

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

TRADEMARK PROPERTIES, INC., a ) Civil Action No. 2:06-cv-2195-CWH  
South Carolina corporation; RICHARD C. )  
DAVIS, an individual, )  
)  
Plaintiffs, )

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. )

**REPLY MEMORANDUM IN SUPPORT OF**  
**DEFENDANTS’/COUNTERCLAIM**  
**PLAINTIFF’S MOTION TO COMPEL**

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

vs. )

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

\_\_\_\_\_  
Defendant/counterclaim plaintiff A&E Television Networks (“AETN”)  
and defendant Max Weissman Productions, Inc. d/b/a Departure Films (“Departure  
Films”) (together, “Defendants”) submit this reply in further support of their motion to  
compel. Plaintiffs/counterclaim defendants Trademark Properties, Inc. and Richard C.

Davis (together, “Plaintiffs”) recently amended their discovery responses. Defendants agree that the amendments remedy four of the eight deficiencies identified in the motion to compel. Four deficiencies remain, and as to those relief is still appropriate:

1. Document Response No. 7: Plaintiffs should be compelled to produce non-privileged communications that involve their counsel, and to produce a privilege log of withheld documents. Even after amending their responses, Plaintiffs assert an overbroad view of privilege – namely, that *all* communications between them and their attorneys will be withheld. The only lawyer-client documents properly withheld would be those as to which Plaintiffs can establish each element of the privilege – in particular, those that reflect actual requests for or delivery of legal advice. *See generally United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (setting forth scope of privilege); *Zeus Enterprises, Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 244 (4th Cir. 1999) (party asserting privilege bears burden of establishing that it applies to all withheld documents). There is special reason to hold Plaintiffs tightly to their burden here. Much of what their lawyers apparently did was render business advice, and one of the lawyers appears to have been a full-time minor league baseball executive who assisted Davis informally and happens to have a law degree. Plaintiffs also must produce a privilege log that identifies any withheld documents with enough detail that Defendants can assess the privilege claim. FED. R. CIV. P. 26(b)(5).

2. Document Response No. 8: Plaintiffs should be compelled to produce documents concerning communications between Plaintiffs and television networks other

than AETN. Defendants are entitled to fully explore the true reasons for Davis' decision to break off his business relationship with AETN and sign instead with The Learning Channel ("TLC"). This is an absolutely central event in the case. Not only does Davis allege that he was motivated by AETN's purported breach of a prior agreement concerning ownership rights and the division of revenue (e.g., Complaint ¶¶ 11-14), but he has given different explanations to the press:

Davis' show appeared on the A&E network for its first season, but he says he wasn't satisfied with the lengthy periods between episodes. So, he strutted to TLC's parent company, Discovery Network, and convinced them to pick him up. "It was so damn slow with A&E, so I approached TLC. I said, 'Listen, I set every kind of ratings record there is; so if you guys can keep up, I'll switch.'"

Ian Wheeler, *Get Real*, CHARLESTON CITY PAPER, July 12, 2006 (attached hereto as Appendix A); *see also* Jim Parker, *Davis' real estate reality show flips to TLC*, POST AND COURIER, Mar. 31, 2006 (Appendix B) (stating that Davis decided to switch to TLC in order to "assume greater creative control"; Davis says the AETN series focused too much on flipping and not enough on a well-rounded look at the real estate business).

Plaintiffs' challenge to the relevance of these documents lacks any merit, especially given that relevance during discovery is interpreted broadly. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (relevance under Federal Rule 26(b)(1) is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case").

3. Document Response No. 10: This request seeks documents concerning any television shows that have a concept or format similar to that of the AETN series “Flip This House.” Although Plaintiffs’ amended responses state that they are not aware of any such documents, they limit their response to documents that predate Plaintiffs’ video pilot of the series. Plaintiffs should either produce any documents that post-date Plaintiffs’ video pilot of the series or should state that there are no such documents.

4. Document Response No. 26: Plaintiffs should be compelled to produce documents reflecting any executed or final agreements between Plaintiffs and TLC. Plaintiffs’ relevance objections are without merit for the reasons discussed above with respect to Document Response No. 8. Any actual agreements between Plaintiffs and TLC are especially relevant. Plaintiffs have made allegations and public statements denigrating the terms offered by Defendants for Season Two of “Flip This House.” *See, e.g.*, Complaint ¶¶ 17, 24, 28; Appendix C (Plaintiffs’ Press Release, July 24, 2006). Defendants expect to demonstrate that the terms offered by TLC and AETN were similar, and that Plaintiffs’ claim that AETN did not offer fair terms is merely an excuse for breaching their obligations for Season Two. The terms of Plaintiffs’ agreement with TLC also will be relevant to prove that Plaintiffs’ actual agreements with AETN were industry standard, while the imaginary agreements alleged by Plaintiffs – such as 50-50 ownership of the series and equal shares of all net revenues and proceeds generated – are unheard of in television. Defendants are willing to agree

to the production of Plaintiffs' agreement with TLC subject to entry of a Confidentiality Order.

Defendants respectfully request an Order compelling Plaintiffs to fully remedy the four remaining deficiencies in their discovery responses as outlined above.

Respectfully submitted,

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POSTED ON JULY 12, 2006:

## TOP STORY | Get Real

*Chucktown's very own celeb-reality stars indulge our voyeuristic pleasure*

By Ian Wheeler



'Extreme Akim' Anastapoulo wields the 'Bat of Justice' on *Eye for an Eye*

Will everyone who is a reality TV star please raise your hand? OK, good; most of us are here. Since we're all on the same page, let's take a bit of time to discuss why we set out to "star" in reality TV — broadcast's annoying stepchild.

In a market increasingly crowded with regular-folks-turned-D-list-celebs, we see a trend which we'll refer to as the "Hmmm, I could be famous, too" line of reasoning. This is completely natural and not particularly deplorable or pathetic. For instance, if you watch a show and see some average idiot mowing his grass shirtless one week, and the next week he is finding a golden grail for which he will earn a brand-new jet-ski and a spot on the cover of *US Weekly*, you want that, right? Absolutely. And don't think our pretty little town isn't in on the jig.

Our fair city brags a list of reality stars and "reality opportunities," and I'm not talking about the *Palmetto Pointe* kids (who I'm sure don't read *CP* anyway, thanks to Nick Smith). So what constitutes a reality opportunity? To start, any dispute, no matter how trivial. For a fair resolution, look no further than Extreme Akim.

APPENDIX A

Local injury lawyer Akim Anastapoulo serves as judge and jury in his own national "reality courtroom drama" *Eye for an Eye*. Rulings are steep, like wrestling in a vat of chili for the ownership rights to a pawn shop engagement ring. That's justice to me. If Extreme Akim's mere 5'5" presence isn't enough to hold order in the courtroom, it's backed up by the "Bat of Justice," which is basically just a wooden bat painted with the word "justice." Akim also has a burly bailiff: former boxing champ Sugar Ray Phillips, who (when not executing writs) appears to be a pimp. To cap off this list, Kato Kaelin, who became a star by thrusting himself into the spotlight during the O.J. trial, provides meaningful legal commentary.

Now, this may sound like an awful show, but the far reach of *Eye for an Eye* is nothing short of spectacular. In the past year, the show cleared over 80 percent of the nation (70 percent is the syndication mark). The show airs in 38 different countries and between four and six million people watch each day. Statistically, it's slightly more successful than *Joey*.

To Extreme Akim's credit, he couldn't be a nicer guy. His reasons for accepting the proposal to appear as star judge on the show are perfectly understandable. "I was asked to do it. I was curious about the TV business, and I gained interest when we did some pretend cases," says Extreme Akim.

Akim says he was perturbed over whether or not the show would make a difference in the world, but he managed to find a resolution. "I was concerned whether it did any good for society," says Akim. "But one day an old lady called me and told me that she was having a bad day. She couldn't pay her bills; she was really down and out. But she told me that she saw my show and it made her laugh, and I realized: TV's importance is to entertain people and let them escape their problems for 30 minutes."

Akim is highly devoted to his Charleston roots. He explains that he grew up here and hopes his show will positively affect our city. Not to mention that his local celebrity status is through the roof! "I enjoy the celebrity. I like meeting people a lot more than when they point at me and whisper," says Akim. He adds that we can expect the show to focus more on the judge this season, but he thinks he's ready for it.

Charleston native Richard Davis saw what was going on in reality TV and felt that he could do better. Davis created *Flip This House*, where regentrification becomes wholesome entertainment. And he isn't the least bit bashful about admitting his success. "I think scripted reality TV is B.S. They needed to show the trials and tribulations of running a business. So, I wrote a show and said, 'You wanna see a drama; look at what I do everyday'," says Davis.

Davis' show appeared on the A&E network for its first season, but he says he wasn't satisfied with the lengthy periods between episodes. So, he strutted to TLC's parent company, Discovery Network, and convinced them to pick him up. "It was so damn slow with A&E, so I approached TLC. I said, 'Listen, I set every kind of ratings record there is; so if you guys can keep up, I'll switch.'"

As for his position as a celebrity, Davis says that hasn't changed much. He confesses that he knew "pretty much everyone in Charleston" before the show started. Fortunately, there's more (completely sincere) deference for him now that he has so many bills in the bank. "It's gotten kinda crazy. I mean, I got helicopters and BMWs with our logo on them," says Davis. He bargains on having even more BMWs after the next season. "They're going to promote the dogshit out of this thing," says Davis.

Another classy concept sweeping reality TV, wife swapping, also struck Charleston. Aletha and Glenn Smoak of Ravenel appeared on the show *Wife Swap* two years ago and say they still get stopped by fans. "I knew my family and husband were taking me for granted and I just wanted to show them that

the grass isn't always greener," says Aletha Smoak.

Smoak was sent to the pit of Kentucky to live with a dreadlocked hillbilly. The steamy possibility that she may have fallen for him didn't seem to be in the cards. "I wondered, 'What if I like this guy better? What if I don't want to go back to my life?' But when I got there and saw him, I knew that wasn't likely."

Smoak says that the cash was the last thing she and husband Glenn considered when they agreed to do the show. "Money was definitely not a factor. But ABC has taken care of us. They gave us \$5,000 and we get to travel a lot. We've met Richard Gere and Usher, which has been fabulous. And we've gone on *The View* and CNN."

As for newfound celebrity, Smoak says that it isn't uncommon to be recognized in public. "I was in the New York airport and people stopped me. It's unreal how good people treat you. It's really flattering. You hear all these celebrities talk about how terrible it is being in the spotlight. I think it's fun."

Smoak also gave some insight into the production process. "Manipulation came in the form of text messages. I butted heads with the producers, but I think that was because they were British and there were cultural differences," says Smoak.

The roles of manipulation from producers and the editing team are highly debated in the reality realm. The infamous Cirie Fields, a Walterboro registered nurse turned *Survivor*, seemed to be a victim of the editing process. Fields was frequently shown complaining and her tagline — "I hate leaves" — became a favorite around office water coolers everywhere. Fields is reluctant to speak about her experience, which is why she refused to talk with *CP* for this article. She did, however, score a new GMC Yukon from her *Survivor* stint.

Mary Sean Johnson entered the reality TV world for different reasons. Johnson owns Organized Bliss, a personal organization business in Mt. Pleasant, and appeared on an episode of *Mission: Organization* on the HGTV network. Johnson says that she's never felt comfortable on camera, and while she feels that many go into reality television with the hope of developing their acting careers, her decision was purely business. "I felt it was an opportunity that presented itself and as a professional organizer I couldn't turn it down. It's one way for my business to stand out," says Johnson. "There's only been one person who recognized me from the show, but it's really grounded my business and shows that I'm serious about what I do."

Johns Island resident Chad Hayes also felt that reality TV wasn't for him, but still managed to appear on the small screen. Hayes is a saltwater fishing guide and was approached to compete in ESPN's *Ultimate Outdoorsman* competition, a challenge he couldn't resist. "So far the experience has been both fun as well as educational. I grew up watching outdoor television shows and always wondered how they were put together," says Hayes.

His show airs at the end of the month, so he still isn't sure what the total outcome will be.





Chad Hayes competes to be the Ultimate Outdoorsman on ESPN2

The competition offers Hayes a chance to host an outdoors show on ESPN2, the aspiration of any wilderness adventurer. Still, he makes it clear that he never anticipated his involvement in the reality TV sector.

"I am not a big fan of reality television. I find it to be a grim reminder of just how stupid most people are. Considering that, it's funny that I am part of a reality show competition. It's not really reality, many scenes have to be staged to look good on television, but hey, it's television. It's meant to be entertaining," says Hayes.

Some reality shows shift the focus from showering contestants with gifts, seeking instead to help those less fortunate. The Do-It-Yourself (DIY) network recently started taping episodes of *DIY to the Rescue* in Mt. Pleasant and Johns Island. The show aims to help people who have started a home improvement project and reached the 'in-

over-their-head' point. Larry Rice is the Charleston-area franchise owner for Paul Davis Restoration, the company undertaking the project. "The producers select the cities they want to go to, and this time they chose Charleston," says Rice.

One of the episodes in Johns Island centers on the installation of a handicapped bathroom at the Charleston Area Therapeutic Riding horse farm. The farm accommodates physically challenged riders and uses riding as part of physical therapy treatment. "I am really excited about getting them a handicapped bathroom. We're thrilled to volunteer our time, resources, and planning to help out with these causes," says Rice.

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So, maybe all reality television isn't fueled by the desire to enhance our financial situation and societal status. But why do we, as viewers, watch? Because we see other peoples' lives as either (A) more fascinating or (B) more depressing than our own, and this provokes us to absorb every moment of "real" life (as portrayed on television).

We watch *The Apprentice* because we actually want to be the lucky souls that head up that Fortune 500 corporation, not because we find Donald Trump the least bit appealing or (gasp) attractive. Conversely, we watch *The Biggest Loser* because we can pin those people as bigger losers than ourselves. We even acknowledge that this isn't legit. Note that when most of your friends tell you they watch a reality show, they refer to it as a "guilty pleasure," as in: "Karen and I get together every week for *Wife Swap*. It's our guilty little pleasure (giggles)."

Many of us see this as a semi-tragic display of our society descending to voyeuristic excess. But isn't this just entertainment? Does anyone actually use reality television as some sort of guidance tool for how to live his or her life? The reality of reality TV is that most of it is crap. But crap is generally the

most entertaining content. I have long stated my hatred for the show *American Idol*, which I believe allows people to compete for ridicule and, if they're lucky, a major label record deal which will legally bind them for the remainder of their natural lives. But the most recent season taught me that America values kindness more than talent. Taylor Hicks lacks even a mediocre voice, he's not particularly good looking, and he probably has the most obnoxious catchphrase since "Whasssssup." But he's a nice guy and this is easily detectable. America seems to have voted with their hearts this year.



The Smoaks, of Hollywood, wife-swapped two years ago and still get recognized — 'I knew my family and husband were taking me for granted and I just wanted to show them that the grass isn't always greener,' says mom Aletha

Further, I was asked by a casual acquaintance if I'd like to watch an episode with a group that gathers every week. This seemed strange to me at first. Why would I want to get together with you and your friends to watch a show that I abhor? But when I finally did, I realized that the communion was the real entertainment; friends gathered to laugh and talk about what's going on in their lives and how they relate to the "real" characters. In light of the *Bowling Alone* era, maybe reality TV is somehow inadvertently drawing people closer together. Maybe reality TV isn't just a viable escape from everyday life, but rather a means to connect with other people in an increasingly isolationist society.

I still cringe when I hear some idiot say "Soul Patrol!" but I do have more respect for Charleston's own reality stars. They're putting themselves in front of the world, at the risk of extreme judgment, for the sake of communion and healthy escapism. Or at least that's the outcome that my producers manipulated in this article. Editing is a bitch.

For more photos of our local celebrities, visit [here](#).

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**SECTION:** NATION; Pg. A2

**LENGTH:** 453 words

**HEADLINE:** Davis' real estate reality show flips to TLC

**BYLINE:** JIM PARKER, The Post and Courier

**BODY:**

The Charleston real estate owner who parlayed his company's business of buying and fixing up undervalued properties into a prime time show has switched allegiances to TLC cable network from A&E TV to assume greater creative control on the reality program.

Richard C. Davis, who grew up on James Island and is head of **Trademark Properties**, was a star of the A&E series "Flip This House," which he helped create. The hour-long show, launched last fall on late Sunday afternoons, moved to Mondays at 8 p.m. in the winter and reached more than 1.2 million viewers. It followed the exploits of Davis and other associates in Team Trademark.

But Davis has expressed concern that the series focused on the aspect of flipping, where homes are sold quickly at a profit, rather than taking a well-rounded, educational look at a 15-year-old \$250 million real estate business that's involved in a range of ventures including condominium conversions and property management.

Davis said TLC, an affiliate of Silver Springs, Md.-based Discovery Communications International, is more amenable to his plans. The first show, which is being taped this week and next, will show the transformation of baseball legend Shoeless Joe Jackson's childhood home in West Greenville into a museum to honor his legacy. A nine-person production crew is working on the series opener.

He said the new show should appear on TLC by July. The exact name hasn't been finalized, but he believes it will be similar to his original working title, "Worst to First." Davis shopped around his pilot a few years ago, first approaching the Discovery Channel before going with New York-based A&E - a joint venture of Hearst Communications, ABC and NBC.

The president of privately held Discovery Communications is Greenville native Billy Campbell. Davis met recently with the executive. "I was real upfront with him," he said. In response, the

broadcasting company "rolled out the red carpet; treated me like royalty," he said. Most importantly, "he (Campbell) is not going to script my life," Davis said, referring to his creative differences with A&E and its production crew.

"Richard has built a reputation as a real estate mastermind and TLC viewers will soon have the opportunity to learn from the best in this new series," said Sean Gallagher, senior vice president of development at TLC, in prepared remarks.

In a prepared statement, Davis said, "On behalf of everyone at Team Trademark, I am ecstatic and excited to be moving up to the "major leagues" with Discovery Communications and TLC, after just one season in spring training. TLC has the same feel and camaraderie that we value at **Trademark Properties.**"

Reach Jim Parker at 937-5542 or at [jparker@postandcourier.com](mailto:jparker@postandcourier.com)

**LOAD-DATE:** March 31, 2006

# FLIP THIS LAWSUIT

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TRADEMARK PROPERTIES V. A&E TELEVISION NETWORKS

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« The first hints...

Season 2, Episode 3 »

## Lawsuit Press Release

*Following is a press release issued shortly after filing the lawsuit.*

### **TRADEMARK PROPERTIES FILES MULTI-MILLION DOLLAR CIVIL ACTION AGAINST A&E OVER “FLIP THIS HOUSE”**

*Martin Singer of Lavelly & Singer Retained to Lead Case for Plaintiff*

Charleston, SC (July 24, 2006) – Trademark Properties and its President/CEO Richard C. Davis have filed a multi-million dollar civil action against A&E Television Networks and Departure Films in connection with the reality television series “Flip This House,” which aired on the network this past season.

Among nine causes of action, the complaint alleges fraud, breach of contract, misappropriation of trade secrets and unfair business practices by A&E, which failed to codify deal points into a written agreement, paid nothing to Trademark Properties for its original series concept and involvement, and is now launching a second season “without Plaintiffs’ approval, participation, or otherwise providing any compensation.” The civil action, which also requests a jury trial and an injunction restraining A&E from exploiting the series any further, was filed in the Court of Common Pleas, Ninth Judicial Circuit, State of South Carolina, County of Charleston by plaintiff’s attorney Frank M. Cisa of Cisa & Dodds, LLP. Trademark Properties has retained well-respected entertainment attorney Martin Singer of Lavelly & Singer to lead the case.

“In my over 25 years of practicing entertainment litigation, this case involves one of the most outrageous acts by a television network. My clients’ television show that they have worked on for several years has been taken by A&E, and my clients have not been paid one penny by A&E. We are looking forward to the jury vindicating my clients in this matter.” According to the complaint, in April 2004 Davis and Trademark Properties created a digital video pilot originally titled “Worst To First,” which featured Davis and certain Trademark staff members going through the process of locating, acquiring, refurbishing and selling houses. After a DVD of the pilot and written treatment were “enthusiastically” received by A&E, the network requested an in-person meeting, held in June 2004. At that time, A&E expressed interest in producing and televising the series, subsequently renamed “Flip This House.” At this meeting, Davis stipulated that Trademark and A&E must be equal 50/50 owners of the

project, that they share equally in all net revenues and proceeds, and that A&E pay for all production costs, among other discussed provisions. A&E explicitly agreed to these terms and, based on that agreement, Trademark permitted A&E to retain Departure Films to produce an initial 13 episodes of the reality series.

Trademark alleges that A&E promised to prepare a written agreement, yet despite repeated requests and assurances, no written agreement was ever prepared during the production and airing of the first season, nor did A&E provide any monetary compensation to Trademark. "A&E never intended to prepare or deliver to Plaintiffs a written agreement," according to the complaint, and willfully induced Trademark to allow A&E to use its "valuable concept and format." In effect, Trademark alleges, the network "misappropriated and stole Plaintiff's project for A&E's own use and benefit."

Trademark Properties is headquartered at 1175 Folly Road, Suite C, Charleston, South Carolina 29412.

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