

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,)

Civil Action No. 2:06-cv-2195-CWH

**RULE 26(f) REPORT AND
LOCAL RULE 26.03 RESPONSES**

vs.)

A&E TELEVISION NETWORKS, a joint)
venture of the Hearst Corporation, ABC,)
Inc. and NBC Universal; DEPARTURE)
FILMS, an entity of unknown origin; and)
DOES 1-20, Inclusive,)
)
Defendants.)

A&E TELEVISION NETWORKS,)
)
Counterclaim Plaintiff,)

vs.)

TRADEMARK PROPERTIES, INC. and)
RICHARD C. DAVIS,)
)
Counterclaim Defendants.)

Pursuant to Federal Rule of Civil Procedure 26(f) and Local Civil Rule 26.03, defendant/counterclaim plaintiff A&E Television Networks (“AETN”) and defendant Max Weissman Productions, Inc. d/b/a Departure Films (“Departure Films”; together with AETN, “Defendants”) submit the following report:

RULE 26(f) DISCLOSURES

1. What changes should be made in the timing, form or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made?

RESPONSE: Defendants have submitted a proposed scheduling order, which is attached hereto.

2. The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues.

RESPONSE: Discovery will be necessary concerning, though not necessarily limited to, the course of dealings between plaintiffs Trademark Properties, Inc. and Richard C. Davis (“Plaintiffs”) and Defendants with respect to the show “Flip This House,” including the terms and performance of any contracts alleged to have been entered into. Discovery will also be necessary on any claims for damages. Defendants request that discovery be completed according to the proposed scheduling order attached hereto.

3. What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed?

RESPONSE: No limitations other than those identified in the proposed scheduling order are known at this time.

4. Any other orders that should be entered by the Court under Rule 26(c) or under Rule 16(b) and (c).

RESPONSE: None of which Defendants currently are aware.

LOCAL RULE 26.03 DISCLOSURES

1. A short statement of the facts of the case.

RESPONSE: This suit arises out of AETN's television show "Flip This House." Plaintiffs appeared in the first season of this show. It was always understood and agreed between the parties that AETN would exercise final creative authority over "Flip This House," own all legal rights in the show, and receive and control all revenues associated with the show. Plaintiffs allege, however, that they own certain rights in the show and in particular that they are entitled to 50% of all profits, revenues, and proceeds generated by the show. Defendants expressly deny all of the material allegations in Plaintiffs' complaint, including that any agreement was reached of the type alleged by Plaintiffs. AETN has countersued Plaintiffs, on the grounds that the parties reached an agreement for Plaintiffs to appear in Season Two of the show and that Plaintiffs broke that agreement.

2. The names of fact witnesses likely to be called by the party and a brief summary of their expected testimony.

RESPONSE:

Discovery in this litigation is ongoing, and to the extent additional individuals with knowledge relevant to this dispute are identified, Defendants will disclose their identities.

For Plaintiffs

1. Richard Davis
929 White Marlin Drive
Charleston, South Carolina 29412

It is anticipated that the above-named witness will testify about his knowledge regarding (1) the relationship between Plaintiffs and Defendants, (2) the alleged agreement between Plaintiffs and Defendants for Season One, (3) the negotiations between the parties during Season Two and (4) Plaintiffs' alleged damages.

2. Thomas Whaley
St. Paul Saints Baseball Club, Inc.

1771 Energy Park Drive
St. Paul, Minnesota 55108

3. Pierre Brogan
Creative Artists Agency
9830 Wilshire Boulevard
Beverly Hills, California 90212
4. Bryan Geers
Creative Artists Agency
9830 Wilshire Boulevard
Beverly Hills, California 90212

It is anticipated that the above-named witnesses will testify about their knowledge regarding the relationship between Plaintiffs and Defendants and the Season Two negotiations and agreement between them.

For Defendants

1. Thomas Moody
A&E Television Networks
235 East 45 Street
New York, New York 10017
2. Michael Morrison
A&E Television Networks
235 East 45 Street
New York, New York 10017
3. Nancy Dubuc
A&E Television Networks
235 East 45 Street
New York, New York 10017
4. Dina Ganz Traugot
A&E Television Networks
235 East 45 Street
New York, New York 10017
5. Max Weissman
Max Weissman Productions, Inc. d/b/a Departure Films
333 West 39 Street #1502
New York, New York 10018

6. Charles Nordlander
Food Network
1180 6th Avenue
New York, New York 10036

It is anticipated that the above-named witnesses will testify about their knowledge regarding (1) the relationship between Plaintiffs and Defendants, (2) that there was no agreement between the parties during Season One on the terms alleged by Plaintiffs, (3) the Season Two negotiations and agreement between the parties and (4) Defendants' damages.

3. The names and subject matter of expert witnesses (if no witnesses have been identified, the subject matter and field of expertise should be given as to experts likely to be offered).

RESPONSE: Defendants' experts, if any, will be identified according to the scheduling order.

4. A summary of the claims or defenses with statutory and/or case citations supporting the same.

RESPONSE: Plaintiffs have sued AETN for (1) fraud, (2) breach of contract, (3) promissory estoppel, (4) breach of fiduciary duty, and (5) conversion. Plaintiffs have brought claims against AETN and Departure Films for (1) misappropriation of trade secrets, (2) unfair trade practices, (3) constructive trust and accounting, and (4) preliminary and permanent injunctive relief.

As noted above, Defendants expressly deny all of the material allegations in Plaintiffs' complaint, including Plaintiffs' characterization of the contractual relationship between the parties. As also noted above, AETN has countersued Plaintiffs for breach of contract and breach of the duty of good faith. *See, e.g., Fuller v. Eastern Fire & Cas. Ins. Co.*, 124 S.E.2d 602 (S.C. 1962) (a claim for breach of contract requires proof of (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the

non-breaching party as a direct and proximate result of the breach); *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996) (similarly); *Adjustrite Sys., Inc. v. GAB Business Services, Inc.*, 145 F.3d 543, 548 (2d Cir. 1998) (a duty of good faith arises from a “binding preliminary commitment,” which is created when the parties “agree on certain major terms, but leave other terms open for negotiation”); *Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 408-09 (4th Cir. 2002) (following the “modern trend” and holding that binding preliminary commitments carry an obligation to negotiate in good faith).

Defendants reserve the right to present additional facts and law in support of their defenses and counterclaims.

5. Absent special instructions from the assigned judge, the parties shall propose dates for the following deadlines listed in Local Civil Rule 16.02:

RESPONSE: Defendants will identify their experts and complete their discovery in accordance with the scheduling order.

6. The parties shall inform the Court whether there are any special circumstances which would affect the time frames applied in preparing the scheduling order. See generally Local Civil Rule 16.02(C).

RESPONSE: Defendants are unaware of any special circumstances.

7. The parties shall provide any additional information requested in the Pre-Scheduling Order (Local Civil Rule 16.01) or otherwise requested by the assigned judge.

RESPONSE: Defendants are not aware of any additional information requested in the Pre-Scheduling Order or otherwise requested by the assigned judge.

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Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

s/ROBERT H. JORDAN

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Films*

Charleston, South Carolina

October 23, 2006