IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

TRADEMARK PROPERTIES, INC., a South Carolina corporation; RICHARD C. DAVIS, an individual, Plaintiffs, vs. A&E TELEVISION NETWORKS, Defendant.	)	Civil Action No. 2:06-cv-2195-CWH

DEFENDANT'S AMENDED PROPOSED JURY INSTRUCTIONS

Defendant A&E Television Networks ("AETN") respectfully requests that the Court include the following instructions in its charge to the jury.

JURY INSTRUCTION NO. 1

Preliminary Instructions Before Trial

Ladies and Gentlemen:

You have now been sworn as the Jury to try this case. By your verdict you will decide the disputed issues of fact.

I will decide all questions of law and procedure that arise during the trial. Before you retire to the jury room at the end of the trial to deliberate upon your verdict and decide the case, I will explain to you the rules of law that you must follow and apply in making your decision.

The evidence presented to you during the trial will primarily consist of the testimony of witnesses and tangible items including papers or documents called "exhibits."

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, you must, unless otherwise instructed, accept the Court's declaration as evidence, and regard as proved the fact or event which has been judicially noticed.

Transcripts Not Available. You should pay close attention to the testimony because it will be necessary for you to rely upon your memories concerning what the testimony was. Although, as you can see, the Court Reporter is making a stenographic record of everything that is said, typewritten transcripts will not be prepared in sufficient

time or appropriate form for your use during your deliberations and you should not expect to receive them.

Exhibits Will Be Available. On the other hand, any exhibits admitted in evidence during the trial *will* be available to you for detailed study, if you wish, during your deliberations. So, if an exhibit is received in evidence but is not fully read or shown to you at the time, do not be concerned because you will get to see and study it later during your deliberations.

Notetaking–Not Permitted. A question sometimes arises as to whether individual members of the Jury will be permitted to take notes during the trial.

It is requested that Jurors *not* take notes during the trial.

* * * * *

During the trial you should keep an open mind and should avoid reaching any hasty impressions or conclusions. Reserve your judgment until you have heard *all* of the testimony and evidence, the closing arguments or summations of the lawyers, *and* my instructions or explanations to you concerning the applicable law.

You must not discuss the case during the trial in any manner, among yourselves or with anyone else, nor should you permit anyone to discuss it in your presence; and you should avoid reading any newspaper articles that might be published about the case. You should also avoid seeing or hearing any television or radio comments about the trial.

From time to time during the trial I may be called upon to make rulings of law on objections or motions made by the lawyers. You should not infer or conclude from any

ruling or other comment I may make that I have any opinions on the merits of the case favoring one side or the other. And if I should sustain an objection to a question that goes unanswered by a witness, you should not guess or speculate what the answer might have been nor should you draw any inferences or conclusions from the question itself.

During the trial it may be necessary for me to confer with the lawyers from time to time out of your hearing with regard to questions of law or procedure that require consideration by the court or judge alone. On some occasions you may be excused from the courtroom for the same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

The order of the trial's proceedings will be as follows: In just a moment the lawyers for each of the parties will be permitted to address you in turn and make what we call their "opening statements." The plaintiffs will then go forward with the calling of witnesses and presentation of evidence during what we call the plaintiffs' "case in chief." When the plaintiffs finish (by announcing "rest"), the defendant will proceed with witnesses and evidence to respond to the plaintiffs' case. After that, the plaintiffs may be permitted, within certain limitations, to call witnesses or present evidence during what we call the "rebuttal" phase of the trial. After that, the defendant, within certain limitations, may be permitted to again call witnesses and present evidence in rebuttal. The plaintiffs proceed first, and may rebut at the end, because the law places the burden of proof or burden of persuasion upon the plaintiffs (as I will further explain to you as a part of my final instructions).

When the evidence portion of the trial is completed, the lawyers will then be given another opportunity to address you and make their summations or final arguments in the case, after which I will instruct you on the applicable law and you will then retire to deliberate upon your verdict.

Now, we will begin by affording the lawyers for each side an opportunity to make their opening statements in which they may explain the issues in the case and summarize the facts they expect the evidence will show.

I caution you that the statements that the lawyers make now (as well as the arguments they present at the end of the trial) are not to be considered by you either as evidence in the case or as your instruction on the law. Nevertheless, these statements and arguments are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for purposes of opening statements.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: O'Malley, Grenig, Lee, Federal Jury Practice and Instructions: §101.01 (5th ed. 2000) (quoting Eleventh Circuit Pattern Jury Instructions (Civil) (2000), Preliminary Instructions Before Trial (as modified to address counterclaims)); Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions Civil, § 71.08 (4th ed. 1987) (judicial notice).

JURY INSTRUCTION NO. 2

Juror Attentiveness

Ladies and gentlemen, before you begin your deliberations, I now am going to instruct you on the law. You must pay close attention and I will be as clear as possible.

It has been obvious to me and counsel that until now you have faithfully discharged your duty to listen carefully and observe each witness who testified. Your interest never flagged, and you have followed the testimony with close attention.

I ask you to give me that same careful attention as I instruct you on the law.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 71-1.

JURY INSTRUCTION NO. 3

The Parties

This is a civil case with claims brought by the plaintiffs against the defendant. The parties who bring the claims are called the plaintiffs. The defendant is then called upon to respond to the claims. The plaintiffs in this case are Trademark Properties, Inc. ("Trademark Properties"), a corporation, and Richard C. Davis ("Richard Davis"), an individual. A&E Television Networks ("AETN") is the defendant in this case.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: Amended Complaint; Answer to Amended Complaint.

JURY INSTRUCTION NO. 4

Role of the Court

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be – or ought to be – it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 71-2.

JURY INSTRUCTION NO. 5

Role of the Jury

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

In determining these issues, no one may invade your province or function as jurors. In order for you to determine the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing arguments, in the objections, or in their questions is not evidence. Nor is what I may have said – or what I may say in these instructions – in evidence. In this connection, you should bear in mind that a question put to a witness is never evidence, it is only the answer which is evidence. But you may not consider any answer that I directed you to disregard or that I directed struck from the record. Do not consider such answers.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your award of damages, if any, should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to what damages, if any, plaintiffs should be awarded here.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to

any damages, if any, you should award, or whether any of the witnesses may have been more credible than any other witnesses. You are expressly to understand that the Court has no opinion as to the amount of damages, if any, you should award in this case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice to any party.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 71-3 (as modified).

JURY INSTRUCTION NO. 6

Juror Oath

In determining the facts, you are reminded that you took an oath to render judgment impartially and fairly, without prejudice or sympathy and without fear, solely upon the evidence in the case and the applicable law. I know that you will do this and reach a just and true verdict.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 71-4.

JURY INSTRUCTION NO. 7

Jury to Disregard Court's View

I have not expressed nor have I intended to intimate any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference or inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it. You are, I repeat, the exclusive, sole judges of all of the questions of fact submitted to you and of the credibility of the witnesses. Your authority, however, is not to be exercised arbitrarily; it must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law which I give you. In making your determination of the facts in this case, your judgment must be applied only to that which is properly in evidence. Arguments of counsel are not evidence, although you may give consideration to those arguments in making up your mind on what inferences to draw from the facts which are evidence.

From time to time, the Court has been called upon to pass upon the admissibility of certain evidence, although I have tried to do so, in so far as it was practicable, out of your hearing. You have no concern with the reasons for any such rulings and you are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law in the province of the Court and outside the province of the jury. In admitting evidence to which objection has been made, the Court does not determine what weight should be given to such evidence, not does it pass on the credibility of the evidence. Of course, you will dismiss from your mind completely and entirely any

evidence which has been ruled out of the case by the Court, and you will refrain from speculation or conjecture or any guesswork about the nature or effect of any colloquy between Court and counsel held out of your hearing or sight.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 71-5.

JURY INSTRUCTION NO. 8

Conduct of Counsel

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the Court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the Court. You should not show any prejudice against any party because an attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the Court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not, unless expressly stated by me, indicate any opinion as to the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 71-6.

JURY INSTRUCTION NO. 9

Reprimand of Counsel for Misconduct

If during the course of the trial, I have had to admonish or reprimand an attorney because I do not believe what he was doing was proper, you should draw no inference against the attorney or his client. It is the duty of the attorneys to offer evidence and press objections on behalf of their side. It is my function to cut off counsel from an improper line of argument or questioning, to strike offending remarks and to reprimand counsel when I think it is necessary. But you should draw no inference from that. It is irrelevant whether you like a lawyer or whether you believe I like a lawyer.

In fact, in this case, I would like to express my gratitude to each of the attorneys for their conscientious efforts on behalf of their clients and for work well done.

Your verdict should be based on the facts as found by you from the evidence and the law as instructed by the Court.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 71-7.

JURY INSTRUCTION NO. 10

Corporate Parties

In this case, the parties, with the exception of plaintiff Richard Davis, are corporations. The mere fact that they are corporations does not mean they are entitled to any lesser consideration by you. All litigants are equal before the law, and corporations, big or small, are entitled to the same fair consideration as you would give any individual party.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 72-1.

JURY INSTRUCTION NO. 11

Burden of Proof — Generally

This is a civil case and as such Trademark Properties and Richard Davis have the burden of proving the material allegations of their complaint. There are two claims in this matter with two different burdens of proof.

If, after considering all of the testimony, you are satisfied that Trademark Properties and Richard Davis have carried their burden on each essential point as to which they have the burden of proof, then you must find for them on their claims. If, after such consideration, you find that Trademark Properties and Richard Davis have failed to sustain their burden on each essential point, then you shall proceed no further and your verdict must be for AETN.

If, and only if, you find that Trademark Properties and Richard Davis have established the essential elements of their case, then you shall proceed to consider the issue of damages.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 73-1.

JURY INSTRUCTION NO. 12

Preponderance of the Evidence

Trademark Properties and Richard Davis are the plaintiffs in this case, and bear the burden of proof on all of the claims they are presenting. Trademark Properties and Richard Davis claim that AETN breached an oral agreement, and bear the burden of proving every disputed element of that claim by a preponderance of the evidence. If you conclude that Trademark Properties and Richard Davis have failed to establish the elements of their breach of contract claim by a preponderance of the evidence, you must decide against them.

What does a "preponderance of evidence" mean? To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

If you find that the credible evidence on a given issue is evenly divided between the parties – that it is equally probable that one side is right as it is that the other side is right – then you must decide that issue against the party having this burden of proof. That is because the party bearing this burden must prove more than simple equality of evidence – it must prove the element at issue by a preponderance of the evidence. On the

other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof, then that element will have been proven by a preponderance of the evidence.

In other words, Trademark Properties and Richard Davis, the plaintiffs in this case, bear the burden of proof on their claim that AETN breached an oral agreement, and must establish the elements of this claim as more likely true than not, that is, by a preponderance of the evidence.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this and you should put it out of your mind.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 73-2 (as modified).

JURY INSTRUCTION NO. 13

Clear and Convincing Evidence

Trademark Properties and Richard Davis also claim that AETN committed fraud, and bear the burden of proving every disputed element of that claim by clear and convincing evidence. If you conclude that Trademark Properties and Richard Davis have failed to establish the elements of their fraud claim by clear and convincing evidence, you must decide against them.

What is "clear and convincing evidence?" It is evidence that satisfies you that there is a high degree of probability that the elements of fraud are satisfied. To decide for the plaintiffs on the fraud claim, it is not enough to find that the preponderance of the evidence is in the plaintiffs' favor. Clear and convincing evidence is a higher standard than a preponderance of evidence. A party who must establish his case by clear and convincing evidence must satisfy you that the evidence makes it highly likely that what he claims is what actually happened.

If, upon all the evidence, you believe that there is a high probability of fraud as I will define it for you, you must decide for the plaintiffs. If you do not believe that there was such a high probability, you must decide for the defendant.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: New York Pattern Jury Instructions, Civil § 1.64 (2007); *Leucadia, Inc. v. Reliance Ins. Co.*, 864 F.2d 964, 971 (2d Cir. 1988); *Hutt v. Lumbermens Mutual Casualty Company*, 466 N.Y.S.2d 28, 30 (N.Y. App. Div. 1983).

JURY INSTRUCTION NO. 14

What Is and Is Not Evidence

The evidence in this case is the sworn testimony of the witnesses, the exhibits received in evidence, any facts to which all the lawyers have agreed or "stipulated," and any fact which I have instructed you to accept as true.

By contrast, the question of a lawyer is not to be construed by you as evidence. It is the witnesses' answers that are evidence, not the questions. At times, a lawyer on cross-examination may have incorporated into a question a statement which assumed certain facts to be true, and asked the witness if the statement was true. If the witness denied the truth of a statement, and if there is no direct evidence in the record proving that assumed fact to be true, then you may not consider it to be true simply because it was contained in the lawyer's question.

The famous example of this is the lawyer's question of a married witness "When did you stop beating your wife?" You would not be permitted to consider as true the assumed fact that he ever beat his wife, unless the witness himself indicated he had, or unless there was some other evidence in the record that he had beaten his wife.

Testimony that has been stricken or excluded is not evidence and may not be considered by you in rendering your verdict. Also, if certain testimony was received for a limited purpose, you must follow the limited instruction that I gave at the time the testimony was received.

Arguments by lawyers are not evidence, because the lawyers are not witnesses. What they have said to you in their opening statements and in their summations is

intended to help you understand the evidence to reach your verdict. However, if your recollection of the facts differs from the lawyers' statements, it is your recollection which controls.

Exhibits which have been marked for identification may not be considered by you as evidence until and unless they have been received in evidence by the Court.

To constitute evidence, exhibits must be received in evidence. Exhibits marked for identification but not admitted are not evidence, nor are materials brought forth only to refresh a witness' recollection.

Finally, statements which I may have made concerning the quality of the evidence do not constitute evidence.

It is for you alone to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 74-1 (as modified).

JURY INSTRUCTION NO. 15

Direct and Circumstantial Evidence

There are two types of evidence which you may properly use in reaching your verdict.

One type of evidence is direct evidence. Direct evidence is when a witness testifies about something he or she knows by virtue of his own senses – something he or she has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example of circumstantial evidence which is often used in the Court.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom shades were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence; it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but simply requires that you find that Trademark Properties and Richard Davis have satisfied their burden of proof.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 74-2.

JURY INSTRUCTION NO. 16

Judicial Notice

I have taken judicial notice of certain facts which are not subject to reasonable dispute. I have accepted these facts to be true, even though no direct evidence has been introduced proving them to be true. You are required to accept these facts as true in reaching your verdict. These facts are as follows: [TBA by the Court]

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 74-3 (as modified).

JURY INSTRUCTION NO. 17

Stipulation of Facts

A stipulation of facts is an agreement among the parties that a certain fact is true. You must regard such agreed facts as true. Here the parties have stipulated to the following: [TBA by the parties].

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 74-4.

JURY INSTRUCTION NO. 18

Stipulation of Testimony

A stipulation of testimony is an agreement among the parties that, if called, a witness would have given certain testimony. You must accept as true the fact that the witness would have given that testimony. However, it is for you to determine the effect, if any, to be given to that testimony.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 74-5.

JURY INSTRUCTION NO. 19

Summaries and Charts Admitted as Evidence

The parties may have presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries in place of the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 74-11.

JURY INSTRUCTION NO. 20

Depositions

Some of the testimony before you is in the form of depositions which have been received in evidence. A deposition is simply a procedure where the attorneys for one side may question a witness or an adverse party under oath before a court stenographer prior to trial. This is part of the pretrial discovery, and each side is entitled to take depositions. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a witness given at trial.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 74-14.

JURY INSTRUCTION NO. 21

Witness Credibility — In General

You have had the opportunity to observe all the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues raised by the parties in the face of very different pictures painted by both sides. In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which the witness testified, and any other matter in evidence which may help you decide the truth and the importance of each witness' testimony.

How do you determine where the truth lies? You watched the witness testify. Everything a witness said or did on the witness stand counts in your determination. How did the witness impress you? Did he or she appear to be frank, forthright and candid, or evasive and edgy as if hiding something? How did the witness appear; what was his or her demeanor – that is, his or her carriage, behavior, bearing, manner and appearance while testifying? Often it is not what a person says but how he or she says it that moves us.

You should use all tests for truthfulness that you would use in determining matters of importance to you in your everyday life. You should consider any bias or hostility the witness may have shown for or against any party as well as any interest the witness has in the outcome of the case. You should consider the opportunity the witness

had to see, hear, and know the things about which he or she testified, the accuracy of his or her memory, his or her candor or lack of candor, his or her intelligence, the reasonableness and probability of his or her testimony and its consistency or lack of consistency and its corroboration or lack of corroboration with other credible testimony.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment and your own life experience.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 76-1.

JURY INSTRUCTION NO. 22

Bias

In deciding whether to believe a witness, you should specifically note any evidence of hostility or affection which the witness may have towards one of the parties. Likewise, you should consider evidence of any other interest or motive that the witness may have in cooperating with a particular party.

It is your duty to consider whether the witness has permitted any such bias or interest to color his or her testimony. In short, if you find that a witness is biased, you should view his or her testimony with caution, weigh it with care and subject it to close and searching scrutiny.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 76-2.

JURY INSTRUCTION NO. 23

Interest in Outcome

In evaluating the credibility of the witnesses, you should take into account any evidence that a witness may benefit in some way from the outcome of the case. Such interest in the outcome creates a motive to testify falsely and may sway a witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony, and accept it with great care.

Keep in mind, though, that it does not automatically follow that testimony given by an interested witness is to be disbelieved. There are many people who, no matter what their interest in the outcome of the case may be, would not testify falsely. It is for you to decide, based on your own perceptions and common sense, to what extent, if at all, the witness' interest has affected his or her testimony.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 76-3.

JURY INSTRUCTION NO. 24

Discrepancies in Testimony

You have heard evidence of discrepancies in the testimony of certain witnesses, and counsel have argued that such discrepancies are a reason for you to reject the testimony of those witnesses.

You are instructed that evidence of discrepancies may be a basis to disbelieve a witness' testimony. On the other hand, discrepancies in a witness' testimony or between his or her testimony and that of others do not necessarily mean that the witness' entire testimony should be discredited.

People sometimes forget things and even a truthful witness may be nervous and contradict himself or herself. It is also a fact that two people witnessing an event will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance but a willful falsehood always is a matter of importance and should be considered seriously.

It is for you to decide, based on your total impression of the witness, how to weigh the discrepancies in his or her testimony. You should, as always, use common sense and your own good judgment.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 76-4.

JURY INSTRUCTION NO. 25

Impeachment By Prior Inconsistent Statement

You have heard evidence that at some earlier time the witness has said or done something which counsel argues is inconsistent with the witness' trial testimony.

Evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence in determining liability. Evidence of a prior inconsistent statement was placed before you for the more limited purpose of helping you decide whether to believe the trial testimony of the witness who contradicted himself or herself. If you find that the witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of his or her trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgement, to determine whether the prior statement was inconsistent, and if so, how much, if any, weight to give to the inconsistent statement in determining whether to believe all or part of the witness' testimony.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 76-5.

JURY INSTRUCTION NO. 26

Admission of a Party Opponent: Statement by a Party's Agent

Generally, a party on one side of a case can offer a statement or admission by its opponent in the case as evidence against the opponent. This is true not only when the opposing party makes the statement itself, but also if someone designated as the opposing party's agent or representative makes a statement on their behalf or within the course of representing them.

One example of an agency relationship is that of an attorney and a client. A statement by a lawyer on behalf of a client in the context of representing a client can be used against the client as an admission so long as the statement does not rise to the level of implicating the client in criminal wrongdoing.

Another example of an agency relationship is that of a talent agent and a client. Again, a statement by the agent on behalf of a client in the context of representing a client can be used against the client as an admission so long as the statement does not rise to the level of implicating the client in criminal wrongdoing.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: Fed. R. Evid. 801(d)(2); *United States v. Martin*, 773 F.2d 579 (4th Cir. 1985); *United States v. Gregory*, 871 F.2d 1239, 1243 (4th Cir. 1989).

JURY INSTRUCTION NO. 27

Signing a Document

Anyone who signs a document is both presumed to know its contents and is bound by the terms of the document. Even ignorance of the terms within a signed document will not prevent someone from being held liable based on the terms contained within the document.

Moreover, an individual who signs a document is conclusively bound by its terms, and cannot avoid the effect of the document by claiming he did not read it.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: *Bishop v. Maurer*, 823 N.Y.S.2d 366, 368 (N.Y. App. Div. 2006); *In re Ms. Interpret*, 222 B.R. 409, 415 (Bankr. S.D.N.Y. 1998); *Floyd v. Nationwide Mutual Insurance Co.*, 626 S.E.2d 6, 12 (S.C. 2005); *Regions Bank v. Schmauch*, 582 S.E.2d 432, 440 (S.C. 2003).

JURY INSTRUCTION NO. 28

Expert Witness—Generally

In this case, I have permitted certain witnesses to express their opinions about matters that are at issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

It is not improper for an expert witness to be compensated for services. It is a customary and accepted procedure and no impropriety results from the paying of compensation for the services of an expert witness, including for giving expert testimony at trial. However, you may consider an expert witness' bias, including the fact that the expert witness is being compensated, as part of your overall evaluation of the expert's credibility.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 76-9; Duane Burton, Jury Instructions in Intellectual Property Cases § 60:31:03 (1998).

JURY INSTRUCTION NO. 29

Witness Testimony by Video Conference

During the course of the trial you heard both live testimony and testimony via video conference. Testimony by video conference is sometimes necessary due to the lack of availability of a witness. Testimony given via video conference should not be given any more or any less weight than testimony that was given by witnesses live in the courtroom. That is, the video testimony should be given as much weight as if that witness would have testified live in court before you.

In order to safeguard the testimony and ensure its reliability, certain measures were taken by both sides. The parties agreed that no notes, flash cards, teleprompters or any other media or means which might have been used to suggest an answer or otherwise influence the testimony of the witness were used in the conference room or within eyesight or earshot of the witness. The exhibits that the parties used in connection with the witness were sealed and remained sealed until opened by the witness during the examination.

Furthermore, a lawyer from the defendant's law firm was present in the conference room during the testimony to monitor compliance with this agreement and to assist with the handling of exhibits. That lawyer had a full set of all the exhibits marked for trial in a closed binder or box, and to the extent the plaintiffs' lawyer, the Court, or any other lawyer wished to examine the witness regarding any other pre-marked exhibit not under seal, that lawyer retrieved the exhibit and confirmed with the lawyer doing the examination, or with the Court itself, that the correct exhibit was being presented. In

addition, if any exhibit was presented to the witness that had not been previously marked, the lawyer who was with the witness was available to receive this exhibit by fax or email and presented it to the witness. Any presentation of the exhibits were made without any editorial comments, and you were always able to see the lawyer present so that there could be no question as to her non-interference with the questioning.

In addition, as you may have noticed, at the beginning of the video testimony, a camera panned the room to confirm to the lawyers, the Court, and you, the jury, that these protective procedures were in place and that there was no one else in the room with the witness.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: Fed. R. Civ. P. 43(a).

JURY INSTRUCTION NO. 30

Right to See Exhibits and Hear Testimony

You are about to go into the jury room and begin your deliberations. If during those deliberations you want to see any of the exhibits, you may request that they be brought into the jury room. If you want any of the testimony read, you may also request that. Please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of the testimony.

Your requests for exhibits or testimony – in fact any communication with the Court – should be made to me in writing, signed by your foreperson, and given to one of the marshals. In any event, do not tell me or anyone else how the jury stands on any issue until after a unanimous verdict is reached.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: 4 L. Sand, et al., Modern Federal Jury Instructions 78-1.

JURY INSTRUCTION NO. 31

Plaintiffs' Claims

In this case, Trademark Properties and Richard Davis are claiming that AETN entered into an oral agreement with Mr. Davis to share 50/50 the net revenues from the show "Flip This House" but that AETN failed to deliver on this agreement, thus resulting in a breach of their contract. In addition, Trademark Properties and Mr. Davis claim that AETN's conduct constituted fraud.

Trademark Properties and Mr. Davis are seeking monetary damages from AETN. If Trademark Properties and Mr. Davis prevail on one or both of their claims, you, the jury, will decide if they are entitled to money from AETN and, if so, how much. You must decide first whether Trademark Properties and Mr. Davis have proven the elements of their legal claims, as I will explain them to you, and if so, you will separately consider whether they are entitled to any monetary damages.

AETN denies the plaintiffs' allegations. I will further explain each of these claims during the course of these instructions.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: Amended Complaint of Trademark Properties and Richard C. Davis; Amended Answer and Counterclaims of A&E Television Networks and Max Weissman Productions, Inc. d/b/a Departure Films.

JURY INSTRUCTION NO. 32

Plaintiffs' Theories of Recovery

In this case, Trademark Properties and Richard Davis have asserted two claims regarding their involvement with the television show "Flip This House." You may find in favor of Trademark Properties and Mr. Davis on each of the claims or you may find for AETN on each of the claims, or you may find in favor of Trademark Properties and Mr. Davis on one claim and for AETN on the other claim. However, you must reach a decision as to each claim separately. Trademark Properties and Richard Davis' claims against AETN are:

1. Breach of Contract
2. Fraud

I will now give you instructions on the different legal theories asserted by Trademark Properties and Richard Davis.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: Amended Complaint of Trademark Properties and Richard C. Davis.

JURY INSTRUCTION NO. 33

Breach of Contract

Plaintiffs Trademark Properties and Richard Davis seek to recover damages they claim were caused by AETN's breach of contract. A contract is an obligation which arises from actual agreement of the parties as manifested by words, oral or written, or by conduct. In order for Trademark Properties and Richard Davis to prevail on their claim of breach of contract, they must prove the following elements by a preponderance of the evidence:

1. The existence of an enforceable contract. This can broken down into:
    a.) Whether a contract was made
    b.) Whether, if made, the contract would be enforceable.
2. Adequate performance of the contract by the plaintiffs.
3. Breach of contract by AETN.
4. Damages.

The first, and for the purposes of this case, most important and disputed factor is whether or not the alleged oral agreement between Richard Davis and AETN ever took place. If you find that such an agreement was made, then you must decide whether or not such a contract would be enforceable. A valid contract exists only when the parties have objectively manifested an intent to be bound such that there was a meeting of their minds regarding the agreement. In determining whether the parties intended to be bound by an oral agreement (as opposed to one in writing), you may consider:

(1) whether a party has made explicit statements that it reserves the right to be bound only when a written contract is signed;

(2) whether a party has partially performed and that performance was accepted by the party disclaiming the contract;

(3) whether there were terms that remained to be negotiated; and

(4) whether the agreement concerns those complex and substantial business matters where requirements that the contract be in writing are the norm rather than the exception.

If you find that the parties merely reached an agreement to agree, such that a material term was left for future negotiations, you must find that the alleged contract is not enforceable.

Trademark Properties and Richard Davis claim that an oral agreement was reached with AETN during a telephone call between Mr. Davis and Charles Nordlander, who worked for AETN, whereby the plaintiffs were to receive 50% of all net revenues and proceeds from the show "Flip This House." Trademark Properties and Richard Davis claim that AETN's failure to pay the 50% share of profits from the show, and to reimburse them for expenses, amounts to a material breach of that alleged agreement.

AETN claims that the evidence shows that there was no such agreement reached between the parties. AETN contends that the plaintiffs cannot identify any facts

supporting their claim of an oral agreement beyond Mr. Davis' own allegations, which themselves are inconsistent.

Furthermore, AETN argues that any such agreement would not be enforceable because it lacked so many essential terms that it was fatally indefinite.

In addition, AETN claims that any agreement of this kind also was both so complex and novel that it had to be put in writing before it could be enforceable.

If you find that there was no oral agreement between AETN and Mr. Davis, then you must find for AETN on the breach of contract claim. If you find that there was an agreement, but the agreement was not enforceable, then you also must find for AETN.

If you find that there was an enforceable legal contract, then you should proceed to consider whether the plaintiffs adequately performed on their end of the contract. A plaintiff who defaulted in performance of a contract such that a defendant could actually bring a claim of breach of contract against the plaintiff, cannot then claim the defendant is liable. Thus it is the party who is guilty of the first breach which is generally the one held liable for nonperformance.

If you find that the plaintiffs held up their end of the agreement, you must then consider whether AETN was in violation of that agreement. If you find that AETN was in breach of the contract, then you shall consider whether the plaintiffs are entitled to any damages.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: New York Pattern Jury Instructions, Civil § 4:20 (2007); *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996); *Express Indus. & Terminal Corp. v. New York State DOT*, 715 N.E.2d 1050, 1053 (N.Y. 1999); *Adjustrite Sys., Inc. v. GAB Bus. Servs.*, 145 F.3d 543, 549 (2d Cir. 1998); *166 Mamaroneck Ave. Corp. v. 151 East Post Rd. Corp.*, 575 N.E.2d 104, 105-06 (N.Y. 1991); Amended Complaint of Trademark Properties and Richard C. Davis.

JURY INSTRUCTION NO. 34

General Damages—Contract

The basic principle of damages in a contract action is to leave the injured party in as good a position as he or she would have been if the contract had been fully enforced. The injured party should not recover more from the breach than the party would have gained had the contract been fully performed.

Even if you find that AETN breached the alleged oral contract between it and the plaintiffs, that is insufficient for an award of damages. Rather, you must find that there was a causal relationship between the breach of contract and the damages sustained. That is, Trademark Properties and Richard Davis have the burden of showing that because of AETN's alleged breach, they were specifically harmed. Damages are measured from the date of the breach.

A plaintiff has a duty to exercise reasonable care and diligence to minimize his or her damages. If the plaintiffs did not do what was reasonable in order to avoid damages, then the amount of their recovery should be reduced accordingly.

In other words, the party seeking damages has the affirmative obligation to make reasonable efforts to minimize his or her damages. The law will not allow a party to sit by and see his or her property damaged or destroyed and then collect damages when he or she failed to make a reasonable effort to stop or minimize the damage.

In this case, in the event that you find for the plaintiffs, the amount of damages is not in dispute, and would consist of 50% of AETN's profits from the show "Flip This

House." In addition, the amount of damages would include reimbursement to the plaintiffs of the expenses they incurred in connection with the show.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: New York Pattern Jury Instructions, Civil § 4:20 (2007); *Hamilton v. McPherson*, 28 N.Y. 72 (1863); *Wilmot v. State*, 297 N.E.2d 90, 92 (N.Y. 1973).

JURY INSTRUCTION NO. 35

Fraud

Plaintiffs Trademark Properties and Richard Davis seek to recover damages they claim were caused by fraud committed by the defendant AETN. In order to recover for fraud, Trademark Properties and Mr. Davis must prove the following elements by clear and convincing evidence:

(1) That AETN made a representation of fact;

(2) That the representation was false;

(3) That AETN knew it was false or made the representation recklessly without regard to whether it was true or false;

(4) That AETN made the representation to induce Trademark Properties and Richard Davis to rely upon it;

(5) That Trademark Properties and Richard Davis did justifiably rely upon it; and

(6) That Trademark Properties and Richard Davis were injured as a result.

Plaintiffs Trademark Properties and Richard Davis claim that AETN committed fraud when the senior executive for non-fiction programming at AETN, Nancy Dubuc, advised Richard Davis in an email that she had asked Charles Nordlander to review Mr. Davis' material, as he oversaw all of A&E's lifestyle programming. Plaintiffs claim this constituted fraud because Mr. Nordlander was not in a position of authority to make a financial agreement on behalf of AETN, and that AETN knew this at the time.

AETN claims that there was no fraud because the statements in Ms. Dubuc's email are true, she did not know Mr. Davis would rely on the email as a statement that Mr. Nordlander had authority to enter into an agreement on behalf of AETN, that she did not intend Mr. Davis to rely on the email as a statement that Mr. Nordlander had such authority, that Mr. Davis did not rely on the email as a statement that Mr. Nordlander had authority to enter into an agreement because Mr. Davis never entered into any agreement, and that any such reliance would have been unreasonable.

The first question you will be asked to decide is whether AETN made a representation. If you find that AETN did not make the representation, you need proceed no further on the claim of fraud. If you find that AETN did make a representation, you must next decide whether the representation was true or false. If the representation was true, you need proceed no further on the claim of fraud.

If the representation was false, you must next decide whether AETN knew it was false or made it recklessly without regard to whether it was true or false. If you find that AETN did not know that it was false and that AETN did not make it recklessly, you need proceed no further on the claim of fraud. If you find that AETN did know the representation was false or acted recklessly, you must next decide whether the representation was made to induce Trademark Properties and Richard Davis to enter into an agreement with AETN. If you find that AETN did not make the statement to induce Trademark Properties and Richard Davis to enter into an agreement with AETN, you need proceed no further on the claim of fraud.

If you find that AETN did make the representation to induce Trademark Properties and Richard Davis to enter into an agreement with AETN, you must next decide whether Trademark Properties and Richard Davis relied on the representation. If Trademark Properties and Richard Davis did not rely on the representation, you need proceed no further on the claim of fraud. If you find that Trademark Properties and Richard Davis did rely on the representation, you must next decide whether Trademark Properties and Richard Davis were justified in relying on the representation. Whether the person to whom a representation is made is justified in relying upon it generally depends upon whether the fact represented is one that a reasonable person would believe and consider important in deciding whether to enter into an agreement. Whether a person is justified in relying on a representation also depends on whether a reasonable person would enter into an agreement without independent investigation. If you find that Trademark Properties and Richard Davis were not justified in relying on the representation, you need proceed no further on the claim of fraud.

If you find that Trademark Properties and Richard Davis were justified in relying on the representation, you must next decide whether Trademark Properties and Richard Davis were damaged as a result of the fraud. If you find that Trademark Properties and Richard Davis did not sustain any damage as a result of the fraud, you must find for AETN on the claim of fraud. If you find that Trademark Properties and Richard Davis did sustain damage as a result of the fraud, you must decide the actual monetary loss sustained.

It is up to you to decide whether or not Trademark Properties and Richard Davis have proven that Ms. Dubuc's email to Mr. Davis constitutes fraud—namely, that it was a representation regarding a present fact, it was false, it was made knowingly to induce reliance, Richard Davis and Trademark Properties justifiably relied on it, and they were damaged as a result.

If you find even one element lacking, then you need not proceed any further, and you must find for AETN. If you find all of the elements are satisfied, then you must find for Trademark Properties and Richard Davis on this claim.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: New York Pattern Jury Instructions, Civil § 3:20 (2007); *Leucadia, Inc. v. Reliance Ins. Co.*, 864 F.2d 964, 971 (2d Cir. 1988); *Hutt v. Lumbermens Mutual Casualty Company*, 466 N.Y.S.2d 28, 30 (N.Y. App. Div. 1983); *Holloway v. King*, 361 F. Supp. 2d 351, 359-60 (S.D.N.Y. 2005).

JURY INSTRUCTION NO. 36

General Damages—Fraud

The damages in an action for fraud are measured by the actual monetary loss sustained as a direct result of the wrong, or the "out of pocket" rule. This will be the difference in value between what the plaintiffs parted with as a direct result of the fraud and what the plaintiffs received. Recovery is denied where the fraud would leave the plaintiffs in a better position than the plaintiffs would have been in the absence of fraud. If the fraud in has caused no loss, then the plaintiffs should recover no damages.

In this case, the damages would be the money actually spent by Trademark Properties and Richard Davis (that is, their out-of-pocket expenses) because they were induced to enter an agreement with AETN. If Trademark Properties and Richard Davis would have spent money even if they had not entered into an agreement with AETN, then they may not recover these expenses as damages.

Given: _____

Given as Modified: _____

Refused: _____

Withdrawn: _____

Authority: New York Pattern Jury Instructions, Civil § 3.2 (2007); *Lama Holding Co. v. Smith Barney*, 668 N.E.2d 1370, 1373 (N.Y. 1996).

Dated: October 29, 2008
Charleston, South Carolina

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: S/ ROBERT H. JORDAN
Richard A. Farrier, Jr. (Fed. # 772)
Robert H. Jordan (Fed. # 6986)
Liberty Building, Suite 600
151 Meeting Street
Post Office Box 1806 (29402)
Charleston, SC 29401
(843) 853-5200

Attorneys for Defendant A&E Television Networks

Of Counsel:

DEBEVOISE & PLIMPTON LLP
Bruce P. Keller
Jeremy Feigelson
S. Zev Parnass
919 Third Avenue
New York, New York 10022
(212) 909-6000
Admitted *pro hac vice*