American Arbitration Association
Dispute Resolution Services Worldwide

FAX

Western Case Management Center

6795 N. Palm Avenue, Floor 2, Fresno, CA 93704
Telephone 559 490-1900 Facsimile 559 490-1919

DATE NOVEMBER 14, 2000

To Elhanan C. Stone, Esq.

COMPANY Hall, Dickler, Kent, Friedman & Wood LLP

FAX NUMBER (212) 935-3121

FROM Kimberly J. Colbert
Fax Number (559) 490-1919
NUMBER OF PAGES 14 (including cover page)

RE 72-300-00054-00 KJC
Steve Guttenberg; Guten Corp, Inc.;
and
The Coca-Cola Company

Note: Arbitrator's Award

American Arbitration Association
Dispute Resolution Services Worldwide

Western Case Management Center

6795 N. Palm Avenue, Floor 2, Fresno, CA 93704
telephone: 559 490 1900, toll free: 877 528 0880
facsimile: 559 490 1919
www.adr.org

November 14, 2000

Via Facsimile and 2nd Day Mail

Jeffrey C. Foy, Esq.
Atty for Steve Guttenberg; Guten Corp, Inc.;
Attorney at Law
1260 N. Havenhurst Dr., Suite 204
Los Angeles, CA 90046

Elhanan C. Stone, Esq.
Hall, Dickler, Kent, Friedman & Wood LLP
Atty for The Coca-Cola Company
909 Third Avenue, 27th Flr.
New York, NY 10022

Re: 72 300 00054 00 KJC
Steve Guttenberg; Guten Corp, Inc.;
Screen Actors Guild (ex oficio)
and
The Coca-Cola Company
Grievance: breach of SAG Commercials Contract;
unauthorized use of name & likeness

Dear Parties:

By direction of the Arbitrator, we herewith transmit to you the duly executed Award and Opinion in the above-captioned matter.

The Arbitrator's bill is included in paragraph four of the award. Your check should be prepared and mailed directly to the Arbitrator not to the American Arbitration Association.

The American Arbitration Association, in its publications Summary of Labor Arbitration Awards, Arbitration in the Schools and Labor Arbitration in the Government, reports Awards in labor cases. These monthly services are used by practitioners in the field as well as for educational and research purposes.

The AAA would like to consider the enclosed case of yours for reporting in a forthcoming issue and/or making it available for research and educational purposes. Unless we hear from you to the contrary within one (1) month from the date of this letter of transmittal, we will assume that you have no objection to our doing so. Objections to the use of the decision should be sent to the Publications Department, 335 Madison Avenue, New York, New York 10017-4605.

Your cooperation in this matter is greatly appreciated.

Sincerely,

Kimberly J. Colbert
Case Manager
(559) 490-1897
colbertk@adr.org

Enclosure(s)

cc: Dixon Q. Dern, Esq.

TO: THE PARTIES

Please note that it is my practice to retain files for arbitration matters conducted by me for six (6) months.

After that six (6) month period it is my practice to destroy the file. Therefore, if any party desires the return of any exhibits or other documents of such party which are held in my possession, please request their return within the next six (6) months.

DIXON Q. DERN

11/9/00

BEFORE THE ARBITRATION TRIBUNAL

OF THE AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between GUTEN CORPORATION AND STEVE GUTTENBERG, jointly Claimant and THE COCA-COLA COMPANY, Respondent	Case No. 72 300 00054 00 KC ARBITRATOR'S FINDINGS, CONCLUSIONS, AND FINAL AWARD

This matter came on for hearing on September 19 and September 20, 2000, before the undersigned, acting as sole arbitrator pursuant to agreement of the parties. Claimant appeared and was represented by Jeffery C. Foy, Esq.

Respondent appeared and was represented by Dorothy Wolpert, Esq. of Bird, Marella, Boxer & Wolpert and Elhanan C. Stone, Esq. of Hall Dickler Kent Friedman & Wood LLP and Lisa Rovinsky Esq. of Coca-Cola. Pamela Conley Ulich, Esq. was also present during a portion of the hearing, representing Screen Actors Guild (SAG) as an ex-officio party (as provided for in the Arbitration provisions of the applicable collective bargaining agreement). The parties had held preliminary telephonic hearings with the undersigned and had prepared pre-hearing briefs. Each party introduced both oral testimony and written evidence during the hearing. Subsequent to the hearing each party prepared and timely filed a post-hearing brief and reply brief, and the matter is now submitted.

The uncontroverted facts leading up to the filing of this arbitration may be summarized as follows:

(a) In or about 1980 Claimant and Respondent (or its agent) entered into a written agreement for Mr. Guttenberg's services as a player in a Coca-Cola commercial described as the "Ten Speed" commercial. Although the parties were unable to introduce a copy of this agreement, both parties agree that the agreement was a standard form of agreement under which Mr. Guttenberg rendered services in the commercial for minimum union scale payment and Respondent acquired rights to use the commercial for a limited period for television broadcast purposes only. Mr. Guttenberg's employment was subject to the terms of the SAG 1977 or 1979 Commercials Contract, the collective bargaining agreement covering services of players appearing in commercials; Respondent is a signatory to, or otherwise bound by, such collective bargaining

agreement. The parties stipulated that the provisions of the two collective bargaining agreements are the same, insofar as applicable here.

(b) In 1999-2000 Respondent used the commercial during a period of twenty to twenty-one months as a part of a "reel" which was run continuously in a small theatre venue located at the World of Coca-Cola (WOCC) museum in Atlanta; the commercial was also used --apparently inadvertently--in a reel used for four months at a similar theatre venue at the WOCC exhibit in Las Vegas. Respondent introduced testimony (which was not controverted) during the hearing that approximately one million persons visit each site per year.

(c) Article 16 of the SAG Commercials Contract sets forth restrictions on the use of commercials produced under that Contract. Basically, the employer is limited to use of the commercials in television; any other uses must be separately negotiated for; if an employer fails to separately bargain for such additional uses it may not make such use, and if it does it owes "damages" to the player in an amount equal to three times the compensation originally paid for services. The contract further provides that "However, the player may, in lieu of accepting such damages, elect to arbitrate his claim or bring an individual legal action in a court of competent jurisdiction to enjoin such use and recover such damages as the court may fix in such action."

(d) When SAG learned of the uses in dispute here it made claims against Respondent on behalf of all players involved, including Claimant. SAG and Respondent ultimately entered into a settlement (the "SAG Settlement") with settling claims of all players other than Claimant, and Claimant reserved the right

to take independent action as permitted under the collective bargaining agreement. Respondent acknowledged that the use was a non-television use for which separate bargaining should have been conducted, and sought to arrive at a settlement with Claimant.

(e) Because a settlement was not effected with Claimant, on February 22, 2000 Respondent filed a Demand for Arbitration before the Atlanta office of the American Arbitration Association (AAA). On March 10, 2000 Claimant filed a Demand for Arbitration regarding the same matter with the Los Angeles office of AAA. On or about April 4, 2000, AAA gave the parties notice consolidating the two cases and setting Los Angeles as the venue for the hearings. Because the dispute in both cases arises under the SAG Commercials Contract, these demands for arbitration are the appropriate course of action under Article 56 of the SAG Commercials Contract which provides for arbitration of "all disputes and controversies of every kind and nature whatsoever...arising out of or in connection with this Contract and any contract or engagement...in the filed covered by this Contract..." Under other provisions AAA is designated as administrator for purposes of selection of a neutral arbitrator, where there is disagreement, and the Labor Rules of AAA are designated for other purposes.

(f) On or about March 28, 2000, Claimant also filed an action in the Los Angeles Superior Court for breach of contract and for violations of rights of publicity, violations under California Civil Code Section 3344 (herein "Section 3344"), and the like arising out of the uses of the Ten Speed commercial at the WOCC venues. On or about May 10,2000, the parties entered into a stipulation

(pursuant to which the Court's Order has issued) compelling all pending or existing disputed among the parties to be arbitrated in the AAA consolidated case. The stipulation further provides that "nothing herein is or shall be deemed a waiver or relinquishment by any party of any claim, defense or argument that it otherwise has or possesses and that all such claims, defenses or arguments shall be presented during arbitration."

DISCUSSION, FINDINGS AND CONCLUSIONS

1. Arbitrability of all issues:

The arbitration clause governing this matter is Article 56 of the SAG Commercials Contract cited above. Under that Article all disputes as to the "existence, validity, construction, meaning interpretation, performance, non-performance, enforcement, operation, breach, continuance, or termination of this Contract and/or such contract or engagement [for work within the field covered by the Contract]" are arbitrable. This language, coupled with the stipulation of the parties that all claims are to be presented in this proceeding, make it clear that the parties intended to submit all claims--both contractual and tort--in this proceeding, and that in fact was done. During the course of the hearing counsel for Claimant at one point interjected an argument that the submission of this matter was for non-binding "judicial arbitration" and that Claimant was reserving the right to proceed, after this hearing, to a jury trial. However, it is clear under the arbitration clause of the SAG Commercials Contract and the Rules of AAA to

which the parties are subject and under the parties' own stipulation that the parties have submitted this matter to binding arbitration, and I so find, referring the parties to Article 56 of the SAG Commercials Contract which provides in part that "the provisions of this paragraph shall be a complete defense to any suit, action or proceeding instituted in any federal, state or local court..."

2. Contract Claim:

(a) Respondent has acknowledged that the use of the Ten Speed Commercial was done in violation of the "separate bargaining" requirements of the SAG Commercials Contract. Therefore, liability on this basis is established and acknowledged, and the only contract issue is the issue of damages.

(b) Section 3300 of the California Civil Code provides that

> "For the breach of a obligation arising from contract the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom"

(c) Section 3355 of the same Code, upon which Claimant relies, provides that:

> "Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer"

(d) In the case of a player's name and likeness, the test under either Section may well be the same. Clearly, a player's name and likeness has a peculiar value in the entertainment and advertising field, and, in that regard,

Section 3355 may well be read as a exception to Section 3300. However, under neither Section is the test of measure of damages a purely subjective test. The "peculiar value" of a player's name and likeness can be measured by the price which he/she has put on the use of that particular type of property, with the result that damages under either Section should be calculated so as to reimburse the player for the price that he/she losses when a use is made for which no compensation has been paid.

(e) In this case, Claimant presented an accountant who presented various estimates as to damages, based on Claimant's earnings for three commercials during the period from 1985 through 1999, namely a 1985 Seagram's commercial for which he received $1,000,000.00, a 1990 Coca-Cola commercial ("Echo Point") for which he received $500,000.00 and a 1999 Nike commercial for which he received $50,000.00. The contracts for the Seagram's and Coca-Cola commercials provided for one-year terms of usage and for both television and other usages. Specifically, the Echo Point contract provided for unlimited, perpetual usage of the commercial at the Atlanta WOCC venue (it is not necessary to get into the issue as to whether the other uses were "separately bargained" and paid for as required under the SAG Commercials Contract, because that issue is not relevant here). Using these figures, the witness calculated a "daily rate" which when multiplied by the number of days of usage at the WOCC venues resulted in an estimate of damages of $2,137,500.00 (the adjusted figure in Claimants post-hearing brief).

In response to questions from the arbitrator as to the worth of the uses, Mr. Guttenberg indicated at one point that he might base the price on a similar test, e.g. $2000.00 per day (using Seagram's as a base) or, in other testimony, on a flat fee such as $500,000.00 per venue; in any event, he thought he would make it "expensive" (explaining that these were just thoughts and that he was reluctant to quote figures, understandably, because he didn't have his agent with him at the hearing to participate).

(f) Although Respondent argues that the rates in the SAG Commercials Contract (i.e. triple damages) should be taken into account, I reject that for the reason that, by electing to arbitrate (as provided in the collective bargaining agreement) Claimant rejected that formula and it cannot be cited as a basis for determining damages under those circumstances. The fact that Respondent settled with the other players is also irrelevant here. I also reject, as inapplicable, the fact that the Echo Point contract included the WOCC usage, because it is not clear as to what value was placed on that usage. I find that the SAG Settlement with other players is also not relevant here.

(g) What is relevant, however, is the value that Claimant placed on the use of his name and likeness during the same period, and how that value is affected by the size of the audience involved in the uses then and here. The value that Claimant attributed to the use of his name and likeness during 1985-1999, for one-year usage rights in television commercials is $1,000,000.00 in 1985, $500,000.00 in 1990 and $300,000.00 in 1999 (projecting the rate for sixty days to one year) or an average of $600,000.00. The rights granted in each

instance enabled the employer, at a minimum, to make full use of the commercials in television (with a potential audience of one hundred million viewers or more world-wide). The use here, albeit unauthorized, was to a much smaller audience approximating one million viewers per year in Atlanta and approximately 333,000 (assuming four months usage) in Las Vegas.

In granting the rights he granted, it can be assumed that Claimant knew that the commercials were to be exhibited regularly during the use period and that they could be viewed by audiences representing substantial numbers of homes using television; clearly no television product is seen by one hundred per cent of the potential audience; yet it can be assumed, and I take note, that the audience for an average viewing can equal or exceed thirty million homes in prime time and a significantly fewer number of homes (e.g. four million or less) in non-prime time. As Respondent notes, the aggregate of the uses by Respondent at the venues would equal a small number in comparison with average viewing audiences. Although, based on the above averages, a direct mathematical comparison of audiences would result in a very low measure of damages, this measure is affected in part by Claimant's prominence and Respondent's obvious desire to use his likeness at the Atlanta venue because of that prominence, thus giving it a greater peculiar value than would be attributed to the use on a straight mathematical formula. Taking all of this into account, it is not unreasonable to conclude that damages to Claimant could approximate $150,000.00, and I so find.

3. Tort Claims:

(a) Claimant alleged and sought damages for emotional distress and related torts; as noted at the hearing, in view of the fact that Claimant participated in other commercials and in view of his indicated willingness to participate in this usage (albeit at a price that Respondent did not want to pay) defeats any basis for such claims, and they are denied.

(b) Claimant has alleged that the use here violates rights granted under Section 3344 and that the measure of damages be determined by reference to that Section. As noted during the hearing, the use of this commercial, albeit unauthorized, does not create a right under Section 3344, but rather creates rights to recover damages under a contract theory. The unauthorized use of copyrighted material has been held not to create separate rights of the types covered by Section 3344; See for example the Fleet.v CBS and Comedy III v. New Line cases cited in the briefs (citations omitted). The line of cases in the Ninth Circuit dealing with uses apart from the copyright product (e.g. White and Wendt, cited in the briefs) are not applicable to the facts here and are clearly distinguishable. Accordingly I find that Claimant's remedies in this matter are to secure contract damages and that the breach of the employment agreement does not give an independent cause of action under Section 3344.

(c) Claimant also asserted claims of invasion of privacy under state law; for the same reasons outlined above, this claim is denied.

(d) If I correctly understood the argument, Claimant suggested in testimony (or discussions) that the use of the Ten Speed commercial had, in

some way, diminished the value of his name for commercial purposes. However, based on the evidence before me, I find that not to be the case.

4. Fees and Costs:

Under the arbitration provisions of the SAG Commercials Contract each party is to bear its own expenses of the arbitration. Although Claimant presented a Cost Bill as a part of the final brief, such costs are to be borne by the party incurring the same. The costs of the arbitrator will be divided and charged equally to each party.

AWARD

1. Claimant is awarded (and Respondent ordered to pay) the sum of $150,000.00 as damages for Respondent's use of the "Ten Speed" commercial at the Atlanta and Las Vegas World of Coca-Cola venues without separately negotiating for compensation for such uses as required under the applicable SAG Commercials Contract and the employment agreement entered into pursuant thereto. If not paid within thirty (30) days from date that this award is mailed to the parties by American Arbitration Association, said amount shall bear interest at the maximum legal rate on unpaid balance from said date until paid.

2. All other claims asserted by Claimant are denied.

3. Each party shall bear its own expenses including its share of fees of American Arbitration Association, the court reporter, and its own attorneys fees incurred in connection with this matter.

4. The Arbitrator's fee in this matter for preparation, preliminary hearings, the hearing and research for and preparation of this Award is $3750.00; each party shall pay one half of said amount, i.e. $1875.00. . If not paid within thirty (30) days from date that this award is mailed to the parties by American Arbitration Association, said amount shall bear interest at the maximum legal rate on unpaid balance from said date until paid.

DATED: 11-9-00

Dixon Q. Dern, Arbitrator