

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

3 TRADEMARK PROPERTIES, INC. :
and RICHARD C. DAVIS :
4 :
vs. :
5 :
A&E TELEVISION NETWORKS : 2:06 CV 2195
6

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8 Telephone conference in the above-captioned matter held
9 on Tuesday, April 1, 2008, before the Hon. C. Weston Houck,
10 in chambers, United States Courthouse, 85 Broad Street,
11 Charleston, South Carolina.
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14 APPEARANCES:

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

17 ROBERT H. JORDAN, ESQUIRE, P.O. Box 1806,
18 Charleston, SC, appeared for defendant via
telephone.

19 JEREMY FEIGELSON, ESQUIRE, 875 Third Avenue,
20 New York, NY, appeared for defendant via
telephone.
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23 RECORDED BY JULIA EBERT
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1 THE COURT: Good afternoon.

2 MR. JORDAN: Good afternoon, Your Honor.

3 MR. CISA: Good afternoon, Judge.

4 THE COURT: Okay. I don't have a court reporter.
5 They came up and bugged the room, we've got a recording and a
6 microphone, and so I think what we're doing is being
7 transcribed. But for some reason, I'm kind of the odd man out
8 today, and they don't have anybody to send up here. So I
9 trust that suits everybody. It will be a record made, but I
10 just don't have an operator here with earphones on.

11 MR. JORDAN: That's fine, Judge.

12 MR. CISA: Yes, sir.

13 THE COURT: You've got some motions pending. Let me
14 see first of all who all is here. We can just kind of sound
15 off who's on the phone.

16 MR. CISA: Your Honor, this is Frank Cisa, I
17 represent the plaintiff.

18 MR. JORDAN: Judge, this is Robert Jordan with Nelson
19 Mullins, and I'm on the phone representing the defendants,
20 and I've also got my cocounsel, Jeremy Feigelson, on the
21 phone.

22 MR. FEIGELSON: Good afternoon, Judge.

23 THE COURT: Okay. Tell me what we've got. The
24 defendant has some motions, some discovery motions, don't you?
25 Aren't there two depositions you're kind of quibbling about?

1 MR. JORDAN: That's correct, Judge, this is Robert
2 Jordan. And we've been working with Frank on these issues,
3 and I guess we submitted a motion for an amended scheduling
4 order, and Frank was in agreement with everything, but there
5 were one or two contingencies, I guess, in that order that
6 Julia Ebert says you wanted us to discuss.

7 THE COURT: Well, it just seemed like I wasn't doing
8 my job. It said that there was so many eventualities in the
9 future, you know, that it seemed to me like I needed to tie it
10 down so we'd be sure that those depositions were going to be
11 taken. So you've got those two depositions to take. Where
12 are the witnesses located?

13 MR. JORDAN: Judge, I think we've worked everything
14 out but one issue.

15 THE COURT: Okay. Tell me what it is.

16 MR. JORDAN: And, Frank, correct me if I'm wrong.
17 Everything we stated, I guess, in that amended order, Frank's
18 agreed to and we've worked out. The two issues that are out
19 there, the one issue that's between the lawyers is the
20 deposition of a guy named Tom Whaley. He's a lawyer in
21 Minnesota. And we deposed him last year. And he represented
22 the plaintiffs at one point in some business negotiations with
23 A&E, our client, involving the subject matter of the
24 litigation. And during that deposition, Frank objected on
25 attorney-client basis to several questions. Frank was not

1 representing Mr. Whaley, but Mr. Whaley in several instances
2 opted to follow the objection and not answer the question.
3 Frank and I agreed on the record in that deposition that he
4 was going to have some blanket objections to a line of
5 questioning, and that we would reserve our right to raise it
6 with you later.

7 THE COURT: Okay. Let's talk about that. Let's talk
8 about that. Frank, what do you think that is privileged as
9 far as Tom Whaley's concerned, and what do you think's not
10 privileged?

11 MR. CISA: Your Honor, Tom Whaley was hired by the
12 plaintiff, Richard Davis.

13 THE COURT: I'm not worried about that; I'm asking
14 you a question. What do you think that --

15 MR. CISA: The thing I think is privileged is his
16 conversations with Richard Davis concerning legal advice.

17 THE COURT: Okay. What isn't privileged?

18 MR. CISA: His conversations with A&E.

19 THE COURT: Let's get a little broader. Let's say
20 his knowledge as to the existence and terms of a contract, and
21 the basis of that knowledge. Wouldn't that be unprivileged?

22 MR. CISA: I think his conversations, Judge, with
23 Richard Davis, would be privileged.

24 THE COURT: Now, I don't know that they would be. I
25 mean, we're talking about the -- if he has firsthand knowledge

1 as to the existence of a contract, and that firsthand
2 knowledge -- and the basis of that knowledge, it seems to me
3 he can testify about it. I mean, if you have a contract, if
4 you entered into a contract with someone, it doesn't seem to
5 me you intended for those terms to be confidential. And --

6 MR. CISA: Even though the --

7 THE COURT: And to the extent he knows what the
8 contract was. Now, if he tells his client, you don't have a
9 contract, you need to get something in writing, now, he does
10 something like that, that's advice.

11 MR. CISA: Yes, sir.

12 THE COURT: But if he just listens in on a phone
13 conversation or something like that, and has firsthand
14 knowledge of the existence of a contract, it seems to me that
15 that would not be privileged, because it wouldn't be intended
16 to be confidential, first of all; and secondly, by bringing
17 the action, you certainly waive that. I mean, we're entitled
18 to know what he knows about the actual existence of a
19 contract, it seems to me.

20 Now, Mr. Jordan, what about that; do you want more than
21 that?

22 MR. JORDAN: That's pretty much our position, Judge.

23 THE COURT: Okay. Well, does that suit you, Frank?

24 MR. CISA: Well, Judge, I think, if I understand
25 clearly what you're saying, I was objecting to conversations

1 that he had just vis-a-vis himself and Richard Davis.

2 THE COURT: Well, I don't know that those
3 conversations would be privileged. Now, if Richard Davis told
4 him, I've got a contract with these fellows --

5 MR. CISA: Yes, sir.

6 THE COURT: -- or I don't have a contract with these
7 fellows, it doesn't seem to me that that's privileged. If, on
8 the other hand, he says, Mr. Whaley, here's what happened, do
9 I have a contract or not, that's privileged, because that's
10 advice. But if Davis just told him what happened, not seeking
11 any advice, then it seems to me that wouldn't be privileged.
12 Or, if he gleaned -- gained independent knowledge of the
13 existence of a contract and its terms, by hearing them
14 negotiate or something like that, then he can testify to it.

15 MR. CISA: All right, sir.

16 THE COURT: Now, what I think we need to do is this.
17 He does need to be protected, and I don't think that there's
18 any -- my understanding is that the plaintiff has stated
19 publicly that they waived the privilege, is that correct?

20 MR. CISA: No, sir, Your Honor, we have not waived
21 the privilege.

22 THE COURT: Okay. You have not waived it.

23 MR. CISA: We have not.

24 THE COURT: Well, then if you haven't waived it, I
25 think probably I need to issue an order, ordering him to

1 testify in such a way, and that same will not be covered by
2 the privilege. I think he's entitled probably to that.

3 MR. CISA: All right, sir.

4 THE COURT: Don't you think so?

5 MR. CISA: Yes, sir.

6 THE COURT: Robert, is that what you think?

7 MR. JORDAN: That's correct, Judge.

8 THE COURT: Have I covered it okay?

9 MR. JORDAN: I think so. I mean, we --

10 THE COURT: What about a conversation with his client
11 in which his client said, I've got contract or I don't have a
12 contract, or this is what took place.

13 MR. JORDAN: We think that's factual.

14 THE COURT: I think it's factual.

15 MR. JORDAN: And those are basically the exact
16 questions I asked.

17 THE COURT: But any -- Okay. Any time he asked him
18 for advice, it wouldn't be. Okay.

19 MR. JORDAN: Understood.

20 THE COURT: I'll see if we can draw something up that
21 will be broad enough and restrictive enough to reflect both of
22 your positions, and when we do that, we'll try to go ahead and
23 do it. If there's any problem, we'll give both of you a
24 chance to look at it and maybe we'll need to talk about it
25 again on the phone, if you've got any suggestions or

1 objections, okay?

2 MR. JORDAN: All right, sir.

3 THE COURT: Now, what else do we have?

4 MR. JORDAN: Judge, looking at the other issues we
5 raised, there were some documents that we thought we were
6 entitled to, and Frank said he's requested those and he
7 doesn't object. He doesn't have any objections to the
8 production and he's getting those from his client, and I guess
9 the deadline, what we submitted was April 14th, and Frank says
10 he's fine with that.

11 THE COURT: Okay.

12 MR. JORDAN: So I think the documents are taken care
13 of. The other two depositions that are out there, one is Mark
14 Halloran, he's Frank's expert, he's in L.A., he's an
15 entertainment guy, and we've been trying to get dates for him
16 for quite some time. We finally have obtained those dates,
17 and the parties have agreed on what day those are going to be
18 taken. I guess the issue out there is we noticed his
19 deposition, we asked for documents in his files you normally
20 do as an expert, and Frank told me this morning that
21 Mr. Halloran has a problem with some of the documents we've
22 requested. I don't know what those are yet, I don't know if
23 Frank's going to object or not to some of the documents we
24 would want in advance of his deposition. That's one issue
25 that may be out there, although the parties have agreed to

1 take Mr. Halloran's deposition later this month.

2 THE COURT: Well, let me say this to you. I don't
3 know that I have jurisdiction to decide that issue.

4 MR. JORDAN: Right.

5 THE COURT: I mean, I might be able to direct the
6 traffic as far as when discovery deadlines have to be made and
7 when you can take his deposition. But once you get into the
8 mechanics of subpoenaing him and enforcing that subpoena at
9 the site of his deposition in California, that goes to the
10 District Court out there. So what you have to do, and don't
11 hold me as an authority, though at one particular time I
12 thought I was an authority, I haven't done it in many years,
13 but you file your notice of deposition here in the
14 jurisdiction of the case, and you get a certified copy of the
15 notice and take that to California, and they issue the
16 subpoena out there. And if you look at the rule, as to the
17 enforcement of that subpoena, it says the District Judge in
18 the jurisdiction where the deposition is being taken. I don't
19 particularly like the rule, and it kind of takes the case away
20 from the judge who has more knowledge than anybody else, any
21 other judge about it, and kind of lets another judge that's
22 totally foreign to the case, make some discovery rulings that
23 could in some instances be very important and very crucial in
24 the case. But be that as it may, that's what the rule says.
25 And so you want to study that rule carefully and be sure that

1 you understand it, and you comply with it in some detail.
2 Because it's a type rule that can be tricky, if you don't know
3 what you're doing. And some witnesses will -- I've had it
4 happen -- never happened to me, but I've seen it happen, where
5 people would not go through the right process, they would
6 subpoena a witness, and then the witness would go to his own
7 lawyer and show him the subpoena, and the lawyer would look at
8 it and see who signed it, and say, look, this thing isn't
9 worth the paper it's written on, just take a trip or whatever.
10 And you don't want to go all the way to California and have
11 that type thing happen.

12 So if you look at that very carefully, and try to -- both
13 of you need to talk to the witness and kind of see what he's
14 going to do, and then if you can get from him any objections
15 he has, then possibly you can work something out with a
16 District Judge out there, get it assigned to a District Judge
17 and kind of get him on base so that he'll be prepared to rule
18 on it, and you won't have to spend a damn month in California
19 to get your objections and your requests ruled on and your
20 deposition taken. Okay?

21 MR. CISA: Yes, sir.

22 MR. JORDAN: Judge, the other deposition that lingers
23 falls under that same umbrella, and we were aware of the
24 issue, and this is a guy named Billy Campbell, he's a fact
25 witness, he's not an expert. He was identified for the first

1 time in a deposition of Richard Davis in January of this year,
2 and Mr. Davis discussed conversations he had with Mr. Campbell
3 about his dealings with A&E. Mr. Campbell's a former
4 executive at Discovery, which is the channel Mr. Davis went to
5 after he was finished with A&E. And Mr. Campbell has since
6 left the employment of Discovery, he lives in Washington,
7 D.C., and we've served him with a deposition notice through
8 the District Court up there, and have tried to work with him
9 to schedule a date. And he's -- I don't know if he's job
10 hunting or just traveling extensively, but he does e-mail and
11 call us occasionally, but he's always in China or L.A. or
12 somewhere. And so we face the same issue there where he's
13 been somewhat cooperative, but not given us a firm date.
14 Frank and I have identified a date in two weeks where we can
15 both do it in D.C. I'm re-serving him through that court with
16 a notice, and if he can't do it or doesn't appear, then we'll
17 have to take that up with the D.C. court, I guess.

18 THE COURT: Okay.

19 MR. JORDAN: That's the other issue out there as far
20 as depositions.

21 THE COURT: And don't forget to tender the money.

22 MR. JORDAN: That's right.

23 Frank or Jeremy, are there other issues out there?

24 MR. CISA: No, Robert, I think you've covered it.

25 MR. FEIGELSON: Yeah, I'm not aware of any.

1 MR. JORDAN: So, Judge, really, I guess, the ruling
2 on Whaley was the only thing that we weren't in agreement on,
3 and that we would --

4 THE COURT: Okay. We'll try to get you an order up.
5 Go ahead and schedule your deposition. I don't see why we
6 would take -- why we couldn't get something out to you this
7 week, and so bear that in mind in scheduling your deposition.

8 I'll just issue the order and trust that one or both of
9 you can bring it to the attention of Whaley, so he'll have it
10 and feel protected. And if he doesn't feel protected, if he
11 will just tell us why not, we'll look at it and consider his
12 advice and maybe alter the order, if it seems like that's the
13 prudent thing to do.

14 As far as the time, as far as the discovery time,
15 obviously I have authority over that, and I will extend the
16 time for taking of depositions for a reasonable time until you
17 can conclude these depositions you want to take.

18 MR. JORDAN: That was my question.

19 THE COURT: Okay. I'm assuming that whatever you
20 have promised to give by way of discovery, you'll give it,
21 Frank, in ten days; and if you don't receive it in ten days,
22 you let me know, Robert, and we'll get back in touch on the
23 phone. If I don't hear from you in ten days, I will assume
24 that you've got what you needed, and everything except the
25 depositions we discussed today has been disposed of. Okay?

1 MR. JORDAN: Sounds good. Thank you, Judge.

2 MR. CISA: Thank you, Your Honor.

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4 (Hearing adjourned.)

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REPORTER'S CERTIFICATION

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

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR