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

TRADEMARK PROPERTIES, INC. and RICHARD C. DAVIS	:	
vs.	:	
A&E TELEVISION NETWORKS	:	2:06 CV 2195

Motion Hearing in the above-captioned matter held on Thursday, October 16, 2008, commencing at 10:05 a.m., before the Hon. C. Weston Houck, in Courtroom IV, United States Courthouse, 85 Broad Street, Charleston, South Carolina.

APPEARANCES:

FRANK M. CISA, ESQUIRE, 622 Johnnie Dodds Blvd., Mt. Pleasant, SC, appeared for plaintiff via telephone.

RICHARD A. FARRIER, JR., ESQUIRE, P.O. Box 1806, Charleston, SC, appeared for defendant.

JEREMY FEIGELSON, ESQUIRE, 875 Third Avenue, New York, NY, appeared for defendant.

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THE COURT: When we had the bar meeting, one of you, I think it was Mr. Farrier, expressed a desire to take somebody's testimony by video deposition. Isn't that correct?

MR. FARRIER: Yes, sir.

THE COURT: That's the lady that was getting ready to have a baby?

MR. FARRIER: Had it on Tuesday, Your Honor, had a C-section.

THE COURT: Any objection to that by the plaintiff?

MR. CISA: Judge, there's no objection. We talked about that some time ago, and I didn't object to the videotaped deposition, but the request was really to do some type of a feed from New York during the trial of the case, and I objected to that.

THE COURT: On what grounds?

MR. CISA: Well, on the basis that, Judge, I think to do a feed of a witness in New York, I think it unduly promotes that witness and makes the witness seem special in the eyes of the jury. I think it's awkward on cross-examination, because I don't really know what she's going to say.

THE COURT: Well, you wouldn't know what she was going to say, if she was testifying in the Court, and that's the theory under which she gets to testify.

MR. CISA: Yes, sir. But the difficulty, I think, is if I want to cross-examine her about something she said, with

a document that we have here, I'm not exactly sure how we'd go about that, seeing that she's in New York.

THE COURT: Okay. The rule is Rule 43, and -- of the Federal Rules of Civil Procedure. 43(a). And it says, "For good cause and compelling circumstances, and with appropriate safeguards, the Court may permit testimony in open court by a contemporaneous transmission from a different location." And, of course, that's different from a video deposition.

We have the capacity with this teleconferencing unit here, to do that. We can match her up with a similar unit near her home, and make it unnecessary for her to travel. The papers that they filed indicate she has two children, she just had a birth yesterday, and it seems to me that they've met the requirements of Rule 43.

I really anticipate that rule being amended, as we get into the technology age in our courts and start using these devices more and more. But I do think they've shown good cause, because of her pregnancy and birth. I think the fact she lives in New York and would have to come down here and be away from her first child and her second child a period of time, is something that would qualify for the compelling circumstances. And the appropriate safeguards, of course, I think we will have a verbatim transcript, we will have the witness sworn, we will have -- the parties will have the right to cross-examine the witness.

I'm not sure about documents. I'll have to check that out. I'm not sure exactly how that works. I don't know how we could do it. Certainly if you wanted to forward documents to her in advance, we could do it that way.

MR. CISA: Yes, sir.

THE COURT: We could, if you chose to, I can require Mr. Farrier to disclose to you what the nature of her testimony's going to be, and you could select whatever documents you wanted to select, and put them in an envelope and seal them and not give her an opportunity to review them, and thereby diminish your effectiveness on cross-examination. We could number them and ask her to take out of that packet document number such and such. Or, I'm almost positive that we could take her direct testimony, and then depending upon how voluminous the documents are, fax them to the Clerk of Court. This would be done in a Federal Courthouse in New York, and there would be a Clerk of Court there who would have to assist us in the process. They've got to set the video conferencing up, they're got to receive it. We would swear her as a witness on this end. But I think that I'm going to permit him to do it, provided we can work out that part of it. If you would prefer to fax them, we can do that. If you can put them in an envelope and send them there, and we will have a Clerk of Court there, if we can. If we can't, we just can't take the deposition. If we can't safeguard to it where we

provide you with what you need to have to appropriately cross-examine her, then we're not going to do it. But if we can do that, which I think we can, and we can do it if we get just a little bit of cooperation from the people in New York, we can send it to them, mail it to them, fax it to them, and then just say give her document No. 1 at this time, and then you can ask her about that. And you can use the equipment that we have in this courtroom, to show that document to the jury as you cross-examine her on it.

So I think that with a little work, we can work out that detail. And I think when the Court talks about appropriate safeguards, then that may be one of the safeguards that they're speaking of.

The cases that I've looked at, don't really deal with that particular issue. But I think it's a real issue and it's an important issue, and it does present a question of whether we can safeguard that right of yours.

Now, yesterday when we had our demonstration of the equipment in the courtroom, we used the video conferencing. What we established yesterday is the ease with which you can contact the other location. Now, they've got a little clicker over there like a remote control, and they've got it programmed. And they hit the menu, and then the menu comes up, and they punch Columbia, South Carolina, and it goes to Columbia. But they've got that phone number and all, in the

document. We don't have that with New York, but we'll have to make that arrangement. I don't think there will be any problem, but we don't know. I mean, you know, a lot of people are very critical of people from the North. I'm not one of those people, but maybe I will be after we get through this process. But I would assume that they would be cooperative. And there's -- as I announced yesterday, there's no charge for this. And I now know why there's no charge, and that's because our phone bill is paid by the Administrative Office of the U.S. Courts in Washington; we don't pay it. And this thing costs us 12 cents a minute, which is a pretty good price, pretty reasonable price. And so it's not expensive, and I think it may help us try cases in this state in a way that we do it efficiently, and we do it in such a way that we reduce the costs to the litigants. Bringing somebody from New York is expensive. If that were an expert witness, you'd have to add three or $400 an hour to that. And you're talking about something that can cost you five to $10,000. And most litigants like to save that money. Most of the litigants that want to save money, happen to be sitting where you're sitting, because they don't have a lot of money.

But one of the things we developed yesterday was that we don't have but one place to plug this video conferencing in. We hadn't plugged it in until yesterday; we didn't know; there's supposed to be two. And we're in touch with the

technology people that we hired to design this technology to tell us where the second one is; we don't know. If we can't find it, we'll just have to get a longer extension cord. Because it would be my proposal to pull this screen up to about where that evidence cart is, so the jury can see it. And then you'll have to cross-examine from each end of the jury box, or maybe all of you will cross-examine from there. But it seems to me that's the best. I don't know how we can get that cart over here by the witness, to emulate a witness on this stand. And I don't see why we should go to all that trouble. But if we can't find a second hook-up, we'll get an extension cord and we'll have it where we can position it properly for the jury to see it.

The other thing that I noticed yesterday was that the sound was not good. There's one microphone. And one person had that microphone, and she could talk to the witness at the other end. I've talked to the technical people yesterday about that. And what they think they can do is take the sound on the video conferencing and hook it into our sound system, which will -- the witness can hear everything. And so we're looking into that. If we can't work that out, then we'll have to give each side a wireless mike or something like that. But we'll work the details out before November.

I think that's about it. I'm not going to issue a formal order permitting it. You know, I -- we'll work out these

details, if we can work them out, to give you the right to cross-examine. We'll do it, and I'll go forward with it.

Yes, sir?

MR. CISA: I was just -- Judge, I don't know exactly how your equipment works, but it could very well be that maybe I could put an exhibit down on this screen, and she had a screen --

THE COURT: You can't do that.

MR. CISA: Can't do that?

THE COURT: They're separate systems and we just can't do it.

MR. CISA: Yes, sir.

THE COURT: We went into that yesterday. You can't take the video conferencing and put it into our system. Now, maybe we the put the sound in there, that's what we're going to try to do, but the other parts, you can't put it in there. It's a separate system and it's just not integrated to that extent. If it were, then it would be much easier. But we've got two of these video conferencings here in Charleston, one in this building and one in the other building, and so we'll have it available. But it's going to take some preplanning, and it's not the kind of thing that you can do it in the last minute.

Now; I don't know -- The witness is a lay witness, Mr. Farrier?

MR. FARRIER: Yes, sir.

THE COURT: I think in all fairness, you know, in the normal course of things, if you're in a courtroom, you don't -- you're not entitled to know what a witness is going to say, unless you've taken that witness' deposition. But in light of the reservations that counsel has, concerning documents and cross-examination, then I think we're in a little bit different situation with the video conferencing. On regular cross-examination, he's got his file, he's got his documents, he can take a minute, go back and pull those documents out and cross-examine. Not knowing -- and he didn't have to know what she's going to say, didn't have a right to know, unless he takes her deposition.

But in this particular case, in transferring the documents up there and trying to make the process move along at a reasonable pace, then I think he's entitled to know what the witness is going to say. I would never ask a lawyer to have to summarize a witness' testimony, and I'm not asking you to do that at this time. But I do think you have to give him a general idea of what she's going to testify to and what documents she's going to be referring to in her testimony.

To the extent you're going to give her documents and let her have documents in New York, then we've got to work that out. In other words, we've got to be sure that the documents in New York are what they purport to be. In other words, if

you say you've got the letter of September the 29th, 2005 from so-and-so to so-and-so, we've got to be sure that's what she's got. I mean, I'm not suggesting that you would be a trick artist, you certainly don't have that reputation, but I don't want to subject this Court to that possibility.

So I guess that we probably need to give counsel some information about what the witness is going to testify to. Not verbatim, but in general, and what subject she's going to address. And what her knowledge of those subjects and how she became aware of those subjects and is able to testify concerning the same.

And also, to the extent you're going to show her documents, I think you need to let counsel know that. And enough in advance to where he can -- I think it's best to get the documents up there to her, rather than fax them. That just slows the process down, and I don't see any reason to do that.

Any problem with that, Mr. Farrier?

MR. FARRIER: No, Your Honor. And I don't know how much we said in our brief, but who she is, she's an in-house counsel who was charged, as we were approaching season two, with trying to finalize a contract with Mr. Davis for the next season. And so it's a limited period of time, I'm happy to work with Frank and talk through, I think that there's a known universe, a contract, some e-mails and discussion and things

between the contract, and I don't think there's going to be any problem with that.

THE COURT: Let's try to do that, say within the next week. I don't want to have that many deadlines here, and I'd like to go on and get that done, and then counsel can come back and tell you what he wants. And then in the meantime, we'll be making connections with -- tell me where she lives and tell me what's the best place to be, and we'll start making contact with someone up there and see if they have a technician that will come down and set up their video conferencing.

MR. FARRIER: Your Honor, the one thing I'd like to bring to the Court's attention to, may be no problem at all in the time frame, and I would not discuss the medical condition, but she had her baby by way of C-section, which I have some familiarity with, not personally, but with my wife. And she doesn't get out of the hospital till Saturday. So there may be -- we certainly can do it next week, but it might not be Monday or Tuesday. And I don't -- she may not know how she's feeling at that stage. There's some recovery time involved in that.

THE COURT: Okay. I understand the clerk's office has made arrangements with both of you to kind of give you a private lesson on this stuff. And when are they going to do that?

THE CLERK: Monday at 9:00.

THE COURT: Okay. Maybe we can get some more information about this before then, and be set up on it. I frankly don't think the argument that a video conferencing deposition draws attention to that witness' testimony and could tend to cause a jury to give it more weight than if that witness appeared in person or by regular deposition, I don't think that. I think when a witness is here in court, they make a much stronger impression than if they appear via video. That's been my experience, and I've observed many many video depositions, and I don't think that the witness is as strong appearing in that fashion, as if they were here in person.

Now, I don't -- since our discussion yesterday, a number of questions have arisen in my mind. Someone asked the question, who has control over the witness? As you might know, when we take a deposition of a witness in a foreign jurisdiction, we issue the notice, or the notice of deposition is filed in this Court, a certified copy of that notice is sent to the clerk of the Court where the witness resides. And that Court where the witness resides, issues a subpoena requiring that witness to go to a location and submit to deposition. And the rule is that any questions that arise, if there are objections to evidence, those objections are handled by the jurisdiction where the witness is.

In other words, even though it's my case, depositions

coming into this Court, I know more about this case than a guy in New York does; if you're taking a deposition, he rules on the objections, he rules on -- et cetera. Same thing applies to interrogatories and discovery. When it goes up there, they decide it.

We've got a little different situation here. First of all, I think the statute contemplates something -- that the rule contemplates something different than that. It doesn't contemplate a deposition that's taken independent of the trial, and then offered into evidence, if the rules permit at trial. It contemplates the Court may permit testimony in open court by contemporaneous transmission from a different location.

I think that language would seem to indicate that this Court would have authority to rule on objections. We don't have the right to subpoena. Now, when somebody is going to try to take the deposition subpoena and use it in a video conferencing deposition, I don't know, and I don't know what will happen then. But in this case, we're not doing that. In this case, Mr. Farrier is able to get this witness to voluntarily go and sit down in that chair and testify. And as she testifies, if there are objections, they'll be made just as if she were in open court, and they'll be ruled on in that fashion. And I think -- I haven't seen any authority, but I just think from the language of the rule, that the rule

contemplates that since there's testimony coming into this Court live, that this Court has the right to rule on any objections that come up. And that's the way I plan to handle it. Even though, if it were a deposition, that would be different. But there is a fine line between the two. And as I told the lawyers here yesterday, we're not getting in the deposition business. We're not going to use this equipment for video depositions. That's something for you to do and you to pay for. We're using this to make our trials more efficient and less expensive for both parties. And I hope it works to our advantage in that regard in the future. But we've just got to wait and see; we haven't used it yet.

I think on the criminal side they've used this quite effectively. Obviously if you can take a video conferencing and have a man in confinement at the Ridgeville penitentiary, and you don't have to pay guards and all that to bring him here to the courthouse, you've saved money, plus you've provided a larger degree of security to the public, in not having to take him out in public and transport him here. And it's been used effectively there. We haven't used it in civil, but we're getting ready to. Okay?

Give him what he needs, and then we'll probably chat next week and see what's going on. By Monday when you come in here, we'll have someone in New York, and I will have known by Monday who we're going to have and when we're going to have

them and that type thing. Okay.

We've got some motions today, so let's dispose of those motions. I think most of these motions are motions by the defendant filed for summary judgment or partial summary judgment regarding a number of causes of action asserted by the plaintiff in its complaint. The motion takes a position that New York law applied.

MR. CISA: Yes, sir, that was based upon -- you had indicated to us at a prior motion for summary judgment hearing, that you thought that New York law applied. I wasn't real clear on what your basis was for saying that, but I think at the last hearing we kind of agreed that New York law was pretty much the same as South Carolina law.

You know, it's a situation where my client contends he was on a phone in South Carolina and negotiating an oral contract with Charles Nordlander, who was in New York. But the series was actually filmed in South Carolina, and all the leg work, so to speak, for the series, was done in South Carolina. So I was pitching that South Carolina law applied, but I think it was kind of a moot issue, because I don't know that there's a big distinction, at least at the last hearing we had, based upon what counsel said, what law applied.

THE COURT: I don't know what the difference is either. In looking at the motions, I think that they are similar. It seems to me that the New York law is a little

more explicit, as far as what you can plead outside of a breach of contract. This case arises out of an alleged contract. And I don't think there's any question but that the thrust of the plaintiffs' case is a contract and its breach by the defendant.

And the New York law seems to say, clearly, that if the other causes of action are duplicative of the breach of contract cause of action, and they don't really allege something outside of that cause of action, they can't be maintained. I don't know that South Carolina law is quite that strict, but it ought to be, and it used to be. Used to be if your relationship arose ex contractu, it was a contract case; if it arose ex delicto, then it was a tort case. And I think the law is now that for you to have some action outside of the contract, it has to be an independent act creating that cause of action.

But anyway, let me hear from the defendants as to the difference in the law and why they think New York law applies.

MR. FEIGELSON: Good morning Your Honor, Jeremy Feigelson, admitted pro hac vice. I'm from the North; I hope that's okay.

THE COURT: For the time being, it is. No, that's fine; we're happy to have you.

MR. FEIGELSON: I'll try not to do anything to change Your Honor's view on that.

Your Honor, the issue of choice of law first came up before the Court, at the initial motion back in 2007. At that point we took the position that New York law did apply, because that's where the contract was formed, that's where the defendants are based. And Your Honor said at the hearing at that time that New York law applied.

Since then, I think it's been a working assumption, certainly on the defense side, and we thought on the plaintiffs' side as well, that it was a settled issue. And there has not been any discussion or any further motion practice or, you know, any litigation over choice of law. We took Your Honor's comment on that point from last year's hearing as dispositive. So it was an open issue going into the 2007 --

THE COURT: Go ahead.

MR. FEIGELSON: It was on open issue going into the 2007 motion hearing, and hadn't come up before the Court previously. What we did at that point was we submitted a brief that gave Your Honor the law of New York and the law of South Carolina, with the suggestion that New York law applied. But since it was an open issue, we provided the Court with citations to both states' law. At that point Your Honor said they thought it was New York law.

THE COURT: Is there any difference between the two substantially?

MR. FEIGELSON: Well, I think Your Honor's maybe right that the New York law is a little more explicit on this duplicativeness point. But, you know, since that time, Your Honor, we've been developing the entire case --

THE COURT: Okay.

MR. FEIGELSON: -- under New York law.

THE COURT: Let's assume that New York law applies. If anybody submits anything to me to reconsider that, then I'll do it. But my clerk's handed me the transcript of that first hearing, and there's no question that that was the -- you know, I said, "I think New York law is controlling." I mean, I didn't make a real strong ruling, but at least I expressed that opinion, and I wouldn't have said that, had I not felt that it was appropriate to use New York law.

So let's assume that New York law applies. And if we determine, or counsel thinks that's wrong, you can submit some cases to me, and if you do, you know, counsel said they thought that was the law of the case. It is the law of the case, but it can change. And so it may be after I rule today, if I do rule today, and I would hope that I could, on part of what you've submitted, then you'll have a better idea whether you want to contest it or not. It may be easier to tell which applies or whether you want to take that position, when you find out what I've ruled, and you might then say, well, South Carolina law's different, maybe I can get him to do something

else if we apply South Carolina law. We've got a little time before the trial.

Okay. Your motions; let me hear from you.

MR. FEIGELSON: Thank you, Your Honor. If I could start maybe with where we agree, as opposed to where we disagree, that might help clarify things, I think. Where we agree is that there is a contract case to try here. Richard Davis and A&E either got on the telephone and made this fifty-fifty oral agreement back in 2004, or they didn't. That's an issue for the jury, and they're going to be here on November 3rd to pick a jury, and we're fired up ready to go, ready to roll right into trial and we're going to try that issue.

The reason for the motion, Judge --

THE COURT: You understand I moved the trial up to that Monday.

MR. FEIGELSON: Yes.

THE COURT: We just got a terrible schedule with Election Day the next day, Veterans' Day the next Monday, and then I've got some plans about Wednesday or Thursday of that second week. I think it's Thursday. And so I think we've got a good enough cushion, but I don't see why we should throw away Monday. So we'll get into the case Monday and run Monday, skip Tuesday, and come back Wednesday, Thursday and Friday, and probably finish it that first week. Anyway, we'll

see. Go ahead.

MR. FEIGELSON: That's fine, Your Honor. The reason for the motion is that although it's all agreed that the case should go to trial on the contract claim, the plaintiffs still want to try this case on three other theories; fraud, fiduciary duty and unfair competition.

We had a conference in this case before Your Honor not too long ago, where Your Honor commented that it seems like a lot of the complaints that you see have some extra stuff in them, and plaintiffs tend to put in. And that concern is very real here. These are all just repackaged versions of the contract claim. That is a clear basis for summary judgment before you even get to the merits of those claims.

We have also given Your Honor discussion and citations in our briefs how you could look at those things on a stand alone basis, if you look past the issue of duplication. And when you get to the claims on a stand alone basis, here we are at the end of -- this case has been pending for two years, we've had a lot of discovery, we have a full record. And at this point there are no genuine issues of material fact that could support sending any of these three claims to the jury.

So we've met the summary judgment standard, both on the duplication point, and looking at the claims on the stand alone basis. And at this point, keeping the claims alive is not supported by the law, by Rule 56, and it's a recipe, we

think, for a longer trial and maybe a confused jury.

I want to also clarify, Judge, in the spirit of focusing on what we agree on for just a moment, what's off the table at this point. We understand from Mr. Cisa, and he can confirm this separately, but the plaintiffs are going to drop Departure Films as a defendant in this case.

THE COURT: Do what now? Yeah.

MR. FEIGELSON: Plaintiffs are going to drop Departure Films --

THE COURT: Sure.

MR. FEIGELSON: -- as a defendant in the case. There's a separate motion pending before Your Honor on behalf of Departure Films, and as I understand it, we're not going to need a ruling on that because we'll have a stipulation.

There are some other claims that we had moved against, which plaintiffs are withdrawing. So these three claims, fraud, fiduciary duty, unfair competition, as we understand it, that's the whole landscape that Your Honor has to deal with on this motion.

And in the spirit of, you know, everybody should contribute to simplifying the case, there's a counterclaim that A&E has brought, and we can advise Your Honor today that A&E is not going to seek trial on the counterclaim, we'll withdraw that voluntarily.

On the duplication point, Judge, this is, as we set forth

in our briefs, there's a real strong, real clear legal rule, when you have a contract claim, that's what you've got. And you cannot take a contract claim and just hang other legal labels on it, without showing, certainly at the summary judgment stage, that those really are independent acts. And we laid that out in our brief, Judge, at pages five to eight. And what we got back really is nothing more than a bare bones statement that the claims really are different. Plaintiffs haven't pointed to any facts that make them different.

And to be clear where we are on that, Judge, summary judgment at the close of discovery. It's not a motion to dismiss, we're not talking about the plaintiffs' right to plead claims in the alternative, we're talking about what they've been able to prove through discovery, and, therefore, would have a right to present to the jury.

This is about their burden to come forward at this point in the case with specific evidence that makes the claim independent. And they haven't done that. In fact, they've confirmed in discovery the damages are exactly the same. Whatever claim you look at, it's about 50 percent of the revenues. That's the theory of damages.

On the fraud claim, again, the only basis for the fraud claim that's been asserted in the complaint was that A&E didn't intend to make this agreement with the plaintiffs, went ahead and made the agreement anyway. Again, if A&E made the

agreement and then breached it, they breached it. It's a breach of contract, it's not a fraud.

On fiduciary duty --

THE COURT: What about the allegations that they never intended to perform the contract when they induced the plaintiff to enter into it?

MR. FEIGELSON: Two answers on that, Judge.

THE COURT: Say what?

MR. FEIGELSON: Two answers on that?

THE COURT: Sure.

MR. FEIGELSON: First, before you even get to the evidence on that, fact is, as a matter of law, it's still just a contract claim. And the cases in our brief make that clear.

And the second answer, Judge, is when you get into the evidence, as I said, when you look at the claims on the stand alone basis, the plaintiffs have walked away from that allegation. It says in the complaint that A&E didn't intend to enter into the agreement in a bona fide way.

What Mr. Davis said at his deposition is that he was firmly convinced that A&E actually intended to make the agreement at the time that they made it. And then they made a subsequent decision, after the show became a hit, and they had the prospect of some real revenues, they made a subsequent decision at that point, and only at that point, to breach the agreement. That's a discretion by the plaintiffs, Judge, that

only maps on to one cause of action, and that's breach of contract. And I think that's the complete answer on the fraud claim.

Fiduciary duty, again, the argument, here again, is all about this telephone conversation where supposedly Mr. Davis and Mr. Nordlander, the fellow from A&E, made this agreement or didn't. If they made the agreement on the telephone, they made a contract. There's nothing in the record that supports that that was a fiduciary relationship regarding --

THE COURT: Let's go on. Let's skip over the fiduciary relationship. I want to hear from Mr. Cisa. I see nothing to indicate that there was a fiduciary relationship. And I want to hear from him first, then I'll hear from you on that.

MR. FEIGELSON: That's fine, Your Honor, thank you.

THE COURT: Let's go on to the next one.

MR. FEIGELSON: Okay. And the last thing, Judge, is unfair competition. And again, I set out the cases on duplication, Judge, that when the so-called unfair competition takes the form of a failure to pay on a contractual arrangement, that's a duplicative claim, and it should be dismissed on that basis.

And then if you get to unfair competition on a stand alone basis, what you see is a couple of legal requirements that these plaintiffs just clearly cannot meet.

One legal requirement is that an unfair competition claim cannot arise, as a matter of law, out of the private commercial dispute. It has to be a dispute affecting a public interest. That's true under New York law, it happens to also be true under South Carolina law.

And second requirement is that, look, unfair competition, if what you're claiming is the misappropriation of a concept for a television show, which --

THE COURT: They don't do that. They talk about money.

MR. FEIGELSON: It's not entirely clear what they're talking about, Judge. But if we look at the claim generously, and look at it that way, then it's preempted under the Copyright Act; and as a matter of law, it fails for that reason, and summary judgment is appropriate.

So again, Judge, just to underscore, we're at the end of the road here in terms of discovery, we've been exchanging documents, taking depositions for going on two years. It's the plaintiffs' burden at this point to come forward with specific facts showing these claims aren't duplicative, and that there are viable issues of fact.

THE COURT: Okay. Let me hear from the plaintiff.

MR. CISA: Thank you. Your Honor, what counsel said about our agreement where the case stands is correct.

As to the fraud claim, Judge, you know, what we've alleged

is that at the time that A&E represented that we were going into enter into this partnership agreement or this joint venture, that they had no intention of following through.

THE COURT: Well, they say that that's what you allege, but at the end of discovery, that your client, Mr. Davis, said that he was convinced that the defendants entered into a contract, which they intended to perform. But after they saw they were going to make a lot of money off the film, they changed their mind and decided to breach it. And, therefore, what he's saying -- what they're saying is there's no genuine issue of fact as to the allegation that the defendants entered into the contract, not intending to perform it. Now, what evidence do you have, other than what your client said? Is this your client?

MR. CISA: This is my client, Your Honor, this is Mr. Richard Davis with me.

I think you're exactly right. Richard Davis testified at his deposition at the time they made these representations, he believed they were going to follow through and honor those representations. There's no question about that. What I'm saying is, is that through discovery and through knowing what has transpired, that they had no intention to honor those representations.

THE COURT: What evidence do you have?

MR. CISA: One glaring thing that I have Judge, is I

have an e-mail from the executive that we dealt with at A&E initially, Nancy Dubuc, who's responsible for the development of nonfiction programming, where she tells Richard Davis, "I've asked Charles Nordlander to review your materials, as he oversees all Lifestyle programming." Nancy Dubuc, at her deposition, and also by way of affidavit, indicates that Nordlander had no authority to negotiate anything with Richard Davis.

So what I suggest to the Court is, is that A&E had no intention of honoring any agreement that Richard Davis negotiated with the person that he was directed to deal with.

THE COURT: Now, what did she tell him to do?

MR. CISA: She told him -- She said this. "I have asked Charles Nordlander to review your materials, as he oversees all of our Lifestyle programming."

She asked Charles Nordlander to deal with Richard Davis. She now takes the position, Judge, through affidavit and deposition testimony, she says this. She says Mr. Nordlander had no authority to enter into any contracts on behalf of A&E, had no authority over allocation of advertising revenues. The only person that Richard Davis dealt with initially, as far as this oral agreement, was Charles Nordlander. Now she's saying he didn't have any authority to do anything anyway.

So I submit that they had no intention of honoring any agreement. They induced him to spend six million dollars on

real estate, take all his time and effort relative to this show for a year, and they had no intention of honoring any kind of agreement. Nordlander doesn't even have authority, is what she's saying.

So I submit there's evidence of fraud in the inducement, based upon Nancy Dubuc's deposition testimony and her affidavit.

THE COURT: Okay.

MR. CISA: All right? Just as to the breach of fiduciary duty cause of action, we have alleged that they have agreed -- they agreed to partner this show with us. This was a joint venture or partnership arrangement where everybody was going to put something in; at the end of the day they were going to add up what they grossed off the show as far as revenues and subtract the expenses, and we were entitled to 50 percent.

I don't think that New York law is any different than South Carolina law relative to fiduciary duty. I found several New York cases that says that partners owe a fiduciary duty to the other partners. They have an undivided and undiluted duty of loyalty to the other partners.

In this particular case we contend that they misappropriated our idea, concept and our money, our share of the money, relative to this partnership or joint venture arrangement. And they did not account to us for the profits

and the revenues and -- or any of the expenses at the end of the first season. That's why it broke down, that's why we went on.

So I would submit, Judge, that based upon what we say and what Mr. Davis said in his affidavit, as far as partnering the show. And what Mr. Davis did was he described -- he's in the real estate business -- he described how he partners deals with other people. That's how he pitched it to A&E. I buy a house, my partner puts money in, I put money in, I put effort in, and at the end of the day when it's sold, we add it up and we divide it. That's what he contends happened here. And I submit that the law is very clear that partners owe a fiduciary obligation to the other partners.

Judge, as to the unfair competition cause of action --

THE COURT: Well, let me say, all you're saying is that they agreed to go into this venture, and they agreed to divide the proceeds fifty-fifty.

MR. CISA: The net proceeds, that's correct. As partners.

THE COURT: That's far from a partnership. I mean, it might be a partnership in lay terms, but a partnership, I mean, one partner has a right to act for the other partner. If you're in a partnership with somebody, they can bind you to contract. They can sign checks on your partnership account. I mean, they can do all kind of things. And that's what's

contemplated by the word partnership, when you start talking about fiduciary relationships. I've been in partnerships before. You probably -- most lawyers have been in partnerships, and I mean, it's one guy acting for the whole crowd.

MR. CISA: Don't you think when you're in a partnership with somebody, you have a duty to account?

THE COURT: I don't think there's any question; I just don't know that these people were in partnership. They just signed a contract, they were going to do business together, and the fact you might call it partnership, doesn't make it a quote, "partnership," end quote, within the law that creates a fiduciary relationship.

MR. CISA: All I'm suggesting is I believe the law is that you can have an oral partnership. And you certainly have a duty to account, and you can't misappropriate one partnership's funds, and you --

THE COURT: What did the defendant agree to do?

MR. CISA: The defendant agreed, in this partnership arrangement, that --

THE COURT: Now you're calling it a partnership arrangement.

MR. CISA: I understand that. What the defendant agreed to do was to front the money for the production company. That's what they agreed to do. And they agreed to

air the show. They agreed to credit Mr. Davis as being the creator of the show. Mr. Davis, in turn, was to purchase all the properties and bear all the risk relative to those properties. He was to use his time and efforts relative to doing the series. He was to use his company, Trademark Properties, a local real estate company, to make those shows. Everybody did everything they were supposed to do, except they didn't divide it up. A&E didn't divide up the money at the end. That's our allegation.

THE COURT: Okay.

MR. CISA: So what I'm suggesting is that -- And this is what we got in response, Judge. We got some evidence from them that there was some type arrangement. When the series was approved, we pitched it, they write it up, they send it to the board of directors. This is the A&E e-mail to Richard. "Congratulations, Richard, the board approved the money for our series." Our series. There was -- just in line with what Richard understood the agreement was. We're going to partner this show. If it makes money, good; if it don't make money, I'm a big boy, I'll walk away.

So I submit that there is evidence of a partnership or a joint venture arrangement between A&E and Richard Davis.

THE COURT: Okay.

MR. CISA: Judge, unfair competition, I did find a New York case that says a basis for unfair competition, cause

of action for that, is misappropriation. They misappropriated our money, they misappropriated our idea, concept, format, and we had registered with the Writers' Guild, and I think unfair competition is a viable cause of action. I submit that.

THE COURT: Well, what does it add that you don't have under the contract claim?

MR. CISA: Well --

THE COURT: I'm just curious. I'm always curious why people want to take a pretty simple straightforward claim and complicate it, when it doesn't add anything to the case. You've got to prove the breach of contract to prove the unfair competition that you allege.

MR. CISA: Well, I think, Judge -- it's true that our damages are exactly the same under any legal theory.

THE COURT: And the establishment of liability is the same. You've got to prove the existence of a contract, the breach of the contract, and damages. And though you might call it something else, under unfair competition, it's the same three things.

MR. CISA: Well, then you get into unfair competition is, you know, our claim is, is that they misappropriated our share of this deal.

THE COURT: That's the same thing you contend under the breach of contract claim. I mean, I'm just amazed at why lawyers feel like they have to say the same thing over five

times, when it doesn't help your case, it just confuses the jury. But that's not what we're here today to decide.

MR. CISA: Yes, sir.

THE COURT: So go ahead and make your argument.

MR. CISA: Your Honor, that's it basically on the -- on their motion for summary judgment.

THE COURT: What about the conversion?

MR. CISA: I've abandoned that. I don't think that has application, Judge.

THE COURT: Okay. I agree.

MR. CISA: The only things that -- the contract claim, as I understand, it is a given, at least at this stage of the case. I'm seeking to go forward on fraud, breach of fiduciary duty and unfair competition.

THE COURT: Okay. Yes, sir.

MR. FEIGELSON: Your Honor, if I could respond to what Mr. Cisa had to say about those three causes of action, fraud and fiduciary duty and unfair competition. On fraud, this is not a question of what Richard Davis believed at the time that this purported agreement was reached in the phone conversations. The issue here is whether we can take this claim to trial on a case of admissions by Mr. Davis, that A&E had a good faith intent to go forward at that time. And the admissions are as clear as day, Judge. And they're on page ten of our brief. And just one very quick excerpt from

Mr. Davis' deposition, and I quote, "I think he -- that's Mr. Nordlander -- I think he truly believed we cut a deal. I've got to believe that he really intended to."

So when you've got the plaintiff saying that under oath in deposition --

THE COURT: Okay. Okay. You've got Mr. -- Nordlander is it?

MR. FEIGELSON: Yes, sir.

THE COURT: All right. The plaintiff contends that he thought he had a deal. All right? You've got the other witness, Mr. Nordlander's boss, according to the plaintiff, saying he didn't have any authority. So it didn't make any difference what he thought he had; he didn't have a contract because he didn't have the authority to enter into one. Now, that's their argument. And they say it creates the inference that by sending Mr. Nordlander out there to negotiate the contract, when he didn't have the authority, that that shows an intention not to perform any contract he agreed to.

MR. FEIGELSON: Judge, I think it's a question of what does the evidence say exactly. Mr. Cisa read aloud an e-mail, it's a one-line e-mail, and I'll repeat it. This is Miss Dubuc's e-mail to Mr. Nordlander back in 2004. Quote, "Dear Richard: I have asked Charles Nordlander to review your material, as he oversees all of our Lifestyle programs. Thank you, Nancy Dubuc." Close quote. That's it, Judge. There's

no statement by Miss Dubuc Mr. Nordlander is being instructed or authorized to negotiate any business arrangement. He's being instructed to review the material. Period, end, full stop.

And Mr. Davis has testified that he derived from that, some grand idea of Mr. Nordlander's authorities, just as maybe Mr. Nordlander was the president of A&E.

This is summary judgment, Judge, and we've got to be focused on exactly what the evidence does and doesn't say. That e-mail does not say what the plaintiffs want it to mean.

THE COURT: They didn't represent it said Mr. Nordlander had authority.

MR. FEIGELSON: Well --

THE COURT: I didn't -- what they read to me, I got the impression that they said deal with Mr. Nordlander, but they didn't say he had the authority to do a contract.

MR. FEIGELSON: Well, it doesn't say that, Judge, but that's the inference on which their argument to allow the fraud claim to go forward, and the evidence doesn't support the inference.

THE COURT: Okay.

MR. FEIGELSON: And on the fiduciary duty claim, Judge, let's -- what happened here, Mr. Davis has a real estate business. He didn't go into the real estate business because of A&E. Trademark Properties has been around for 20

years. And it's called Trademark Properties, it's a real estate company. The understanding was Mr. Davis was going to go about his business, and A&E was going to film it and make a television show about it. And there's undisputed evidence in the record, which we cited to in our briefs, that the business went on as before, they did the same types of transactions.

THE COURT: How do you enter into a partnership?

MR. FEIGELSON: I'm sorry?

THE COURT: How do you enter into a partnership?

MR. FEIGELSON: I don't think there's a way to enter into a legal partnership --

THE COURT: That's what he -- that's the cases he's citing for fiduciary duty, are legal partnership.

MR. FEIGELSON: I appreciate that, Judge. I don't think you can enter into a full-scale legal partnership on the basis of one telephone call.

THE COURT: I don't think you can either.

MR. FEIGELSON: That's the allegation, Judge.

THE COURT: Yeah.

MR. FEIGELSON: And on unfair competition, I don't think we heard any response, and I don't think there is one, to either the duplication point, which is set forth in our brief, or the two legal grounds on which that you can eliminate that claim on a stand alone basis. You need that quality of harm affecting the public interest, not just a

private interest. And to the extent we're talking about an idea for a television show, the Copyright Act preempts that. And we saw no answer to that in the brief, we heard no answer to that in the argument just now.

THE COURT: Anything else, Mr. Cisa?

MR. CISA: One comment, Judge, about his fraud argument. This idea Mr. Davis believed they were going to go through with this oral agreement, he did believe they were going to go through with the oral agreement. But in any fraud case, you know, if I'm going buy a car from you, and I say this car has been wrecked, and you say no, it hasn't; I believe you, I believe that. And I find out later that, in fact, the car has been wrecked, I've got a cause of action for fraud. That's the way it works. I mean, he believed it; that's why he went forward and did all this stuff. I don't see that's unusual in a fraud cause of action. I'm not sure what his point is in that regard.

THE COURT: Well, in the situation where you sell a car, I mean, the contract is a sale of the car. I deed the car to you, and you pay me, that's the contract. Now, to say that the car hasn't been in a wreck, is something outside of that contract. And what they're saying in this case is, as far as your fraud is concerned, nothing falls outside of the agreement itself. Everything you say makes up the contract and the breach thereof, makes up factually the alleged fraud

and the commission thereof. That's what they're saying.

MR. CISA: Yes, sir.

THE COURT: Anything else?

MR. FEIGELSON: Just briefly, Judge, on that, dealing with Mr. Nordlander and what Miss Dubuc had to say, I just want to be real clear what the Network's position on this is, Judge.

Charles Nordlander had authority to do what he was instructed to do, which was to review the material and to have a conversation with Mr. Davis about creative concepts for the show. A&E is a television network. And if you want to make a contractual arrangement with them, the Network has policies and procedures, departments that have to be dealt with. The position isn't Charles Nordlander was utterly lacking authority; he had all the authority he needed to do what he was actually instructed to do, and what we'll show at trial he actually did do. The position is simply that what Miss Dubuc is saying is Charles Nordlander, acting as a solo, did not have authority --

THE COURT: I understand.

MR. FEIGELSON: -- to give away millions of dollars of Network revenue.

THE COURT: This case comes before the Court on motion of the defendants for summary judgment, and partial summary -- for partial summary judgment.

The plaintiff agrees that the defendant Max Weissman Productions, Inc., d/b/a Departure Films, is removed from the case. And the Court grants summary judgment in favor of that defendant.

The motions filed, therefore, remain viable on behalf of the defendant A&E Television Network as to the claim against that defendant by Trademark Properties, Inc., and Richard Davis, an individual.

As far as a counterclaim of A&E Television Networks is concerned, against Trademark Properties, Inc. and Richard C. Davis, that claim is withdrawn. And the Court shall also enter judgment for the plaintiff on that counterclaim.

There remains the motion for summary judgment by the defendant A&E Television Network as to all causes of action asserted by the plaintiff, except the cause of action for breach of contract.

In arguing this motion, the plaintiff takes the initial position that all of these additional causes of action, to wit, those causes of action based upon fraud, breach of fiduciary duty, conversion and unfair competition and unfair business practices, in violation of Unfair Trade Protection Act, are duplicative under New York law of the breach of contract claim, and should be dismissed, or summary judgment should be granted therefor, because of that; and secondly, that each fails on its merits, if it's not duplicative.

Counsel for the plaintiff advises the Court today that its claim for conversion is being withdrawn. And the Court will enter a partial summary judgment against the plaintiff on its claim for conversion.

There remains, therefore, the defendant's motion for partial summary judgment, based upon fraud, breach of fiduciary duty and unfair competition.

As far as the fraud is concerned, I'm not sure that the -- that claim is duplicative of the breach of contract claim. I think that there may be an inference -- however, I hasten to add that I'm not ruling on that, and I may not rule in that manner at trial -- but there may be an inference that there was fraud in the inducement of the contract. And, therefore, as to the fraud cause of action, I'm going to deny the defendant's motion for partial summary judgment.

Again, I want to emphasize that in large measure, my denial of that motion is being made so that I can hear the evidence and rule more intelligently on the defendant's position. I do not believe that the denial of that motion as to partial summary judgment on the plaintiffs' claim for fraud affects in any way whatsoever the evidence that would be presented in this case, if the only cause of action was the one based on breach of contract. I do not think it changes the evidence on liability or damages or any other aspect of the plaintiffs' case. And, therefore, I think it is best for

the Court to deny that motion at this time, hear all of the evidence, and then rule on the same with a full deck of cards.

As far as the defendant's motion based upon a fiduciary duty, I grant that motion. I see no evidence in this case of a fiduciary duty. There are certain relationships that create fiduciary duties. Someone entering into a general partnership, the parties have fiduciary duties among themselves. I'm not sure, however, that even in that situation, a suit can be brought as the plaintiff has brought it here. I'm inclined to believe that you can only ask for an accounting. The general theory behind that rule is that when you truly enter into a general partnership, all of the general partners own all of the property of the partnership equally. And, therefore, they cannot convert their own property, they cannot take their own property, and all they have to do, if they're caught doing that, is render an accounting.

But in this case I think that the plaintiffs' claim fails because this is merely a business transaction, that there is no prior dealing that creates a fiduciary relationship, there is nothing here that creates one. If these parties were truly general partners, then there would be a fiduciary relationship, just like a fiduciary relationship is created when an attorney represents a client. But this is just a contract to perform services and receive a benefit. And I do not see where it in any way whatsoever creates a fiduciary

duty.

I think under New York law this claim is duplicative of the contract claim. I think under New York law, if it's not duplicative, it fails on its merits because there is no evidence of a fiduciary relationship in this case.

On the question of fiduciary relationship, New York law provides that in order to establish a fiduciary relationship, the parties must prove, first, the vulnerability of one party to the other, which secondly results in the empowerment of the stronger party by the weaker, which thirdly, empowerment has been solicited or accepted by the stronger party, and fourth, prevents the weaker party from effectively protecting itself. This relationship can be created by past dealings, but in an arm's length transaction in a commercial setting, such a relationship is not created. Therefore, as I previously stated, I hereby conclude that no fiduciary relationship existed, and that cause of action must be disposed of by way of partial summary judgment.

We have here, as far as the unfair competition claim is concerned, a private contract between the plaintiff and the defendant, at the very best. We have a breach of contract action, at the very best. In order to constitute a cause of action for unfair trade practices in North Carolina, it must be shown that the dispute covers consumers and the public at large, and does not just involve the parties to the contract.

There's no evidence here that this dispute involves the public at large. And, therefore, it is the Court's determination that no cause of action for the conduct alleged and proven in this case, rests for unfair competition.

The New York law also recognizes a common law claim for unfair competition. But the Second Circuit has explicitly ruled that a claim for unfair competition under New York law is fundamentally similar to copyright infringement claims, and this is preempted by copyright law. Therefore, the Court concludes that the plaintiffs' claim for unfair competition must be disposed of by way of summary judgment.

Therefore, the defendant's motion for summary judgment is granted as to the plaintiffs' claim for breach of a fiduciary duty, conversion, unfair competition and unfair business practices in violation of the Unfair Trade Practices Act, and it is so ordered.

That means that the breach of contract claim and the fraud claim, at least for the present, remain viable. And it is so ordered.

Anything further?

MR. FARRIER: Your Honor, we've got one other in limine motion regarding the exclusion of plaintiffs' expert.

THE COURT: Okay.

MR. FARRIER: This is a bit of an odd -- it's not a motion that's developed, Your Honor. I'm very used to arguing

motions in limine based on Daubert, typically not at this stage, and typically not with this record.

If the Court will permit, I'd like to give a couple benchmarks of history, so that the Court's oriented. This case is, at its core, as the Court recognizes, a case of breach of contract based on oral agreement.

In December -- on December --

THE COURT: Well, if you don't want to argue it now, what do you want me to do, rule on it at trial?

MR. FARRIER: I want to argue right now. I thought the Court was inviting me to argue it.

THE COURT: I am. But you want me to rule today or do you want me to wait until trial?

MR. FARRIER: I'd like you to rule today. In fact, it's imperative, I think, because if the Court denies our motion, then we're going to have to face some stark discovery issues.

On December 14 of 2007, the date came for the plaintiff to name experts. And the plaintiff named a fellow named Mark Halloran as an expert on the issue of damages.

Consistent with the plaintiffs' theory, the report and the disclosure required under the rules said that Mark Halloran was going to opine to this. That the damages in this case, if proven, consisted of 50 percent of the net revenues related to this television show. Not having deposed Mr. Halloran, we

retained our own support, Roy Strickland, who is an accountant and a forensic analyst. And we sought discovery from Mr. Halloran. That, as is laid out in an affidavit we've provided, was a fairly tortured process. And I want to emphasize, in that process that the difficulties we had, that stretched over about six months, had nothing to do with Frank.

Mr. Halloran was handled by the other lawyers in this case out of L.A., who have never made an appearance here. Mr. Cisa was not even at the deposition of Mr. Halloran.

When we got around to finally being able to depose Mr. Halloran, we asked him what his opinions were, and in that process we confirmed a couple things. His opinion was that the damages consisted of 50 percent of the net revenue. And that his expert analysis consisted merely of taking the net revenue and dividing it by two.

On that basis, we, in essence, released our expert. And we concluded a couple of things. First of all, you don't need an expert witness to testify as to what 50 percent of the net revenue is. In fact, I think that to the extent that the Court concludes that is a viable theory of damages, that's something that can be stipulated to; you don't need an expert at all. I don't think there's any dispute as to what the net revenue is. It is a moving target.

THE COURT: There's no dispute as to what the net revenue is?

MR. FARRIER: No.

THE COURT: Okay. You agree with that?

MR. CISA: I do, Your Honor.

THE COURT: Okay.

MR. FARRIER: And I don't think there's any dispute as to what 50 percent of that is. Based on that, we --

THE COURT: As long as it's in English.

MR. FARRIER: Based on that, a couple of weeks ago we made a motion to exclude Mark Halloran. You don't need an expert for this.

Now, let me tell you who Mark Halloran is and isn't. Mark Halloran is an entertainment lawyer. He's not an economist, not a CPA, he's not a statistician. He's an entertainment lawyer. In fact, he -- I don't know if he's currently representing Mr. Davis, but he has represented Mr. Davis in his negotiations with our competing network, in his deal with the competing network.

Anyways, we made a motion to exclude, on the basis you don't need an expert. Over the weekend, on the date that opposition was due to that motion, we received a couple things. We received an opposing memorandum, but we also received what clearly is a brand new expert report. And it's new in three significant ways.

Number one, there's a whole new category of damages that Mr. Halloran opines on. And that is, the present value of

future lost revenue. There is an entirely new methodology. This time, not a division of two, but a very complicated process by which Mr. Halloran says, well, if this show gets to year four, then statistically, based on an analysis I've made of other networks and other television shows, I believe that this show will run 15 years. And I believe that the revenue that would be produced by this show over 15 years can be extrapolated from existing revenue. And I believe that the plaintiff in this case would be entitled to a present day award of those future damages. The analogy is to --

THE COURT: Let me stop you now. Do you have the first report?

MR. FARRIER: I have the first report yes, sir.

THE COURT: Do I have it?

MR. FARRIER: You do.

THE COURT: Let me find it. Do I have both reports?

MR. FARRIER: You do. It's attached as an exhibit. Exhibit D to the original motion, Your Honor.

THE COURT: That's the first one?

MR. FARRIER: Yes, sir. And the second report --

THE COURT: Wait a minute now.

MR. FARRIER: Yes.

(Brief interruption in proceedings.)

THE COURT: Now, when did you receive this second report?

MR. FARRIER: The second report was received over the weekend, received Friday, we got the disclosure --

THE COURT: What Friday?

MR. FARRIER: A week ago. Well, six days ago.

THE COURT: Say what?

MR. FARRIER: Six days ago, Friday the 10th. If it's helpful, I can point you to a couple places in the second report, or I can let the Court read it.

THE COURT: Just a second.

MR. FARRIER: I'd refer the Court to paragraph six in the second report, revenue projections for future seasons.

THE CLERK: Which exhibit is that?

MR. FARRIER: It's Exhibit B to our reply.

THE COURT: What is Exhibit C?

MR. FARRIER: That's a deposition, Your Honor, of Mr. Davis. These are exhibits to our reply memorandum.

THE CLERK: I have B right here.

MR. FARRIER: Your Honor, I have an extra copy, if you need it.

THE COURT: Give it to me. That might save a lot of time. If you'll just give us that and stay right there, we can probably locate it. It's just that y'all filed so many papers, sometimes it's hard to find them.

Now, it's obvious to me from glancing at the reports that the first report deals with three seasons. And that's the

report that he gave you and testified fifty-fifty was the split.

MR. FARRIER: Yes, sir.

THE COURT: You have no problem with that?

MR. FARRIER: No, sir.

THE COURT: But then the new report, he projects it into future seasons. How far does he go?

MR. FARRIER: 15 years. And beyond that, Your Honor, I don't want to concede -- you understand we have a problem with the need for expert testimony.

THE COURT: I understand that.

MR. FARRIER: But what's different is, and I highlighted and tabbed couple things that I informed Mr. Cisa. There's --

THE COURT: Wait, wait, wait, wait a minute.

MR. FARRIER: Yes, sir.

THE COURT: All right, sir.

MR. FARRIER: A couple things I would like to point out, Your Honor. First of all, terminology. Seasons, a lot of -- at least before I got into this case, I equated seasons with years. There's a disconnect here between that; the seasons aren't necessarily a full year.

We understood his methodology applicable to the seasons, and we understood that that number would be changing. We, I think in April, provided revenue numbers through that time,

and we came up with his first report, or at least the first report given to us had a damages figure of five million one fifty-five. We've supplemented a couple of times since then with additional revenue figures as it goes forward. And frankly, the numbers can be slightly different, and we'd be prepared at trial to give a final number that would be cut in half at trial.

When you get to the second report, that number's in here, and that's the second thing that I tabbed for you, Your Honor, under E you'll see the number 50 percent share of the net proceeds, Your Honor; are you with me on that page?

THE COURT: That's on page six?

MR. FARRIER: No, that's on the second yellow sticky that I put on the document I handed up. It's actually table Exhibit E. And you'll see that his most recent calculation of 50 percent of the net proceeds is going to be $7.6 million.

THE COURT: Okay.

MR. FARRIER: And that number will be slightly higher two weeks from now.

We understand that that's consistent with the first report. This thing is vastly different, in three respects.

THE COURT: Paragraph six, you're talking about?

MR. FARRIER: Paragraph six. Because there's a completely new methodology by which he throws in another $24 million in damages, under a theory that we first heard of

less than a week ago, based on methodology that would require us to hire two experts to rebut, would require us to fully discover, would require us to redepose Mr. Davis on this subject, and to redepose Mr. Halloran.

There's some things that would leave out, that anybody that's handled these sorts of reports before, the population reviewed in coming up with these calculations, the lack of any substantive --

THE COURT: Well, it looks to me like, and you tell me if I'm wrong, because I haven't been exposed to this for just a few minutes, but it looks to me like in his report, his latest report, he says that he researched home-related reality shows, paren, typically involving the sale and renovation of houses, close paren, and discovered that among the shows which reached the fourth season, that the mean or average number of seasons was 15. And then he took the figure for seasons one through three, and put that into the 15-year life of -- and that's the way he came up with damages. Okay.

MR. FARRIER: Using a figure, a non-risk factor for present day value.

Your Honor, if the Court --

THE COURT: Did you take his deposition?

MR. FARRIER: Yes.

THE COURT: Before he gave this opinion?

MR. FARRIER: Took it in June. Asked if you have any

other opinions to offer. We confirmed with Mr. Cisa, is he going to talk about industry issues? Absolutely not. He's going to say one thing. He's going to say fifty-fifty, and here's the number. All of a sudden, what's odd to me, is all of a sudden we have a completely new expert that's parachuted into the case.

THE COURT: What about that, Mr. Cisa?

MR. CISA: Well, Your Honor, I disagree with the history. If I can just briefly tell you how this came down. I served them with --

THE COURT: You disagree with it, do you?

MR. CISA: I do disagree with it.

THE COURT: You admit that this latest report was furnished to them on October the 10th, 2008?

MR. CISA: I agree with that. But, Judge, what I did was I asked them for supplemental answers to my discovery on the issue of how much the revenues are, and how much your expenses were. I did that on December 21st of '07. They responded by saying --

THE COURT: That's not the part that they're objecting to. What they're objecting to is him trying to take these damages out 15 years, because he has now determined that that is the average life of a show such as this. That's something he could have done the day you hired him. That had nothing to do with information to be furnished by the

defendant.

MR. CISA: I think -- I respectfully disagree, and I'd like to explain why.

THE COURT: Go right ahead.

MR. CISA: I asked him for updated information on seasons one, two, three and four, and I asked him for that on December -- in December of '07. They responded by saying, we don't want to update anything until we get close to trial. I wrote them on August 7 this year saying, I want the updated information so I can get it to Mr. Halloran so he could do an updated report. That was August 7th. And I asked for it by the 20th, so I could get an updated report and get it to them prior to trial.

They responded by saying, we're going to give you updated information on September 15th of this year, and it's only going to be updated as of June 30th of 2008. And we don't want an updated report.

Well, they got me the updated information on September 16th of this year. As soon as I got it, I shipped it out. Now, the only information I had prior to that was seasons one and two. I had asked for seasons one, two, three and four, and international sales, back in December of '07. They didn't give it to me until September 16th. As soon as I got it, I shipped it out to Mark Halloran, and he responded with a report October 9th. And as soon as I got it, I gave it to

him.

THE COURT: Yeah, but he adds nine years to it. Or 11 years.

MR. CISA: I understand. But what he says is, is that when he got the updated information on seasons three and four, which he didn't have before, then he was of the opinion that since it made four seasons, that it would go 15.

And, Judge, in all my discovery responses, I said the plaintiffs' damages are continuing, A&E continues to receive revenues, the show keeps running, and the damages are going to change. And I asked them to give me the information way back when. And I just couldn't get it out of them until September 15th. I told them in my letter, I want to get an updated report and get it to you, so you can do whatever you need to do. And they chose not to get it to me until September 16th. And I don't know why it took till September 16th, when it's only an update as of June 30th. So I didn't have the information on seasons three and four or international sales until that time. And as soon as I got it, I reacted. And as soon as I got the report, I gave it to them. I mean, I'm just suggesting that they squeeze me till the very end, and when I'm --

THE COURT: Well, that's beside the point.

MR. CISA: I understand.

THE COURT: The point is that he testified that the

plaintiffs' damages were one-half of the net profit for a certain period of time. And now he wants to say it's one-half of the net profit for 15 years, based on some research that he has done.

Now, if he was going to do that research, and he was going to project damages 15 years into the future, he should have let them know before the day of trial. I mean, he in his report, first report, limits himself to the first three years, and now he wants to go out 15 years. That changes the damage picture dramatically.

Now, I've got serious questions about whether he can testify to it. I mean, he says he did research. I don't know what kind of research he did, and, you know, I don't know that I've ever had an expert witness come in here and say he did research, and, therefore, he's now an expert. He's supposed to be an expert before he does the research. So I've got serious reservations about whether he can testify to it. But you can't just take the damage picture and enlarge it from three years or four years to 15 years, a week or two before trial.

MR. CISA: Well, I went from two years. The first report was based on two years. And like I say, I asked him long ago through discovery, for updated information on seasons --

THE COURT: When did he come up with the 15 years and

why?

MR. CISA: Well, the way he came up with it is because I got their responses as to seasons three and four and international sales on September 15th of this year. I sent it out to him, and he saw the damages figures for -- the revenue figures for four seasons. He said, based upon, you know, my research, my knowledge, if a show runs for four seasons, you can expect it to run for 15.

THE COURT: If it runs for three, how many can you expect it to run for?

MR. CISA: That, I don't know. I mean, I don't know, Judge. All I'm suggesting is I tried to get the information so I could give them an updated report. And the earliest they could get it to me was September 15. But I did have discovery out for a long period of time.

THE COURT: What about that, Mr. Farrier?

MR. FARRIER: Your Honor, I don't think anything he said, at least factually, is inaccurate. And, in fact, I thought I was -- had laid that out for the Court -- I intended to -- when I was speaking. It's a rolling number. When we deposed Mark Halloran in June of this year, he knew we were in season three. The show's on television.

THE COURT: He knew what now?

MR. FARRIER: He knew that the show was in season three, it's on public television, it's on television. Anybody

can turn on the television and look in the newspaper and see it's still running, that it's in the next season.

And Mark Halloran testified in his deposition, we asked him, is anything, in your opinion, going to change, as we provide these new numbers, because that was specifically discussed in his deposition, and he said the numbers will go up, but my methodology which will not change.

THE COURT: The numbers go up?

MR. FARRIER: But my methodology will not change. And what he's done now is just created an entirely new theory. And it's so --

THE COURT: I don't know what his methodology is. What is it?

MR. FARRIER: Divide by two. That's the methodology that -- that we don't think you need an expert on.

THE COURT: Well, the problem is whether or not he can testify that this show is likely to run 15 years. Now, I don't know what he bases that on. That's the real meat of the nut is whether or not he can express that opinion.

MR. FARRIER: I don't -- Your Honor, you and I are in the same boat. I don't have any basis upon which to -- just other than common sense -- doesn't make any sense to me. But in fairness to the case, if that's going to be an issue, we would have the opportunity to do discovery. And not some sort of discovery that's going to be done in a day or two, but

discovery that would require us to hire probably two experts. I mean, we've already got Roy Strickland on the --

THE COURT: Why do you need two experts?

MR. FARRIER: Because most of what you just quoted is based on industry analysis that Roy did, to my knowledge -- I haven't talked to him about this aspect -- is on the industry on how long programs usually run if they've reached the third year versus the fourth year versus the fifth year, what happens with decline in revenue as the show runs into the tenth, eleventh, twelfth year. These are significant assumptions that are just brushed completely over in this new report.

The point is, in a normal sequence, had that been disclosed in December of 2007, then we could have done discovery on it, and we could have either been prepared for trial today, or been prepared with a Daubert motion to attack it. We can do neither.

Your Honor, there's some other significant issues with --

THE COURT: Say what?

MR. FARRIER: Your Honor, there are some other issues that are pretty glaring, that have to do with methodology, but this goes to the actual underlying opinion. He uses a present day figure of 4.3 percent, which is, in essence, a no risk present day value figure. Just from my experience, typically present day, something like this, you're going to have a 20 to

25 percent.

THE COURT: You mean he discounted it 4.4 percent?

MR. FARRIER: That's right. And, Your Honor, just conceptually, this is an entirely different case that Mark Halloran is testifying about. It's as if this were a business tort.

THE COURT: I've never heard of anybody using 4.4 percent. I don't know what can be used, I mean, the only case I know that went into it was Judge Russell's case, which he decided as a District Judge, which is Brooks against the U.S.A., and I think he approved in that case a five percent discount rate. And that's, generally speaking, what Oliver Woods has used in this court on many occasions, and he's accepted as probably the top witness in this state on economic loss. And he uses that figure. But he's subject to cross-examination. And what we're talking about is the value of money.

In other words, if you get this money now, how much can you invest it at? And he says you can invest it at four and a half percent, which gets you, when the damage occurs 15 years from now, you're at that figure. And, of course, what lawyers can do, and what I used to do when I examined Dr. Woods, was you got him to computer it at figures you thought the jury would believe were reasonable. In other words, what can you get on a CD, you know, and you'd get him to compute it.

So the fact that he uses four and a half percent is not an important factor. That can be taken care of by way of cross-examination.

But the fact that bothers me is whether or not he's an expert, first of all, and whether or not --

MR. FARRIER: Your Honor, may I say one other thing?

THE COURT: I just -- Go ahead.

MR. FARRIER: Well, the last point, and I think there's a lot more I could say, there's a lot more I could say about questions I have about his assumptions and so on, but I'd like to step away and make another sort of larger point. He is testifying about a case different than that we're about to try.

THE COURT: Say what now?

MR. FARRIER: He's testifying about a case, causes of action, that aren't present in this case that's going to be tried in a couple weeks. What he's doing is he's doing a present day value of an entity; in other words, if this were a case about a partnership or an LLC, start-up business. What Oliver Woods does is he comes in and says I think that this business is going to make X over the lifetime of this business, and this is a reasonable lifetime of this business. That's not what this case is about.

What the case is about, is Mr. Davis says I'm entitled to 50 percent of the net revenue. What this methodology does is

it contemplates an award of revenue on shows that have never been made. If the Court were to buy this claim in its entirety, I think that in some fashion we might be required to pay out additional revenue as it's earned. Real revenue, accurate revenue.

Now, we're a long way away from that, and I don't concede that that is at all the issue. But what he's saying is that this thing has a present day value of $32 million. I can tell that you if Mr. Davis -- That's half the value of this thing. If Mr. Davis would like to pay our client $32 million, we would cut that deal before the doors closed getting out of here.

MR. DAVIS: I'll take that deal right now.

MR. FARRIER: The case would settle.

THE COURT: I don't think it's that simple. But, you know, if you want him to pay you $32 million, and he wants to pay $32 million, you know, I doubt if you're going to take a note. You'd want some collateral.

Is that a settlement offer, Mr. Cisa?

MR. CISA: It is not, Your Honor.

THE COURT: Well, what is it?

MR. CISA: It's an inappropriate comment made by my client.

THE COURT: Well, I knew that.

MR. CISA: Yes, sir.

THE COURT: I'm really not of a mind to continue the case. I'm not sure what I'll do as far as a motion in limine is concerned. It looks to me as though the witness has changed his report; maybe not his methodology, because there's no methodology there. And what he's doing is he's projecting the life of this show some 15 years into the future. And he's doing that by looking at other shows and projecting how long they last. I don't know if he can do that or not. I don't know how he did it. I think probably the best thing to do is to put him on the stand. Where does he live?

MR. FARRIER: Los Angeles. Actually Beverly Hills.

THE COURT: I think we probably need to put him on the stand and just have a hearing as to what he's going to testify to. And his report is very poorly drawn. The fact that he's testified as a witness in cases before, the fact that during my career I've engaged as an expert consultant, a witness in more than 30 matters and have testified in depositions, arbitrations and court trials over 20 times, I'm an attorney licensed to practice law in the State of California, have been practicing entertainment law, including with respect to the motion picture and television industry for the last 28 years, from 1999 to present. I've cowritten three nationally published books on the entertainment business. One of my areas of practice is a representation of cable television producers such as Trademark. I've negotiated and

documented many fifty-fifty joint ventures, and have prepared and supervised the preparation of many financial projections comparing both existing and anticipated revenue, expenses and resultant profits, both in my capacity as a transactional entertainment lawyer and as an expert witness. An expert in negotiation, documentation and calculation of participations in entertainment business, and acted as an expert consultant and expert witness in approximately 30 cases.

I am also currently adjunct professor of entertainment law at Southwestern University School of Law in Los Angeles, California, and served as co-chair of the USC Gould School of Law/Beverly Hills Bar Association Institute on Entertainment Law and Business, whose next annual program to be held on October 18th, 2008, is entitled "Your Television is Ringing: Entertainment in a Digital World."

That doesn't tell me much about his qualifications.

I think probably we need to have a hearing. I don't think I can make the decision today, based on what I know, as to whether or not he's going to be able to testify. If I wanted to look at his report, I'd be inclined to say I'm not going to let him express the opinions that he attempts to express, because I don't know that he has expertise. I don't know that there is a method that he applies that can be subjected to cross-examination, or whether what he's doing is really not relevant under Rule 702 because it doesn't help the jury.

But the safest thing to do is to have a hearing and present his testimony. Now, today is October the what; 16th. Let's just take a minute and let me look at my calendar and see when we can do it. We probably need to do it the first part of the week, but let me look at it and see.

Just take about five minutes, let me go look at my calendar and I'll be right back.

(A recess was held at this time.)

THE COURT: We can wait until trial. And that's kind of what I thought we were going to do to dispose of this. But in right light of the fact that Mr. Farrier has brought up his desire to maybe update his expert, I think we need to have a hearing as soon as we can. My schedule is pretty tight. Normally I can do anything I want to just about any time I want to, but it seems that right now I've got a right tight schedule. I've got a couple of meetings to go to, and next week we've got motions booked up, and they're motions where people have to come a long way to get here and I can't really move them around.

I've got an opening on October the 22nd, which is next Wednesday, I think, at 2:30. So I propose that we bring him in at 2:30 next Wednesday, and put him on the stand and just have a Daubert hearing at that time, exploring his qualifications and exploring his opinions.

Yes, sir?

MR. FARRIER: Your Honor, if that's the Court's ruling, certainly we'll accept it. But I would like to put our position on the record. That does not, I don't think, allow us to sufficiently prepare for trial.

If there is -- I'll tell you my wish, then the Court can do what it wishes. But if there is a possibility that Mark Halloran is going to testify, and testify consistent with the second report, I would like for -- first of all, I'd like the case to be continued. That's not what we want to do. We've got people, as you say, we've got a guy that's going to pack up out of the jungle in Tanzania and be here for the trial. We've got everything, people, it's -- this case is ready to be tried and we want to try it. But in fairness to our client, we'd like sufficient time to develop issues relative to this, and actually to prepare for a Daubert hearing.

THE COURT: We're not talking about rocket science here. This man says that he researched programs such as this that lasted for four years, and he found that of those programs that lasted four years -- Let me see what he said. Many of them, a certain percentage of them, lasted 15 years. I mean, the people with the expertise, your witness asked, and can tell you tell whether that's true or not in ten minutes. I mean, you know, that's his business. It's not like -- he might have brought in a new idea, but he sure hasn't brought in anything complicated.

So I don't see why in the world the figures that he cited can't be contradicted or supported in plenty of time before trial. I don't see that.

Now, because of the fact that the plaintiff has failed to produce this information to you, in what I think is truly a timely fashion, and it may be that you haven't produced your information in a timely fashion as well, I'm going to give you a chance to update your expert's report and testimony in response to this, if I decide to let it in. And I just don't see where you need that much more time.

Now, we've got a right unusual situation here. And I'm not sure how I'm going to deal with it, but I'll put it out there, and then you'll know as much as I know about what I'm thinking about.

MR. FARRIER: Your Honor --

THE COURT: The opinion that he expresses is not relevant. Rule 702 says that an expert properly qualified can testify on a fact in issue, if the same will assist the jury in doing its job. And so for expert testimony to be relevant under Kumho Tire and those other cases, it's got to be a subject that the jury doesn't know about. In other words, if the jury knows about it and has as much knowledge as the witness, then the witness' opinion is not going to help the jury, and, therefore, it's not relevant under 702.

So the fact that a certain percentage of programs such as

this, that are on the air for five years, usually last for 15 years, is not expert opinion, but it is data that the jury doesn't know. And so how can you get that data to the jury? It seems to me that they might be entitled to that data, but not entitled to this witness' opinion, that because of that data, this program is going to last 15 years. And because I don't know of anything in his expertise, as he's expressed it, that would permit him to do any more with that data than you or I could.

All he said is I researched home-related reality shows, paren, typically involving a sale and renovation of houses, close paren, and discovered that among the shows which reached the fourth season, that the mean or average number of seasons was 15.

I mean, that's data, but how does that relate to this case? He doesn't express an opinion on that, and I don't think he can expand his opinion to that extent at this time.

And so we've got a situation where the data may be admissible. I'm not sure. Because I'm almost of the opinion that the data is speculative. That the jury doesn't know what percentage reached. He says that the mean or average number of seasons was 15. I mean, how does a jury know what puts you in that average, and what knocks you out at five years? I mean, that's what the jury's got to determine. They've got to determine how long this show's going to run, and how much

damages are done. And unless somebody can come in and give them some expertise as to how to determine that, then they're engaging in speculation in assuming that this show is average or below average or above average. And this witness doesn't shed any light on that. He doesn't express an opinion on it.

MR. FARRIER: Your Honor, if I may, just one point to that.

THE COURT: Let me think about this a minute.

MR. FARRIER: Yes, sir.

(Brief interruption in proceedings.)

THE COURT: Yes, sir, Mr. Farrier.

MR. FARRIER: Thank you, Your Honor. In anticipation of the hearing, I think we may wish to make certain --

THE COURT: I'm not sure I'm going to have a hearing.

MR. FARRIER: Very good.

THE COURT: Let me back up just a little bit. I think we've had a Daubert hearing here today. We've had the witness' two reports. I think we can submit his deposition and add that to the record, if there's no objection. And I don't know that we need to have the witness here.

I think that's the purpose of the report, as Rule 26 requires, to set forth his qualifications, all opinions he plans to express, and the basis of those opinions. And since that report has been submitted by counsel, as his 26, whatever it is, (b)(2) report, I think that's it. And I don't see any

reason to bring him in and bring him all the way from California and testify.

And so what I propose to do is to supplement the record to the extent you desire, included therein the two reports from the witness and his deposition, and anything else you think's relevant, and then I'll consider those and rule.

And if I rule that he can testify, then I will let Mr. Farrier update his witness' testimony, and give you an updated report as to what his witness is going to testify to, prior to trial.

But I don't think you've given him anything too much prior to trial, and I don't see why he has to give it to you at any time except prior to trial. And, of course, with the five-day trial, that will give you some time to think about it.

But I really think that that's what we need to do, and I don't know of any reason why I need to bring him all the way in here and testify. But if anybody has anything else they want to add to the record that gives me the ability to decide the issues that have been raised by the motion in limine, I'd like to hear you; if not, I'll consider the two reports and the deposition and that will be it.

MR. FARRIER: Your Honor, frankly, I think that you have in the record that we've provided, enough to rule. My concern is if he is allowed to testify, only the first report and -- second report, excuse me -- if he's allowed to testify

on the second --

THE COURT: Well, let's deal with matters as they occur. You know, let's wait and see what happens. If I go one way, then we'll see what happens; if I go another way, we'll see what happens. But let's don't try to prejudge that.

MR. FARRIER: That's fine. The only --

THE COURT: We'll just wait. You get my order, then you can make whatever motion you want to make.

MR. FARRIER: Very good.

THE COURT: All right, Mr. Cisa.

MR. CISA: Your Honor, my memorandum that I filed in opposition, I think, sets out the discovery sequence and everything that I wanted to put in.

And I believe you put in Mark Halloran's deposition in your motion, didn't you?

MR. FARRIER: Portions of it.

MR. CISA: Relevant portions. So I have nothing further.

THE COURT: And Mr. Farrier agrees that what you said in your memorandum, at least what you said in your argument, those time lines were accurate. And I assume those were the same time lines as to discovery and all that you had in your memorandum.

MR. CISA: Exactly, Judge.

MR. FARRIER: Your Honor, getting past this, there's

a couple --

THE COURT: But, you know, it's a good question. I mean, it's not -- you know, it's a very -- somewhat unique question as to expert testimony. Go ahead.

MR. FARRIER: Thank you. Just a couple. These are really bullet points. Well, depending on what the Court does, there may be an issue about -- we certainly would like to conduct discovery, if there is going to be testimony, but --

THE COURT: Do what now?

MR. FARRIER: We would like the opportunity to conduct discovery on these issues, if the Court's going to allow Mr. Halloran to testify. And I just -- given the time frames, I mean, we'll react after the Court rules, but given the time frames, we're going to have to be moving pretty quickly to do some of those things. And there really are issues with cooperativeness with this witness.

THE COURT: Well --

MR. CISA: When I submitted --

THE COURT: Wait just a second.

MR. CISA: Yes, sir.

THE COURT: The witness says I have researched home-related reality shows. Now, Rule 26(a)(2), under the heading disclosure of expert witness, in (a) it says, "A party must disclose to the other party the identity of any witness it may use at trial to present evidence under Rule of Evidence 702(3)

and (5). Written report, (b), the report must contain a complete statement of all opinions the witness will express, and the basis and reasons for them; two, the data or other information considered by the witness in forming them; three, any exhibits that will be used to summarize or support them; four, the witness' qualifications, including a list of all publications authored in the previous ten years; five, a list of all other cases, et cetera; and six, a statement of the compensation."

He's done pretty good except for two, and he hasn't furnished the data or other information considered by the witness in forming his opinion.

Now, normally we might have a motion to compel requiring that, and usually that would take care it. We don't have it in this case, because they want to strike his entire report. But his report is defective in that fashion, in that manner. He talks about researched home-related reality shows. He needs to furnish to them, in detail, immediately, every piece of data he researched, and what he based that opinion on. Every bit of it.

MR. CISA: Yes, sir.

THE COURT: And I'll give him -- today is Thursday -- I'll give him till Monday to give it to them. He's supposed to have it in his file, and all he's got to do is give it to you and get it to them.

Now, I'm not sure what else you need.

MR. FARRIER: I have two or three pedestrian bullets, Your Honor, I'd just like to ask the Court in anticipation of trial. Number one, does the Court have any idea how long it's going to allow for openings?

THE COURT: Opening statements?

MR. FARRIER: Yes, sir.

THE COURT: Why?

MR. FARRIER: I don't want to run over the Court's patience.

THE COURT: You know, I never have set a time, but the local rules tell you what you can do.

MR. FARRIER: They certainly do, Your Honor.

THE COURT: And I don't know that anybody ever reads these rules. Opening statement. Rule 83.VI.01. How they came up with that number, I'll never know. "Counsel for any party may summarize their pleadings to the jury or make a statement to the jury of the ultimate facts alleged in the pleadings and their theory of the case, but counsel shall not argue the case during opening statement. The pleadings shall not be submitted to the jury for its deliberations."

And, of course, that rule comes from way back when you couldn't plead evidentiary facts; all you could plead were ultimate facts; and, therefore, you can't argue to the jury, evidentiary facts, only ultimate facts.

In other words, in this case, that the parties corresponded, talked on the telephone, met on such and such a date and agreed to a contract. I mean, that's an ultimate fact. So-and-so sent an e-mail that said my offer is this; so-and-so responded, my acceptance is this. Those are evidentiary facts. And I think it's easy to see why you do that. You do that because you restrict what lawyers can say, because the evidence hasn't come in yet, and we don't know what's going to come in, and it's not ripe to discuss with the jury what one witness is going to say, or what other evidentiary facts are going to reveal, when they may not come in. And then we've got to tell them to disregard it. And so that's why I like to see somebody ask what the rule is, and ask me to enforce it.

But I would say in a case such as this, I really can't see how in the world you can make an opening statement in excess of ten minutes; seems like five minutes. I mean, you just get up and say, we didn't do it, I mean, that's about it, you know.

MR. FARRIER: Thank you.

A couple other things, Your Honor. We would like the order of sequestration of witnesses.

THE COURT: You're entitled to that. You're entitled to that. Any real party can stay in court. And basically any party, any person that is necessary for the presentation of a

party's case. That's not the exact language, but I think you know what the language is.

MR. FARRIER: Thank you.

THE COURT: So obviously Mr. Davis is a party, and there are no individual parties, but the rule refers to corporate representatives, but you can read the rule just as good as I can read it and see what you can have there. Sometimes we let expert witnesses sit through the case, if someone makes a good argument that they have to have them there for the purpose of presenting their case. But I don't always do it. But we can handle that on the day of trial.

MR. FARRIER: Last question. We've got a couple of witnesses who are in California that we intend to publish their depositions on the basis of unavailability. I don't know what specifically the Court needs, whether an agreement between counsel suffices, or whether you need some affidavit as to the fact that they're in California.

THE COURT: I would say usually in the beginning of the deposition they ask where they live, and they say California, and that's more than 100 miles away. Unavailability is used, but 100 miles is the main thing we cover.

MR. FARRIER: Thank you, Your Honor.

THE COURT: There's some case law on that. I don't think it's the type proof that you have to make of evidentiary

facts. I think if you say that the person's in California, I think that's enough. But I would suggest you talk to Mr. Cisa and see if there's any disagreement.

MR. FARRIER: The only reason, those three questions, in my experience that I, even though -- even within our district sometimes vary from judge to judge, and I'd just like to -- I haven't tried a case before Your Honor, it's been a while, and I like to be clear with this.

THE COURT: I have in the back of my mind a case I tried as a lawyer where I took the position that the other side didn't show that this witness was unavailable. And I think it went up to the Fourth Circuit, and but I'm not -- I can't remember for sure.

MR. FARRIER: Thank you, Your Honor.

THE COURT: Whatever it is, the rule is pretty lax. If the lawyer says they're unavailable, unless the other side comes up and says something about it, I think that carries the day, but I'm not sure.

MR. FARRIER: Thank you.

THE COURT: Anything else?

MR. CISA: No, sir, Your Honor.

THE COURT: I'll try to get you a ruling out on this by the first of the week maybe, and we'll see where we go. Okay? Thank you very much. We'll be in recess.

(Court adjourned at 1:20 p.m.)

REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court Reporter for the United States District Court for the District of South Carolina, hereby certify that the foregoing is a true and correct transcript of the stenographically recorded above proceedings.

S/Debra L. Potocki
_____

Debra L. Potocki, RMR, RDR, CRR