

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MICHAEL KORDONSKY, individually and on
behalf of Dial Car Inc., and JEFFREY GOLDBERG,
individually and on behalf of Dial Car Inc.,

Plaintiffs,

Index No.: 524563/2023

-against-

**AFFIRMATION IN
OPPOSITION TO THE
MOTION TO INTERVENE**

ALEX BRUDOLEY, MARK LEVSHITS,
DEMETRIOS SARDELIS, ANASTASIOS
KOSTARELOS, MARK BARISHMAN, DAVID
UKILIS, LEV BEYEDER, AVENUE X REALTY
NY LLC, and WEBSTER BANK NATIONAL
ASSOCIATION,

Defendants.

And

DIAL CAR, INC.,

Nominal Defendant.

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MEGHAN R. GRAZIADEI, Esq., an attorney duly admitted to practice in the State of New York, pursuant to New York Civil Practice Law and Rules (“CPLR”) section 2106, and under the penalty of perjury, affirms as follows:

INTRODUCTION

1. I am an attorney with Fidelity National Law Group, attorneys for defendants Avenue X Realty NY LLC (“Ave X”) and Webster Bank National Association (“Webster”, referred to collectively as “Defendants”), in the above-captioned action.

2. I respectfully submit this affirmation in opposition to the motion to intervene (the “Motion”) filed by Plaintiffs’ counsel, Edward Finkelstein, Esq., on behalf of 32 proposed

intervenor shareholders of nominal defendant Dial Car, Inc. (“Proposed Intervenors”) who seek to represent themselves in this action *pro se*.

3. I have knowledge of the facts set forth herein based upon a review of the files maintained by my office, except those facts set forth upon information and belief, and as to those facts, I believe them to be true.

PRELIMINARY STATEMENT

4. Plaintiffs Michael Kordonsky individually and on behalf of Dial Car Inc. (“Dial Car”) and Jeffrey Goldberg, individually and on behalf Dial Car (collectively, “Plaintiffs”), filed this Motion on behalf of the Proposed Intervenors seeking intervention as of right pursuant to CPLR 1012, or intervention by permission pursuant to CPLR 1013, and for the Proposed Intervenors to represent themselves *pro se*.¹

5. This Motion should be denied because Proposed Intervenors cannot represent themselves *pro se* in this shareholder derivative action, *see Park v. Song*, 61 Misc.3d 1047, 1049 (Sup. Ct. N.Y. Cnty 2018), and they failed to include a proposed pleading as required by CPLR 1014.

PROCEDURAL HISTORY

6. Plaintiffs Michael Kordonsky individually and on behalf of Dial Car Inc. (“Dial Car”) and Jeffrey Goldberg, individually and on behalf Dial Car (collectively, “Plaintiffs”) commenced this shareholder derivative action by filing a summons and complaint on August 23, 2023. A true and correct copy of the summons and complaint is annexed to the Affirmation of Edward Finkelstein, Esq. (“Finkelstein Aff.”), dated November 6, 2023, as Exhibit 1.

7. The first cause of action is brought on behalf of Dial Car and alleges, *inter alia*, that

¹ Plaintiffs are already a party to this action and therefore have no standing to bring a motion to intervene on behalf of non-parties. For this reason, including the others discussed herein, this Motion should be denied.

the Board breached its fiduciary duties and obligations to Dial Car and its shareholders. *See Finkelstein Aff.*, Exhibit 1, ¶¶ 117-123. The second cause of action asserts a cause of action for dissolution of Dial Car. *See Finkelstein Aff.*, Exhibit 1, ¶¶ 124-128. The third cause of action asserts that the shareholders are entitled to damages resulting from Dial Car's failure to make certain payments. *See Finkelstein Aff.*, Exhibit 1, ¶¶ 129-133. The fourth cause of action, which is the only claim asserted against Defendants, seeks to cancel the sale of certain real property commonly known as 2104-2108 Avenue X, Brooklyn, New York 11234, Block 7422, Lot 202 (the "Property") to Ave X, and a resulting \$2,466,000 mortgage in favor of Webster pursuant to Business Corporation Law § 909. *See Finkelstein Aff.*, Exhibit 1, ¶¶ 134-150. The fifth cause of action seeks damages for Dial Car and its shareholders based on conversion. *See Finkelstein Aff.*, Exhibit 1, ¶¶ 151-153. Similarly the sixth cause of action seeks damages for Dial Car and its shareholders based on unjust enrichment. *See Finkelstein Aff.*, Exhibit 1, ¶¶ 154-156. The seventh cause of action seeks on behalf of Dial Car and its shareholders, the imposition of a constructive trust upon the remaining proceeds from the sale of the Property. *See Finkelstein Aff.*, Exhibit 1, ¶¶ 157-163. Lastly, the eighth cause of action seeks on behalf of Dial Car and shareholders injunctive relief against the Board from taking further action with regard to the proceeds from the sale of the Property. *See Finkelstein Aff.*, Exhibit 1, ¶¶ 164-169.

8. On October 23, 2023, Ave X filed its Answer with Counterclaims and Cross Claims. A true and correct copy Ave X's Answer is annexed hereto as Exhibit A.

9. On October 26, 2023, Webster filed its Answer with Counterclaims and Cross Claims. A true and correct copy Webster's Answer is annexed hereto as Exhibit B.

10. On November 2, 2023, Plaintiffs and Dial Car filed their reply to the Counterclaims and Cross Claims asserted in Ave X's and Webster's Answers. *See NYSCEF Doc Nos. 30-31.*

11. On November 7, 2023, Plaintiffs on behalf of Proposed Intervenors filed this Motion seeking permission for the Proposed Intervenors to intervene in this action pursuant to CPLR 1012 or CPLR 1013.

LEGAL ARGUMENT

12. This Motion should be denied because the Proposed Intervenors, as shareholders in a shareholder derivative action, cannot represent themselves *pro se*. Under New York Law shareholders who step in the shoes of the corporation and bring a shareholders derivative action are required to have counsel. *See Park v. Song*, 61 Misc.3d at 1049. The reasoning is twofold. First, a fictional person such as a limited liability company, like Dial Car, ““must be represented by a licensed practitioner answerable to the court and other parties for his or her own conduct in the matter.”” *Id.*, quoting *Matter of Sharon B.*, 72 N.Y.2d 394, 398 (1988C) (internal ellipsis omitted); *see* CPLR 321 (a). Second, “a derivative action implicates the rights of all shareholders and members who will ultimately be bound by the findings made and the outcome reached in the litigation. It is therefore essential that one pursuing derivative claims be capable of doing so on behalf of all who would be affected.” *Park*, 61 Misc.3d at 1050.

13. Further, a shareholder’s inability to pay attorney’s fees is not grounds to permit them to represent themselves *pro se* because “[a] successful derivative plaintiff . . . is entitled to an award of attorneys’ fees” *Id.*, citing to Business Corporation Law ¶ 626 (e).

14. Allowing the Proposed Intervenors to intervene and represent themselves *pro se* violates the rule in New York against such representation and flies in the face of the public policy concerns, as set forth above, justifying such rule. *See Park*, 61 Misc.3d at 1049-50. Furthermore, the Proposed Intervenors’ assertion that they cannot afford an attorney does not permit them, as shareholders, to represent themselves *pro se* in this shareholder derivative suit. *See id.*

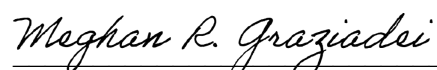
15. Lastly, since paragraph 5 of the Complaint alleges that Dial Car has 485 shareholders, allowing the 32 Proposed Intervenors to intervene in this action *pro se*, which would directly contravene the law of this State, could ultimately result in the addition of another 400 plus shareholders entering this action as *pro se* plaintiffs.

16. For these reason, Plaintiffs' Motion on behalf of Proposed Intervenors should be dismissed.²

17. Lastly, CPLR 1014 requires that “[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought.” Failure to include a proposed pleading denies the court and opposing parties the ability to ascertain the grounds upon which intervention is sought and is grounds to deny the motion. *See Zehnder v. State*, 266 A.D.2d 224, 224-25 (2d Dept 1999) (affirming the supreme court’s denial of a motion for leave to intervene where the proposed intervenor failed to include a proposed pleading); *Colonial Sand & Stone Co. v. Flacke*, 75 A.D.2d 894, 895 (2d Dept. 1980). For this reason, standing alone, this Motion should be denied.

18. For the foregoing reasons, Defendants respectfully request that the Motion to Intervene by denied, and that the Court grant such further relief as it deems just and proper.

Dated: New York, New York
December 11, 2023


MEGHAN R. GRAZIADEI

² The Motion should also be denied because intervention by the Proposed Intervenors is not necessary as their interests are already being represented and litigated under the claims Plaintiffs brought *on behalf of* Dial Car. Where the interests of the stockholders are being adequately represented and, the proposed intervenor shareholders has not set forth any other reason why they should be heard, intervention is not necessary. *See Auerbach v. Bennett*, 47 N.Y.2d 619, 628 (1979) (the real question when a stockholder seeks to intervene in a stockholder derivative action “is one of proper representation). The Proposed Intervenors do not allege that their interests are not being properly represented or that they should be heard for other reasons.

CERTIFICATE OF WORD COUNT

Index No: 524563/2023
Case Name: *Michael Kordonsky, individually and on behalf of Dial Car Inc., et al. v. Alex Brudoley, et al.*
Document Title: Affirmation of Meghan R. Graziadei, Esq. in Opposition to Plaintiffs' Motion for Leave to Intervene filed on behalf of 32 Shareholders

Pursuant to Rule 17 of the Rules of the Commercial Division of the Supreme Court, I certify that the accompanying Affirmation of Meghan R. Graziadei, Esq. in Opposition to Plaintiffs' Motion for Leave to Intervene filed on behalf of 32 Shareholders, contains 1,388 words, excluding the parts of the document that are exempt under Rule 17. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this day of 11 December 2023.

FIDELITY NATIONAL LAW GROUP

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