuant to 14.3 of the APA (Cl Bates Ex 136).

Mountain Air also seeks "incidental damages" as part of the specific performance remedy. Its alleged damages are set forth on Cl Bates Ex 209, with a two-page attachment.

BMA, in its Counterclaim, seeks damages and relies on 14.2 of the APA which, if followed, would entitle BMA to recovery of the escrow deposit and the interest accrued thereon as liquidated damages. The escrow deposit, although never made, was to have been in the amount of $50,000, the purchase price of the McCall AM station.

The status of real property. It appears to the Arbitrator that both sides intended that the real property be sold separately and distinct from the radio station license and related assets. Even though the Real Estate Purchase Agreement identified a total purchase price of $300,000, by its own terms it segregated $50,000 of that purchase price for allocation to the radio station license and assets. Furthermore, counsel for BMA advised the Arbitrator at the hearing that no claim was being made against the real property by BMA. Accordingly, the only agreements the terms of which the Arbitrator believes are relevant in this matter are the APA, the AM-TBA and the FM-TBA.

DECISION

In analyzing the negotiations leading up to the execution of the APA and the TBA AM, it is abundantly clear that David Combes and David Eaton, both experienced professionals in the radio industry, agreed to the basic terms of the deal. Ms. Larsen, a day-care operator with no

experience at all with radio stations, FCC requirements or the customs and practices of the communications industry, relied to an extraordinary degree upon Combes. He had extensive experience in the industry. He and Eaton had been discussing a possible purchase of the AM facility since 2005. Then, when Eaton was able to negotiate the sale of the FM in 2006 which would consummate in 2007, the discussions between the two men intensified in the late spring and early summer of 2007. Combes apparently had no money and so he went out to find someone who had the financial wherewithal to purchase the AM license and the six acres of real property. He found that person in Holly Larsen. The testimony of both Combes and Eaton concerning the involvement of Larsen (and her husband) is remarkably similar. Larsen, her husband and Combes met with Eaton in late summer of 2007. They all went to the bank together to see if she could obtain local financing (which she did not), but she was able to secure financing in Boise and the various agreements followed.

The Arbitrator is constrained to say that it became painfully obvious at the hearing that Larsen never had (and perhaps does still not have) an understanding of the complexities of the Asset Purchase Agreement and both Time Brokerage Agreements which governed the purchase of this AM station. Having said that, however, it is equally clear that Combes did. His testimony makes it abundantly clear that he knew exactly what would be required of the purchaser pursuant to the APA, the AM-TBA and the assignment and assumption of the FM-TBA. Larsen apparently never had an understanding going in of what her obligations would be. Her lack of understanding and confusion over the financial requirements relating to the AM-TBA and the assignment and assumption of the FM-TBA created a toxic atmosphere from which

the parties never recovered. Combes' suggestion to disguise the LMA fee of $5,000 each month for the months of October, November and December only added to Ms. Larsen's confusion. So, by the time the closing date, triggered by the approval of the transfer of the AM license to her company approached, she had become extremely suspicious and mistrustful.

However, the Arbitrator does not believe that her lack of understanding and her payment of the financial obligations reluctantly and under protest, really have any bearing on the ultimate legal decision to be made in this matter. Mountain Air is not claiming any breaches of the contract based on misrepresentations as to the financial duties imposed upon it by the APA or the TBA agreements. Instead, Mountain Air alleges as the most serious breach the inadequacy of the tower facility. The other complaint that Mountain Air has raised with respect to the contracts is that BMA wrongfully withheld the revenues from her to which it was entitled under paragraph 4 of the AM-TBA (Cl Bates Ex 158, paragraph 4). Paragraph 4 provided that Mountain Air, as broker, would be entitled to all revenues of the stations during the term of the contract. The revenues were sent to Mountain Air for a period of time, but then, after Ms. Larsen sent her letter of January 6, 2008 (Cl Bates Ex 174), to Eaton, Susan Eaton testified that she was instructed by Eaton to resume control over the collection receipts although giving full credit for them to Mountain Air.[3] Given the circumstances then existing, the failure to allow Mountain Air the collections does not rise to the level of a material breach by BMA.

[3] The January 6, 2008 letter purported to rewrite the contract. It is understandable why Mr. Eaton was concerned.

However, the substantial breach upon which Claimant relies is the tower height discrepancy. Combes testified that he and Eaton had had several conversations over the last year or two about the fact that the tower was only 85 feet high and how there was a need to get an authorization from the FCC to build a 195 to 200-foot tower. So, it appears to the Arbitrator that the Claimant, through her agent Combes, had at least imputed knowledge of the deficiency in height. Even having such knowledge, however, would not exclude it as a material breach if that would jeopardize the license. BMA had warranted that it was selling an FCC AM license in good standing, unimpaired. BMA, upon being put on notice of the potential tower height breach then obtained the temporary permit and letter from the FCC representative authorizing continuing with the current height (as enhanced by the "top hat" work done by Mr. Stargel back in 2003 and the subsequent work which he did in the winter of 2008), after notice of the deficiency was given.

Therefore, to the extent that the deficiency concerning the height of the tower constituted a material breach of the APA, BMA took adequate steps to cure the breach and, in doing so, gave Mountain Air notice that the tower deficiency would be corrected. In his letter of February 13, 2008, to counsel for Mountain Air (Resp Bates Ex 1032), counsel for the BMA, at paragraph 11 (Resp Bates Ex 1035), committed to correcting the tower height issue at BMA's expense. This was borne out by the STA temporary permit of March 13, 2008. (Cl Bates Ex 363).[4]

[4] The Arbitrator rejects Claimant's assertion that BMA's STA Request (Cl Bates Ex 362) was a misrepresentation of the tower site problem.

The Arbitrator concludes, therefore, that Respondent timely corrected any material breach with respect to the height of the tower.

Claimant is seeking equitable relief from the Arbitrator, based on the doctrine of specific performance. In order to avail itself of this remedy, however, Idaho law requires that a party who seeks specific performance "must allege and prove that all conditions precedent to the other party's duty to perform have been satisfied." (*Hinkle v. Winey*, Court of Appeals of Idaho, 126.993, 895 P.2d 594; 1995 Ida. App. LEXIS 69). Mountain Air has failed to meet the Hinkle test. Mountain Air wants BMA to specifically perform by transferring the license and the other assets. In order to satisfy the Hinkle standard, however, Mountain Air must show that it has performed all conditions precedent to BMA's duty to perform. It cannot do so. Here is why: (1) it did not deposit the $50,000 into escrow as required by the APA; (2) it did not tender the $50,000 at a closing setting; (3) it did not appear at closing, either on January 31, 2008, or at any other time afterwards, although invited on several occasions to do so by counsel for BMA; and (4) it ignored the requirement of the APA under 14.4, Cl Bates Ex 136, requiring any dispute arising out of the APA to be resolved by arbitration.

As noted above, specific performance is an equitable remedy. The venerable maxim "she who seeks equity must do equity" comes to mind. Although the Arbitrator can understand Ms. Larsen's discomfort with receiving the closing documents from Mr. Wood in such a way as to cause her consternation and confusion, by that time she did have capable counsel in Mr. Runft. Any problems with the closing documents could have been worked out and a new closing date arrived at after a colloquy between counsel concerning any problems in the original documents

submitted. On January 31, or in the days following, it would have been a simple matter for Claimant to deposit the $50,000 into escrow, accompanied by a caveat to the closing agent that the funds were not to be released until both parties had reached agreement on the closing requirements. Mr. Wood made it clear in his email letters to Mr. Runft that he and his client were amenable to delaying the closing to allow the parties to work through the problems. (Cl Bates Ex 1035, paragraphs 11 and 12).

In that regard, it is certainly worth noting that as the time for closing (whatever that may have been) drew near, Mountain Air had not obtained the consent from FM Idaho to assume BMA's position in the FM-TBA. That was the "elephant in the room" that should have given Mountain Air strong motivation to move into a closing mode quickly. Wendell Starke, the principal of FM-Idaho, testified that he was willing to consent to the assignment of the BMA's rights and duties under the FM-TBA provided he received assurances that the dispute between BMA and Mountain Air had gone away. He also wanted indemnification from BMA, but the primary need, from FM-Idaho's perspective, was that the dispute be resolved. Consent to this assignment was extremely important to the successful operation of the AM station, but it was never obtained. One wonders how the lack of the consent affects Mountain Air's proposed specific performance remedy, since the Arbitrator does not have jurisdiction to order FM-Idaho to do anything. One also wonders how Mountain Air could successfully operate the AM station without access to the FM programming.

As the Arbitrator attempts to balance the equities, as it were, in this case, he cannot help but be struck by the fact that both parties meant well. The Arbitrator empathizes with Ms.

Larsen who, venturing into unknown territory, necessarily relied on Combes for advice and counsel. It appears that he may not have explained to her adequately the intricacies of these complex agreements. But, since Mountain Air had (even though in protest) paid all the invoices submitted to it up to the closing date, it is puzzling that she elected not to make a record at a mutually agreed closing date and tender the funds which the contract required her to have on deposit at the time of closing.

With respect to the BMA and Eaton, the Arbitrator fails to see any notable inequitable conduct. BMA followed the contract language in the charges that were made and followed Combes' own instructions on how to set up the billings. BMA cannot be held accountable for Ms. Larsen's misunderstanding of her obligations under the agreements. Furthermore, BMA did everything possible to cure the defect with respect to the tower. Indeed, if the matter had closed as contemplated, Mountain Air would be the owner of a facility with an adequate tower as required by the STA permit by September 6, 2008.

AWARD

Based on the foregoing, the Arbitrator concludes that: (1) Mountain Air is not entitled to a decree of specific performance; and (2) Mountain Air is therefore not entitled to an award of damages.

BMA is seeking an award of liquidated damages based on paragraph 14.2 of the APA. These damages are equivalent to the amount that should have been deposited with the Escrow Agent back at the time of the execution of the APA, in the amount of $50,000. The Arbitrator must observe that his understanding of the law is there must be some reasonable relationship

between liquidated damages and actual damages suffered. BMA has recouped the January and February 2008 payments it was owed under the TBA agreements, from the collections of Mountain Air. It has waived any claim to lost profits. BMA still owns the AM radio station and licenses. Presumably, it will still be able to sell the station to some other buyer. Having read the Respondent's brief concerning damages, the Arbitrator is left scratching his head as to what BMA's actual damages have been, if any. The Arbitrator has not had the benefit of any briefing in support of the proposition that a liquidated damages provision must be blindly enforced even in the absence of any proof of actual damages. The Arbitrator declines to do so. The Arbitrator understands, of course, that the BMA has sustained attorney fees in litigating this matter. BMA is the prevailing party. As the prevailing party and pursuant to 14.4 of the APA, BMA is entitled to an award of reasonable attorney fees and costs of arbitration.

Accordingly, the Arbitrator makes an award to Respondent as follows:

1. Actual damages in the amount of $ -0-;

2. Reasonable attorney fees and costs of arbitration to be determined following post-award submission by counsel for BMA of its Memorandum of Costs and Attorney Fees..

DATED this 16th day of July, 2008.

W. Anthony Park, Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2008, true and correct copies of the foregoing instrument were served by facsimile and U.S. Mail, postage prepaid, on the following parties:

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