

<b>Malkinzon v Kordonsky</b>
2007 NY Slip Op 30528(U)
March 27, 2007
Supreme Court, Kings County
Docket Number: 0020932/2006
Judge: Carolyn E. Demarest
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At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27<sup>th</sup> day of March, 2007.

P R E S E N T:

HON. CAROLYN E. DEMAREST,  
Justice.

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BORIS MALKINZON (CAR 269), et al.,

Plaintiffs,

- against -

Index No. 20932/06

MICHAEL KORDONSKY, et al.,

Defendants.

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The following papers numbered 1 to 22 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 3-19 20-21
Opposing Affidavits (Affirmations) _____	22
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers in this shareholders' derivative action, defendants Michael Kordonsky (Kordonsky), Alex Sulava (Sulava), Israil Yakobzon (Yakobzon), Michael Levin (Levin), David Goldstein (Goldstein), Alan Fishman (Fishman), Boris Manelis (Manelis), and Dial Car, Inc. (Dial) (collectively, defendants) move, pursuant to CPLR 3211, to dismiss

plaintiffs' complaint, claiming that it does not satisfy the requirements of Business Corporation Law § 626 (c) or CPLR 3013, and only alleges damages to individual shareholders. Defendants' motion also seeks dismissal of plaintiffs' sixth cause of action because it is not brought by the holders of 10% of the outstanding shares of Dial as required by Business Corporation Law § 706. Plaintiffs cross-move for leave to add anonymous John Doe plaintiffs.

Defendants also move, by order to show cause, for an order, pursuant to CPLR 3103 and Rules of the Chief Administrator (22 NYCRR) § 130.1.1: (1) requiring plaintiffs and their agents, including their attorney Paul Verner, Esq., to provide to the court all information (and all copies of the same) relating to the home addresses and telephone numbers of Dial's shareholders and/or drivers obtained pursuant to a subpoena directed at the Taxi and Limousine Commission (the TLC subpoena), which was made without notice to them, (2) barring plaintiffs and their agents, including Paul Verner, Esq., from contacting, orally or in writing, any shareholder or driver of Dial, who is not currently represented by Paul Verner, Esq., to discuss this shareholders' derivative action, or any of the allegations contained therein without first providing notice of the intent to do so to defendants' counsel and without first obtaining approval from the court, (3) requiring plaintiffs and Paul Verner, Esq. to send a letter, to be approved by the court, to all shareholders and drivers of Dial correcting alleged misstatements in a letter sent by Paul Verner, Esq. and plaintiffs on October 26, 2006, (4) sanctioning Paul Verner, Esq. and ordering him to pay a fine for alleged misconduct, and

(5) requiring plaintiffs to reimburse Dial for costs, expenses, and attorney's fees resulting from their conduct, including those associated with this motion.

Dial is a New York corporation, which was incorporated in 1983. It is a car service company engaged in the business of providing luxury ground transportation to corporate clients on a credit voucher basis. Dial's cars are essentially "radio-dispatched" using computer/satellite communication systems installed in the drivers' vehicles. The market price for a car radio/satellite system in June 2006 was approximately \$85,000. Upon receiving a request for car service from customers, Dial's dispatching base distributes assignments to the individual drivers in various zones.

There were 2000 authorized shares of Dial, of which approximately 946 were issued and outstanding. No one person owns a controlling interest in Dial, and no individual shareholder owns more than four shares. Shares are always sold in blocks of two units. Thus, the 946 outstanding shares of Dial are owned by more than 400 different people. In addition to the right to receive dividends, ownership of two shares of Dial entitles the shareholder to receive "radio rights." "Radio rights" mean the right to contract with Dial to receive radio transmissions, through a computer/satellite communication system installed in the driver's car, to pick up and transport passengers. All of Dial's members are required to provide their own vehicles, drivers, and insurance. Members are required to purchase and lease a vehicle specified in Dial's by-laws and the shareholders' agreement.

Pursuant to Dial's by-laws, Dial is managed by a board of directors, and a number of committees. The board of directors consists of seven rank and file drivers, elected to their posts, for three-year terms, by a majority vote of the other shareholders/drivers of Dial. Each of the committees, such as the Rules Committee and the Grievance Committee, typically consists of one representative from the board and several other Dial shareholders/drivers, who are either elected to the committee by Dial's shareholders/drivers or are appointed by a board member. Dial also has a separate management system, which is comprised of a number of employees, such as an office manager, dispatch room manager, controller, pricing department supervisor, and billing department supervisor.

In October 2002, plaintiff Boris Malkinon (Car 269) (Malkinon), as the owner of two of the 946 outstanding shares of Dial, commenced a shareholders' derivative action in the Supreme Court, Nassau County. That action followed the imposition of a fine against Malkinon as a result of several customer complaints and other actions by Malkinon that violated the shareholders' agreement which he executed in 1996, and an unsuccessful run by Malkinon for election to Dial's board of directors. Malkinon's amended complaint in that action alleged that the individual members of the board of directors misappropriated corporate funds to themselves or to others with whom they were associated.

The Supreme Court, Nassau County, by decision and order dated April 11, 2003, granted a motion to dismiss by the board of director defendants. It ruled that Malkinon had "failed to comply with Business Corporation Law § 626 ( c ) either by making the required

demand of the Board or setting forth with particularity the futility of such a demand.” Specifically, it held that the conclusory allegations, made by Malkinzon against the board of directors “en masse, [wer]e insufficient.” In so holding, the Supreme Court, Nassau County, noted that “[t]he generalized statements about defendants’ misconduct [we]re those that would be expected from a disgruntled member of the corporation who ha[d] been sanctioned and temporarily suspended according to the company’s rules.” It further held that “[s]ome independent evidence that the directors [we]re not mindful of their fiduciary duty to the shareholders of the corporation or that their obligation to be impartial in exercising their judgment on behalf of the corporation [wa]s not fulfilled must be shown before demand [could] be deemed futile.”

Plaintiffs Valentin Shepotkin (Car 440) (Shepotkin) and Armen Karapetyan (Car 99) (Karapetyan), as shareholders of Dial, were also petitioners in an earlier CPLR article 78 proceeding to void grievance findings against them by Dial’s Grievance Committee, which resulted in the termination of their “radio rights.” By decision and order dated January 9, 2007 (*Matter of Shepotkin v Kordonsky*, 14 Misc 3d 1216 [A] [2007]), this court dismissed the petitions by Shepotkin and Karapetyan. The court found, inter alia, that Shepotkin and Karapetyan failed to exhaust their available affirmative remedy to appeal to the board of directors. In so ruling, the court rejected the argument by Shepotkin and Karapetyan that such an appeal would be futile. The court found that Shepotkin and Karapetyan made only specific claims of self-dealing and corruption with respect to Kordonsky, but as to the other

five elected members of the board, they made only mere conclusory allegations of general corruption, which were insufficient to establish the futility of exhausting their alternative remedy.

The instant second shareholders' derivative action, which is asserted against the individual defendants, who are the directors of Dial (the director defendants) and Dial, was filed in July 2006 by Malkinzon, Shepotkin, Karapetyan, and five other shareholders (i.e., Aleksandr Ilyayev [Car 450], Mark Egelbaum [Car 324], Eli Shreter [Car 167], Boris Bonopolsky [Car 117] [incorrectly named in the complaint as Boris Bronopolsky] and Vladimir Mayster [Car 209]). (Mati Schwartz [Car 192], who was originally named as a plaintiff and is no longer a shareholder of Dial, has been deleted as a plaintiff.) The original complaint alleged seven causes of action, which contained general allegations that the director defendants entered into a conspiracy to self-deal and acquire the benefits of ownership of Dial, now worth approximately \$40 million, for themselves. Following defendants' motion to dismiss, this court granted a cross motion by plaintiffs to amend their complaint. Defendants have requested that their motion to dismiss be applied to the amended complaint (*see Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2003]).

The amended complaint alleges seven causes of action. Plaintiffs' first and second causes of action allege claims of breach of fiduciary duty, waste, mismanagement, and conversion of corporate assets by the director defendants. They assert that the director defendants committed these acts "by virtue of their self-dealing and conspiratorial

misconduct.” Plaintiffs’ third cause of action seeks to recover compensation paid to the director defendants during the period of their allegedly disloyal service. Plaintiffs’ fourth cause of action alleges conspiracy by the director defendants “to convert company assets through fraud, coercion, extortion, and threats.” Plaintiffs’ fifth cause of action claims that the director defendants entered into a pact or conspiracy and by engaging in a pattern of extortion, coercion, and theft wrongfully converted shareholder assets. Plaintiffs’ sixth cause of action seeks the removal of the director defendants as directors and officers, pursuant to Business Corporation Law § 706 and §716, due to the alleged misconduct, self-dealing, and threats and coercion of shareholders. Plaintiffs’ seventh cause of action requests recovery, pursuant to Business Corporation Law § 626 (e), of statutory legal fees and costs incurred by them in bringing this shareholders’ derivative action.

In support of their motion, defendants assert that plaintiffs’ derivative claims (the first, second, third, fourth, fifth, and seventh causes of action) must be dismissed because plaintiffs’ complaint does not satisfy the requirement of Business Corporation Law § 626 (c), which mandates that in a shareholders’ derivative action, “the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort.” Defendants contend that since plaintiffs did not make a demand on the board and the issue of demand futility was adjudicated by the April 11, 2003 decision and order of the Supreme Court, Nassau County, plaintiffs are barred by the doctrines of res judicata and collateral estoppel from relitigating the issue of demand futility.

Defendants' contention is devoid of merit. The doctrines of res judicata and collateral estoppel apply to bar a subsequent action only where the prior action involved an adjudication on the merits upon claims in the subsequent action which were decided against the parties or those in privity with them in the prior action, which were or could have been raised in such prior action (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Fitzgerald v Hudson Nat. Gold Club*, 35 AD3d 533, 533 [2006]). Here, the Supreme Court, Nassau County, merely held that Malkinson's complaint in that action only contained generalized conclusory statements about the board of directors' conduct en masse without specific allegations, and that it was, therefore, deficient in satisfying the demand requirement of Business Corporation Law § 626 (c). That court did not hold that shareholders of Dial would for all time and in all circumstances never be able to satisfy the demand requirement (*see Bansbach v Zinn*, 1 NY3d 1, 11 [2003]). Thus, the doctrines of res judicata and collateral estoppel cannot preclude plaintiffs from correcting this pleading deficiency by making specific allegations which satisfy the demand requirement of Business Corporation Law § 626 (c) (*see id.*).

Moreover, the allegations of plaintiffs' complaint relate to additional facts which have occurred subsequent to the Supreme Court, Nassau County's decision and order. Thus, the prior action could not have preclusive effect with respect to the merits of the necessity for making a demand upon the director defendants, pursuant to Business Corporation Law § 626

(c), with respect to these later occurring facts in this action (*see id.*; *Robinson v Robinson*, 11 AD3d 853, 855 [2004]).

Defendants further contend that, in any event, the allegations of the amended complaint do not establish the futility of making a demand on the board of directors sufficient to excuse plaintiffs from making such a demand. In this regard, it is noted that “the demand is generally designed to weed out unnecessary or illegitimate shareholder derivative suits” (*Marx v Akers*, 88 NY2d 189, 194 [1996], quoting *Barr v Wackman*, 36 NY2d 371, 377 [1975]). However, “[d]emand is excused because of futility when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction” (*Marx*, 88 NY2d at 200; *see also Barbour v Knecht*, 296 AD2d 218, 224-225 [2002]). “Director interest may either be self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction is ‘controlled’ by a self-interested director” (*Marx*, 88 NY2d at 200; *see also Bansbach*, 1 NY3d at 9).

In their amended complaint, plaintiffs allege that Kordonsky, Yakobzon, and Sulava have established a double-tiered or two-book company accounting system for purposes of hiding company funds from which all of the director defendants convert and skim company funds, which are distributed among each board member. They state that shareholders were overcharged for their TLC registration and that the excess funds are appropriated by the director defendants, that Kordonsky leases extravagant automobiles for himself and his wife, and that all of the director defendants award themselves extravagant expense allowances,

incurring thousands of dollars for catering charges, and security equipment. They assert that this constitutes waste and conversion.

Plaintiffs' amended complaint also alleges that all of the director defendants received undisclosed remuneration and kickbacks from Bay Ridge Federal Credit Union and A & Y Royal Insurance Brokers, which are, respectively, touted and advertised by the director defendants as the sole authorized credit union and sole authorized insurance brokerage within Dial. They claim that the director defendants forcefully exclude any other bank or credit union or insurance brokerage which seek to compete for Dial's shareholders' business, and that the director defendants participate in the solicitation of customers for credit union loans and insurance on Dial's premises. They claim that they gave Gene Brody of Bay Ridge Federal Credit Union and principals of A & Y Royal Insurance Brokers ownership of "radio rights" for less than market value and have received titles from Bay Ridge Federal Credit Union as "loan officers." Plaintiffs claim that due to this, the value of radios has decreased, Dial loses productive shareholders to other companies, and shareholders pay more for financing and loans than they would if free competition existed. They also state that Dial would be devastated if its clients withdrew their patronage to avoid the taint of fraud which emanates from this.

Plaintiffs' amended complaint further alleges that from 2003 to the present, Kordonsky has created and the other director defendants have maintained a priority class of 185 shareholders as a "Club," and that the Club members of this priority class have participated

in a patronage system. They claim that on the instructions of Yakobzon, in conspiracy with the other directors, the Club members receive priority dispatch services, better jobs overall, and are not targeted for “random trumped-up grievance offenses.” They allege that, in exchange, the Club members contribute dues and fees to the director defendants. Plaintiffs assert that Dial and the shareholders of Dial who are not members of the club are damaged because the value of their shares/radios has been decreased, Dial loses shareholders to other companies, and Dial’s clients may withdraw their patronage to avoid the taint of fraud which allegedly emanates from this.

Plaintiffs additionally claim, in their amended complaint, that all of the director defendants have established systems within Dial to maintain their conspiracy by charging outspoken shareholders with trumped-up offenses under the Driver’s Rules, forcing their ouster from the company. Plaintiffs also claim that there are other more egregious violations of the by-laws by the director defendants, which remain hidden, such as the illegal sale of radios to unlicensed persons and embezzlement of company funds.

Plaintiffs’ amended complaint further alleges that Kordonsky, Sulava, Fishman, and Goldstein actively participated in the extortion of shareholders who desire to sell or buy their “radio rights” by disapproving the credentials of the shareholders’ proposed buyers until the shareholders tender illicit payments to them. Plaintiffs also claim that the director defendants, through sham contracts, in the names of their wives, mothers, cousins, etc., acquired “radio rights” for reduced prices using physical threats of harm and coercion.

Thus, plaintiffs, in their amended complaint, do not merely name the majority of directors as defendants and make conclusory allegations of wrongdoing or control by them to justify the failure to make a demand (*see Bansbach*, 1 NY3d at 11; *Marx*, 88 NY2d at 199-200; *Barr*, 36 NY2d at 379; *Lewis v Akers*, 227 AD2d 595, 596 [1996]). In contrast to the allegations made in the CPLR article 78 proceeding by Shepotkin and Karapetyan, plaintiffs have not only made specific claims of self-dealing and corruption with respect to Kordonsky, but have also made specific allegations of wrongdoing and control by the other named board members. The amended complaint is replete with particular and specific allegations that all of the members of the board of directors are personally interested in the challenged transactions complained of in this action. Plaintiffs also, alternatively, plead that the directors have lost their independence by being controlled by Kordonsky (*see Bansbach*, 1 NY3d at 12; *Marx*, 88 NY2d at 200). Consequently, the court finds that plaintiffs have sufficiently set forth with particularity the reasons for not making a demand so as to satisfy the requirement of Business Corporation Law § 626 (c) (*see Bansbach*, 1 NY3d at 12).

Defendants, in further support of their motion, argue that the amended complaint should be dismissed for failure to satisfy the requirement of CPLR 3013 that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action.” Defendants assert that plaintiffs’ allegations are conclusory and vague.

Defendants' argument is rejected. As set forth above, plaintiffs have alleged sufficiently particular and detailed facts to give defendants notice of the transactions and occurrences intended to be proved and the material elements of their causes of action so as to satisfy CPLR 3013. Moreover, deference must be given to the procedure posture of this case. That is, on a motion to dismiss, the court must accept the allegations of the complaint as true and liberally construe the allegations, according the complaint the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). After vigorous scrutiny of the allegations of the amended complaint, the court finds that the amended complaint sets forth viable claims. The allegations made by plaintiffs, if proven, are serious and plaintiffs, at this stage of the litigation, should not be denied an opportunity, through discovery, to substantiate their claims.

Defendants' argument that any factual averments in plaintiffs' amended complaint which appear to chronologically pre-date 2003 should be stricken, is rejected. Such averments merely give context and foundation to the facts from 2003 through the present and the alleged wrongdoing of the director defendants.

Defendants also argue that plaintiffs have only pleaded damages to individual shareholders, and not to Dial. Such argument, however, is belied by a perusal of the amended complaint. Specifically, plaintiffs allege that due to the director defendants' self-dealing and other misconduct, there has been a waste of corporate assets and a devaluing of Dial's shares. Plaintiffs also seek recovery of damages in favor of and on behalf of Dial. It is noted in this

regard that any individual shareholder may bring a shareholder's derivative action, and so long as a plaintiff maintains his shares in Dial, he has standing to maintain this action. Thus, dismissal of plaintiffs' first, second, third, fourth, fifth, and seventh causes of action must be denied.

Plaintiffs' sixth cause of action seeks the removal of the director defendants as officers and directors of Dial. Pursuant to Business Corporation Law § 706 (d) and § 716 (c), an action to procure a judgment removing a director or officer for cause may only be brought by the attorney-general or by the holders of 10% of the outstanding shares. Here, the eight named plaintiffs own no more than four shares each (for a total of 32 shares) which is far less than 10% of the 946 outstanding shares of Dial.

Plaintiffs, however, claim that there are 43 other anonymous shareholders who would be willing to join as plaintiffs in this action on the condition that they remain anonymous and are named only under the pseudonyms John Does 9-51. Plaintiffs, by their cross motion, seek leave to add these anonymous John Doe plaintiffs. Plaintiffs state that with the original eight named shareholders, there would then be 51 shareholders, representing 103 outstanding shares. They assert that since this number would constitute in excess of 10% of the outstanding shares of Dial, they should be found to have met the requirements of Business Corporation Law § 706 (d) and § 716 (c).

CPLR 2101 (c), however, mandates that a summons and complaint include the names of all parties. A summons and complaint containing fictitious names of plaintiffs are

jurisdictionally defective (*see Coe v La Guardia Airport Assocs.*, 134 Misc 2d 579, 581 [1987]). This is because CPLR 2101's requirement “goes to the basic requirement of due process: (1) notice and (2) an opportunity to be heard” (*id.* at 580). The failure to provide the names of the plaintiffs on the summons and complaint deprives the defendants of the notice to which they are entitled because without the inclusion of plaintiffs’ identities, defendants are not apprised of who has made claims against them. “A party has the right to know the identity of those who seek to sue him [or her]” (*id.* at 580-581).

While in a rare and exceptional case, a court may find it permissible to permit a plaintiff to proceed under a fictitious name (*see Doe v Shakur*, 164 FRD 359, 361 [SD NY 1996]), there is a powerful presumption in favor of open court proceedings where the parties are identified. Thus, the unusual practice of using a pseudonym has been permitted only in exceptional cases where the party has “a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings” (“*J. Doe No. 1*” v *CBS Broadcasting, Inc.*, 24 AD3d 215, 215 [2003]). Such a dramatic departure from the basic requirements of due process is, therefore, warranted only in the most extreme circumstances (*see id.*).

When considering whether due process would be violated by permitting plaintiffs to proceed anonymously, the court may take into consideration “whether the plaintiff would risk suffering injury if identified” and “whether the party defending against a suit brought under a pseudonym would be prejudiced” (*Shakur*, 164 FRD at 360-361). Plaintiffs contend that

if they reveal their identities, they will be at risk of economic and physical injury. They claim that they have been threatened with harm by the director defendants. Plaintiffs also claim that the director defendants will not be prejudiced by their proceeding under pseudonyms because the named plaintiffs' claims are essentially interchangeable with similarly situated persons.

Plaintiffs' claim of threatened harm, however, appears speculative and exaggerated (*see Doe v City of New York*, 261 FRD 100, 102 [SD NY 2001]). The matter at issue involves a corporate lawsuit, not a criminal action, and plaintiffs have not shown that the director defendants have any criminal records. Nor have there been any criminal charges filed against the director defendants or any other adequate showing that plaintiffs' physical safety would, in fact, be in jeopardy from the director defendants if their names were revealed.

Furthermore, to permit the action to proceed with anonymous plaintiffs, who would be a majority of the plaintiffs, would prejudice the director defendants since the director defendants would be unable to verify that these shareholders, in fact, represent 10% of Dial's shares. The director defendants also would be denied the opportunity to confront the charges made by their accusers, to investigate these allegations, and to counter their claims in their defense of this action. The director defendants would be placed at a serious disadvantage since they would be required to defend themselves without knowing the identity of their accusers who would be hidden behind a cloak of anonymity (*see Javier H. v Garcia-Botello*, 211 FRD 194, 195 [WD NY 2002]; *Shakur*, 164 FRD at 361).

Moreover, “[c]ourts must also consider that a party in a civil case brings an action on its own volition to vindicate its own interest” (*Javier H.*, 211 FRD at 195; *see also Shakur*, 164 FRD at 361). Plaintiffs “have not alleged a matter implicating a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings” (“*J. Doe No. 1*,” 24 AD3d at 215; *see also Doe v New York Univ.*, 6 Misc 3d 866, 879 [2004]). The statutory requirements of Business Corporation Law § 706 (d) and § 716 (c) are intended “(1) to provide a vehicle by which the majority shareholders may petition judicially for the ouster of a director perpetuated in office by minority shareholders or a class despite the majority’s charges of abuse of trust, (2) in furtherance of minority shareholder rights, and (3) in reaction to the holding in *Matter of Burkin*, 1 N.Y.2d 570 (1956) [holding that only the Attorney General could obtain judicial removal or suspension of a director acting in violation of his or her fiduciary duty]”. McKinney’s Cons Laws of NY, Business Corporation Law § 706, Legislative Studies and Reports, at 241. The statutorily mandated minimum 10% of shareholders must actually be shown to exist and these shareholders must publicly stand behind their claims in court. In this regard, it is noted that (as pointed out by defendants) without a court proceeding initiated by 10% of the shareholders, Dial’s by-laws provide a method for a shareholder to seek the removal of a director or officer of Dial if the shareholder believes that there is a ground to do so. Plaintiffs, however, have not availed themselves of this procedure.

Consequently, the court cannot permit the use of numerous John Doe pseudonyms to sustain plaintiffs' sixth cause of action. Thus, since plaintiffs have not met the requirements of Business Corporation Law § 706 (d) and § 716 (c), dismissal of their sixth cause of action is mandated (*see Spencer v Petrone*, 297 AD2d 730, 731 [2002]; *Martin-Trigona v Capital Cities/ABC, Inc.*, 145 Misc 2d 405, 407 [1989]).

The court now turns to defendants' motion for sanctions. This motion relates to the lack of notice provided to defendants with respect to the TLC subpoena. The TLC subpoena demanded an updated list of all registered car licenses assigned to Dial under their mailing addresses. Plaintiffs obtained the TLC subpoena from the court on October 13, 2006 ex parte and without notice to defendants' counsel, and served it on the TLC on the same day. Defendants point out that this was contrary to CPLR 2307, which requires the request for such a subpoena to be made via a motion "on at least one day's notice to . . . the adverse party." Defendants contend that they were, therefore, denied the opportunity to review and object to the subpoena.

Defendants also assert that they did not receive notice that the TLC was served with the TLC subpoena at least 24 hours prior to return date of the TLC subpoena, as required by CPLR 2307. They claim that plaintiffs and their counsel did not provide any notice of the signing and service of the TLC subpoena until October 31, 2006, 18 days after the subpoena was signed by the court and served by plaintiffs. Defendants further point out that CPLR 3120 (3) required plaintiffs to provide them with notice that the TLC had provided

information in response to the TLC subpoena within five days of plaintiffs' receipt of such information which occurred on October 20, 2006. Defendants state that plaintiffs did not notify them that they had obtained the information from the TLC until November 6, 2006.

Defendants additionally point to the fact that plaintiffs or Paul Verner, Esq. utilized the information obtained pursuant to the TLC subpoena to contact all drivers of Dial, and that, on October 26, 2006, Paul Verner, Esq., sent a letter, a memorandum, and a proposed retainer agreement to all Dial drivers. Defendants argue that the letter and memorandum contain misleading statements.

Defendants, based upon the above, seek an order, pursuant to CPLR 3103 (c), suppressing the information obtained by plaintiffs. Defendants argue that they are entitled to an order requiring plaintiffs and their counsel to return all information improperly obtained as a result of the TLC subpoena or an order prohibiting them from further use of that information without prior approval of the court. They also request a curative letter and the imposition of monetary sanctions upon plaintiffs' counsel.

Paul Verner, Esq., in response, is apologetic and explains that the lack of notice to defendants was not intentional, but the result of an inadvertent mistake. He explains that there was confusion between him and his clients regarding the mailing of the notice, which was only resolved after the notice was discovered to be tardy.

Contrary to defendants' arguments, the actions of plaintiffs are not so blatantly improper so as to necessitate the relief requested by them. Moreover, defendants have not

shown any prejudice or damages flowing from the purported improprieties in the notice provided to defendants' counsel of the TLC subpoena. The TLC data was already in the possession of Dial. Furthermore, the documents had been previously requested from defendants by plaintiffs, and defendants had refused to voluntarily provide the shareholders' mailing addresses to plaintiffs. In addition, the court does not find that a suppression order or curative letter is necessary, particularly in view of the dismissal of plaintiffs' sixth cause of action. The information obtained was not privileged and no substantial right of a party has or will be prejudiced so as to warrant the suppression of the obtained information (*see* CPLR 3103 [c]; *Levy v Grandone*, 8 AD3d 630, 631 [2004]; *Gutierrez v Dudock*, 276 AD2d 746, 746 [2000]; *DiMarco v Sparks*, 212 AD2d 965, 965 [1995]). The court also does not find Paul Verner, Esq.'s conduct to be so egregious as to require the imposition of monetary sanctions. Thus, defendants' motion must be denied.

Accordingly, defendants' motion to dismiss plaintiffs' complaint is granted with respect to plaintiffs' sixth cause of action, and is otherwise denied. Plaintiffs' cross motion for leave to add anonymous John Doe plaintiffs is denied. Defendants' motion for sanctions with respect to the TLC subpoena is denied.

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to read 'C. Demarest', written over a large, empty oval shape.

J. S. C.

**HON. CAROLYN E. DEMAREST**