

To: Michelle Malkin

From: Eric O. Costello, Esq.

Date: 18 August 2005

Re: Multicultural Radio v. Radio Free America et alia

This memorandum is pursuant to your invitation tendered to me on 17 August 2005 to comment on the Summons and Complaint filed in the Supreme Court of the State of New York, County of New York, in the above-referenced matter.

You are free to quote from this memorandum as you see fit. Please be advised, of course, that this memorandum does not constitute legal advice of any kind, and is meant to provide commentary on an issue of public interest.

Further to that last thought: I notice a number of comments, indeed very learned comments, have already been tendered to your site (and no doubt Radio Equalizer) regarding the Summons and Complaint in Multicultural Radio (which I shall refer to hereinafter as "MRB") versus Radio Free America, Inc. (which, along with its affiliate Progress Media, I shall refer to hereinafter as "RF/PM"). Rather than directly parallel what those individuals have done, what I propose to do here is to take a Tim McCarver - Joe Buck (rather than a Benjamin Cardozo - Learned Hand) approach, and walk the readers through the two documents, pointing out items of interest that strike my fancy. Colour commentary, in other words. To begin...

I. A Few General Reactions

Both documents were rather polished in format, and were well-written. This is not all that surprising, since the counsel of record for MRB is Gibson, Dunn & Crutcher ("GDC"). GDC is a very well-established and prominent firm with national reach. This is of some significance when one is pondering the legal firepower that can be brought to bear on RF/PM in this matter. One deprecates GDC at one's own risk.

In general, I thought GDC was fairly well restrained in its language. To be sure, as is typical in a Complaint, the tone is similar to that of an opening statement; it is argumentative, and there is some sharp language regarding the actions of the various defendants. But on the whole, I felt that the language tells of a legal team that has a high degree of confidence in its case, and feels that, rhetorically speaking, it need not go whole hog to hammer the defendants. Based on how much information is set forth in the Complaint, I believe that this confidence is fairly well-placed.

I also felt that GDC was restrained in its remedies that are requested. The six causes of action all tie together in one coherent group, and none of the relief sought is particularly outré. Fraudulent conveyance is a pretty plain-vanilla kind of action that has been recognized for many, many decades, and it is highly unlikely that GDC is breaking new ground here. To the contrary: I am sure that GDC is going to have a wealth of prior case law to back their causes of action. (Counsel for RF/PM is going to have its work cut out for it searching for case law that will exculpate them.)

Keep in mind that "discovery" in this action could be ongoing, and ongoing for quite

some time. One thing that often slows down discovery is the question of which documents are “privileged,” that is, which documents in whole or in part can be kept secret because they reflect attorney work product or the advice of attorneys. I suspect there are a number of documents that will fall into this category. (In commenting on the case, one should be careful in publishing documents that might be privileged, as this could, in theory, impact the case.) A key document, or documents, that we do not have are the demands for discovery either by the plaintiff or the defendants, which would provide a very interesting road map for the respective legal tactics (and, for that matter, might show how much MRB really knows in advance, a point I will get back to).

This is not an action that is going to be dismissed on a motion for summary judgment brought by the defendants. There would seem to be more than enough for a case to be sent to a trier of fact, and motions for summary judgment for defendants are rarely granted.

II. The Summons

The action is being brought in the “Supreme Court” of the State of New York for the County of New York (i.e., Manhattan). For those who do not live in New York State, it should be noted that the title “Supreme Court” is something of a misnomer, as it is, in fact, the trial court level in the New York State judicial system. Above it is the Appellate Division and the top level, the Court of Appeals.

I find it mildly interesting, given the broad number of individual plaintiffs who live in other states, that it was a New York State court, and not a federal court, that was chosen as the venue. It is possible that, to play for time, RF/PM and the individual defendants may seek to have the matter transferred to a federal court. As MRB is based in New York, and RF/PM is based in New York, and a lot of the actions complained of took place in New York, you will either see the action stay in the Supreme Court, or be transferred to the U.S. District Court for the Southern District of New York.

There is a reference in the Summons to Answers to be filed, which were not included in the .pdf I reviewed. For the most part, these Answers would be pretty dry, as they would be largely confined to admitting or denying the allegations set forth in the numbered paragraphs of the Complaint. The “fun” would happen if there were counterclaims, or third-party actions, brought in the Answers.

I am not aware of any action that was taken by any of the defendants with regard to answering the Summons and Complaint, or if they received any extensions of time.

I do not know anything about the counsel listed in the Summons, though the Martindale-Hubbell directory of lawyers usually provides basic information, such as how long the attorneys have been admitted to practice, where they went to law school, &c.

The 05107278 number stamped on the document is probably the index number for the case (properly read, 107278/05). Later on the case, you’ll see a (XXX) set of initials, which would be the initials of the presiding judge. (Cp. Paragraph 25 of the Complaint.)

III. The Complaint

One point to keep in mind with the Complaint is that this is, in essence, an opening argument, giving only one side of the story. The plaintiff is not at all obligated to set forth any exculpatory facts in this document. The objective of a Complaint is to make the other side look as bad as possible. In assessing the state of the case for RF/PM and the individual defendants, this must be kept in mind.

Paragraph 1 is essentially a summary of the case. There is some pejorative language here describing the case, which isn't overly surprising. The \$255,000+ judgment seems not to have been appealed by RF/PM, and the "interest clock" is still ticking on this. (The judgment relates to the dispute between MRB and RF/PM over matters relating to a Chicago contract; the Los Angeles contract, as noted below, is still the subject of litigation, another possible contingency against RF/PM.)

Paragraphs 2 through 25 introduce us to the Plaintiff, MRB, the corporate defendants, the individual defendants that were corporate officers of either RF/PM or Piquant, and the individual defendants that were investors in one or the other of RF/PM or Piquant. (One of these investors, Anita Drobny, is an officer of the Board of Directors of Piquant -- this is not the same as being an officer of Piquant.) Paragraphs 22 through 25 specifically tell the Court (and us) why they are allowed to bring the action in this particular court.

Points of interest: (a) has Radio Free America, Inc. filed any bankruptcy petitions in Delaware? (b) is Radio Free America, Inc. in good standing with the Secretary of State of Delaware? (c) note that Radio Free America and Piquant LLC appear to have the same address -- in assessing whether the asset sale was arms' length, this might be a point indicating that it was perhaps not arms' length (d) note the number of individuals who were in both the Radio Free America and Piquant camps (E.g., Kreeger and Sinton for the officers and each one of the "Investor Defendants) -- again, this goes to the issue of whether the asset sale transaction was truly arms' length (e) note the spread of states in which the defendants live -- this may push the case to federal court.

In reading the rest of the complaint, one should keep in mind that MRB's causes of action relating to fraudulent conveyance will rest on the need to prove three sets of facts. (1) That RF/PM was an insolvent entity. (2) That Piquant, in buying the assets of RF/PM, did not give fair value for the assets. (3) That the purpose of the transaction would be to delay or hinder creditors. GDC has drafted the complaint to hit upon these points repeatedly, which is why you see things the way you do.

Paragraphs 26 through 31 describe some of the early efforts to form Air America Radio. Note that GDC uses language (especially in 28) to paint a picture of a wobbly financial status (going to the first point in proving MRB's case). Why MRB is involved in this whole mess is set forth in paragraphs 29 and 30.

Paragraphs 32 through 46 are designed by GDC to paint a picture of Air America as an entity in serious financial trouble. Paragraph 32's reference to the party is meant to draw a contrast in not paying creditors versus throwing a party. It would be very interesting to know how, exactly, GDC got a hold of the quotes referred to in Paragraphs 34 and 35. It is possible that these were the product of the litigation relating to the Chicago agreements. It is also possible that there is a source that was, or is, on the inside of Air America giving materials to GDC and MRB.

Paragraphs 36 and 37 are designed to show how desperate RF/PM was, by turning to Gloria Wise for funding. Note that the \$875,000 is indicated as having been loaned in about six months (prior to the launch of Air America), that all of the \$875,000 is allegedly tied to Air America (as opposed to alleged personal matters for Evan Cohen), and that the sum allegedly loaned to RF/PM was fractionally under half of Gloria Wise's total cash as of a date shortly before. (GDC has probably reviewed Gloria Wise's filings with the New York Attorney General, the supervisor of New York charities, to get this information.) Note also that these allegations came before the Gloria Wise matter was generally known to the public, an interesting commentary on those that would critique the blogs' coverage of the

whole Air America matter.

Paragraph 38 is meant to show the serious burden of obligations from just one source (MRB) that RF/PM had. Note that the \$1.5 million figure relates to startup costs *before* Air America's launch.

Paragraphs 39 through 46 are designed to show how RF/PM acted a number of times in bad faith. For example, by stopping cheques and then claiming bank error (compare Paragraphs 40 and 44), by defaulting on agreements, making negative statements in press releases regarding the head of MRB, and ultimately not honouring the settlement agreement relating to the litigation involving the Chicago station. Interestingly, RF/PM agreed to settle the matter for the amount that MRB demanded it pay under the Chicago agreements, hardly evidence of a strong legal case for RF/PM in that litigation.

Paragraphs 47 through 84 are the meat of the Complaint, in that they set forth crucial information as to all three elements of the case for a fraudulent conveyance.

Paragraph 47's phrasing indicates that GDC does not yet have the financial data for RF/PM, but is assuming, because of the default under the Chicago agreements, that RF/PM couldn't meet its obligations.

Paragraph 48 is another statement of bad behaviour on the part of RF/PM, regarding its continued downward spiral. Because of this, Paragraph 49 asserts, RF/PM was under an obligation to treat its creditors fairly, by taking open and above-board steps to resolve its insolvency, which could have been done by fresh investments, a merger, a receivership, or a bankruptcy filing.

Note that Paragraph 50 seems to confirm Al Franken's public statement about not being paid. Query where GDC got this confidential information. In point of fact, many of the statements in the following paragraphs indicate that somehow GDC has talked to a person or persons with first-hand knowledge of the events being described.

Paragraph 52 notes the break in management of Radio Free America. Note in particular the use by GDC of the word "temporary" for the relinquishing of voting control.

It is very interesting that David Goodfriend, who was the sole director of RF/PM for a period of time in May, 2004, and who had sole voting control during that period, is *not* a defendant in this matter. Indeed, he is portrayed sympathetically in the Complaint (cf. Paragraphs 55, 61 and 63) as not going along with this matter. It is worthy of speculation as to whether Goodfriend is cooperating with MRB and their counsel.

Compare Paragraphs 57 and 51. In 51, the investors say that they will not pump any more money into RF/PM so long as there is current management in place. Then it become a "reorganization" of Air America. Query: why did the investors not simply put more money into RF/PM? Cp. Paragraph 59, which draws the attention of the reader to this fact, and notes the commonality among the groups (a key fact for disproving this was an arms' length transaction.) The question of investment vehicle choice is going to be a key question going to the heart of the motivations of Piquant and the individual defendants, and whether they tried to defraud creditors.

It is not clear from Paragraph 54 whether Latham & Watkins (a very highly respected firm) is representing the investors as a whole, or some other entity. Note that Paragraph 55 implies that at least one investor had their own counsel.

Paragraph 55 is potentially explosive, since, as accurately noted, not paying payroll taxes is illegal. This is another point GDC is making to show that the management of RF/PM was not acting in an above-board, honest fashion. (There's also something of an irony here, given Air America's presumed attitude toward corporate tax cheats.)

Note the language in Paragraphs 56 and 57, where the words "scheme," "euphemistically," and "transparent attempt" are used. All of this is directed at colouring the argument in the worst light for the defendants. Query as to where GDC got the quote from Sheldon Drobny, and how they knew he was an "architect" of the scheme.

Paragraph 58 is key to the last two of the six causes of action brought by MRB (vide Paragraphs 90-136, especially 122-136), tying the individual "Investor Defendants" into the scheme to dump the debts of RF/PM, and holding these defendants accountable.

Paragraph 60's fuzzy phrasing seems to imply GDC doesn't have a firm grip on the timeline involved. Likely this would be a subject for depositions of Kreeger and other defendants, to nail down these dates.

Paragraph 62 again tries to paint the defendants in a bad light, by making them out to be bully-boys armtwisting Goodfriend into taking a risky and possibly illegal move. Note how Goodfriend is described in a friendly fashion.

Walter Leaphart is introduced briefly in Paragraph 63. He is not a defendant in this case. This is probably because he refused to go along with the transaction, and resigned. Cf. Paragraph 65. The fuzzy nature of the language in Paragraph 65 indicates that GDC has not nailed down the facts there, but has heard them second-hand. Clearly, GDC did not have a copy of the resignation letter of Leaphart when they wrote this.

Paragraph 64 is part of the building of facts to show how the defendant Sinton bears sole responsibility for the transaction, from the standpoint of RF/PM, since he had sole voting control (after Leaphart's resignation) over the entity, and was its sole director.

Paragraph 66 is interesting. The "on or around" language indicates that GDC did not have a final copy of the Asset Purchase Agreement ("APA"), but the specificity of the listing of the "valuable assets" and the comment in Paragraph 67 regarding obligations makes me speculate that they got a hold of a draft from an insider. The APA is absolutely vital to an understanding of whether fair compensation was paid for the assets of RF/PM, and a nominal consideration would also be part of an argument that the transaction was meant to defraud the creditors of RF/PM, including MRB. Paragraph 69 states bluntly that no consideration was given for the assets, and Paragraph 67 is clearly meant to show that RF/PM intended to stiff MRB by not conveying the obligation to MRB (that is, the obligation to pay under the Chicago agreements) to Piquant.

Paragraph 70 is a statement designed to tie into the elements of proving fraudulent conveyance.

It would be interesting to know where GDC got the information set forth in Paragraph 71 (relating to \$2 million owed in accounts payable and the lack of funds to pay same), since it is not made on "information and belief." This makes me speculate again that GDC has some inside information on RF's activities, and that someone is cooperating with them. This, again, goes to the issue of insolvency.

Paragraphs 72 through 84 are designed to show further bad acts on the part of the defendants. MRB is essentially claiming that no only did Piquant and the individual

defendants strip RF/PM of their assets, but they essentially took the engine out of RF/PM, by preventing them from conducting any business that would generate income to pay off creditors (cf. Paragraphs 79 and 80). This, obviously, is keyed toward the element of proving that the defendants intended to defraud or hinder creditors.

Again, note that in Paragraphs 74 through 76, GDC sets forth specific information. Where did they get the copy of the Settlement Agreement that they liberally quote from?

GDC attaches significant importance to the fact that the claims of MRB are carved out of the indemnifications in the Settlement Agreement. The ellipsis fuzzes up what other claims might have been carved out as well.

Paragraph 85 is meant to show, again, that RF/PM was not acting in good faith, by showing that its action against MRB was entirely without merit (implying, in a way, that it was a delaying tactic on the part of RF/PM). 10% is a statutory rate of interest on judgments, and one that could greatly hurt Piquant if MRB succeeds in this action.

The interesting thing about Paragraph 87, which others have noted, is that Piquant apparently, in some way, assumed the \$875,000 debt to Gloria Wise. How exactly this squares with the "moral obligation" statements made by Air America is not clear. GDC is drawing a contrast between the Gloria Wise debt and the MRB debt, showing bad faith on the part of Piquant in picking and choosing its creditors (in this case, to protect Evan Cohen as an officer and director of Gloria Wise, perhaps).

Paragraph 89 shows that there is another potentially substantial contingency outstanding against RF/PM, relating to the Los Angeles agreements between RF/PM and MRB. This fact, which would have been at least known, and possibly pending, at the time of the asset transfer (the timeline is not clear in Paragraph 89), would again play a role in proving the elements of fraudulent conveyance, in going to insolvency and motive to hinder creditors.

IV. The Claims for Relief

The first four claims all tie together, in that they are against the corporate defendants Radio Free America and Piquant, and all four claims essentially claim fraudulent conveyance, and demand that either the transaction be set aside to the extent necessary to satisfy MRB's claim in the Chicago agreements (\$255,000 and counting), or MRB could attach on the assets conveyed to Piquant. Note the requests for punitive damages, alleged to be proper because of the deliberate nature of the acts involved.

The last two claims are designed to tie the individuals into the bad acts, and hold them responsible for designing and implementing the fraudulent conveyance, for their own benefit as officers and investors.

"Joint and several" means that if MRB wins these causes of action, they could, if they wanted to, seek the entire judgment granted under the two individual actions from one individual defendant. Translation: deep pockets get hit first.

V. What Do I Want To See?

There are a number of documents I'd love to get my hands on, including but not limited to:

- (1) Defendants' Answers to the Complaint;
- (2) The discovery request(s) of MRB;

- (3) The Asset Purchase Agreement and all schedules to it;
- (4) The corporate minute books of Radio Free America and Piquant, including resignations;
- (5) The full text of the Settlement Agreements
- (6) The agreements signed by investors to invest in Piquant LLC, including all disclosure documents furnished to investors; and
- (7) Deposition transcripts, if any have been taken.

This is not to speak of the matters relating to the Gloria Wise loan or loans (such as the terms, guarantees, &c.). It would be also interesting to know who is providing the inside information to GDC that clearly shows up in the Complaint.

I hope you find this discussion of interest to you, and your readers.