

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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3	TRADEMARK PROPERTIES, INC.,)	2:06-CV-2195
4)	
5	Plaintiff)	Charleston,
6)	South Carolina
7	VS)	June 6, 2007
8)	
9	A&E TELEVISION NETWORKS,)	
10	ET AL,)	
11)	
12	Defendants)	

TRANSCRIPT OF SUMMARY JUDGMENT MOTION HEARING
BEFORE THE HONORABLE C. WESTON HOUCK,
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical shorthand,
transcript produced by computer-aided transcription.

1 THE COURT: This is Civil Action 06-2195, *Trademark*
2 *Properties, et al, Plaintiffs, against A&E Television*
3 *Network, Defendants.*

4 And I show a double caption in it indicating a
5 counterclaim, but I don't think that's necessary.

6 We have set this morning the motion of the
7 defendants for summary judgment. I'll be glad to hear from
8 you.

9 Who represents the defendant, you, Mr. Farrier.

10 MR. FARRIER: Yes, sir, Your Honor. Richard Farrier
11 here on behalf of A&E and Departure Films. Mr. Feigelson, my
12 co-counsel from the Bar of New York, is going to make the
13 argument.

14 There is a matter of housekeeping. Frank and I had
15 talked about this earlier in the week. Some of the pleadings
16 underlying to this motion have been filed under seal; some of
17 them have been unsealed. There still remain two documents
18 under seal.

19 The agreement that we have reached, subject to the
20 Court's approval, is that we are going to try not to publish
21 the sealed portions. We try to abide by the confidentiality
22 agreement that we reached with the third-party. It may be
23 necessary to discuss them indirectly or directly. To the
24 extent that we do that, we've agreed that no such discussion
25 be argued by either side to constitute a waiver of our

1 agreement of confidentiality.

2 THE COURT: That's fine. That's what you agreed to.
3 I don't make things confidential; that's what the parties do.
4 And it's virtually impossible for me to have the time or the
5 ability to review everything that relates to every case and
6 determine what should be confidential.

7 We have in this court, the Judges have gotten
8 together -- I was not a party to it, but it's just something
9 I wasn't that concerned with -- but they've gotten together
10 and prepared a form confidentiality order, so that when
11 parties want to make things confidential, we have one order
12 that we use.

13 I assume you signed that order?

14 MR. FARRIER: Yes, sir.

15 THE COURT: So whatever you do here, as far as what
16 you will mention, I don't know, but I do know that if you
17 don't argue something, I can't read your mind, and I can't
18 give any consideration to anything except for what you do
19 argue and what you bring to my attention here today.

20 I'm not going to assume the responsibility of going
21 and looking at all confidentiality documents, all documents
22 filed under seal, and pick out what I think supports or
23 attacks the case here today.

24 MR. FARRIER: Okay. Thank you, Your Honor.

25 THE COURT: Okey-doke.

1 All right, sir. I'll be glad to hear from you.

2 MR. FEIGELSON: Good morning, Judge. As Mr. Farrier
3 said, my name is Jeremy Feigelson. I'm with the firm of
4 Debevoise & Plimpton in New York City.

5 THE COURT: Your name is what?

6 MR. FEIGELSON: Jeremy Feigelson.

7 THE COURT: Mr. Feigelson?

8 MR. FEIGELSON: Correct.

9 THE COURT: Okay.

10 MR. FEIGELSON: Thank you, Judge. We are co-counsel
11 with Mr. Farrier's firm for the defendants in this case, A&E
12 Television and Departure Films.

13 The central issue in the case, Your Honor, is
14 whether there was an oral agreement between the plaintiffs
15 and my client, A&E, under which the parties were supposedly
16 going to split all the revenue from a television show 50/50.
17 If there is no evidence to support that claim, then the
18 breach of contract claim fails, and all the other claims
19 which sort of pivot off the contract claim fail, as well.

20 So I want to start with the contract issues, Judge,
21 because that's really the heart of the case.

22 And we have offered in our briefs, Your Honor, three
23 reasons why the contract claim fails here at the summary
24 judgment stage.

25 The first is that there simply is no evidence of an

1 agreement. It's obviously lack of a contract; that you have
2 to have an offer and an acceptance in order to have a
3 contract. There is zero evidence in the record of an
4 acceptance by A&E.

5 The second reason is that the plaintiffs cannot get
6 their story straight. There are multiple sworn versions in
7 the record and in the documentary evidence as to whether
8 there was or wasn't an agreement; how it was made; what it
9 was. And if the plaintiffs can't get their story straight,
10 then no reasonable jury can be expected to credit it.

11 The third reason why summary judgment should be
12 granted, Your Honor, is that even if we go beyond what the
13 evidence in the record really allows for, and assume for
14 purposes of this motion that the plaintiffs and the defendant
15 had actually agreed on something, then what the evidence
16 describes that they purportedly agreed on is not an
17 enforceable contract. It's too indefinite. It's the type of
18 agreement that can be only enforceable when it is in writing
19 and it's void under the Statute of Frauds.

20 I want to go back briefly through --

21 THE COURT: I'm not sure I understood that. You
22 kind of tailed off there at the end.

23 MR. FEIGELSON: Well, what I said, Your Honor, was
24 that there are three reasons why the agreement --

25 THE COURT: I'm talking about the third one.

1 MR. FEIGELSON: The third one, Statute of Frauds,
2 Your Honor.

3 THE COURT: Okay.

4 MR. FEIGELSON: I want to go back through each of
5 these issues briefly and talk a little bit about the evidence
6 that's in the record and submitted with our motion.

7 I said there is no evidence of any agreement. And
8 if I could approach, Your Honor? I want to hand up one
9 exhibit. There are actually two. And I'll hand them up at
10 the same time.

11 The first of these two documents I just handed up,
12 Your Honor, has already been submitted as Exhibit W to the
13 moving declaration of Robert Jordan. So it's already in the
14 record, Your Honor. It's the single most important piece of
15 evidence in this case. It's a representation of warranty
16 that Mr. Davis signed in his personal capacity and on behalf
17 of his company, and it's a representation of warranty signed
18 before there was ever a lawsuit, before there was ever any
19 litigation. And he gave the misrepresentation and warranty
20 to a competing network who wanted to take his services after
21 he became unhappy with A&E.

22 And what he says in the written warranty in plain
23 English is that he had no agreement with A&E. He had not
24 entered into any agreement with A&E. That he never asked
25 for, requested or received any payment from A&E.

1 That is 100 percent flatly inconsistent with the
2 allegations in the complaint in this case.

3 Going beyond the documentary evidence, Judge, we
4 come to Mr. Davis's deposition. Obviously, this was an
5 important issue in the deposition. That is, what exactly was
6 the colloquy between Mr. Davis and representatives of A&E on
7 the issue of whether there was an agreement?

8 Mr. Davis testified over and over about what he
9 demanded from A&E; what he wanted from A&E. We asked him, by
10 my count, Your Honor, seven times -- and I've handed up
11 transcript excerpts, which are also in the record -- we asked
12 him seven times: Okay. Well, that's what you said. What
13 did A&E say? The questions were real clear and real simple.
14 And the answers, every time, were that he could not identify,
15 did not identify any statement by A&E that represented an
16 acknowledgement, an agreement of any kind. And it's very
17 clear in the record, Judge, that we are talking only about a
18 conversation with one individual whose name is Charles
19 Norlander.

20 And Mr. Davis said very clearly in his deposition
21 the entire oral agreement was reached by phone with Mr. Davis
22 sitting in South Carolina and Mr. Norlander on behalf of A&E
23 sitting in New York. And the excerpts that I've just handed
24 up, Judge, are the record of what Mr. Davis had to say that
25 Mr. Norlander said. And we asked him over and over, What did

1 Charles Norlander say? Please tell me specifically as
2 possible exactly what Charles Norlander said.

3 Most of the time what Mr. Davis said in response to
4 the deposition questions was that he simply repeated, Well,
5 this is all I asked him. It couldn't have been clearer. And
6 at one point on Page 89, he finally put some words in
7 Mr. Norlander's mouth, but it's not an agreement. He says,
8 Mr. Norlander said, and I quote Mr. Davis's testimony,
9 basically, he said he had to get confirmation they could do
10 that.

11 So there is no deposition testimony to support the
12 agreement. We deposed Mr. Davis for three days, both in his
13 personal capacity and as the 30(b)(6) witness on behalf of
14 his company. And he had every opportunity to answer simple
15 questions with simple factual answers that would have
16 supported his claim. He simply didn't do that.

17 And what the Fourth Circuit said in the *ABT* case,
18 which is cited in our brief, is that in order to get past
19 summary judgment and to get to a jury on an oral contract
20 claim, it's not enough to just say that you thought you had
21 an agreement. Obviously, if that were the law, all oral
22 contract claims would always go to juries, and that's not the
23 case.

24 The Fourth Circuit says in the deposition testimony
25 that shows a sequence of offer and acceptance, and that's

1 exactly what Mr. Davis failed to provide in his deposition.
2 So that, Your Honor, pretty much covers the water from the
3 first point.

4 I said that the second issue was that Mr. Davis
5 keeps changing his story, and he does do that. There is an
6 affidavit which he has put in, in opposition to summary
7 judgment, where for the first time he now puts those magic
8 words in Charles Norlander's mouth. He attributes to
9 Mr. Norlander in his affidavit, the statement, Okay, let's do
10 this. That comes after Mr. Davis has laid out his terms. So
11 according to the affidavit, finally, we have an agreement.

12 Why isn't that good enough? It's not good enough
13 because you just can't create an issue of fact by coming in
14 at the eleventh hour, the summary judgment stage, and
15 contradict your own deposition testimony.

16 The only disputed fact here is between Mr. Davis and
17 Mr. Davis. And the cases that we have cited in our brief,
18 including *Vantage Marketing*, you simply cannot withstand
19 summary judgment by coming in at the affidavit stage with the
20 evidence that you failed to provide at your deposition under
21 oath.

22 Now, the affidavit becomes only the latest in a
23 whole series of different stories that Mr. Davis has told.
24 And this goes to my second point, that if he can't keep his
25 own story straight, no reasonable jury can credit it.

1 In addition to the written warranty, no agreement at
2 all; in addition to the deposition, where he's unable to
3 identify any acceptance by Mr. Norlander; in addition to the
4 affidavit, where all of a sudden we have acceptance by
5 Mr. Norlander, we also have his complaint, where he tells a
6 completely different story. And he testified under oath that
7 he reviewed the complaint before it was filed; personally
8 approved it to be filed.

9 And what he says there is there was a face-to-face
10 meeting in New York City, a specific date, June, 2004, and
11 that Mr. Norlander and another A&E executive at that meeting
12 agreed to a very detailed list of terms that Mr. Davis laid
13 out.

14 We asked Mr. Davis about that meeting at his
15 deposition. We asked every other representative of his
16 company present at that meeting at their depositions what
17 happened. They all completely abandoned the central
18 allegation in the complaint.

19 There was absolutely no negotiation deal points, no
20 offer, no acceptance, no agreements made at any time during
21 that meeting. So that's another version of events which has
22 fallen by the wayside.

23 And then we have interrogatory answers in which
24 Mr. Davis says -- and, again, he personally supported this --
25 that the agreement was, in his words, confirmed by a woman

1 named Nancy Dubuc, who is a senior executive at A&E. That
2 happened at a conference call.

3 At his deposition, again, he had a different story.
4 And we've got that story. Interrogatory answers are
5 abandoned, as well. Because what he says at his deposition
6 is that the woman on the call was not even identified;
7 doesn't even know if it was Nancy Dubuc. And the only
8 comment anybody at A&E made on that call was laughter,
9 cackling; a statement, We'll get back to you and then, click,
10 the line goes dead. No agreement, no confirmation of any
11 agreement.

12 So you put that whole string of stories together,
13 including multiple stories Mr. Davis has told under oath, and
14 also the story that he told in the written warranty, and this
15 is just not a case that warrants the time of a jury.

16 The third issue, Your Honor, that I identified at
17 the outset, is that Mr. Davis has not identified, even if
18 there was any type of an agreement at all, an enforceable
19 contract. It's perfectly possible for two parties to talk to
20 each other and come to some sort of loose agreement and have
21 that agreement fall well short of being legally enforceable.

22 And if, in fact, there was any agreement here -- and
23 I think there was strongly no evidence of any agreement -- if
24 there was an agreement here, it would fall short of that
25 standard. And it is Mr. Davis's burden to be clear, under

1 Fourth Circuit case law, under Your Honor's decisions,
2 numerous cases, that he has to come forward at this stage
3 with specific facts on all of these issues.

4 We've made our burden by demonstrating the absence
5 of any proof to support his positions. And it's not enough
6 to come in now and say, I thought I had an agreement. I
7 thought it was definite enough. He's got to have those
8 specific facts.

9 Why is the contract not enforceable? Well, as I
10 said before, Your Honor, really three separate and
11 independent reasons.

12 The first is, there are too many missing pieces.
13 This contract had no term. By Mr. Davis's own agreement,
14 there was no time limit on it. There were no procedures or
15 standards in place for renewal. There were no procedures or
16 standards in place for termination. It's black letter
17 contract law that you have to have a definite nexus, at least
18 as to time, place and payment, material terms.

19 And Mr. Davis testified, his words, all undisputed,
20 all cited in our brief, there was no discussion, no agreement
21 as to whether this television show would even happen at all
22 in the first place.

23 So all we have, at the very most, was an agreement
24 to agree, which is not enforceable. There was no agreement
25 as to term; no agreement as to timing and payment; no

1 agreement as to ownership of the copyright.

2 The whole central point that Mr. Davis is contending
3 for here is an agreement for 50/50 revenue split. Well,
4 according to Mr. Davis's own testimony, there was no
5 discussion, no agreement about how you get from gross to net.
6 He said, We were going to divide up the net revenues, but
7 couldn't provide any answers, when he was asked, how they
8 were going to take into account certain significant expenses.
9 Mr. Davis couldn't say what legal entity was going to be
10 party to the agreement and whether any of the trademark
11 entities were going to be a party to the agreement.

12 And the whole central economic factor in the
13 agreement was the division of the advertising revenue pool.
14 Lots of different kinds of television advertising, Your
15 Honor. Mr. Davis testified there was no discussion, no
16 agreement as to what types of advertising revenue would go
17 into the pool to be divided up 50/50.

18 With all of those missing pieces, Judge, we simply
19 have an agreement that is fatally indefinite, if there was an
20 agreement at all.

21 The second reason why, Your Honor, the contract, the
22 agreement, if there was one, is unenforceable is because
23 there are some kinds of agreements that simply have to be in
24 writing as a matter of law or they can't be enforced, and
25 this is one of those deals, Your Honor.

1 By Mr. Davis's own testimony, this is an agreement
2 that was supposed to go on for years, conceivably decades.
3 The economics here are tremendous. We are talking about
4 dividing up possibly tens of millions of dollars a year in
5 advertising revenue.

6 And it is undisputed in the record --

7 THE COURT: What is the range -- excuse me -- what
8 if the ratings the first year were zero, what would happen
9 then?

10 MR. FEIGELSON: Well --

11 THE COURT: What if it didn't bring in revenue,
12 couldn't it be terminated?

13 MR. FEIGELSON: According to Mr. Davis's testimony,
14 Your Honor, the agreement was supposed to continue.

15 THE COURT: And I know, but according to the
16 testimony that I read, the defendants were very interested in
17 ratings. Mr. Davis allegedly told them, guaranteed them that
18 he was going to get a certain high rating. But I read that
19 it was pretty well understood that if those ratings were not
20 achieved or average ratings were not achieved, the deal was
21 off. If that's true, it could have possibly been performed
22 within one year, the Statute of Frauds doesn't apply.

23 MR. FEIGELSON: Okay. Well --

24 THE COURT: And I don't think you can say there's no
25 possibility it could be applied -- be completed in one year.

1 MR. FEIGELSON: Your Honor, taking into light the
2 Statute of Frauds point -- I was going to get there next.
3 I'm going to go there right now.

4 THE COURT: You were talking about the Statute of
5 Frauds?

6 MR. FEIGELSON: No, Your Honor.

7 The point I was addressing at the point of your
8 question was a little different. My point was that --

9 THE COURT: You said it was an agreement that had to
10 be in writing. You mean you weren't talking about the
11 Statute of Frauds then?

12 MR. FEIGELSON: I was not talking about the Statute
13 of Frauds.

14 THE COURT: I'm sorry. I misunderstood you.
15 Go ahead.

16 MR. FEIGELSON: The principle that an agreement has
17 to be in writing really comes under two different legal
18 headings, Judge. The first is that there are some kinds of
19 agreements, simply because they are so commercially
20 significant, so complex, so novel, there is so much at stake
21 that no court will ever enforce them, the Statute of Frauds
22 or no Statute of Frauds, unless there is a writing. That's
23 the point I was making, Judge.

24 THE COURT: I read the District Court opinion that
25 counsel sent to me, um, I assume he sent it to Mr. Cisa, as

1 well.

2 MR. FEIGELSON: Yes, we did.

3 THE COURT: And I don't think that opinion is
4 authority for what you tell me to do here. I wouldn't be of
5 a mind in this case, knowing what I know about it on summary
6 judgment, to say it's the type of agreement that has to be in
7 writing. I'm not going to follow a District Court case in, I
8 forget where it was, New York.

9 MR. FEIGELSON: It was a New York case, Your Honor.

10 THE COURT: And I mean, he just went went on and on
11 and on and on. It was obvious in that case that the parties
12 intended that there be something in writing. I mean, the
13 majority party kept saying there was, Mr. Stein kept
14 insisting on it. So I don't think that that law is
15 applicable to this situation; nor would I want to, based on
16 that law, say that this contract had to be in writing
17 regardless of the application of the Statute of Frauds.

18 So you go ahead.

19 MR. FEIGELSON: Well, Your Honor, as for the *Stein*
20 case, which we sent you, the issue there --

21 THE COURT: I'm familiar with the case. I don't
22 need to be told. You sent it to me and I read it.

23 MR. FEIGELSON: Okay.

24 THE COURT: It was hard to read, because he just
25 went on and on and on. I've never seen anybody write so

1 much. It must have been 25 or 30 pages. And he just kept --
2 but I guess he must have been worried he was going to get
3 reversed.

4 MR. FEIGELSON: In this case, Judge, the case we
5 have here today, we do have evidence by pleadings in the
6 record that the parties did very much intend to put this deal
7 in writing. There were exchanges of draft agreements.

8 THE COURT: I think they did. I don't think there
9 is any question of that. I don't think there is any question
10 but that Mr. Davis expected to get a writing. And he says,
11 even though he expected a writing, that doesn't mean they
12 didn't have an oral agreement. And there are certain
13 circumstances where that can be the case. I mean, you know,
14 you can have an oral contract and then request that it be put
15 in writing, and request that it not take effect until it is
16 in writing. They are two different things.

17 MR. FEIGELSON: I understand, Your Honor. And I
18 appreciate the comment on the *Stein* case.

19 To be very clear, Judge, there is a separate
20 principle at stake here, apart from whether the writing was
21 intended, and that is, is it simply the type of deal that
22 commercially is so groundbreaking, so new, so many dollars at
23 stake, that no reasonable person could expect to have a deal
24 on the basis of, in this case, a single phone conversation.

25 THE COURT: I told you I can't make that call. I

1 mean, I can't make that call based on what I know in this
2 case.

3 MR. FEIGELSON: Well, Your Honor, I would -- I'll
4 move on, but I want to reserve my rights to say a little bit
5 more about that issue before we wrap up here today.

6 The Statute of Frauds issue, Your Honor, which you
7 addressed in your question before, we are talking here about
8 New York law, because this is a contract that was supposedly
9 formed over the telephone. The speaker, Mr. Norlander,
10 supposedly giving the acceptance from New York. And under
11 the *O'Briant* case in our reply brief, which is the South
12 Carolina Supreme Court stating that on issues of contract
13 formation --

14 THE COURT: You argue that New York law is
15 applicable, but then most of the law you cite is South
16 Carolina law.

17 MR. FEIGELSON: We tried to cite both on virtually
18 every proposition, Judge. And I think --

19 THE COURT: I think New York law is controlling.

20 MR. FEIGELSON: And we agree, Your Honor.

21 And the New York Statute of Frauds would therefore
22 be controlling. And we've cited two cases for you on the New
23 York Statute of Frauds, Judge, which I think are highly
24 relevant. But what the *Zupan* case says is if the agreement
25 is indefinite duration, but the performance, a continued

1 performance depends on a third party outside the control of
2 the parties to the agreement, then the Statute of Frauds
3 voids the oral agreement.

4 In this case, what Mr. Davis is saying is that we
5 are going to keep this thing going as long as the ratings,
6 that is the approval from the general public, there is the
7 third-party, are good enough. So that puts you within the
8 New York Statute of Frauds and voids this agreement.

9 In the *Burke* case, which we've also cited Your
10 Honor, says under the New York Statute of Frauds, that you
11 have to have an expressed termination provision as part of
12 your oral agreement. And there was no expressed termination
13 provision here.

14 So that's a double whammy under the New York Statute
15 of Frauds. And this agreement fails for that reason, Judge.

16 I want to talk briefly about the other claims in the
17 case, other than the oral contract claim, Judge. There are a
18 series of other pleadings, which really, as I said at the
19 outset, all pivot off the proof or lack of proof of any
20 agreement, any acceptance by A&E, any promise by A&E.

21 And for all the reasons I set out before, there is
22 no evidence for any such promise other than the eleventh
23 hour, Hail Mary affidavit from Mr. Davis. And that means
24 that the promissory estoppel claim has to fail, because there
25 is no evidence of a promise, which is an essential element of

1 that claim.

2 The fiduciary duty claim has to fail because the --
3 this agreement is the foundation of any fiduciary duty claim
4 and there was no agreement. The fiduciary duty claim also
5 fails because the agreement, even if accepted under
6 Mr. Davis's description, is not a fiduciary agreement.

7 There is a conversion claim, Your Honor, which is
8 nothing more than another twist on the contract claim,
9 claiming that the funds not paid under the purported oral
10 agreement were converted, cannot have, as a matter of law, a
11 conversion claim. And the only real issue is the breach of
12 contract.

13 And likewise, the unfair competition claim has been
14 pled. It's just another twist on this claim of an agreement.

15 There is also the fraud claim, Your Honor. And the
16 fraud claim also fails because you need a promise to have
17 fraud. And if you have no evidence of a promise, the fraud
18 claim fails for separate and independent reason, which is --
19 Mr. Davis testified at his deposition that the only promise
20 ever made to him here was by Mr. Norlander over the
21 telephone, and that he thought that Mr. Norlander was
22 speaking honestly and in good faith, and the company just had
23 a subsequent change of position that describes, at the very
24 most, a contractual issue; not a fraud issue.

25 There is one more claim in the complaint, Your

1 Honor, which I'm going to address briefly, one more
2 substantive claim, and that is the claim for misappropriation
3 of trade secrets. As best we can tell, that's been
4 abandoned. Not surprisingly, the whole premise here was
5 Mr. Davis wanted to have his business on television. He was
6 unable to support that claim in his deposition. And in his
7 opposition brief, does not even mention the trade secrets
8 claim.

9 There are also several claims in the complaint which
10 really are just descriptions of remedies; they are not
11 freestanding claims for causes of action. Those are claims
12 for constructive trust, accounting, injunctive relief. We
13 have explained in our brief why those are not claims at all.
14 And again, we've had no response. And so those claims, like
15 the trade secret claim, would have to be deemed abandoned.

16 One last point before I sit down, Judge, and that is
17 that I represent both of the defendants in this case, A&E
18 Television, the network, and Departure Films.

19 Departure Films is the independent production
20 company that filmed the television show that's at issue here.
21 And Departure Films is named in only a couple of counts of
22 the complaint. They are named in the unfair competition
23 count and they are named in the trade secrets count. Both of
24 those counts fail as to Departure, as well as the reasons
25 I've already given.

1 And I want to emphasize that in the opposition
2 papers that I received from the plaintiffs, there is not one
3 word mentioned about Departure claims. There is no effort
4 made to support any argument that there is a claim against
5 them.

6 And we are asking for summary judgment on behalf of
7 Departure Films, as well as A&E.

8 And I would like to reserve the right to address any
9 other issues.

10 THE COURT: Okay. Thank you, sir.

11 All right. Mr. Cisa?

12 MR. CISA: Thank you, Your Honor.

13 THE COURT: To begin with, let's determine whether
14 or not you abandon any claims against any of the defendants.

15 MR. CISA: Your Honor, I really have not abandoned
16 the claims. I think they are correct when they say the
17 claims for injunctive relief for accounting --

18 THE COURT: I'm not talking about the claims
19 themselves; I'm saying against any defendant.

20 MR. CISA: Trade secrets.

21 THE COURT: I'm not talking about --

22 MR. CISA: The violation --

23 THE COURT: Are there any defendants against whom
24 you assert no claims now?

25 MR. CISA: No, sir.

1 THE COURT: Now, he said you didn't mention
2 Departure Films.

3 MR. CISA: Well, the only cause of action I think
4 that's viable against Departure Films is Unfair Trade
5 Practices Act, which I addressed as to A&E.

6 THE COURT: Are there any claims in your complaint,
7 causes of action, that you abandon?

8 MR. CISA: Just the cause of action for violation of
9 trade secrets.

10 THE COURT: You abandon that?

11 MR. CISA: Yes, sir.

12 THE COURT: All right.

13 MR. CISA: I think he's correct.

14 THE COURT: That's as to all defendants?

15 MR. CISA: Yes, sir.

16 THE COURT: Okay. All of the other causes of action
17 you still contend are viable?

18 MR. CISA: Correct. Yes, sir.

19 THE COURT: Okay. Go ahead.

20 MR. CISA: Your Honor, I'll start with the contract
21 claim, because they started with the contract claim.

22 I submit to you that the law of contracts is fairly
23 straightforward and fairly simple. A contract is an
24 obligation which arises from an actual agreement of the
25 parties manifested by words, oral or written, or by conduct.

1 I submit in this particular case, Judge, we can show
2 that we have a contract that established by the oral contract
3 was established, in accordance with Mr. Davis's affidavit.
4 And further, that the contract is established by the conduct
5 of the parties.

6 We acknowledge that a written agreement was never
7 entered into. Although we expected to get some writing, we
8 just never got any writing from A&E.

9 Judge, just by way of brief background, Mr. Davis
10 came up with this idea concept of a reality based TV show
11 back in 2003. He registered his idea with the Writer's
12 Guild, which is all he knew how to do at that particular
13 point in time.

14 He then hired a production company out of Greenville
15 and spent \$85,000 doing a pilot episode of his series. He
16 then transmitted that pilot episode of his series to three
17 different networks, HGTV, the Discovery Communications and
18 the defendant, A&E in this particular case.

19 As a result of the pilot being sent, Mr. Davis got
20 an e-mail back from Nancy Dubuc with A&E, where she says, I
21 have asked Charles Norlander to review your material, as he
22 oversees all of our Lifestyle programs.

23 Mr. Davis then communicated with Mr. Norlander by
24 telephone, um, and ultimately, according to Mr. Davis,
25 entered into an oral agreement concerning his series.

1 The first conversation he had with Mr. Norlander
2 was, How much do you want for your show? Mr. Davis's
3 response was, My show is not for sale. I want to partner my
4 show. I want to share in the revenues. That's what I do for
5 a living now relative to the operation of my business.

6 Clearly, Your Honor, in his affidavit he sets out --
7 I acknowledge the deposition was all over the board. I
8 didn't take the deposition. But I think there is plenty in
9 the deposition that shows that there was an oral agreement.

10 But clearly in his affidavit, he sets forth the
11 material terms that he and Mr. Norlander agreed to. And it
12 wasn't a complicated agreement, Judge. It was a rather
13 simple agreement. They agreed to partner the project. And,
14 Judge, I think this -- there is evidence that there was an
15 agreement to partner the project.

16 Once board approval was obtained for this series
17 from A&E, um, Mr. Davis received an e-mail from Thomas Moody,
18 who is a vice president with A&E, that says, Congratulations,
19 Richard, the board approved the money for our series.

20 So Mr. Davis says that there was a clear agreement
21 that they were partner in the project with A&E. That A&E
22 would pay the costs of a third-party production company.
23 There is no question that Mr. Davis was asked to come to New
24 York to meet with a third-party production company. They
25 asked for Mr. Davis's input concerning the hiring of that

1 production company. That production company was hired. They
2 agreed -- they were aware of the cost that required -- that
3 Mr. Davis and his company would bear the cost of requiring
4 refurbishing and marketing the various parcels of real
5 estate. Mr. Davis did that for 13 different series. He
6 bought \$6 million worth of property. They agreed that A&E
7 would have no financial risk relative to that real estate.
8 They agreed that Mr. Davis would keep track of his
9 out-of-pocket expenses and try to keep expenses down, which
10 he did, and he would be reimbursed at a later date. They
11 agreed that he would be credited as a creator of the series,
12 and he was, and on all 13 episodes of the first season.

13 And at the end of the first season, they would
14 equally split all revenues generated from the series after
15 A&E was reimbursed for the expenses of the third-party
16 production company, and after Mr. Davis was reimbursed for
17 his out-of-pocket expenses.

18 The parties --

19 THE COURT: Are you claiming damages after the first
20 year?

21 MR. CISA: Yes, sir, I am. I am. Because what
22 happened after the first year, I'm claiming damage as a
23 result of the first year, Your Honor. But what happened at
24 the end of the --

25 THE COURT: You understand if you claim those

1 damages, in all probability, the defendant is going to be
2 able to examine in detail the present agreement that the
3 plaintiff has with the production company?

4 MR. CISA: I understand that, Your Honor.

5 THE COURT: You understand that?

6 MR. CISA: I understand that. And we touched on
7 that before. But I do understand that. And we've got an
8 explanation for why we did what we did.

9 THE COURT: Well, you have a right to, based on your
10 theory of the case, you have an obligation to mitigate your
11 damages.

12 MR. CISA: Yes, sir.

13 THE COURT: So I don't, you know, taken your case as
14 stated as true, you have an obligation to do that. And I
15 would assume that you could make an argument that what you
16 did was in mitigation of damages, but --

17 MR. CISA: Yes, sir.

18 THE COURT: -- they have a right to look into it and
19 look under every rock and every leaf. I think you need to
20 know that.

21 MR. CISA: Yes, sir. I understand that. And I
22 understand the Court's position on that issue. We did
23 discuss --

24 THE COURT: That's not my position; it's the law.

25 MR. CISA: I understand. I understand.

1 Judge, my point is, is that this oral agreement that
2 Mr. Davis says he had with Mr. Norlander -- and this is what
3 happened. After the discussions and the agreement, Norlander
4 said, Okay, we will do this. But keep in mind that there is
5 a chance that it may not make any money. A&E didn't think
6 this show was going to make any money at that time.

7 It wasn't until about the fifth or sixth episode it
8 started rolling and it got a million viewers that it was
9 really starting to make some money.

10 Then what we think happened is A&E started getting
11 cold feet of starting to share these millions of dollars of
12 revenues.

13 But the point is Mr. Davis says in his affidavit, he
14 had an oral affidavit, we set forth the material terms. And
15 the fact of the matter is, is that every term of that oral
16 agreement was fully fulfilled by both parties, except when it
17 came time to pay him and split the revenues by A&E.

18 Mr. Davis used himself and his staff to produce all
19 of the episodes. He bought all of the properties. He
20 refurbished them. A&E paid the production company as agreed,
21 and would be reimbursed on the back end. Mr. Davis kept
22 track of his expenses. The show is doing well.

23 Not once did A&E say, You are not doing what you
24 agreed to do, not one time. The only thing that A&E failed
25 to do or the parties failed to do was A&E failed to account

1 to Mr. Davis for the revenues and failed to split. Mr. Davis
2 got paid zero for all of his efforts. And, Judge, we think
3 an agreement is shown by the oral words as set forth in
4 Mr. Davis's affidavit, as well as the conduct of the parties.

5 They touched on some matters dealing with
6 credibility, Judge. I think what they are saying is they may
7 be able to chip away at Mr. Davis on some credibility issues.
8 That always happens. I understand that. We have got a
9 position on those things, and we've got a story as set forth
10 in this affidavit.

11 All of their -- in their memorandum, they attack the
12 remaining causes of action, all premised on the fact that
13 there was never a representation or an agreement by A&E. I
14 submit to the Court that we have submitted evidence that
15 there was an agreement and representations made by A&E. And
16 therefore, all the other causes of action should survive,
17 Your Honor.

18 And that's what they are saying. They are saying
19 every cause of action that we've had should fail because
20 there was no oral agreement. I submit that there is evidence
21 that there was an agreement, and there was evidence of
22 representations.

23 You can take fraud -- you know, they e-mail Richard
24 Davis, and they say, You need to deal with Charles Norlander.
25 He's in charge of Lifestyle programs. That's what you need

1 to deal with.

2 Then they file an affidavit with this court saying,
3 Well, Charles Norlander didn't have authority to do anything.
4 Well, they certainly told Richard Davis that. And I think
5 that's evidence they never intended to honor any agreement
6 they reached with him.

7 Judge, I'll be glad to respond to any questions you
8 may have. I filed the affidavit. I've done the memorandum.
9 I think there is evidence that we have submitted that create
10 a question of fact as to whether or not there is an
11 agreement, um, and that we should be entitled to go to the
12 jury on that issue.

13 THE COURT: I understand your argument.

14 MR. CISA: Yes, sir. Thank you, Your Honor.

15 THE COURT: All right.

16 Yes, sir?

17 MR. FEIGELSON: Your Honor, a few points in
18 rebuttal, if I may?

19 The contention and the argument we just heard, you
20 have to have a contract proven by conduct, as well as by oral
21 agreement, um, I believe that's the first I'm hearing that
22 one. It's not pled as a conduct case; it wasn't briefed as a
23 conduct case; it was pled, briefed as an oral agreement case,
24 and that's what it is.

25 THE COURT: I couldn't understand you. You say it

1 wasn't pled as a conduct case?

2 MR. FEIGELSON: It's not been pled or briefed on the
3 theory that there was an agreement reached by conduct; that
4 it was pled and briefed on the plaintiff's theory that it was
5 an oral agreement.

6 THE COURT: Well, as I understand the law, there are
7 a number of rules for interpretation of contracts. I'm not
8 totally familiar with the Rules available in New York, but I
9 am in South Carolina.

10 And one of the ways that you interpret what the
11 parties' intent was is how they acted pursuant to the alleged
12 agreement. And I assume that's what Mr. Cisa was talking
13 about.

14 MR. FEIGELSON: On that point, Your Honor, there is
15 two years' worth of documentary evidence in the record about
16 how the parties dealt with one another after the supposed
17 oral agreement was reached in 2004.

18 The single most important fact from those two years,
19 Judge, is you will not see one word, one written word from
20 Mr. Davis, although he is e-mailing A&E right and left
21 documenting things he wants, there is not one statement by
22 Mr. Davis referencing the so-called oral agreement for a
23 50/50 revenue split. And he admitted that in his deposition.

24 So if we are going to look at the parties' conduct
25 post-2004, then what you need is, under Fourth Circuit law

1 and the basic summary judgment process, Mr. Davis point
2 specific facts to the parties' post-2004 conduct that would
3 support an agreement for a revenue split. You will not find
4 anything, Judge. It is undisputed that the parties continued
5 to deal with each other when they did the television show for
6 a year, but that is far from proof of an agreement to a
7 revenue split.

8 I want to go back to the issue of whether there is,
9 in fact, evidence of an agreement.

10 THE COURT: You went into all that in your opening
11 statement. I don't need to hear it again. I know what your
12 position is. I've read your memos. I've read his memos.
13 I've read the cases. I've heard you. And I don't need to go
14 back over it again.

15 MR. FEIGELSON: All right, Your Honor.

16 THE COURT: I don't know of anything Mr. Cisa said
17 that injected anything new into the argument that you haven't
18 discussed in your principle argument.

19 MR. FEIGELSON: If I could be allowed one sentence,
20 Your Honor?

21 THE COURT: If it relates to something new, but I
22 don't know that it does.

23 MR. FEIGELSON: There was a reference in the
24 argument of being plenty in the deposition that's evidence of
25 an agreement. And in the 60 pages of deposition excerpts the

1 plaintiffs submitted in opposition to this motion, you will
2 not find one sentence on behalf of Mr. Davis that attributes
3 for his agreement to A&E.

4 THE COURT: You went into that in detail earlier.
5 You handed up excerpts of the deposition underlined to
6 emphasize the point.

7 MR. FEIGELSON: I apologize, Your Honor.

8 THE COURT: That's all right. No need to rehash it.
9 I've got a pretty good memory and I was listening.

10 MR. FEIGELSON: Credibility issues.

11 We are not -- to be very clear, this motion is not
12 asking the Court to resolve a he said/they said dispute.
13 What the case is all --

14 THE COURT: We don't deal with credibility. I
15 thought he was talking about at trial.

16 MR. FEIGELSON: Well, I thought I heard the
17 suggestion made that this motion or argument today was
18 raising credibility issues.

19 Um, what the case law says is that when, prior to
20 summary judgment, you have the plaintiff constantly changing
21 the story, as has happened here, it's in the records and it's
22 in our briefs, that is a reason, as a matter of law, not to
23 let those multiple stories go to a jury for resolution. It's
24 not a credibility point at all.

25 And unless the Court has questions --

1 THE COURT: I don't. Thank you.

2 MR. FEIGELSON: -- we'll rest on the papers and
3 argument.

4 Thank you, Judge.

5 THE COURT: Anything, Mr. Cisa?

6 MR. CISA: Your Honor, I don't believe so.

7 THE COURT: Okay.

8 THE COURT: I have looked at the memorandum that you
9 had filed carefully, as well as the applicable case law. And
10 in my judgment, there are genuine issues of fact as to the
11 existence of an oral contract between these parties.

12 There is a contention by the defendants that the
13 affidavits submitted by Mr. Davis contradicts directly his
14 deposition testimony, and under Fourth Circuit law, should be
15 considered a sham affidavit and stricken.

16 My study of the two documents, the deposition on the
17 one hand, and the affidavit on the other, leads me to
18 conclude otherwise. I do not think it can be or should be
19 declared a sham affidavit. Based on that affidavit, and the
20 deposition testimony, I think there is sufficient evidence in
21 this case that there was an oral contract between the
22 parties.

23 Now, Mr. Cisa mentioned credibility. I thought he
24 meant that you were going to make Mr. Davis eat his
25 deposition at trial, along with his affidavit, in asking the

1 jury to not give him any credibility. That's the way I took
2 it. And I would anticipate that that is what you were trying
3 to do. That's what I would try to do if I were defending a
4 case.

5 Obviously, there is no written contract. The only
6 contract that exists, or at least the only contract that may
7 exist, is an oral one. But I don't believe that it's
8 necessary that it be in writing.

9 The State of New York has a law applicable, we've
10 looked at the *Braun against CMGI* case. We've considered the
11 factors discussed therein. We've looked at the Statute of
12 Frauds. And we think that neither the Statute of Frauds in
13 New York, nor the *Braun* factors require this contract to be
14 in writing under New York law.

15 Based on the foregoing, it's the conclusion of this
16 court that there does exist an oral contract which, if
17 believed by the jury, is enforceable. And therefore, the
18 motion of the defendants in regard thereto is denied.

19 The plaintiff has withdrawn its causes of action
20 based on misappropriation of trade secrets. It has out there
21 claims of breach of fiduciary duty and conversion, and I
22 believe a case based on improper trade practices. I don't
23 believe that the granting or denial of a motion for summary
24 judgment on those additional claims will affect in any way
25 whatsoever the discovery pursued in this claim. And so I'm

1 going to deny it at this time.

2 I, generally speaking, if I can't grant a complete
3 summary judgment, and if I conclude that a partial summary
4 judgment does not aid the parties as far as the scope of
5 discovery, then I deny the summary judgment in its entirety.
6 And based on that general rule, I'm going to deny the Summary
7 Judgment Motion in its entirety.

8 It may be that, I shouldn't say it may be,
9 inevitably, as we get to trial, we'll have to sort those
10 other causes of action out based upon discovery and determine
11 which ones are viable and which ones should be submitted to
12 the jury.

13 Though I'm a little reluctant to throw them out at
14 this stage, I'm very willing to throw them out at trial,
15 because it's my practice to reduce the issues submitted to
16 the jury down to the bear minimum, so that they can give a
17 proper consideration and not be confused by an overwhelming
18 number of issues to decide when all of the facts are
19 concentrated in one area and one set of facts controls
20 multiple causes of action.

21 Now, I have previously bifurcated discovery.
22 Mr. Farrier, I believe argued earlier, that for the defendant
23 to participate in discovery on the damage issue, it caused
24 the defendants to make public certain pricing factors and
25 placed them at a competitive disadvantage with their

1 competitors.

2 I'm not sure that I understand that. But I've
3 concluded that the best way for me to deal with that
4 objection is specifically as opposed to generally. That I'll
5 deal with it as we do in all cases, based on motions to
6 compel and motions for protective order. And in that way, we
7 can look at specific requests for information and relate
8 those to the facts of the case, and I think make a more
9 intelligent, meaningful judgment as to what is discoverable.

10 I don't think that I would be willing to issue a
11 protective order limiting discovery material to Mr. Cisa's
12 observation and not to his client. I've never done that
13 before. I've never reached it, but it just seems like there
14 is something about that that is fundamentally unfair and not
15 in keeping with our rules.

16 So I'm not of a mind to do that now. I've never
17 done it, and I can't think of any circumstances under which I
18 would do it in a civil case. But let's deal with those
19 discovery matters as they come up.

20 And I think as we do that, I'll become more familiar
21 with what you are doing and what you are after, and I can
22 deal with them maybe in a little more general way as I get
23 into it. But for right now, let's just let the ball roll.
24 And as you object and ask for protective orders, we can
25 consider that as we go along.

1 And it may be that Mr. Cisa, who is a reputable
2 attorney and should be only seeking the information that will
3 help him in this case, and not anything that will benefit his
4 client outside of the case, because certainly, he shouldn't
5 be seeking that, that he can shape these discovery requests
6 in such a way that there won't be any real serious objection
7 by, let's wait and see what happens with that.

8 I'll issue a new scheduling order. I think we need
9 that. It seems to me that the factual issues involved in
10 this case aside from damages are very simple. And so it
11 would seem to me that you ought to be able to complete
12 discovery, say, in four months.

13 Does that sound reasonable?

14 MR. CISA: It does to me, Judge.

15 THE COURT: That will be the centerpiece of any
16 scheduling order. But we'll schedule all the other matters,
17 as well. But we'll give you a four-month deadline on
18 discovery. If you need more time, obviously if you request a
19 reasonable amount, I'll give it to you.

20 One other thing I was not going to mention today,
21 because I just thought it might be best to ignore it, but
22 upon reflection, I think it's a matter of such seriousness
23 that I do need to mention it.

24 It's been brought to my attention that there is a
25 web blog entitled Flip This Lawsuit. I haven't looked at

1 that blog, I haven't studied it to see what it says. I have
2 been told what it says.

3 Now, I've never had this happen before, and I
4 consider it a very, very serious matter. At first blush, it
5 appears to me to be an attempt to influence this lawsuit in
6 an improper way. We can't tell what's happening there until
7 we draw a jury.

8 But at some point in time, if I'm convinced that
9 that has been the result of such a blog, in other words, if
10 we have jurors that come in here and they've read that blog,
11 and upon reading that, they cannot give the defendants a fair
12 trial, then that is a serious matter, and it will be
13 considered by such as this court. And an appropriate
14 punishment and sanctions will be handed out. I'm not sure
15 what those will be. I think you lawyers know that if you did
16 that, what would happen to you, you would probably be looking
17 for another profession. So that's how I feel about that.

18 Now, whether what's going on that blog is of such a
19 nature that it in and of itself, whether members of the
20 public read it and act on it or not, warrants a sanction by
21 this court, and some sort of obstruction of justice, some
22 sort of contempt of this court, I don't know. But it's
23 because of those consequences that I see fit to bring this to
24 your attention. This is a serious matter. This is a serious
25 court. And we will not permit its function to be undermined

1 in such an unseemly fashion.

2 Now, who is responsible for that blog? I don't
3 know. It may be that I'll have to ask the FBI to look into
4 it. It may be I'll have to ask the U.S. Attorney to get the
5 grand jury to look into it, I don't know. Those are things
6 down the road. But it seems to me that the information I
7 have certainly shows that the defendants don't have their
8 name on this blog and that the plaintiff does.

9 And I would think that good, prudent action on his
10 part would have gotten it off of there a long time ago. And
11 that's all I'm going to say on that. But when we get to the
12 end of this case at some point, we'll look at it again and
13 see who is responsible; what the effects are and what action
14 we should take.

15 But it just felt like that it is such a serious
16 matter and such an unthinkable thing for a litigant to do in
17 this court, that it needed to be commented on. I mean, we
18 are not in Boy Scout camp; we are in serious court here and
19 we don't do business that way. And I'm not going to permit
20 litigants in this case to do business in that way. Okay?

21 Thank you very much. We'll be in recess.

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I certify that the foregoing is a correct transcript
from the record of proceedings in the above-titled matter.

Amy C. Diaz, RPR, CRR June 8, 2007

S/ Amy Diaz