

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: COMMERCIAL DIVISION

Index No.: 524563-2023

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

Plaintiffs,

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

- against -

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

Defendants,

and

DIAL CAR, INC.

Nominal Defendant.

-----X

OLEG SMOLYAR, being an attorney duly admitted to practice law in the Courts of the State of New York, and not a party to this action, hereby affirms under the penalty of perjury as follows:

1. I am an attorney for Defendants in the above-captioned action and as such, I am fully familiar with the facts and circumstances hereinafter set forth based on review of the relevant documents, file contents and proceedings had herein, except as to those matters alleged to be true upon information and belief.

2. I submit this affirmation in opposition to the Plaintiffs' motion to intervene (the "Motion") filed by the Plaintiffs' counsel, on behalf of 32 proposed Intervenors shareholders of

Nominal Defendant Dial Car, Inc. (“Proposed Intervenors”) who seek to represent themselves in this action *pro se*.

3. For the reasons stated below, this Motion to Intervene should be denied in all respects.

4. Indeed, New York courts have recognized that intervention should be liberally allowed under CPLR as of right when the intervenors demonstrate: (1) the motion is timely, (2) the representation of the applicant’s interest by the parties is inadequate, and (3) the applicant may be bound by the judgment. CPLR 1012(a)(2).

5. Here, the Proposed Intervenors do not meet these statutory requirements as follows: A party seeking to intervene as of right must show that its interest is not adequately represented by the other parties to the action in which intervention is sought. CPLR 1012(a)(2).

6. First, it should be clarified here that because the Proposed Intervenors sought to intervene as Plaintiffs in a shareholder derivative action, the “true party in interest” is the corporation itself, and not the Proposed Intervenors.

7. Here, the Proposed Intervenors are seeking to intervene in a shareholder derivative action to represent themselves *pro se* as shareholders. Under New York Law, shareholders who step in the shoes of the corporation and bring a shareholder’s derivative action must be represented by a licensed legal practitioner. Accordingly, granting intervention would not be appropriate here where the original derivative Plaintiffs are represented by their counsel and can adequately represent Dial’s interest.

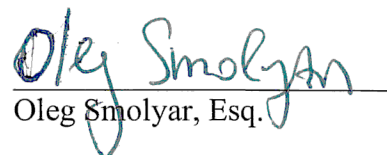
8. Second, the Proposed Intervenors must rebut “the presumption of adequate representation by the parties already in action.

9. Here, the Proposed Intervenors failed to assert any pleadings containing more detailed allegations showing any inadequacy or prejudice to the Intervenors' interest which Intervenors may be bound by a future judgment. The Intervenors did not even attempt to show that their interests might be distinct, unrelated, or somehow divergent to those named by the original derivative Plaintiffs. By filing this Motion, the Plaintiffs' counsel did not render the original Plaintiffs' representation "inadequate", and, therefore, has not rebutted the Proposed Intervenors' presumption.

WHEREFORE, your affirmant respectfully requests that the Court denies this Motion in its entirety, and for such other and further relief the Court may deem just, proper and equitable under the circumstances.

Dated: Brooklyn, New York
February 6, 2024

Yours, etc.,


Oleg Smolyan, Esq.