

1 of 2 DOCUMENTS

**DEBORAH LEVINSON, THERESE JANSEN, et al., individually and on behalf of all others similarly situated, Plaintiffs, -against- PRIMEDIA INC., ABOUT.COM, INC., and SCOTT KURNIT, Defendants,**

**02 Civ. 2222 (DAB)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**2007 U.S. Dist. LEXIS 58518**

**August 9, 2007, Decided  
August 9, 2007, Filed**

**COUNSEL:** [\*1] Deborah Levinson, Theresa Jansen, Jana M. Jones, Boise Matthews, Eponine Sallee, Marshall Bowden, Jim Zwick, Michelle Peterson, Harold Haggquist, Patricia Michaels, Julie Altebrando, Stephen Granade, Richard W. Gray, Jr., Lita Epstein, Cheryl Imboden, Paivi Helena Suomi, Durant Imboden, Angela Thor, Traci Lee Morris, Jeannine Lahey, Suzanne J. Barrett, Linda Nelson, Susi Nuss, Simi K. Valley, David Orozco, Judith A. Kautz, Steven Graham Venter, Murray Wayne Lundberg, John Gordon Ross, Janet W. Burns, Julia Armstrong Murphy, Lori Holuta, Michael Griffis, Individually and on behalf of all others similarly situated, John Irons, Kelly Rivera, Michael Mills, Mark E. Hessey, Margaret Lorraine Smith, Kristyn Schmall, Glen Schmall, Charles E. Haynes, Rachel Sanfordlyn Shreckengast, John Michael Drehobl, Shane William Dell, Peter D. Lathan, Wendy Hogan, Philip G. DeLoach, Anthony Parente, Anne E. Cerva, Robert A Olson, Gayle Olson, Ann Zeise, John Anderson, Walter Blair Logie, Kimberly Pauley, Kathy Stolley, Marlene Dziegeleski, Glen Schmall, Kristyn Schmall, Robert Rak, Mark A. Filetti, Barbara Sehr, Krista Marie Beck, Diane Dobbs, David J. Sweet, Dale E. Lehman, Bonnie Bruno, Andrew George [\*2] Vadas, Scott, Rettberg, Paul H. Ting, Lisa Lorden, Michael J. Helba, Walter Metcalf, Plaintiffs: Leon Marc Greenberg, LEAD ATTORNEY, Leon Greenberg, P.C., New York, NY.

For Primedia, Inc., About.com, Inc., Scott Kurnit, Defendants: Robert S. Whitman, LEAD ATTORNEY, Seyfarth Shaw LLP, New York, NY.

For Kimberly Pauley, Plaintiff: Leon Marc Greenberg, LEAD ATTORNEY, Leon M. Greenberg, Esq., New York, NY.

**JUDGES:** DEBORAH A. BATTTS, United States District Judge.

**OPINION BY:** DEBORAH A. BATTTS

**OPINION**

**MEMORANDUM & ORDER**

DEBORAH A. BATTTS, United States District Judge.

The eighty-two Plaintiffs in this suit allege that they did not receive full payments for services they rendered to Defendant About.com, Inc. ("About"). Their claims are brought on behalf of themselves and a putative class of all others who are similarly situated.<sup>1</sup> They allege claims against About and its parent, Defendant Primedia, Inc. ("Primedia"), under both the Fair Labor Standards Act (Count I) and Articles 6 and 19 of New York Labor Law (Count II). They also assert a claim against these two Defendants for breach of contract (Count III). Plaintiffs further assert two claims for tortious interference with contractual relations, one against About's former [\*3] CEO, Defendant Scott Kurnit ("Kurnit") (Count IV), and the other against Primedia (Count V). Finally, Plaintiff Therese Jansen has brought a separate Fair Labor Standards Act claim against Defendants for allegedly discharging her in retaliation for complaining to them about unpaid back wages (Count VI).<sup>2</sup>

<sup>1</sup> No Plaintiff class has been certified. On November 6, 2003, Judge Constance Baker Motley denied without prejudice Plaintiffs' Motion to Circulate a Notice of Pendency and Consent to Join. Judge Motley's Order stated that: "Should further discovery disclose additional facts to sup-

port Plaintiffs' application, they may renew it upon a proper showing." (Order, Nov. 6, 2003.)

2 While Jansen did not assert in the Second Amended Complaint a retaliatory discharge claim pursuant to *Section 215 of New York Labor Law*, Plaintiffs' summary judgment papers indicate that they believe Jansen brought such a claim. (See Pls.' Mem. of Law at 19-20.)

The Second Amended Complaint also makes reference to "conversion, negligence, copyright infringement under 17 U.S.C. § 501 et seq., replevin and unjust enrichment" (Second Am. Compl. P 1), but states no allegations which would satisfy these causes of action. [\*4] Nor do the parties reference these claims in their summary judgment papers. To the extent that Plaintiffs are bringing claims for conversion, negligence, copyright infringement under 17 U.S.C. § 501 et seq., replevin or unjust enrichment, those claims are hereby DISMISSED.

Defendants now move for summary judgment on each count. Defendants aver that no issue of material fact exists with respect to Counts III, IV, V, and VI. Defendants also argue that summary judgment should be granted in their favor on certain Plaintiffs' claims pursuant to Counts I and II because they fail as a matter of law.

For the reasons contained herein, Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Summary judgment also shall be GRANTED IN PART to Plaintiffs. Finally, the claims of Plaintiffs who did not comply with discovery requirements shall be DISMISSED WITHOUT PREJUDICE, subject to the provisions stated herein.

#### *I. BACKGROUND*

In June of 1996, William Day ("Day") and Scott Kurnit founded General Internet, which later became known as The Mining Company. (Day Decl. P 1.) In May 1999, The Mining Company changed its name to About.com, Inc. and then to About, Inc. ("About"). (*Id.*) [\*5] Scott Kurnit served as General Internet/About's CEO from its inception as General Internet until September 2001 when William Day succeeded him. Day remained in the CEO position until December 2003. (*Id.*)

In February 2001, while Kurnit was its CEO, About merged with Primedia and became its subsidiary. (Daecher Decl. P 8.) On or about March 25, 2005 -- three years after this case was filed -- Primedia sold About, and About is no longer a subsidiary of, or otherwise affiliated with, Primedia. (*Id.*)

About operates About.com, a website consisting of hundreds of topic-specific, special-interest sites. (Day Dec. P 3.) The sites' topics are varied, and include pregnancy, mutual funds, and "Switzerland for Visitors." (Daecher Decl. P 4.) Each topic-specific site is managed by a "Guide" who has expertise in the site's topic and who is charged with posting content on it. (Day Decl. P 3.) Plaintiffs are all former or current Guides for About. Defendants allege -- and Plaintiffs do not contest -- that Named Plaintiffs Shane Dell, Diane Dobbs, Wendy Hogan, Peter Lathan, Walter Logie, Murray Lundberg, Debra Macaulay, Walter Metcalf, Gayle Olson, Robert Olson, John Ross, Paivi Suomi, Andrew Vadas, [\*6] and Stephen Venter have never worked as Guides within the United States. (See Defs.' Mem. of Law at 13, n.6.) Of the other Named Plaintiffs, only Julie Altebrando, Angela Thor, and Jim Zwick ever worked as Guides in the State of New York. (*See id.* At 13, n.7.)

#### *A. About's Agreements with the Guides*

##### *(1) The 1997 Agreements*

Contracts govern the Guides' relationships with About. The first relevant set of contracts consists of agreements executed in 1997 between The Mining Company and each Plaintiff. (Defs.' 56.1 Statement ("Defs.' 56.1 Stmt."), Exhibit 5 (hereinafter cited as "1997 Agreements").) The 1997 Agreements provide each Guide with a monthly stipend termed "basic compensation." (1997 Agreements, Att. A, P 1.) The stipend varies from Guide to Guide, but generally is between \$ 100 and \$ 500. (See, e.g., *id.*; see also Defs.' Mem. of Law at 4.)

The 1997 Agreements provide that each Guide would be eligible to share in an "advertising revenue pool." ("Revenue Pool") (1997 Agreements, Att. A, P 2.) The Revenue Pool is equal to 30% of net advertising revenues, such revenues being defined as "gross ad revenues received by The Mining Company less (i) commissions to advertisers, third party [\*7] sales agents, and advertising agencies, (ii) fees paid for traffic based on ad revenue, (iii) reasonable reserves for returns, make goods or other adjustments, and (iv) other sales expenses based on a share of ad revenue."<sup>3</sup> (*Id.* P 3.) Each Guide's share in the Revenue Pool would be "calculated based on the number of page views recorded on the [Guide's] site as compared with the number of page views for all sites of The Mining Company." (*Id.* P 2.) The monthly stipends were meant to "guarantee against, and [to] be recoupable out of, any advertising revenues payable to [each Guide]." (1997 Agreements, Att. A, P 1.) The parties agree that this means each Guide would receive either the monthly stipend or their share of the Revenue Pool, whichever was greater.<sup>4</sup>

3 While the 1997 Agreements state that the pool is "equal to 30 of The Mining Company's advertising sales revenues" (i.e., not 30 of "net advertising revenues"), the parties do not dispute that the definition of "net advertising revenues" is meant to apply to the term "advertising sales revenues" as it appears in Paragraph 3 of Attachment A of the 1997 Agreements. (*See* Pls.' Mem. of Law at 3; Defs.' Reply Mem. of Law at 2.)

4 Plaintiffs [\*8] state that "[t]he contracts . . . did not provide that the plaintiffs would receive 'either' of these items, but that they would receive the greater of a specified monthly stipend or a specified share of monthly net advertising revenue." (Pls.' 56.1 Stmt. P 15.) Defendants concede this point, stating that the Guides "were compensated by either a monthly stipend . . . or a share of a percentage of About's 'net advertising revenue,' whichever was greater". (Defs.' Mem. of Law at 4).

The 1997 Agreements also fashion an "Advertising Bonus Pool" ("Bonus Pool") which is defined as "10% of the Mining Company's advertising sales revenues".<sup>5</sup> (*Id.* P 3.) Each Guide was "eligible to share in" the Bonus Pool, such share to be "determined by The Mining Company in its discretion." (*Id.*)

5 As with the Revenue Pool, the parties do not dispute whether the "advertising sales revenues" used to calculate the Bonus Pool are the same as the "net advertising revenues" later defined in the Agreements. (*See* Pls.' Mem. of Law at 3; Defs.' Mem. of Law at 4.)

## (2) The 1999 Agreements

The second relevant set of contracts to govern the relationships between the Guides and About were executed in 1999. (*See* Defs.' [\*9] 56.1 Stmt., Exh. 6 (hereinafter cited as "1999 Agreements").) These Agreements replaced the 1997 Agreements beginning in the second quarter of 1999, and governed the Guides' duties and compensation up through the filing of this lawsuit. (*Id.*; Pls.' Mem. of Law at 3.) The latter Agreements closely resemble the 1997 Agreements, with a few relevant distinctions.

Like the 1997 Agreements, the 1999 Agreements provide for a monthly stipend to "be a guarantee against and recoupable out of, any revenues payable" to each Guide. (1999 Agreements, Att. A, P 1.) The 1999 Agreements also make each Guide eligible to share in a Revenue Pool equal to 30% of the Company's net advertising revenues (*id.* P 2), but define "net advertising revenues" differently. According to the 1999 Agree-

ments, "net advertising revenues" is to be calculated as "gross ad revenues actually received by the Company, less (i) sales commissions, (ii) fees paid for traffic, (iii) reasonable reserves for make goods or other adjustments, and (iv) other third-party payments and expenses for sales, advertising, and revenue." (*Id.* P 3.) As with the 1997 Agreements, each Guide's share in the Revenue Pool is to be "calculated based on [\*10] the number of page views recorded on the [Guide's] Site during the relevant month as compared with the number of page views for all sites of the Company." (*Id.*)

The Bonus Pool provision under the 1999 Agreements also differs from its counterpart in the 1997 Agreements. The 1999 Agreements provide that each Guide "will be eligible to share in a bonus pool based upon a percentage of the Company's net advertising revenues. The pool, if any, and [the Guide's] share of the pool will be determined by the Company in its sole discretion." (*Id.* P 3.) Plaintiffs concede that Bonus Pool compensation under the 1999 Agreements is not mandatory, and thus Plaintiffs do not seek to recover bonus payments for any period after the first quarter of 1999. (Pls.' Mem. of Law at 4.)

## (3) The Guides' Compensation Under the Agreements

While the parties agree on the words of the Agreements, they do not agree on the interpretation to be given them. The parties dispute the meaning of "advertising", "gross ad revenues", and "net advertising revenues" as provided in either set of Agreements and thus have calculated very different revenue pools<sup>6</sup>; they do not agree on the meaning of the Agreements' formulas for calculating [\*11] each Guide's share of the Revenue Pool; they disagree on whether discretionary bonus payments should be credited toward payments owed to Guides; and they disagree on how much the Guides were actually paid.<sup>7</sup>

6 Defendants have found that only in the year 2000 were About's net advertising revenues more than zero. (Day Decl. P 4.) That year, Defendants contend, the net advertising revenues totaled \$ 33,565,293.13. (Defs.' 56.1 Stmt., Att. A (*citing* About.com Flash Report, Dec. 2000, at 56.1 Stmt., Ex. 16).) Plaintiffs, however, have calculated net advertising revenues of \$ 3,073,788 in 1998, \$ 57,153,774 in 2000, \$ 18,904,845 in 2001, and \$ 18,869,476 in 2002. (Pls.' 56.1 Stmt., Att. A.) Plaintiffs also have calculated the net advertising revenues for the first quarter of 1999 as \$ 2,103,801. (*See id.*) An appendix has been included at the end of this Background section which tabulates this and other relevant money amounts.

7 Defendants submit that the total compensation paid to About's Guides was \$ 478,419.68 in 1997, \$ 1,758,800.32 in 1998, \$ 3,836,462.84 in 1999, \$ 10,961,096.52 in 2000, \$ 8,038,090.88 in 2001, and \$ 3,941,198.34 in 2002. (Defs. Swanson Dec. PP 11-15; *citing* Defs.' Appendices [\*12] I -- IV.) Plaintiffs offer different totals for the Guides' yearly compensation: \$ 1,730,408 in 1998, \$ 3,784,753 in 1999, \$ 10,740,409 in 2000, and \$ 7,804,189 in 2001. (*See* Pls.' 56.1 Stmt., Attachment A, *citing* Pls.' 56.1 Stmt. Attachment B and Pls.' Appendices I -- V.) These numbers are included in the Appendix to this Background section ("Background Appendix").

According to Plaintiffs, they were not paid their correct shares of the Revenue Pool in the third and fourth quarters of 1998, in the first quarter of 1999, and in every quarter prior to the filing of this lawsuit from 2000 to 2002.<sup>8</sup> (Pls.' Mem. of Law at 4.) Plaintiffs further contend that the Guides were not paid their share of the Bonus Pool in 1998 or in the first quarter of 1999. (Pls.' Mem. of Law at 4.) Specifically, Plaintiffs complain that the allegedly under-compensated Guides are owed \$ 213,682 for 1998; \$ 298,007 for the first quarter of 1999; \$ 6,741,534 for 2000; \$ 887,763 for 2001; and \$ 942,474 for the first half of 2002.<sup>9</sup> (*See* Pls.' 56.1 Stmt., Attachment A, *citing* Exh. A -- E therein.) (*See* Pls.' 56.1 Stmt., Attachment B, *citing* Exs. A & B therein). Defendants argue that Plaintiffs' calculations are erroneous, [\*13] *see supra*, and that they therefore do not owe compensa-

tion to any Guide. Plaintiffs' and Defendants' computations appear in the tables at the Background Appendix.

8 Plaintiffs concede that they were paid appropriately in 1997. (Pls.' Mem. of Law at 4.)

9 Plaintiffs do not explain why the 1998 and 2000 numbers in the "Total by Year" column of Attachment B of their 56.1 Statement (\$ 401,496 and \$ 6,969,309, respectively) differ from the 1998 and 2000 numbers in the "Amount Owed to Guides" column in Attachment A of their 56.1 Statement (\$ 213,682 and \$ 6,741,534, 9 respectively). The Court presumes, for purposes of deciding this Motion, that the lower totals in Attachment A are the amounts sought by the Guides.

#### B. Therese Jansen's Alleged Retaliatory Discharge

Plaintiffs further argue that Therese Jansen, a former Guide, complained to the Defendants that she was owed back wages. Plaintiffs argue that her subsequent discharge was retaliatory and that therefore she should recover damages. Plaintiffs do not point to any evidence which might corroborate these bare allegations.

#### APPENDIX TO BACKGROUND

#### PLAINTIFFS' COMPUTATIONS

(\*numbers from Pls.' 56.1 Stmt., Att. A.)

(\*\* 1997 numbers not included because [\*14] not in dispute)

	GROSS AD REVEUNES	NET AD REVENUES
1998	\$ 3,342,288	\$ 3,073,788
1999 (1st QUARTER)	\$ 2,122,024	\$ 2,103,801
2000	\$ 90,963,310	\$ 57,153,774
2001	\$ 28,436,919	\$ 18,904,845
2002	\$ 30,887,987	\$ 18,869,476

	AMT. ACTUALLY PAID TO GUIDES	AMT. STILL OWED TO GUIDES
1998	\$ 1,730,408	\$ 213,682
1999 (1st QUARTER)	\$ 688,097	\$ 298,007
2000	\$ 10,740,409	\$ 6,741,534
2001	\$ 7,804,189	\$ 889,763

	AMT. ACTUALLY PAID TO GUIDES	AMT. STILL OWED TO GUIDES
2002	N/A thru end of yr.	\$ 942,763 (thru first half of 2002 only)

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*APPENDIX TO BACKGROUND*  
DEFENDANTS' COMPUTATIONS

(\* numbers from Defs.' 56.1 Stmt., Att. A.)

(\*\* 1997 numbers not included because not in dis-  
pute)

	GROSS AD REVENUES	NET AD REVENUES
1998	N/A	< \$ 0
1999	\$ 12,791,980.90	< \$ 0
2000	\$ 87,828,928.78	\$ 33,565,293.13
2001	\$ 15,402,138.18	< \$ 0
2002	\$ 11,553,613.00	< \$ 0

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	AMT. ACTUALLY PAID TO GUIDES	AMT. STILL OWED TO GUIDES
1998	\$ 1,758,800.32	\$ 0
1999	\$ 3,836,462.84	\$ 0
2000	\$ 10,961,096.52	\$ 0
2001	\$ 8,038,090.88	\$ 0
2002	\$ 3,941,198.34	\$ 0

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## II. DISCUSSION

### A. Legal Standard for Summary Judgment

A district court should grant summary judgment when there is "no genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c); see also Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 107 (2d Cir. 2000). [\*15] Genuine issues of material fact cannot be created by mere conclusory allegations; summary judgment is appropriate only when, "after drawing all reasonable inferences in favor of a non-movant, no reasonable trier of fact could find in favor of that party." *Heublein v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993) (citing *Matsushita Elec. Industr. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

In assessing when summary judgment should be granted, "there must be more than a 'scintilla of evidence' in the non-movant's favor; there must be evidence upon which a fact-finder could reasonably find for the non-movant." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L.Ed. 2d 202 (1986)). While a court must always "resolv[e] ambiguities and draw[ ] reasonable inferences against the moving party," *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986) (citing *Anderson*), the non-movant may not rely upon "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Id.* at 12. Instead, when the moving party has documented particular facts in the record, "the opposing [\*16] party must 'set forth specific facts showing that there is a genuine issue for trial.'" *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986) (quoting *Fed. R. Civ. P.*

56(e)). Establishing such facts requires going beyond the allegations of the pleadings, as the moment has arrived "to put up or shut up." *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000) (citation omitted). Unsupported allegations in the pleadings thus cannot create a material issue of fact. *Id.*

#### B. Breach of Contract

"Contract remedies exist to give injured parties the benefit of their bargain." *Capital Nat. Bank of New York v. McDonald's Corp.*, 625 F. Supp. 874, 883 (S.D.N.Y. 1986) (citing *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 63 (2d Cir. 1984); *Clalit Health Services v. Israel Humanitarian Foundation*, No. 02 Civ. 6552, 2003 WL 22251329, at \*3 (S.D.N.Y. Sep. 30, 2003); *International Customs Associates, Inc. v. Ford Motor Co.*, 893 F. Supp. 1251, 1255-56 (S.D.N.Y. 1995). Only parties to a contract have standing to assert a claim for breach of contract. See *Clalit*, 2003 WL 22251329, at \*3. Without a contractual relationship, there cannot be a contractual remedy. *Capital Nat. Bank of New York*, 625 F. Supp. at 883.

The [\*17] Agreements are governed by the law of the State of New York. (See 1997 Agreements P 3; 1999 Agreements P 13.) To state a claim for breach of contract in New York, a claimant must allege: (1) the existence of a contract; (2) that the plaintiff has performed his or her obligations under the contract; (3) that the defendant failed to perform his or her obligations thereunder; and (4) resulting damages to the plaintiff. See *W.B. David & Co., Inc. v. DWA Communications, Inc.*, No. 02 Civ. 8479, 2004 WL 369147, at \*2 (S.D.N.Y. Feb. 26, 2004); *Global Intellicom, Inc. v. Thomson Kernaghan & Co.*, No. 99 Civ. 342, 1999 WL 544708, at \*18 (S.D.N.Y. July 27, 1999). "In pleading these elements, a plaintiff must identify what provisions of the contract were breached as a result of the acts at issue." *Wolff v. Rare Medium, Inc.*, 171 F. Supp. 2d 354, 358 (citing *Levy v. Bessemer Trust Co.*, N.A., No. 97 Civ. 1785, 1997 WL 431079, at \*5 (S.D.N.Y. July 30, 1997)).

When a summary judgment motion concerns a question of a contract's ambiguity, "summary judgment may be granted when its words convey a definite and precise meaning." *Seiden Assoc.'s, Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). [\*18] On the other hand, "[w]here the language used is susceptible to differing interpretations, each of which may be said to be as reasonable as another . . . the meaning of the words become an issue of fact and summary judgment is inappropriate." *Id.* (citations omitted). However, New York follows the "well established *contra proferentem* principle which requires that equivocal contract provisions are generally to be construed against the drafter." *McCarthy*

*v. Am. Int'l Group*, 283 F.3d 121, 124 (2d Cir. 2002) (internal quotations and citations omitted).

The dispute between the parties in this case pertains chiefly to the third element, i.e., whether Defendants breached the Agreements by not paying the Guides their allotted shares of the Revenue Pool and Bonus Pool. Specifically, the parties disagree on: (1) the revenues which are advertising-related and therefore part of gross ad revenues; (2) the appropriate method for calculating net advertising revenues; (3) the appropriate method for calculating each Guide's share of the Revenue Pool; (4) whether voluntary bonus payments to certain Guides ought to be credited against Revenue Pool shares owed to those same Guides; and (5) the amount actually [\*19] paid to the Guides.

#### (1) The Meaning of "Gross Ad Revenues"

Neither the 1997 Agreements nor the 1999 Agreements define "advertising" or "gross ad revenues". The parties do not agree on which revenues and expenditures are part of "gross ad revenues". Specifically, they do not agree on whether Pay Per Click revenue, as well as overhead costs like rent, should have been included, or even were included, in the gross ad revenues.

#### (a) Pay Per Click Revenue

According to Plaintiffs, Pay Per Click revenue is generated when an advertiser places an Internet link on an Internet website and agrees to pay a fee to the host website when an Internet visitor "clicks" on the link. (Pls.' 56.1 Statement P 52.) Defendants do not dispute this definition, but assert that the Pay Per Click revenue was "derived from a product separate from and unrelated to the Guide sites on About.com", and therefore was not meant to be included in "the designated sources that constituted gross or net advertising revenue under the Guide contracts." (Day Reply Decl. P 4.)

While Defendants supply a Declaration from one of the co-founders of About's predecessor, General Internet, to corroborate their argument, they do not cite to [\*20] any other document to support their view that Pay Per Click revenue is related to a product that is separate and apart from the Guides' Sites. In light of the fact that Pay Per Click revenue accrues when people click on "advertisers' links", and in light of the fact that the Agreements do not make reference to whether "gross ad revenues" relate only to revenues earned through the Guides' sites,<sup>10</sup> Defendants' argument that Pay Per Click revenue is not related to advertising and therefore not meant to be included in gross ad revenues is not supported by the record before the Court.

10 The 1997 Agreements state that revenue amounts shall "be based on net advertising reve-

nues . . . from applicable advertising sources" (1997 Agreements, Att. A, P 3), and the 1999 Agreements state that revenue amounts shall "be based on net advertising revenues . . . from advertising sources designated by the Company" (1999 Agreements, Att. A, P 3).

#### *(b) Overhead Costs*

The parties also disagree on whether certain overhead costs, such as rent which Defendants claim was paid by their Sales and Marketing Departments, are advertising-related. (*See* Pls.' Mem. of Law at 12; Defs.' Reply Mem. of Law at 6.) Plaintiffs [\*21] contest that overhead costs are administrative, and not related to advertising. These overhead costs, Plaintiffs state, should never have been, and were never, part of gross ad revenues in the first instance, and therefore should not have been deducted when calculating net advertising revenues. (Pls.' Mem. of Law at 12.) Defendants provide no documentation to dispute this. Nor have Defendants shown that About did allocate these costs as gross ad revenues. Indeed, Defendant Kurnit stated that it would be "illogical" to deem "overhead costs" as part of gross ad revenues. (Kurnit Dep. 64-65, at Exh. Q in Pls.' 56.1 Stmt.)

To be sure, the excerpt furnished from Kurnit's deposition does not make clear which overhead costs he believes are unrelated to advertising (i.e., rent or something else). In any event, Defendants do not argue what other kinds of overhead costs might reasonably be advertising-related. Nor do Defendants provide evidence about which part of the rent or other overhead costs they purportedly allocated as advertising expenses. Defendants present no evidence whether overhead expenses actually are related sufficiently to advertising so as to fall within the scope of gross ad [\*22] revenues, or whether Defendants actually allocated such overhead costs as gross ad revenues.

Accordingly, Defendants' Motion for Summary Judgment is hereby DENIED as to the meaning of "advertising" and "gross ad revenues".

#### *(2) Calculating Net Advertising Revenues*

The parties also do not agree on how to calculate net advertising revenues. Specifically, they do not agree on what is meant in the 1997 Agreements by "(i) commissions to advertisers, third party sales agents, and advertising agencies, (ii) fees paid for traffic based on ad revenue, (iii) reasonable reserves for returns, make goods or other adjustments, and (iv) other sales expenses based on a share of ad revenue". (1997 Agreements P 3.) Nor do they agree on what is meant in the 1999 Agreements by "gross ad revenues actually received by the Company, less (i) sales commissions, (ii) fees paid for traffic, (iii) reasonable reserves for make goods or other adjustments,

and (iv) other third-party payments and expenses for sales, advertising, and revenue". The parties agree that these terms determine what should be deducted from gross ad revenues to arrive at net advertising revenues, but they do not agree on which expenditures these [\*23] terms describe.

#### *(a) 1997 Agreements*

Plaintiffs contend that neither "distribution costs" nor expenditures related to "on-line media and off-line branding" are within any of the categories of deductible expenditures in the 1997 Agreements. (Pls.' Mem. of Law at 10.) Defendants disagree. (*See* Defs.' 56.1 Statement, Att. A, n.4.)

None of the parties explain what "distribution costs", "on-line media", or "off-line branding" are. Without more, a jury reasonably could find, for instance, that "distribution costs" are "fees paid for traffic based on ad revenue"; or a jury could find that they are not. A jury could reasonably find that "on-line media" expenses are "other sales expenses based on a share of ad revenue"; or a jury could find that they are not. The Court has no basis to conclude as a matter of law that "distribution costs" and expenditures related to "on-line media and off-line branding" were to be deducted from gross ad revenues when calculating net advertising revenues under the 1997 Agreements.

#### *(b) 1999 Agreements*

As to the 1999 Agreements, Plaintiffs contend that the clause requiring the deduction of "other third-party payments and expenses for sales, advertising, and revenue" [\*24] refers only to payments and expenses related to third-party transactions. (Pls.' Mem. of Law at 10.) Defendants counter that the descriptor "third-party" refers only to "payments" but does not refer to "expenses for sales, advertising, and revenue." (Defs.' Reply Memo. of Law at 5-6.) Defendants argue that according to this reading, wages paid to employees in their Sales and Marketing Departments, for example, are among the expenditures to be deducted from gross ad revenues when calculating net advertising revenues. (*Id.*)

Both Plaintiffs' and Defendants' readings of this provision are reasonable. No party presents any objective or expert evidence supporting his position. Whether the wages of About's sales and marketing employees should be included within the scope of this clause hinges on which meaning of the clause a jury deems to have been the intent of the parties. The proper meaning to be given to this clause cannot be decided as a matter of law on the facts before the Court.

The parties also dispute whether this clause envisions the deduction of certain "costs of sales". (Pls.' Mem. of Law at 12-13; Defs.' Reply Mem. of Law at 8-

9.) According to Defendants, these "costs of sales" [\*25] include, among other things, "costs . . . for an internet service set up to drive traffic to About.com." (Defs.' Reply Mem. of Law at 8 n.5.) But Defendants do not limit the "costs of sales" to these types of expenses, nor do they explain what other costs may be "costs of sales". Instead, they attack the testimony of Plaintiffs' expert on "costs of sales" as inadmissible. (*Id.* at 8-9.) Whether or not Plaintiffs' expert testimony is admissible is of no import here, because the Court finds that a reasonable juror could conclude, even absent the expert's testimony, that such "costs of sales" as "costs for an internet service set up to drive traffic to About.com" may or may not have been intended to be deducted from gross ad revenues when calculating net advertising revenues. For example, a jury could reasonably conclude that such costs are "fees paid for traffic", which is the second of the four types of expenditures to be deducted under the 1999 Agreements. Accordingly, Defendants' Motion for Summary Judgment on the issue of which expenses should be deducted from gross ad revenues to calculate net advertising revenues is hereby DENIED.<sup>11</sup>

11 Plaintiffs also argue that the amounts that [\*26] Defendants proffer for net advertising revenue do not correspond to revenues About reported to the SEC. (*See* Defs.' 56.1 Stmt., Exhs. 7 & 8.) Because About noted in its SEC filings that "substantially all" of the reported revenue was advertising revenue (Pls.' 56.1 Stmt., Exhs. N, O, & P), Plaintiffs contend that those numbers should correspond approximately to the numbers supplied by Defendants in their Motion papers. (Pls.' Mem. of Law at 7).

Not only is "substantially all" an imprecise arithmetic phrase, but more importantly, Defendants assert that the revenue reported on About's SEC filings pertains to all of About's businesses, not just the About.com website. (Defs.' Reply Mem. of Law at 4-5.) For these reasons, the SEC filings do not transform the accuracy of Defendants' calculations into an issue that can be decided as a matter of law.

### (3) Calculating Each Guide's Share of the Revenue Pool

While the 1997 and 1999 Agreements are clear that the Revenue Pool is equal to 30% of the net advertising revenues (1997 Agreements P 3; 1999 Agreements P 3), the parties do not concur on what percentage of the Revenue Pool should be apportioned to each Guide.

The Agreements state that the Guides' [\*27] portions of the Revenue Pool are to be "calculated based on the number of page views recorded on the [Guide's] site

as compared with the number of page views for all sites of [About]." (1997 Agreements P 3; 1999 Agreements P 3.) Plaintiffs argue that this clause prescribes a directly proportional analysis of Guide page views to total page views.

Defendants contend that the Agreements do not intend for each visit to a Guide's site to be counted the same as visits to other Guides' sites. (Defs.' Reply Mem. of Law at 7.) A "page view", Defendants argue, is not equal to the number of times a page is viewed. (*Id.*) To corroborate their view, Defendants submit the deposition of Audrey Russell, who was responsible for the Guides' compensation. She states that: "pages became worth different amounts . . . . The pages would contain advertising, and based on whether they had advertising or not, they would be worth different amounts of money in payment." (Russell Dep., Swanson Supp. Decl., Exh. 25 at 28:22-24.) Defendants argue that where the Agreements refer to "page views", they refer not just to "number" of page views, but also to the "mix" of page views. (Defs.' Reply Mem. of Law at 7.)

There [\*28] is no mention of "mix of page views" or "value of page views" in the Agreements. The formula prescribed is clear on its face and shall not be muddied by Defendants' tautologies. Each Guide's portion of the Revenue Pool should be equal to the percentage of views of all of About.com's sites that were page views of that particular Guide's site or sites. The Court hereby GRANTS summary judgment to Plaintiffs on this issue.<sup>12</sup>

12 It has long been the law of this Circuit that "as long as some party has made a motion for summary judgment, a court may grant summary judgment to a non-moving party, provided that party has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried." *First Financial Ins. Co. v. AllState Interior Demolition Corp.*, 193 F.3d 109, 115 (2d Cir. 1999); *see also Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991) (noting that a district court's *sua sponte* granting of summary judgment in favor of a non-moving party is "an accepted method of expediting litigation," as long as "the facts before the district court were fully developed so that the moving party suffered no procedural prejudice"); [\*29] *Lowenschuss v. Kane*, 520 F.2d 255, 261 (2d Cir. 1975) ("We have sanctioned a *sua sponte* award by the court of summary judgment to a non-moving party where it appeared from the papers, affidavits and other proofs submitted by the parties that there were no disputed issues of mate-

rial fact and that judgment for the non-moving party would be appropriate as a matter of law.").

Defendants, who moved for summary judgment on the breach of contract, among other theories, have had a full and fair opportunity to establish their case and have provided no "indication that [they] might otherwise bring forward evidence that would affect the court's summary judgment determination." *Coach Leatherware*, 933 F.2d at 167. As the Court has before it all the facts necessary to find for Plaintiffs, the Court may grant summary judgment in their favor on this issue *sua sponte*.

#### (4) Crediting Voluntary Bonus Payments

Plaintiffs concede that voluntary bonus payments were made to some Guides. (Pls.' Mem. of Law at 9.) These voluntary bonus payments were not Bonus Pool payments per se, but were made at About's discretion.

Plaintiffs argue that these voluntary payments, which often were tendered during one part of [\*30] a year, do not absolve About's obligation to pay each Guide every month either their stipend or their Revenue Pool share, whichever is greater. (*Id.*) Defendants argue that their voluntary bonus payments, whenever during the year they were paid, should be credited toward the Guides' Revenue Pool shares. Defendants characterize Plaintiffs' frustration here as a grievance about the timing -- not the amount -- of their compensation. (Defs.' Reply Mem. of Law at 6 n.3.)

Plaintiffs are correct that the Agreements require compensation on a monthly basis. (*See* 1997 Agreements, Att. A P 1; 1999 Agreements, Att. A P 1.) That Defendants chose arbitrarily at times (i.e., in their discretion) to pay voluntary bonus payments to some Guides does not vitiate Defendants' obligation to pay Guides according to the terms of the Agreements. Further, at the time of payment there is no evidence before the Court that Defendants made clear which -- if either -- contractual obligation was being met by the voluntary bonus payment. Thus there is no basis upon which to calculate a set-off against contractual obligations.

Accordingly, summary judgment is hereby DENIED to Defendants on the issue of whether discretionary [\*31] bonus compensation paid to a Guide should be credited against compensation otherwise owed to that Guide.

#### (5) Amount Actually Paid to Guides

Defendants submit "business records"<sup>13</sup> which indicate that the total compensation paid to About's Guides pursuant to the 1997 and 1999 Agreements is \$ 478,419.68 in 1997, \$ 1,758,800.32 (1998) \$

3,836,462.84 (1999), \$ 10,961,096.52 (2000), \$ 8,038,090.88 (2001), and \$ 3,941,198.34 (2002). (Defs. Swanson Dec. PP 11-15; *citing* Defs.' Appendices I -- IV.) Plaintiffs argue that Defendants' totals are incorrect because they include Revenue Pool shares that were apportioned for sites to which no Guides were ever assigned, and therefore Revenue Pool shares which were never actually paid to any Guide. (Pls.' Mem. of Law at 17.) Plaintiffs submit their own spreadsheets which are compiled "from the information that has been introduced into the record of these proceedings." (Greenberg Dec. P 3, *citing* Pls.' Appendices I -- V.) Plaintiffs' spreadsheets offer different totals for the Guides' yearly compensation: \$ 1,730,408 (1998), \$ 3,784,753 (1999), \$ 10,740,409 (2000), and \$ 7,804,189 (2001).<sup>14</sup> (*See* Pls.' 56.1 Stmt., Attachment A, *citing* Pls.' 56.1 Stmt. [\*32] Attachment B and Pls.' Appendices I -- V.)

13 Defendants do not provide further identifying information for these "business records". They appear to be documents generated internally by Defendants in the normal course of business.

14 As stated *supra*, Plaintiffs have not calculated the total compensation actually paid to the Guides in 1997 or in 2002.

Whose spreadsheets to credit is a genuine issue of material fact for a jury. Accordingly, Defendants' Motion for Summary Judgment is DENIED as it pertains to the amount that the Guides actually were compensated.

#### (6) May Primedia Be Held Liable?

Defendants contend that in the event that any breaches of the Agreements are found to have occurred, About's parent company, Primedia, cannot be liable for them. Plaintiffs counter that About and Primedia are alter egos, and that therefore Primedia is subject to the same liability as About.

Two elements must be pleaded to assert alter ego liability in New York: (1) the entity must exercise such dominion and control with respect to the transaction attacked that the subsidiary had no separate will of its own, and (2) the domination and control must be used to commit a fraud or wrong against the [Plaintiffs]. [\*33] *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir. 1988).<sup>15</sup>

15 Although the law of the state of incorporation typically governs alter ego claims, "where the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry." *American Fuel Corp. v. Utah Energy Development*, 122 F.3d 130, 134 (2d Cir. 1997).

Plaintiffs rest entirely on their allegations from the Second Amended Complaint to corroborate their view that Primedia and About are alter egos. The only sentence in their Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment which addresses this issue states: "The complaint makes extensive allegations that Primedia is a jointly liable partner (or alter ego) of About.com and the Count III [sic] seeks relief jointly against About.com and Primedia." (Pls.' Mem. of Law at 17 (internal citations omitted).)

Bare allegations in a party's initial pleadings cannot defeat a summary judgment motion. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000) (establishing facts requires going beyond the allegations of the pleadings, as the moment has arrived "to put up or shut up") (internal citations omitted). Indeed, [\*34] all the evidence on the record indicates that About was the conductor of its own business, not Primedia. Plaintiffs' statement elsewhere in their brief that About made none of its own SEC filings after 1999 (Pls.' Mem. of Law at 19) is not enough to suggest reasonably that Primedia exercised dominion and control over About's conduct under the Agreements.

Accordingly, Defendants' Motion is hereby GRANTED that Primedia has no liability for breach of contract.<sup>16</sup>

16 For these reasons, Defendants' Motion is also GRANTED as to Primedia's liability under the FLSA and under Articles 6 and 19 of New York Labor Law.

#### C. Tortious Interference with Contract

Defendants also have moved for summary judgment on Plaintiffs' claims against Kurnit and Primedia for tortious interference with contractual relations. According to Plaintiffs, these two parties induced About to breach the 1997 and 1999 Agreements for their own financial enrichment.

Under New York law, the elements of a tortious interference claim are: (a) that a valid contract exists; (b) that a "third party" had knowledge of the contract; (c) that the third party intentionally and improperly procured the breach of the contract; and (d) that the [\*35] breach resulted in damage to the plaintiff. *Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir. 1996) (citing *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 134 N.E.2d 97, 99-100 (1956); *Kaminski v. United Parcel Serv.*, 501 N.Y.S.2d 871, 873 (N.Y. App. Div. 1986)).

##### (1) Tortious Interference Claim Against Kurnit

The Court has concluded that the 1997 and 1999 Agreements are contracts (first element). *See supra*. It

cannot be disputed that Kurnit, as About's CEO, had knowledge of those Agreements (second element). Plaintiffs do not direct the Court, however, to any document or deposition which memorializes Kurnit's purported intent to manipulate About's financial arrangements with Plaintiffs (third element). Rather, as with their breach of contract claims against Primedia, Plaintiffs rely solely on their pleadings to defeat Kurnit's argument.

Even were allegations in a pleading sufficient to raise material fact issues, the Second Amended Complaint does not allege that Kurnit was a stranger to the contract. (Second Am. Compl. PP 58-61.) *See Finley*, 79 F.3d 1285, 1295 (citing *Wood Dolson Co.*, 1 N.Y.2d at 120; *Winicki v. City of Olean*, 611 N.Y.S.2d 379, 380 (N.Y. App. Div. 1994) (only "a stranger [\*36] to a contract" may be liable for tortious interference)); *Artwear, Inc. v. Hughes*, 615 N.Y.S.2d 689, 694 (N.Y. App. Div. 1994)). A defendant -employee is a "third party," only where "the defendant-employee has exceeded the bounds of his or her authority." *Finley*, 79 F.3d at 1295 (citing *Kosson v. Algaze*, 610 N.Y.S.2d 227, 228-29 (N.Y. App. Div. 1994) (employer's agents may not be held liable for tortious interference "absent a showing that they acted outside the scope of their authority"), aff'd, 84 N.Y.2d 1019, 646 N.E.2d 1101 (1995)); *see also Sowle v. Stone*, 994 F. Supp. 173, 181 (S.D.N.Y. 1998) (agent may not be held liable for tortious interference so long as he is working in scope of his authority). Moreover, a "corporate officer who is charged with inducing the breach of a contract between the corporation and [the other contracting parties] is immune from liability if it appears that he is acting in good faith as an officer [and did not commit] independent torts or predatory acts directed at another." "*Murtha v. Yonkers Child Care Ass'n, Inc.*", 45 N.Y.2d 913, 915 (1978) (quoting *Buckley v. 112 Cent. Park South*, 285 A.D. 331, 334 (N.Y. App. Div. 1954)); *see also Cohen v. Davis*, 926 F. Supp. 399, 404 (S.D.N.Y. 1996) [\*37] (applying *Murtha* rule to supervisory employee); *BIB Constr. Co. Inc. v. City of Poughkeepsie*, 612 N.Y.2d 283, 285 (N.Y. App. Div. 1994) (employer's agent may be liable for tortious interference if the "agent does not act in good faith and commits independent torts or predatory acts directed at another for personal pecuniary gain").

Plaintiffs allege in their Second Amended Complaint that Kurnit instituted deceptive payment schedules to benefit him when he sold his About stock to Primedia. (Second Am. Compl. PP 58- 60.) Not only do mere allegations not suffice to avoid summary judgment, but Plaintiffs also do not explain how these acts were "predatory" or "independent" of About's alleged alteration of Guides' payment schedules.

Accordingly, Defendants' Motion for Summary Judgment on Plaintiffs' claim against Kurnit for tortious interference is hereby GRANTED.

#### (2) Tortious Interference Claim Against Primedia

Plaintiffs also have lodged a tortious interference claim against Primedia, and Defendants have moved to dismiss it. Generally in New York, parent corporations may not tortiously interfere with their subsidiaries' contracts. *Multi-Juice, S.A. v. Snapple Beverage Corp.*, 2003 WL 1961636, at \*5 (S.D.N.Y. 2003). [\*38] See also *Koret, Inc. v. Christian Dior, S.A.*, 554 N.Y.S.2d 867 (1st Dept. 1990). An exception to this rule exists when the parent has acted with malice. *MTI/The Image Group, Inc. v. Fox Studios, East, Inc.*, 554 N.Y.S.2d 20, 23-24 (1st Dept. 1999).

There is no basis for excepting Primedia from the general rule. Plaintiffs cite only their Second Amended Complaint, which does not make clear whether Primedia's alleged interference preceded or followed its acquisition of About as a subsidiary. (See Second Am. Compl. PP 64-77.) Plaintiffs also reference no evidence which reasonably could prove Primedia's intent to procure financial gain to the detriment of, or even independent of, About. Plaintiffs' only argument is that Primedia "can be charged with knowledge of About.com's accounting practices. Whether those accounting practices were 'improper' (i.e., deceptive) because About.com concealed its failure to pay Guides according to their contracts while simultaneously claiming it was making full and proper payments to the Guides, is an issue of fact for trial." (Pls.' Mem. of Law at 19.) But knowledge of an alleged improper accounting practice does not amount to tortious interference with a [\*39] contract, even if such accounting practice impacts the parties' conduct under the allegedly breached contract. Plaintiffs do not argue, as they must, that Primedia intentionally and affirmatively provided an impetus for the breach. See *Cantor Fitzgerald Associates, L.P. v. Tradition North America, Inc.*, 749 N.Y.S.2d 249, 249-50 (1st Dept. 2002) (requiring that the alleged interferor's action was the *sine qua non* of the alleged contract breach).

As with their breach of contract claim against Primedia, Plaintiffs merely allege their tortious interference claim against Primedia. Even were a juror to find those allegations true (and they would have no evidentiary basis for doing so), those allegations do not make out a claim against Primedia for tortious interference. Accordingly, Defendants' Motion as to Plaintiffs' claim against Primedia for tortious interference is GRANTED.

#### D. FLSA and New York Labor Law Claims

##### (1) Independent Contractor/Employee Issue

In their letter of August 29, 2005, Defendants argued that because "[t]he determination regarding the status of an individual as an employee of independent contractor is a question of law", a motion for summary judgment on Plaintiffs' FLSA [\*40] and New York Labor Law claims should be granted in their favor. On September 15, 2005, this Court ruled that "Plaintiffs' motion for class certification shall be held in abeyance until the 'employee/independent contractor' issue is resolved through Defendants' summary judgment motion" (Order, Sept. 15, 2005, at 2), thereby directing Defendants to address the employee/independent contractor issue in their Motion. Except for brief mentions in their 56.1 Statements which simply restate the parties' dispute about this issue (Defs.' 56.1 Stmt. P 15; Pls.' 56.1 Stmt. P 15), the parties do not address the employee/independent contractor question in their papers. Therefore, this issue remains a question of fact to be determined at trial.

##### (2) FLSA Claims

Defendants have moved to dismiss the FLSA claims of Plaintiffs who did not provide services to About in the United States. (Defs.' Mem. of Law at 13.) According to the Fair Labor Standards Act, the wage provisions do not apply "with respect to any employee whose services during the workweek are performed within a foreign country." 29 U.S.C. § 213(f). Plaintiffs have not disputed this point.

As stated *supra*, Plaintiffs Shane Dell, Diane Dobbs, [\*41] Wendy Hogan, Peter Lathan, Walter Logie, Murray Lundberg, Debra Macaulay, Walter Metcalf, Gayle Olson, Robert Olson, John Ross, Paivi Suomi, Andrew Vardas, and Stephen Venter resided outside of the United States during the time that they were Guides. Accordingly, Defendants' request to dismiss those Plaintiffs' FLSA claims is hereby GRANTED.

##### (3) New York Labor Law Claims

Defendants also argue that Plaintiffs who worked outside New York are outside the purview of Articles 6 and 19 of New York Labor Law. While Plaintiffs do not respond to Defendants' argument, the 1997 and 1999 Agreements provide that they "will be governed by the laws of the State of New York." (1997 Agreements P 3; 1999 Agreements P 13.) An agreement to apply New York law to a contract is tantamount to an agreement to apply New York statutory law to disputes about commissions owed under said contract. See, e.g., *Winter-Wolff International, Inc. v. Alcan Packaging Food & Tobacco, Inc.*, 2007 WL 1655777, at \*8 (E.D.N.Y., Jun. 5, 2007), cf. *Frishberg v. Esprit De Corp.*, 778 F. Supp. 793 (S.D.N.Y. 1991). Because the parties chose to apply New York law, it is not relevant that the New York legislature stated that the New [\*42] York Labor Law is meant to

protect persons employed "in New York State". *N.Y. Lab. Law § 650.*

Accordingly, Defendants' Motion for Summary Judgment on all non-New York Plaintiffs' New York Labor Law claims is DENIED.

#### *E. Therese Jansen's Retaliatory Discharge Claim*

Therese Jansen alleges in the Second Amended Complaint a retaliatory discharge claim against Defendants pursuant to the FLSA, but not pursuant to New York Labor Law. Defendants have moved for summary judgment on Jansen's FLSA retaliation action, arguing that Jansen never lodged a formal complaint against her employer on which Defendants could retaliate. Plaintiffs' opposition memorandum does not respond to this argument, but rather asserts that Jansen's purported retaliation claim pursuant to New York Labor Law should survive. (See Pls.' Mem. of Law at 19-20.) Because the Second Amended Complaint states no New York Labor Law claim on which this Court can rule, Jansen's argument is moot.

But even had Jansen brought a retaliation claim pursuant to New York Labor Law, it would not have survived. She is a resident of the State of California. (Jansen Dep. 22:2-25, at Swanson Suppl. Decl., Exh. 24.) See *N.Y. Lab. Law § 650, cited supra* [\*43] (providing that New York Labor Law is intended to protect the people of New York).

Moreover, had Jansen responded to Defendants' argument that she is not protected by the FLSA, she could not have done so successfully. Defendants submit an excerpt of Jansen's deposition testimony, where she states: "I believe the reason why I was terminated as a guide by About had nothing to do with my site, but rather had to do with my involvement in discussion on the guide forum." (Jansen Dep. 220:7-10, at Swanson Dec., Exh. 3.) Jansen provides no evidence to dispute this testimony or to explain how this testimony may relate to any formal complaint lodged against her employer, and therefore she cannot defeat a summary judgment motion on this issue.

Accordingly, Defendants' Motion for Summary Judgment as to Jansen's retaliatory discharge claim is hereby GRANTED.

#### *F. Dismissal of Noncompliant Plaintiffs*

Concomitant with the filing of their Motion Papers, Defendants wrote to the Court requesting that twenty-six named Plaintiffs who did not comply during discovery be dismissed from the suit. (See Defs.' Letter, dated Jan. 25, 2005 (hereinafter cited as "Defs.' Letter"). Plaintiffs do not dispute that the<sup>17</sup> [\*44] following Plaintiffs never responded to Defendants' discovery requests: Suzanne J.

Barrett, Krista Marie Beck, Edward Bott, Robert H. Brown, Janet W. Burns, Mark E. Hessey, Wendy Hogan, Lori Holuta, Peter D. Lathan, Murray Wayne Lundberg, Patricia Michaels, Tracy Lee Morris, Melany S. Nottenius, Robert Rak, Kelly Rivera, John Gordon Ross, Eponine Sallee, Rachel Sanfordlyn Shreckengast, Kathy Stolley, David J. Sweet, Steven Graham Venter, Carol Vest, Ann Zeise, and Jim Zwick ("Noncompliant Plaintiffs"). (Defs.' Letter, Exh. B; Pls.' Letter, dated Feb. 27, 2006 (hereinafter cited as "Pls. Letter"), at 1.) Plaintiffs also do not dispute that two additional Plaintiffs -- Marshall Bowden and Angela Thor (also included within "Noncompliant Plaintiffs") -- refused to appear for depositions. (Defs.'<sup>18</sup> Letter at 1-2; Pls.' Letter at 1.) Despite these concessions, Plaintiffs' Counsel argues that the Noncompliant Plaintiffs should be dismissed without prejudice -- rather than with prejudice -- so that they may recover as unnamed members of a putative class.

17 While Defendants' letter is dated January 25, 2005, it appears to have been drafted on January 25, 2006. The Court received the letter [\*45] on January 26, 2006.

18 Plaintiffs' Counsel already has indicated to Defendants that Bowden and Thor intend to withdraw from the lawsuit. (See Defs.' Letter, Ex. C.) The Court, however, has received no communications from Bowden, Thor, or their Counsel pertaining to their withdrawal.

*Rule 41(b) of the Federal Rules of Civil Procedure* provides that:

For failure of the plaintiff to prosecute or to comply with [the Federal Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

*Fed. R. Civ. P. 41(b)*. The Second Circuit has held that district courts have authority to dismiss a case *sua sponte* for a plaintiff's failure to prosecute or comply with court orders. *LeSane v. Hall's Sec. Analyst. Inc.*, 239 F.3d 206, 209 (2d Cir. 2001).

"At the same time, a *Rule 41(b)* dismissal remains 'a harsh remedy to be utilized only in extreme situations.'" *LeSane*, 239 F.3d at 209, quoting *Thielmann v. Rutland Hosp., Inc.*, 455 F.2d 853, 855 (2d Cir. 1972). A court contemplating a *Rule 41(b)* [\*46] dismissal must con-

sider the following factors: (1) the duration of Plaintiffs' failures; (2) whether Plaintiffs have received notice that further delays would result in dismissal; (3) whether Defendants are likely to be prejudiced by further delay; (4) whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process . . . and (5) whether the judge has assessed adequately the efficacy of lesser sanctions. *LeSane*, 239 F.3d at 209, citing *Alvarez v. Simmons Market Research Bureau, Inc.*, 839 F.2d 930, 932 (2d Cir. 1988).

The time between Noncompliant Plaintiffs' failures to respond to discovery requests and Defendants' Motion for Summary Judgment was substantial: almost three years (first factor). (Defs.' Letter at 2.) Plaintiffs also were notified sufficiently by Magistrate Judge Gorenstein of the possibility of dismissal at a hearing on February 6, 2004 (second factor).<sup>19</sup> Dismissal of Noncompliant Plaintiffs' suit is warranted.

19 At a hearing on February 6, 2004, Magistrate Judge Gabriel W. Gorenstein admonished Plaintiffs:

If the [discovery] deadline is not met, I'm going to state it now that unless [\*47] there's good cause shown that's not perceivable today they'll be precluded. They'll be dropped as plaintiffs. So plaintiffs should consider themselves warned. I understand there's a lot of them, but when a lot of people sue then a lot of them have got to do a lot of work . . . If 82 people sue and if they don't have 82 lawyers then maybe it means 82 times as much work for that one lawyer, but that's what it is.

(Tr., Feb. 6, 2004, 36:12-20, cited at Defs.' Letter, Exh. A.)

The other factors, however, counsel against dismissing their claims with prejudice. While Defendants may have been disadvantaged by Noncompliant Plaintiffs' past failures, Defendants likely would not suffer from Noncompliant Plaintiffs' future recovery as unnamed putative class members (third factor). Permitting Noncompliant Plaintiffs to join other unnamed putative class members-if and only if a putative class is certified -- would not beset Defendants unnecessarily, because Defendants already would be addressing other putative class members' claims. Dismissing Noncompliant Plaintiffs'

claims without prejudice to their ability to recover as unnamed putative class members also comports with one of the policies [\*48] which motivates collective suits:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

*Amchem Products, Inc. V. Windsor*, 521 U.S. 591, 617 (1997) (internal quotations omitted). Collective actions were designed to permit parties like Noncompliant Plaintiffs who cannot, or choose not to, navigate the cumbersome litigation process to recover nonetheless.

In light of the fact that dismissal with prejudice is the harshest of sanctions (fifth factor), and in light of the fact that Magistrate Judge Gorenstein's admonition reasonably could be interpreted as a warning that Noncompliant Plaintiffs would be excluded from suit only as Named Plaintiffs, Noncompliant Plaintiffs' claims against Defendants shall be DISMISSED WITHOUT PREJUDICE to their ability to recover as unnamed putative class members. This dismissal shall not be deemed a ruling by the Court that any putative class will be certified. [\*49] In the event that a putative class is not certified, the fourth *LeSane* factor -- considerations of Noncompliant Plaintiffs' disregard for the Court's calendar congestion-demands that Noncompliant Plaintiffs shall not be permitted to file the exact same suit at a later date. They may only recover as unnamed putative class members, if such putative class is certified.

### III. CONCLUSION

For the reasons contained herein, Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART as follows:

(1) Defendants' request for summary judgment on the meaning of "advertising" and "gross ad revenues" is hereby DENIED;

(2) Defendants' request for summary judgment on the issue of which expenses to deduct from gross ad revenues when calculating net advertising revenues is DENIED;

(3) Defendants' request for summary judgment on the issue of whether to credit each Guide's potential recovery with the voluntary bonuses paid to that Guide is DENIED;

(4) Defendants' request for summary judgment on the amount

actually paid to Guides is DENIED;

(5) Defendants' request for summary judgment on the issue of whether Prime-midia may be held liable for any asserted claims, including tortious interference [\*50] with contract, breach of contract, the claim pursuant to FLSA, and the claim pursuant to Articles 6 and 19 of New York Labor Law, is GRANTED;

(6) Defendants' request for summary judgment on the issue of whether Scott Kurnit may be held liable for tortious interference with contract is GRANTED;

(7) Defendants' request for summary judgment against FLSA Plaintiffs who worked outside the United States during the times relevant to this suit is GRANTED;

(8) Defendants' request for summary judgment against New York Labor Law Plaintiffs who worked outside the State of New York during the times relevant to this suit is DENIED; and

(9) Defendants' request for summary judgment against Plaintiff Therese Jansen on her FLSA retaliatory discharge claim, and on her purported New York Labor Law retaliatory discharge claim, is GRANTED.

Furthermore, summary judgment is GRANTED in favor of Plaintiffs on the issue of how to calculate each Guide's share of the Revenue Pool.

To the extent that Plaintiffs have brought claims for conversion, negligence, copyright infringement under 17 U.S.C. § 501 *et seq.*, replevin or unjust enrichment, those claims are hereby DISMISSED.

This Court also DISMISSES WITHOUT PREJUDICE [\*51] the Noncompliant Plaintiffs' remaining claims against About. Noncompliant Plaintiffs may not recover in a newly stated action, but may recover as unnamed members of a putative class, if such putative class is certified.

Should Plaintiffs choose to renew their Motion to Circulate a Notice of Pendency and Consent to Join, or should they choose to file a Motion for Class Certification, they shall do so within 45 (forty-five) days of the date of this Order. Defendants shall respond to such motion within 45 (forty-five) days of its being served on them.

Should Plaintiffs choose to forego class certification, Proposed Requests to Charge and Proposed Voir Dire shall be submitted to this Court within 60 (sixty) days of the date of this Order. If Plaintiffs choose not to seek class certification, a Joint Pre-trial Statement, which shall conform to the Court's Individual Practices and Supplemental Trial Procedure Rules, also shall be submitted within 60 (sixty) days of the date of this Order. Memoranda of Law addressing those issues raised by the Joint Pre-trial Statement shall be submitted on the same day as the Joint Pre-Trial Statement, and responses to such Memoranda, if any, shall be submitted [\*52] within 15 (fifteen) days thereafter. There shall be no replies.

SO ORDERED.

Dated: New York, New York

August 9, 2007

Deborah A. Batts

United States District Judge