

**Inter/Media Time Buying Corp. v Chief Media LLC**

2013 NY Slip Op 33567(U)

August 7, 2013

Supreme Court, New York County

Docket Number: 153674/2013

Judge: Milton A. Tingling

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. MILTON A. TRINGLING

PART 4/4

Index Number : 153674/2013  
INTER/MEDIA TIME BUYING  
vs  
CHIEF MEDIA LLC,  
Sequence Number : 001  
COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/31/13  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with*  
*granted decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 8/7/13

[Signature], J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING

PART 44

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INTER/MEDIA TIME BUYING CORPORATION and  
INTERQUANTUM LLC,

PETITIONERS,

INDEX NO. 153674/2013E  
MOTION DATE 5/31/2013

-v-

CHIEF MEDIA LLC,

RESPONDANT

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Upon the foregoing papers, it is ordered that the petition seeking an order to compel production is granted. Petitioners move to grant an order to compel production pursuant to CPLR 3124.

On or about May 27, 2003, Inter/Media ("Petitioners") and Dish Direct Inc. ("Dish Direct") entered into a written agreement, which provided that Petitioners were the exclusive media buying agency for Dish Direct's products, and was entitled to a percentage of the commission based on the cost of the advertising and reimbursement for related expenses. Petitioners contend that Dish Direct was chronically late for the advertising services provided. Subsequently, Petitioners entered into a separate written contract with Biotab Nutraceuticals, Inc. ("Biotab") where Biotab appointed Petitioners as its exclusive agent for purchasing advertising; assumed complete and separate liability for all sums owed to

Petitioners by Dish Direct; and agreed to pay Petitioner for advertising services going forward.

Petitioners contend that throughout 2011 and 2012 Biotab refused to pay sums pursuant to the agreement. Furthermore, Petitioners assert they discovered Biotab was already in the process of engaging and negotiation an agreement with Chief Media (“Respondent”) to perform substantially similar services as those called for by the Biotab agreement.

On or about November 13, 2012, Petitioners commenced an action against Biotab and Dish Direct seeking over \$3,000,000 in damages. In the initial complaint, Petitioners asserted claims including breach of contract, breach of implied duty of faith and fair dealing, unjust enrichment and quantum meruit. On or about April 2, 2013, the court granted Petitioners’ order for leave to file a second amended complaint. They filed the second amended complaint which reasserted the original claims, including the frauds claims and added additional claims for negligent representation.

On or about December 14, 2012, Petitioners served Respondent with a subpoena in New York. The initial subpoena sought Respondent’s agreement with Biotab, and documents relating to the negotiation and performance of the agreement. Respondent objected to the subpoena and refused to produce any documents.

On or about March 8, 2013, Petitioners served Respondent with a subsequent subpoena, seeking production of the identical documents pursuant to the initial subpoena. Respondent objected to this subpoena and has not produced any responsive documents.

Petitioners assert the sought documents are relevant to their claims for breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment and quantum meruit. Furthermore, in an effort to allay Respondent's concern regarding the scope of the requested documents, Petitioners claim they limited the request to communications that occurred between January 1, 2012 and November 1, 2012. Respondent contends the production is unwarranted because Petitioners failed to establish "special circumstances"; the documents sought are obtainable from a source other than Respondent; and the documents sought are only relevant to the frauds claim, which is the subject of a pending motion to dismiss.

The principal requirement for discovery is full disclosure of all matters material and necessary in the prosecution or defense of an action. CPLR 3101(a). It is established that the amendments made to CPLR 3120 do not do away with the general requirement of CPLR 3101(a)(4) – where disclosure is sought from a nonparty, the nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required. *Valez v. Hunts Point Multi-Service Center, Inc.*, 29 A.d.3d 104 (1st Dep't 2006). However, the First Department has consistently held that, upon

deletion of the "special circumstances" language in CPLR 3101(a)(4) in 1984, the requesting party did not have to demonstrate "special circumstances". (See *BAll Banking Corp. v. Northville Industries Corp.*, 204 A.D.2d 233, 612 N.Y.S.2d 141 (1st Dep't 1994)). Although not unlimited, courts do generally possess a wide discretion to decide whether the information sought is 'material and necessary' to an action. Furthermore, the Court of Appeals has held that the words 'material and necessary' are to be interpreted liberally, and that "the test is one of usefulness and reason". *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403 (1968).

For the following reasons, Petitioners' order has been granted. Petitioners have demonstrated the disclosure sought is material and reasonable. Petitioners narrowly tailored their request, seeking information regarding an agreement that allegedly was concurrent to a preexisting agreement. Respondent's reliance on a "special circumstances" condition is not applicable. The First Department has ruled that "special circumstances" is not a requirement for production from a nonparty. Also, Defendant's assertion that Petitioners can seek the requested information from Biotab, and therefore the subpoena should be quashed, is outweighed by the precedent set in *Valez*, where the First Department court deemed a showing of need and relevance is sufficient to warrant discovery from a nonparty. Consequently, this Court grants the petition to compel production.

Date: 8/7/13

  
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J.S.C. **Judge Milton A. Tingling**