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,	)	Civil Action No. 2:06-cv-2195-CWH
Plaintiffs,	)	
vs.	)	
A&E TELEVISION NETWORKS, and MAX WEISSMAN PRODUCTIONS, INC. d/b/a DEPARTURE FILMS,	)	**PUBLIC VERSION**
Defendants.	)	
A&E TELEVISION NETWORKS,	)	
Counterclaim Plaintiff,	)	
vs.	)	
TRADEMARK PROPERTIES, INC. and RICHARD C. DAVIS,	)	
Counterclaim Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants A&E Television Networks ("AETN") and Max Weissman Productions, Inc. d/b/a Departure Films ("Departure") submit this memorandum in support of their motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment as to liability dismissing the Amended Complaint of plaintiffs Trademark Properties, Inc. and Richard C. Davis.

Preliminary Statement

The claims in this case all arise out of an alleged oral agreement concerning the television show "Flip This House," a reality show about fixing up houses for quick resale. Plaintiffs assert that before AETN even committed to do the show, AETN orally agreed to grant them (a) an "ownership interest" in the show, (b) 50 percent of all revenues in perpetuity, (c) "creative control" and other benefits – in all, terms so favorable to plaintiffs that they went well beyond standard practice for AETN and for the TV industry.

Summary judgment should be granted because the undisputed record shows no such agreement ever was reached. Plaintiffs' sworn testimony describes only their demands to AETN. They have completely failed to identify any communication in which AETN actually agreed to those demands, or even gave plaintiffs a basis for believing AETN agreed. The contemporaneous documentary evidence strongly confirms the lack of an agreement: ***Plaintiffs executed a representation and warranty to a competing network expressly stating that they "have not entered into any agreement" with AETN***, including any ***"written, verbal or implied agreement."*** Plaintiffs also have set out multiple sworn versions of the key events – a story so confused and contradictory that no reasonable juror could credit it. (*See* pp. 14-17, *infra*.)

Even were the Court to ignore all of this undisputed evidence, dismissal still would be in order. So many key terms of this supposed "oral agreement" undisputedly were never discussed or agreed to that the deal plaintiffs seek to enforce is fatally vague as a matter of law. Any agreement of this kind – running for years, implicating multi-million dollar obligations and covering novel, complex terms – *had* to be in writing in order to have legal force. (*See* pp. 17-22, *infra*.)

The claim for misappropriation of trade secrets fails because plaintiffs admitted they cannot identify any trade secrets that were misappropriated. The remaining claims, for an accounting, a constructive trust and an injunction, fail because they are not causes of action at all but remedies. (*See* pp. 25-27, *infra*.)

Summary judgment is appropriate because the plaintiffs themselves simply cannot tell a coherent or consistent story that, if accepted as true, would amount to a mutual and enforceable agreement. Unlike some cases about oral agreements, this motion does not present a "he said/they said" dispute. Defendants' motion should be granted and the case should be dismissed.

Undisputed Facts[1]

A. **First Contact Between The Parties**

1. **Reality Shows on AETN**

For years the A&E network has aired popular nonfiction or "reality" shows, including real estate shows. Declaration of Nancy Dubuc ("Dubuc Decl.") ¶ 2. AETN uses a standard legal and business structure for reality shows that is also typical for the cable industry. *Id.* ¶ 3. AETN retains a third-party production company to film and edit the show on a "work for hire" basis, *i.e.*, with AETN retaining all copyrights and other legal interests. *Id.* The production company is responsible for obtaining releases from the people who appear on the shows. *Id.* Advertising is the main revenue source for AETN, as it is for all broadcast and basic cable networks. *Id.* AETN keeps all or virtually all of this revenue for itself. *Id.* Advertising revenue over the life of a successful show can run into the tens of millions of dollars. *Id.* AETN sometimes shares modest amounts of smaller revenue streams, like video sales, with the production company or others. *Id.*

2. **Davis Cold-Calls AETN**

In 2004, Richard Davis cold-called AETN and proposed that the network review a video he had made about his real estate business as the basis for a possible reality show. March 8 Deposition Transcript of Richard C. Davis ("Davis 3/8 Tr.") 62:1-63:17. Davis

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1 All deposition excerpts and other exhibits to this motion, with the exception of unpublished opinions, are attached to the accompanying Declaration of Robert H. Jordan, dated April 2, 2007 ("Jordan Decl."). Unpublished opinions cited within this Memorandum are attached hereto as Exhibit A.

is a Charleston-based entrepreneur whose company, Trademark Properties, handles residential and commercial real estate brokerage, condo conversions, property management and relocation services in South Carolina. The proposed show was to focus on a part of the business that purchases, renovates and resells properties for Trademark's own account. 30(b)(6) Deposition Transcript of Trademark Properties ("Trademark Tr.") 25:9-13, 28:24-29:20. Davis was planning a national expansion and hoped to use the publicity from a television show to attract investment and interest from around the country. Davis 3/8 Tr. 25:7-14; Private Placement Memorandum (Jordan Decl. Ex. J) at 100-01. Davis had never been on a network television show, and had never met anybody from AETN, before he cold-called the network. Davis 3/8 Tr. 61:15-63:17, 110:1-7.

In a one-line e-mail message, Nancy Dubuc – the senior executive for nonfiction programming at A&E – advised Davis: "I have asked Charles Nordlander to review your material, as he oversees all of our lifestyle programs." Jordan Decl. Ex. K. Nordlander was an independent consultant working with AETN. Dubuc Decl. ¶ 6; Declaration of Charles Nordlander ("Nordlander Decl.") ¶ 1. As Davis observed, initial email correspondence with Nordlander – including this message – was conducted from Nordlander's America Online email account. Davis 3/8 Tr. 74:23-24; Jordan Decl. Ex. K. Davis signed a standard waiver and sent in his video, which Nordlander reviewed. Jordan Decl. Exs. L, M. Davis and Nordlander talked by phone. Then Davis and three of his Trademark Properties employees came to New York for the parties' first meeting and for a lunch, on June 14, 2004. Davis 3/8 Tr. 118:17-119:5.

B. The Alleged Oral Agreement

1. Davis' Phone Conversations With Nordlander

Davis testified at his deposition that the alleged oral agreement in this case was formed entirely in one-on-one phone calls between him and Nordlander prior to the June 14 meeting in New York. Davis 3/8 Tr. 81:10-15, 87:18-112:19, 125:12-16, 201:5-11. It is undisputed that these conversations did not result in any agreement that AETN actually would produce or air the show. *See* Davis 3/8 Tr. 195:4-196:17, 198:25-199:2. Instead, the core of the alleged agreement was that ***if*** AETN later decided to do the show, it would split all net revenues with plaintiffs on a 50/50 basis. *Id.* at 87:21-89:8.

Though given every opportunity at his deposition, Davis simply could not pinpoint anything that Nordlander said to communicate AETN's agreement to any deal, let alone a 50/50 revenue split:

> Q: Please tell me as specifically as possible exactly what Charles Nordlander said to you that made you think you had a promise of a 50/50 partnership on revenue streams.
>
> A: He understood—he totally agreed a hundred percent that they weren't going to have to write me a check. He wanted to know how much we wanted for the show; we went through the whole discussion. I said, It's not for sale; it's for partnership. And I explained the whole concept on the whole real estate deal. There's no way you can misunderstand. I went through the whole deal; I told him who the buyer of the property was, the property. I went through a whole explanation. I'm real good on visuals, saying I bought this property; I fixed it up and sold it. I didn't take a fee—I didn't take a fee until the back end. I'm used to doing deals where I don't get paid until the back end. And so I went into this whole deal expecting this to be just like a real estate deal that I had cut, that basically I get compensated on the back end.

Davis 3/8 Tr. 88:6-89:2. Davis testified at length about how he described the proposed deal to Nordlander. Nowhere could he state when, whether or in what manner Nordlander agreed to Davis' terms. *See* Davis 3/8 Tr. 86:11-97:4.

Davis admitted that he and Nordlander never discussed or agreed upon numerous material terms that would be essential to any complete contract. There was no discussion of the duration of the agreement; how and when the profits would be distributed; who would own the copyright to the show; who would make licensing, distribution, or syndication decisions; whether any "created by" credit would be exclusive to Davis; whether there was an option to renew; which of the several different Trademark Properties legal entities, if any, would join Davis as a party to the agreement; which types of advertising revenue would be included in the deal; or even who (Davis or Trademark) would receive the checks. Davis 3/8 Tr. 105:8-112:19, 157:8-172:13, 175:15-177:25, 188:13-189:19, 194:4-196:3, 293:18-295:5; Trademark Tr. 71:15-18, 74:7-82:25.

Davis also admitted that his "agreement" with Nordlander was completely indefinite in other material respects. It did not even require AETN to decide by any particular time whether it would do the show at all. Davis 3/8 Tr. 195:4-196:17. If AETN did decide to launch the show, then the "agreement," by Davis' description, could be perpetual. Davis hoped that the show would go on for 25 years or more, like "This Old House" on PBS. *Id.* at 107:15-112:19. No terms were set for deciding how or whether the agreement would be renewed from time to time. *Id.* Davis could say only that it would be "based on ratings." *Id.* at 110:8-19.

Davis also admitted that he and Nordlander never even discussed key aspects of what would go into the pool of net revenues that the parties supposedly were going to split 50/50. There was no agreement as to what components of AETN's overhead, such as marketing expenses or website operations, would be subtracted from gross revenues. Davis 3/8 Tr. 193:15-195:3; Trademark Tr. 79:3-82:25. Davis admitted that he needed more clarity on certain deal points, such as exactly how his expected "backside" compensation was defined, when the revenue would be paid out and when the expenses would be taken out. Davis 3/8 Tr. 157:21-165:7.

2. Conference Call

Davis testified that during one of the Nordlander-Davis phone calls, Nordlander added several persons to the line. Joining Nordlander were AETN executive Thomas Moody, an unidentified man and an unidentified woman. Davis 3/8 Tr. 113:10-23. Davis "assumed" the woman was Nancy Dubuc, but the woman was not identified and did not say anything. Davis 3/8 Tr. 113:16-19, 116:13-21; Trademark Tr. 63:19-64:6. Nordlander asked Davis to describe his terms to the group. Davis told the group he was "a big boy" who was willing to do the show on a shared revenue basis and be "a hero to the network." Davis 3/8 Tr. 113:24-114:2. There was "cackling" and "laughing" at AETN's end, and Nordlander said, "Thank you. I just need you to confirm that. We'll be back in touch with you shortly." Davis 3/8 Tr. 80, 113:24-114:5. Then the line went dead — "click." *Id.* at 114:4. Davis identified no statement by AETN on this conference call that reflected AETN's agreement to anything, yet testified that to him this was the "defining moment of when I struck this deal with A&E ***in my mind***." Davis 3/8 Tr. 80:24-81:2 (emphasis added).

3. The June 14, 2004 Face-to-Face Meeting

After the phone calls with Nordlander, Richard Davis flew to New York for his first face-to-face meeting at AETN, followed by a lunch at which representatives of Departure Films joined the group. Ginger Alexander, John Davis and Dawn Nosal of Trademark Properties attended along with Richard Davis. Davis 3/8 Tr. 118:22-119:5.

Davis admitted that the June 14, 2004 discussions focused entirely on creative issues. There was no discussion of deal points. Davis 3/8 Tr. 123:12-19, 126:22-24. All of the Trademark Properties employees who attended the meeting confirmed there were no negotiations and no agreements. Deposition Transcript of Virginia Macon Alexander ("Alexander Tr.") 67:15-21, 69:15-20; Deposition Transcript of John F. Davis ("J. Davis Tr.") 17:23-18:1, 20:22-21:6; Deposition Transcript of Dawn Nosal ("Nosal Tr.") 19:15-21:12. Afterwards, Ms. Alexander testified, Max Weissman and Matt Levine of Departure made plans to visit Charleston "to make sure they thought we could do the show." Alexander Tr. 75:7-15.

The deposition testimony of Davis and his employees about the June 14 meeting not only confirms the lack of agreement, but completely contradicts the core allegations of plaintiffs' own complaint. According to the complaint, the June 14 meeting was the central event where a highly detailed oral agreement was hammered out. Plaintiffs allege that Davis set out seven specific demands on June 14, namely that:

> (1) plaintiffs retain an ownership interest in the project; (2) A&E pay for all production costs of any episodes produced based on the project; (3) Trademark Properties be responsible for locating, acquiring, refurbishing and selling all real estate featured in any episodes produced based on the project; (4) Trademark Properties and its principals be prominently featured in the show, and no episode be produced which does not include them in a lead role; (5) Davis to have creative control over the production and receive a "Created By" credit on any episodes produced; (6) Trademark be reimbursed for any direct expenditures regarding the development and production of any episodes produced, and (7) A&E and Trademark share equally on a 50/50 basis in all revenues and proceeds generated by the sale, distribution and/or exploitation of the show, including without limitation sponsorship revenues, product placement revenues, ad sales, syndication fees, and video sales[.]

Amended Complaint ¶ 11 (Jordan Decl. Ex. O). Plaintiffs further alleged that, on the spot, "Nordlander and Moody on behalf of A&E agreed" to Davis' proposed "Partnership Agreement," and that "Nordlander and Moody further represented that A&E would prepare a written agreement embodying the terms of the Partnership Agreement." *Id.*

It is now undisputed that *nothing like this happened on June 14*. Davis and his employees all testified that on June 14 there was no discussion of deal points and no promises or agreements were made. Davis 3/8 Tr. 123:12-19, 126:22-24; Alexander Tr. 67:15-21, 69:15-20; J. Davis Tr. 17:23-18:1, 20:22-21:6; Nosal Tr. 19:15-21:12. Davis testified that the pre-June 14 oral agreement was struck for AETN solely by Nordlander, not by Moody or anybody else. Davis 3/8 Tr. 201:5-11. Remarkably, even as he unequivocally abandoned the basic allegations of his own complaint regarding the timing and terms of the "oral agreement," Davis also testified that everything alleged in the complaint is true. Trademark Tr. 11:8-23.

C. Two Years of Post-"Agreement" Negotiation

The parties continued their negotiations with each other for approximately two years after the June 2004 discussions. The record from that time period contains no evidence at all of the alleged oral agreement.

AETN decided to fund and air the show, which became a hit under the name "Flip This House." AETN set up the show under its usual business and legal structure. Dubuc Decl. ¶ 3. It retained Departure to produce the show on a work for hire basis, meaning that AETN would have sole ownership of the show. *Id.*; Jordan Decl. Ex. Q.

Accordingly, Departure secured releases from Davis on behalf of himself and Trademark Properties. These releases state unequivocally that Departure would have

> the right to exhibit, distribute, transmit, display, exploit, project, perform, reproduce, edit, alter and modify [any footage] . . . without additional compensation to [Davis], in any manner or medium, whether now known or hereafter developed, throughout the world, in perpetuity. I . . . further release [Departure and] its assigns and licensees from any and all claims that I have or might have by virtue of or arising out of . . . the "Program" [i.e., "Flip This House"].

Jordan Decl. Ex. P. Davis admits that he signed these releases in July 2005, although he claims that the releases were limited by oral statements he made at the time of signing. Davis 3/8 Tr. 215:7-220:17. Departure, in turn, licensed and assigned all its rights to AETN, Jordan Decl. Ex. Q, making AETN one of the released parties.

It is undisputed that during the two-year period that followed the alleged oral agreement with Nordlander, Davis traveled to New York repeatedly in an effort to negotiate a written agreement. Davis 3/8 Tr. 225:2-230:23, 253:12-254:7. He also sent

AETN and Departure dozens of emails, including several that candidly acknowledged the lack of any agreement at all:

- On February 23, 2005, Davis wrote to Max Weissman of Departure that he was "***just looking for some accountability in the form of a commitment to Trademark from the network***[.]" Jordan Decl. Ex. R (emphasis added).
- On October 7, 2005, Davis wrote to Weissman: "***[A&E] seem[s] to be fine with leaving me without a contractual agreement. I'm tired of dating, either we get married or engaged but there needs to be forward progress***." Jordan Decl. Ex. S (emphasis added).
- On October 26, 2005, Davis wrote to Nancy Dubuc of AETN: "[W]hat would you normally offer? ***I've yet to be offered anything***." Davis also said: "***[I] would like a firm commitment from A and E*** so I can tell all other suitors thanks anyway but I'm in a partnership with A and E." Jordan Decl. Ex. T (emphasis added).

Davis admitted that not once did he send anybody at AETN an email setting out the terms of his purported 2004 oral deal with Nordlander. Davis 3/9 Tr. 106:21-107:3.

During this period, AETN negotiated with Davis, with his counsel and with a leading Hollywood talent agency that Davis engaged. Davis 3/8 Tr. 283:6-285:4, 302:2-14. Written draft agreements were exchanged, including a draft from AETN that ran 10 single-spaced pages and an equally detailed markup by Davis' counsel. Jordan Decl. Exs. U, V. None of these drafts reflect the terms of the alleged oral agreement.

In the course of these discussions, Davis' agent reviewed the releases he executed in July 2005. The agent concluded that Davis "***had signed away his rights***" (Deposition Transcript of Pierre Brogan ("Brogan Tr.") at 67:2-12), and "***he suddenly now, you know, wanted to try and have a different deal***." *Id.* at 68:25-69:11 (emphasis added); *see also* Alexander Tr. 94:8-11 (Mr. Davis told her that in talent agency's view he had "signed his rights away"). Neither the agents nor Davis' counsel could remember ever asserting to AETN that Davis already had an oral agreement for a 50% revenue share. *See* Deposition Transcript of Thomas Whaley ("Whaley Tr.") 106:21-107:23; Brogan Tr. 54:2-5; Deposition Transcript of Bryan Geers ("Geers Tr.") 34:2-10, 45:12-20.

Consistent with these undisputed facts, plaintiffs explicitly confirmed in a "Representation and Warranty" that they had no agreement of any kind with AETN. After "Flip This House" was a success on A&E, Davis shopped his services to other cable outlets. To facilitate negotiations with a competing network, Davis signed a Representation and Warranty that stated:

> I, Richard Davis, for myself and on behalf of Trademark Properties represent and warrant that ***I have not entered into any agreement (including but [sic] limited to written, verbal or implied agreement) relating to the production of a television show depicting my activities or the activities of my company, Trademark Properties, in the areas of real estate purchasing, property renovation and sale of renovated property ("Activities").*** I am free to negotiate with any party regarding the Activities . . . . [I] have not been offered, requested or received payment from Departure Films, A&E Television Networks or any affiliate . . . of either of those entities arising out of my Activities in connection with the show.

Jordan Decl. Ex. W (emphasis added).

At their depositions Davis and his deal lawyer, Tom Whaley, reviewed an unsigned version of the Representation and Warranty (Jordan Decl. Ex. X) and confirmed its accuracy. Davis 3/9 Tr. 128:2-132:3; Whaley Tr. 152:2-15. Neither Davis nor Whaley produced a signed copy. Following their depositions, Defendants obtained the signed version by subpoenaing the competing network. The signed Representation and Warranty is substantially the same as the version that Davis and Whaley reviewed at their depositions, except that it is even stronger and clearer. The signed version adds a specification that Davis had no "written, ***verbal*** or implied agreement" with AETN (emphasis added). Davis claimed he understood the representation and warranty to mean merely that he was not under a "talent agreement" with A&E (Davis 3/9 Tr. 131:11-132:3), but the plain language contains no such limitation. Jordan Decl. Ex. W.

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Choice of Law

Summary judgment on all the claims is appropriate under both the law of New York, home to AETN, and the law of South Carolina, home to plaintiffs. To the extent there is any doubt, defendants submit it would be most appropriate to apply New York law. Under South Carolina choice of law rules, the law of the place where the contract is made governs. *Livingston v. Atl. Coast Line R.R. Co.*, 180 S.E. 343, 345 (S.C. 1935). It is undisputed that the alleged promises by AETN were all made from New York, and that Davis repeatedly traveled to New York to meet with AETN in order to discuss his deal. When Davis and AETN eventually exchanged drafts of a written agreement, both sides included choice of law provisions that specified New York law. Jordan Decl. Exs. U, V. Because all of plaintiffs' causes of action arise from the alleged breach of contract, South Carolina choice of law principles support applying New York substantive law to all the claims. *See Glaesner v. Beck/Arnley Corp.*, 790 F.2d 384, 386 n.1 (4th Cir. 1986) (where the "liability alleged is predicated" on a contract, the same state's law should be applied to contract claim and other claims). Regardless of which state's law is applied, summary judgment should be granted.

<u>Argument</u>

I. THE "ORAL CONTRACT" CLAIM FAILS BECAUSE AETN UNDISPUTEDLY MADE NO PROMISES OR ENFORCEABLE AGREEMENTS

A. <u>The Undisputed Evidence Shows There Was No Agreement</u>

Plaintiffs' burden in responding to this motion is to identify the "specific facts" that support their claim of an oral agreement. *Baughman v. Am. Tel. & Telegraph Co.*, 410 S.E.2d 537, 545-46 (S.C. 1991) ("Bald allegations" are insufficient to create a genuine issue of fact and defeat defense motion for summary judgment). Because they cannot identify any such facts, judgment should be granted for defendants as a matter of law. *See Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 260 (4th Cir. 2005) (summary judgment is appropriate when the record demonstrates there are no genuine issues of material fact).

Although he had every chance to do so at his deposition, Davis could not identify or pinpoint a single communication in which Nordlander accepted the terms Davis proposed. Davis 3/8 Tr. 86:11-97:4. Nordlander and Dubuc confirm that AETN made no agreement. Nordlander Decl. ¶ 6; Dubuc Decl. ¶¶ 5, 7-8. Even Davis' own attorney and talent agents could not recall ever taking the position with AETN that the company had previously promised Davis a 50/50 revenue split. *See* Whaley Tr. 107:7-8; Brogan

Tr. 54:2-22; Geers Tr. 34:2-10. Davis also admitted that the alleged agreement contained enormous material gaps, including a lack of any specificity as to time period or terms for renewal or termination. Davis 3/8 Tr. 105:8-112:19, 157:8-172:13, 175:15-177:25, 188:13-189:19, 194:4-196:3, 293:18-295:5; Trademark Tr. 71:15-18, 74:7-82:25.

Summary judgment dismissing the contract claim therefore is appropriate under the Fourth Circuit's approach in *ABT Assocs., Inc. v. JHPIEGO Corp.*, 9 Fed. Appx. 172 (4th Cir. 2001):

> The deposition testimony cited by [plaintiff] in support of the existence of an oral contract neither recounts ***the necessary sequence of offer and acceptance*** nor suggests mutual assent to the essential terms of the supposed agreement. On the contrary, the deposition testimony establishes that ***significant open terms remained*** as of [] the date by which [plaintiff] now claims a binding oral contract was made.

Id. at 176 (upholding summary judgment dismissing oral contract claim) (emphasis added); *see also United States v. U.S. Currency in the Amount of $248,430*, No. CV-01-5036, 2004 U.S. Dist. LEXIS 7072, at *13 (E.D.N.Y. Apr. 14, 2004) ("conflicting and evasive deposition answers" support grant of summary judgment against deponent).

The contemporaneous objective record further supports summary dismissal on the grounds that no mutual agreement was ever reached. The parties have exchanged approximately 9,000 pages of documents in discovery. Not one page describes the terms of the agreement now being alleged. To the contrary, the claims in this lawsuit simply cannot be squared with either the Representation and Warranty that Davis signed or with the releases that he signed. Jordan Decl. Exs. P, W. The Representation and Warranty expressly states that plaintiffs "have not entered into any agreement" with AETN covering the subject matter of this case. The releases state that plaintiffs waived the very rights in "Flip This House" that they are now asserting.

These unambiguous documents cannot now be modified through Davis' self-serving deposition testimony for the purpose of defeating summary judgment. *See L&K Holding Corp. v. Tropical Aquarium at Hicksville, Inc.*, 596 N.Y.S.2d 468, 469-70 (N.Y. App. Div. 1993) (if the language of a release is clear and unambiguous, a party's claim that it intended something else is insufficient to raise an issue of fact); *Bowers v. South Carolina Dep't of Transp.*, 600 S.E.2d 543, 545 (S.C. Ct. App. 2004) (clear language of the document controls, and the court will not consider extrinsic evidence that gives a contract a different meaning). The documents speak for themselves and each confirm summary judgment is appropriate because the alleged oral deal simply did not exist.

The many inconsistencies and contradictions in Davis' story provide yet another independent basis for summary judgment. Davis now has put forward ***three different sworn versions*** of the formation and terms of the alleged oral agreement:

- Davis testified at his deposition that the entire agreement was made solely between him and Nordlander one-on-one by telephone. *See* pp. 5, 9, *supra.*

- The complaint alleges that the agreement was formed at the large group meeting on June 14, 2004, when Davis made seven explicit and detailed demands to which both Nordlander and Moody agreed (a story plaintiffs completely abandoned at their depositions). *See* pp. 8-9, *supra*.

- Davis stated in his sworn interrogatory answers that the agreement was "confirmed" by Nancy Dubuc and others in a conference call (Jordan Decl. Ex. Z) – but testified at his deposition that he merely "assumed" Nancy Dubuc was on the call, and that AETN's reactions on the call were limited to laughter, "we'll get back to you" and hanging up. *See* pp. 7-8, *supra*.

No reasonable jury could credit a story that the plaintiffs themselves cannot keep straight. *Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir. 2005) (summary judgment warranted when the plaintiff's testimony was so replete with inconsistencies and improbabilities that no reasonable juror could credit the allegations); *Med. Univ. of South Carolina v. Arnaud*, 602 S.E.2d 747, 749 (S.C. 2004) (in light of defendant's inconsistent testimony, his assertions were not enough to survive a summary judgment motion).

B. Any Agreement Was Not Enforceable

Even accepting that Davis' testimony describes some kind of agreement with AETN, that agreement was not legally enforceable because it undisputedly lacked so many essential terms that it was fatally indefinite. Any agreement of this kind also was both so complex and so novel that, as a matter of law, it had to be put in writing before it could be enforceable.

1. The "Agreement" Was Fatally Indefinite

Plaintiffs acknowledged that many important terms of this complex agreement were never discussed or defined among the parties, let alone agreed upon. By Davis' own account, the "agreement" did not have a fixed end; there was no agreement on conditions under which the deal could be terminated; the agreement did not specify how or when the parties could renew it; Davis assumed that he would get his fifty percent share after each season of the show was complete, but he was unable to say what Nordlander specifically said to make him believe that; Davis never discussed ownership of the copyright in the show with AETN; there was no discussion about exactly which of the numerous Trademark legal entities, if any, was going to be a party to this agreement; Davis assumed that AETN would make any decisions about licensing, distribution, or syndication, but he could not specify any discussions about those particular issues; and Davis could not recall the specifics of the "created by" credit, such as whether it would be exclusive to him. Davis 3/8 Tr. 105:8-112:19, 157:8-172:13, 175:15-177:25, 188:13-189:19, 194:4-196:3, 293:18-295:5; Trademark Tr. 71:15-18, 74:7-82:25.

Perhaps most importantly, Davis and Nordlander never discussed many material issues regarding the all-important 50/50 revenue split. Davis admits they did not discuss what component parts of AETN's overhead would be subtracted from gross revenue in order to reach the net revenue figure that was to be split 50/50. For example, they simply did not discuss whether website costs, marketing costs, or a share of the cost of basic operations for the network would be deducted. It is also undisputed that no discussion took place about whether AETN would deliver checks for the 50/50 revenue split to Davis or Trademark. Davis could not recall any discussions in which he and Nordlander discussed which of the many kinds of advertising revenue would be included in the deal. *See* p. 7, *supra*; Dubuc Decl. ¶¶ 7, 9.

For these reasons, plaintiffs' unsupported assertion of a general agreement to a 50/50 revenue split, even if credited for purposes of this motion, is meaningless given the undisputed fact that so many other crucial terms, on which no agreement was reached, remained open. *See ABT Assocs., Inc.*, 9 Fed. Appx. at 176 (summary judgment was proper for defendants on claim for breach of an oral agreement because significant terms remained open); *Baker v. Robert I. Lappin Charitable Found.*, 415 F. Supp. 2d 473, 483-

84 (S.D.N.Y. 2006) (holding that the lack of discussion on material terms such as ownership of copyrights, nature of investment, time of performance, manner of performance, and the manner of profit-sharing made it impossible to determine the intent of the parties, and the agreement was thus unenforceable because of its indefiniteness); *Trident Constr. Co. v. Austin Co.*, 272 F. Supp. 2d 566, 576 (D.S.C. 2003) (under South Carolina law, certain terms, such as price, time, and place, are considered indispensable and must be set out with reasonable certainty) (internal citations omitted), *aff'd*, 93 Fed. Appx. 509 (4th Cir. 2004).

This undisputed lack of clarity or completeness in the "agreement" is unsurprising, given that Nordlander was an independent consultant who lacked any authority to make a deal of any kind. Nordlander Decl. ¶¶ 1-2, 3, 6; Dubuc Decl. ¶ 6; *see Dinaco, Inc. v. Time Warner, Inc.*, 346 F.3d 64, 68 (2d Cir. 2003) (no contract can be formed when the agent lacks actual or apparent authority to bind the defendant). Davis admitted to having observed many signs of Nordlander's lack of corporate authority, ranging from his use of a home email account to his lack of a business card, a desk or access to a conference room at AETN's offices. Davis 3/8 Tr. 74:20-24; 120:8-121:1. Yet Davis never learned Nordlander's title or even whether he was an employee of AETN, and he never asked a single question about Nordlander's job function or the scope of his authority. Davis 3/8 Tr. 196:18-200:1; Davis 3/9 Tr. 192:15-193:20. Davis' failure to inquire, in circumstances that obviously called for inquiry as a matter of law, underscores the lack of any evidence of agreement. *See F.D.I.C. v. Providence Coll.*, 115 F.3d 136, 141 (2d Cir. 1997) (no agreement when circumstances, including the extraordinary nature of the transaction, created a duty to inquire about promisor's authority, but plaintiff made no inquiry); *Vereen v. Liberty Life Ins. Co.*, 412 S.E.2d 425, 428-29 (S.C. Ct. App. 1991) (reliance on promisor must be reasonable).

2. Any Agreement Of This Kind Had To Be In Writing

Courts have long recognized that some agreements are so complex or so novel that as a matter of law they simply must be in writing in order to be enforced. This is such an agreement. It involved potentially tens of millions of dollars (Dubuc Decl. ¶ 3), was undisputedly "unprecedented" (Davis 3/8 Tr. 87:7) and by plaintiffs' own account could run for decades. Davis 3/8 Tr. 108:2-7, 293:23-295:5. A writing therefore was legally necessary to bind the parties. *See Braun v. CMGI, Inc.*, 64 Fed. Appx. 301, 303 (2d Cir. 2003) (affirming grant of summary judgment rejecting oral contract claim and noting that whether the agreement is typically committed to writing "is especially telling" and holding that a "sophisticated party . . . could not reasonably have believed that an options package, which both parties hoped would become very valuable, would be fixed and made enforceable in a conversation"); *see also Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 408-09 (4th Cir. 2002) (Second Circuit's test is a useful framework for analyzing whether a preliminary agreement is binding).

The undisputed evidence that the parties intended and attempted to reach a written agreement strongly confirms that, as a matter of law, the purported oral agreement was unenforceable. Davis himself has alleged and testified that the agreement was supposed to be put in writing. Amended Complaint ¶ 9; Davis 3/8 Tr. 159:15-162:2. In due course, counsel for Davis and AETN exchanged complex and detailed written draft agreements, going well beyond what any oral agreement could hope to cover. The detailed contracts that Davis eventually signed when he jumped to The Learning Channel confirm that such written agreements are necessary in these circumstances and are the industry norm. Jordan Decl. Ex. Y. Accordingly, the alleged oral agreement is not enforceable as a matter of law. *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir. 1984) (affirming grant of summary judgment and finding that complex oral contract had to be reduced to writing). Particularly when such large sums of money are at stake, "a requirement that the agreement be in writing and signed simply cannot be a surprise to anyone." *Id.*

Davis' clear testimony that the purported oral agreement continues on, without any specificity as to the timing or circumstances of termination, also renders the agreement void under New York's Statute of Frauds. N.Y. Gen. Oblig. L. § 5-701. By Davis' own account the alleged agreement was to continue indefinitely subject only to ratings, a factor controlled by the viewing public and not by any party to the contract. Davis 3/8 Tr. 110:13-19. Davis also acknowledged that AETN had sole discretion to decide on distribution of the show; any reruns, foreign distribution or video sales could occur without his consent years in the future and still would trigger obligations to share 50 percent of the revenue with him. Davis 3/8 Tr. 175:15-176:24. He testified clearly that in his view the agreement is still in force today. Davis 3/8 Tr. 293:4-295:5. The lack of a writing thus supports dismissal. *See Burke v. Benova*, 866 F.2d 532, 538 (2d Cir. 1989) (termination provisions must be express to take a contract out of Statute of Frauds);

Zupan v. Blumberg, 161 N.Y.S.2d 428, 429-31 (N.Y. 1957) (a service agreement of indefinite duration that is dependent on a third party is not, by its terms, performable within a year); *see also* S.C. Code Ann. § 32-3-10.

II. THE OTHER PROMISE-BASED CLAIMS ALSO FAIL IN LIGHT OF THE UNDISPUTED EVIDENCE

Davis's claims for promissory estoppel, fraud, conversion and unfair competition all require proof of a promise and/or an agreement and they all fail for the undisputed lack of such proof.

Davis' claim of promissory estoppel fails as a matter of law given the lack of a clear and unambiguous oral promise. *See Ripple's of Clearview, Inc. v. Le Havre Assocs.*, 452 N.Y.S.2d 447, 449 (N.Y. App. Div. 1982); *Woods v. State*, 431 S.E.2d 260, 263 (S.C. Ct. App. 1993). The element of a clear and unambiguous promise certainly cannot be satisfied when Davis himself could not even describe any affirmative promise Nordlander made to him, has testified that the "agreement" was missing various important terms, and has provided competing sworn versions of the key facts. *See James v. W. New York Computing Sys., Inc.*, 710 N.Y.S.2d 740, 742-43 (N.Y. App. Div. 2000) (oral promise was not sufficiently clear and unambiguous when plaintiff did not identify specific terms of alleged agreement); *Rushing v. McKinney*, 633 S.E.2d 917, 925 (S.C. Ct. App. 2006) (no unambiguous promise existed when plaintiff could not clearly articulate its terms).

The claim of fraud (Amended Complaint ¶¶ 15-22) fails for the undisputed lack of any evidence of either a promise or an intent to deceive. Plaintiffs' failure to identify any affirmative promise or agreement by AETN is fatal to the fraud claim, especially when combined with plaintiffs' admission that many important terms remained open after the purported agreement. *See Jeffcoat v. Blyth Eastman Paine Webber, Inc.*, Nos. 88-2084, 88-2671, 1990 WL 15556, at *3-4 (4th Cir. Feb. 8, 1990) (fraud claim dismissed where the plaintiff could not "plausibly argue that it reasonably believed that [the defendant] was entering into a firm commitment … when numerous details concerning the project had not been resolved" and thus any representations "plainly do not rise to the level of a fraudulent misrepresentation"). At his deposition Davis explicitly abandoned his claim of fraud, admitting that Nordlander – to the extent that he promised anything – spoke truthfully and in good faith. Davis 3/9 Tr. 176:10-13, 177:5-12. Here again Davis contradicted his own complaint. *See* Amended Complaint ¶ 17 (asserting that AETN lied at the outset when it made the oral agreement). Summary dismissal of the fraud claim is appropriate. *See Tom Hughes Marine, Inc. v. Am. Honda Motor Co.*, 219 F.3d 321, 325-26 (4th Cir. 2000) (fraud claim dismissed for lack of evidence that the defendant made promises while contemporaneously harboring an intent to dishonor them).

Davis asserts a claim for <u>breach of fiduciary duty</u> (Amended Complaint ¶¶ 34-39), but the only duty alleged to exist arises out of the purported oral agreement. Given the lack of any evidence of that agreement, there obviously could be no fiduciary relationship and this claim fails as a matter of law. Even if plaintiffs' claim of an oral agreement is credited as true, the undisputed evidence shows that any "agreement" was an arms-length business arrangement, not a fiduciary one. *See Dopp v. Teachers Ins. & Annuity Ass'n of Am.*, No. 91 Civ. 1494, 1993 WL 404076, at *5 (S.D.N.Y. Oct. 1, 1993) ("The arm's-length relationship of parties in a business transaction is, if anything, antithetical to the notion that either would owe a fiduciary relationship to the other"); *accord Pitts v. Jackson Nat'l Ins. Co.*, 574 S.E.2d 502, 508 (S.C. Ct. App. 2002).

Plaintiffs' claim for conversion (Amended Complaint ¶¶ 40-44) rests on the allegation that AETN is withholding revenues from the show that should have been turned over to plaintiffs. The only possible basis for an obligation to turn over revenues would be contractual, so the conversion claim fails along with the contract claim. *Fesseha v. TD Waterhouse Investor Servs. Inc.*, 761 N.Y.S.2d 22, 24, (N.Y. App. Div. 2003); *accord Ray v. Pilgrim Health & Life Ins. Co.*, 34 S.E.2d 218, 219 (S.C. 1945) (if failure to pay funds is more accurately stated as a breach of contract, then no conversion was committed). Outside of a contract, plaintiffs have no cognizable legal interest in "Flip This House," so there was nothing for defendants to convert. Davis is simply wrong, in fact and in law, when he maintains that he "owns the show" because he brought an initial idea to AETN and registered a rough "treatment" for a show with the Writers Guild. Davis 3/8 Tr. 35:14-36:1; 168:12. Ideas, like the concept of a show about fixing up houses for resale, are not legally protectable. *See Harper & Row Publ'g Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); 17 U.S.C. § 102(b) ("In no case does copyright protection . . . extend to any idea."). Writers Guild registration creates no legal ownership. The Guild is a private organization that accepts written materials so that the writer has evidence of a date of creation. As the Guild itself advises registrants like Davis, "Registering your work does not disallow others from having a similar storyline or theme." *See* http://www.wgawregistry.org/webrss/regfaqs.html#quest2.

Still another variant on Davis' breach-of-agreement theory, the claim of unfair competition fails under New York law because defendants cannot "misappropriate[] and exploit[] plaintiffs' valuable idea and concept" when plaintiffs had no property interest in "Flip This House." Amended Complaint ¶¶ 52-55; *Telecom Int'l Am. Ltd. v. AT&T Corp.*, 280 F.3d 175, 198 (2d Cir. 2001) (recognizing there can be no relief under unfair competition law "absent some appropriation of an idea or knowledge ***in which [plaintiff] had a property interest*** or a contractual arrangement creating such an interest") (emphasis added). Plaintiffs' only source for their purported property interest in "Flip This House" is their alleged oral contract with AETN. Because the breach of contract claim fails, the unfair competition claim must also fail.

The failure of the breach of contract claim also eliminates the unfair competition claim under South Carolina law. Plaintiffs do not allege that defendants did anything other than breach a private contract. An ordinary breach of contract, like the one at issue here, does not adversely affect the public interest, as required by the South Carolina Unfair Trade Practices Act. *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 507 (4th Cir. 1992) (ordinary breach of commercial contract does not adversely affect the public interest and is not actionable).

III. PLAINTIFFS' OTHER CLAIMS AGAINST AETN LACK ANY MERIT

A. Plaintiffs Admit There Was No Misappropriation Of Trade Secrets

Plaintiffs' trade secrets claim fails as a matter of law because, at his deposition, Davis admitted he could not identify any secret that was misappropriated:

- He admitted that he personally owns no trade secrets (Davis 3/9 Tr. 183:15-19) and that Trademark Properties only has one trade secret: a "system that we have for sourcing undervalued properties." The "system" is embodied in a proprietary computer database that is operated in a back room of Trademark Properties' offices on Folly Road in Charleston, where Davis permitted Departure Films to shoot. Trademark Tr. 127:4-129:8, 131:20-132:16.

- Davis could identify just one instance in which he thought that Trademark Properties' lone trade secret had been misused or disclosed: a "casting call" questionnaire that was used in the search process for season two of "Flip This House." Trademark Tr. 146:19-149:16; Jordan Decl. Ex. AA.

- At his company's 30(b)(6) deposition, however, ***Davis could not identify anything in the entire 11-item questionnaire that was a trade secret*:**

> Q: Can you point to anything in Questions 1 through 11 that you think reflects knowledge specifically picked up shooting footage in the back room at Folly Road as opposed to general knowledge that Departure Films could have picked up from shooting you in other settings?
>
> A: Okay, I see what you're saying. That – that would be hard to quantify, so I would say no.

Trademark Tr. 153:11-154:6.

Accordingly, the trade secrets cause of action should be dismissed as a matter of law. *See Hudson Hotels Corp. v. Choice Hotels*, 995 F.2d 1173, 1176 (2d Cir. 1993) (plaintiff must demonstrate both possession of a trade secret and that defendants used the trade secret at issue); *accord Lowndes Prods., Inc. v. Brower*, 191 S.E.2d 761 (S.C. 1972).

B. The Other "Claims" Are Remedies, Not Causes Of Action

Plaintiffs mistakenly plead their demand for an accounting and a constructive trust (Amended Complaint ¶¶ 56-59) as if this was an independent legal claim. This is a remedy, and the claim should be dismissed for that reason. *See World Book, Inc. v. IBM*

Corp., 354 F. Supp. 2d 451, 455 (S.D.N.Y. 2005) ("[T]he accounting requested is a remedy . . . it is not an independent cause of action. It is dismissed."); *Lyon v. Campbell*, 33 Fed. Appx. 659, 663 (4th Cir. 2002) ("A constructive trust is an equitable remedy, not a cause of action in and of itself").

The same reasoning requires dismissal of the "claim" for injunctive relief (Amended Complaint ¶¶ 60-64). *See Torres v. Vill. of Sleepy Hollow*, 379 F. Supp. 2d 478, 482 n.2 (S.D.N.Y. 2005) (dismissing cause of action for "Injunctive Relief" because "[t]here is no such cause of action"; injunction is "one remedy for the violations of law alleged in the [other] causes of action").

IV. THERE IS UNDISPUTEDLY NO BASIS FOR THE CLAIMS AGAINST DEPARTURE

This memorandum has focused primarily on the relationship between plaintiffs and AETN, as all nine causes of action were pled against AETN. Only four claims are pled against Departure: misappropriation of trade secrets, unfair competition, constructive trust/accounting and injunctive relief.

The releases signed by Davis specifically exonerate Departure from all these claims. In addition, as described above, *see* pp. 25-26, the trade secrets claim fails because Departure undisputedly did not improperly acquire or use any confidential information belonging to Trademark Properties. The unfair competition claim fails because it is based entirely on the alleged agreement with AETN (*see* p. 25, *supra*), to which Departure undisputedly was not even a party. As described above, *see* pp. 26-27, the constructive trust/accounting and injunction "claims" against Departure fail because they are remedies, not causes of action at all.

Conclusion

For the foregoing reasons, summary judgment should be granted dismissing the Amended Complaint with prejudice.

Respectfully submitted,

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