SHORT FORM ORDER

INDEX No. 03-30324
CAL. No. 10-01876CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 2-15-11
ADJ. DATE 4-13-22
Mot. Seq. # 024 MD

MICHAEL C. TRIMARCO,	:	ROBERT J. DEL COL, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	1038 West Jericho Turnpike
	:	Smithtown, New York 11787
- against -	:	
	:	HERRICK, FEINSTEIN LLP
DATATREASURY CORPORATION,	:	Attorneys for Defendant
	:	2 Park Avenue
Defendant.	:	New York, New York 10016

Upon the following papers numbered 1 to 110 read on this motion to punish for contempt, etc.; Notice of Motion/ Order to Show Cause and supporting papers 1 - 69; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 70 - 104; Replying Affidavits and supporting papers 105 - 110; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for, inter alia, an order punishing defendant DataTreasury Corporation for contempt, granting a preliminary injunction, and directing further disclosure is denied. and it is further

In December 2003, plaintiff Michael Trimarco commenced this action against defendant DataTreasury Corporation, s/h/a DataTreasury Corporation, seeking damages for its alleged breach of a stock option agreement and a judgment declaring that the stock option agreement is valid and enforceable. DataTreasury Corporation (DTC), a Delaware corporation, interposed various counterclaims, alleging, among other things, that Trimarco diverted business opportunities away from it and breached fiduciary duties owed as an officer and director of the corporation. The relevant facts concerning the stock option agreement, the events precipitating this action, and the allegations contained in the pleadings are set forth in detail in an order denying motions for summary judgment dated June 30, 2010 and will not be repeated herein, as the parties' familiarity with such order is assumed. A compliance conference was conducted in this action on July 14, 2010, and a note of issue and certificate of readiness were filed on September 2, 2010. Subsequently, by order dated December 2, 2010, this Court granted plaintiff's motion for an order disqualifying Richard B. Friedman, Esq., and the law firm of McKenna, Long & Aldridge, LLP, from representing DTC in this action. A motion by plaintiff for leave to renew and reargue his prior summary

judgment motion was denied by order issued on July 7, 2011.

Trimarco now moves for an order punishing DTC and its alleged principals, namely Keith DeLucia, Shepard Lane, and Claudia Ballard, for criminal and civil contempt, asserting that they tampered with and intimidated witnesses, and that they failed to comply with a disclosure order issued by this Court (Costello, J.) on August 17, 2007, which was affirmed by the Appellate Division (*see* ***Trimarco v DataTreasury Corporation***, 59 AD3d 615, 873 NYS2d 701 [2d Dept 2009]). He seeks to hold Richard Friedman in contempt on the same bases. Trimarco further moves for an order appointing a temporary receiver to manage the assets of DTC, as well as the assets of its principals, officers and directors, and for an order of attachment. More specifically, the application under CPLR 6201 seeks an order

> attaching any and all licensing and/or settlement amounts or proceeds, including cash, stock, loans, promises, notes, mortgages, things of value or other assets obtained by 'DataTreasury Corporation' or any of its officers, subsidiary or related entities or assignees . . . as well as any and all bank accounts, checking accounts, savings accounts, money market accounts . . . used for disbursing earnings, dividends or any other distribution to shareholders of 'DataTreasury Corporation' . . . any and all assets held by or on behalf of 'DataTreasury Corporation' . . . any and all future settlements, disbursements, dividends or payouts held in escrow on behalf of or disbursed to 'DataTreasury Corporation' or any of its officers . . . [and] any and all assets, including cash, real property, stocks, dividends, warrants, options held by any and all officers, directors and principals as a result of their ownership interest of 5% or more in 'Data Treasury Corporation' or any subsidiary or related entities or assignees, specifically Keith DeLucia, Shepard Lane and Claudio Ballard.

Moreover, Trimarco moves for a preliminary injunction prohibiting DTC, DeLucia, Lane and Ballard from selling, disposing, gifting, dissipating or transferring "any real or personal property," as well as "all real or personal property, bank accounts, savings accounts, checking accounts . . . however title is held, obtained as a result of their ownership interest in DataTreasury Corporation or any subsidiary or related entities," arguing such relief is necessary "pending disclosure and attachment of the same." He also seeks an order "vacating, staying and holding in abeyance" the note of issue, arguing that it was "fraudulently induced" by DTC, and directing that DTC disclose, among other things, "each and every bank account, savings account, checking account, trust account, investment account . . . located in the confines of New York State being held by or on behalf of [DTC] or any of its subsidiaries," as well as "each and every asset located within the geographic confines of the State of New York owned by or being held by or on behalf of DataTreasury Corporation or any of its subsidiaries." In addition, Trimarco seeks an order under CPLR 3126 striking DTC's answer or resolving all issues of fact in his favor based on DTC's alleged failure to comply with the Court's disclosure order; alternatively, he requests leave to amend his complaint to add DeLucia, Lane and Ballard as defendants. Finally, Trimarco seeks an order imposing monetary sanctions in the sum of $150,000 against DTC, Friedman and Lane on the ground that they engaged in frivolous conduct during the disclosure process.

The Court notes that the instant motion was brought on by order to show cause, and that Special Term granted Trimarco ex parte temporary restraining orders enjoining DTC, DeLucia, Lane, and Ballard

from, among other things, selling, disposing, transferring and diluting personal property and corporate assets. It also granted a temporary restraining order prohibiting Nix, Patterson & Roach, a law firm located in Texas, from dispersing "any monies or things of value to defendant or its principals" pending further order of the Court. Submitted in support of the order to show cause was an affirmation of plaintiff's counsel stating that ex parte relief was being sought, because DTC was "fleeing the jurisdiction" and "secreting its assets." Counsel's affirmation further alleges DTC had tampered with witnesses and would "further obstruct and impair plaintiff's ability to recover" if provided with advance notice of the motion. Subsequently, a motion by DTC for an order pursuant to CPLR 5704 striking the temporary restraining orders was granted by the Appellate Division.

DTC opposes the instant motion, arguing plaintiff should be barred from obtaining equitable relief, because he knowingly misled the Court by making numerous false statements in the papers submitted in support of the order to show cause. It asserts, for example, that while plaintiff's counsel alleges in an affirmation that ex parte injunctive relief is needed as DTC "is fleeing the jurisdiction" and "secreting its assets," DTC, in fact, relocated its corporate headquarters from Melville, New York to Plano, Texas back in 2006 and has conducted its normal business activities continuously during the pendency of this action. DTC states that two New York law firms have actively represented its interests in this action, and that one of its defense attorneys spoke with Trimarco's attorney to discuss a pending appeal the day before the motion was presented to Special Term. Moreover, DTC asserts that the instant motion actually is an attempt to reargue disclosure issues that already have been resolved, and that the requested provisional remedies are improper under the circumstances present in this action. The Court notes that while plaintiff's reply and supporting papers were filed after the motion's submission date, it has considered such papers in its determination of the motion in view of the fact that DTC improperly served and filed its opposition papers on the submission date (*see* CPLR 2214 [b]).

Preliminarily, while affidavits of service annexed to the order to show cause indicate personal service of the motion was effectuated on DeLucia, Lane and Ballard in Texas at DTC's headquarters in Plano, Texas, and that Friedman was served at the New York City office of McKenna, Long & Aldridge, no affidavit showing that the motion was served on DTC was submitted. Absent proof of service of the moving papers on DTC, the Court is without jurisdiction to consider the applications to punish it for contempt (*see* Judiciary Law §§ 750, 761; ***Caiolo v Allcity Ins. Co.***, 305 AD2d 350, 758 NYS2d 683 [2d Dept 2003]). Similarly, as DeLucia, Lane, and Ballard have not been named as defendants in this action and DTC's corporate veil has not been pierced, the Court lacks jurisdiction to grant Trimarco's various applications against them seeking injunctive relief and other provisional remedies (*see* ***Riverside Capital Advisors, Inc. v First Secured Capital Corp.***, 28 AD3d 457, 814 NYS2d 646 [2d Dept 2006]; ***Hartloff v Hartloff***, 296 AD2d 849, 745 NYS2d 363 [4th Dept 2002]; ***Michaels Elec. Supply Corp. v Trott Elec.***, 231 AD2d 695, 647 NYS2d 839 [2d Dept 1996]; ***Wasus v Young Sun Oh***, 86 AD2d 753, 447 NYS2d 545 [4th Dept 1982]).

The applications for an order punishing DeLucia, Lane, Ballard and Friedman for contempt are denied. Civil contempt seeks to vindicate the rights of a private party to litigation, and any penalty imposed for such contempt is designed to compensate an injured party or to coerce compliance with the court's mandate (***Matter of Dept. of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.***, 70 NY2d 233, 239, 519 NYS2d 539 [1987]; ***Matter of McCormick v Axelrod***, 59 NY2d 574, 582-583, 466 NYS2d 279 [1983]). Conversely, criminal contempt is imposed to

preserve the power and vindicate the dignity of the court (***Matter of Dept. of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.***, 70 NY2d 233, 239, 519 NYS2d 539; ***Matter of McCormick v Axelrod***, 59 NY2d 574, 583, 466 NYS2d 279). A movant seeking punishment for civil contempt must establish through clear and convincing evidence that the alleged contemnor disobeyed a clear and unequivocal mandate of the court, and that the disobedience prejudiced the rights of another party to the litigation (Judiciary Law § 753[A][3]; *see* ***McCain v Dinkins***, 84 NY2d 216, 616 NYS2d 335 [1994]; ***Collins v Telcoa Intl. Corp.***, 86 AD3d 549, 927 NYS2d 151 [2d Dept 2011]; ***Rose v Levine***, 84 AD3d 1206, 923 NYS2d 689 [2d Dept 2011]; ***Galanos v Galanos***, 46 AD3d 507, 846 NYS2d 654 [2d Dept 2007]). To establish criminal contempt, a movant must show, in lieu of prejudice, that the disobedience was willful (Judiciary Law § 750[A][3]; *see* ***Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.***, 70 NY2d 233, 519 NYS2d 539).

In addition to the requirement that a clear and unequivocal order was in effect at the time of the alleged disobedience, both civil and criminal contempt require a finding that it is reasonably certain the order was disobeyed, and that the party charged had knowledge of the order (***Matter of McCormick v Axelrod***, 59 NY2d 574, 583, 466 NYS2d 279; *see* ***Wheels Am. N.Y., Ltd v Montalvo***, 50 AD3d 1130, 856 NYS2d 247 [2d Dept 2008]). Civil contempt, though, does not require proof that the offending conduct was deliberate or willful (*see* ***Jim Walter Doors v Greenberg***, 151 AD2d 550, 542 NYS2d 324 [2d Dept 1989]; ***Cannizzaro v Cannizzaro***, 186 AD2d 776, 778, 588 NYS2d 912 [2d Dept 1992]), and the mere act of disobedience will be sufficient if it defeated, impaired, impeded or prejudiced a party's rights or remedies (***Matter of McCormick v Axelrod***, 59 NY2d 574, 583, 466 NYS2d 279; ***Matter of Philie v Singer***, 79 AD3d 1041, 913 NYS2d 745 [2d Dept 2010]; ***Bais Yoel Ohel Feige v Congregation Yetev D'Satmar of Kiryas Joel, Inc.***, 78 AD3d 626, 910 NYS2d 174 [2d Dept 2010]). In contrast, no showing of prejudice to the movant's rights is necessary to establish criminal contempt; rather, it is the willfulness of the conduct that elevates the contempt to the criminal level (***McCain v Dinkins***, 84 NY2d 216, 226, 616 NYS2d 335). To determine whether the order was willfully violated, the alleged contemnor's conduct must be examined in light of the express terms of the court's order (***Matter of Dept. of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.***, 70 NY2d 233, 241, 519 NYS2d 539), as "[g]uilt arises only where the authority of the court is flouted" (***Matter of Spector v Allen***, 281 NY 251, 260, 22 NE2d 360 [1939]).

In support of the applications for an order punishing DeLucia, Lane, Ballard and Friedman for civil and criminal contempt, Trimarco's attorney asserts that DTC, "its principals and lawyer have sought to corrupt the entire judicial process by attempting to bribe and unfairly pressure witnesses into providing false testimony." Absent from the affirmations in support of the motion, however, is any proof, or even an allegation, that DeLucia, Lane, Ballard or Friedman willfully flouted an order issued in this action (*see* ***Giorgini v Goldfield***, 22 AD3d 800, 803 NYS2d 155 [2d Dept 2005]; *compare* ***Chew Wah Bing v Sun Wei Assn.***, 205 AD2d 355, 613 NYS2d 371 [1st Dept 1994]). Similarly, Trimarco failed to meet his burden on the application for an adjudication of civil contempt with proof showing that DeLucia, Lane, Ballard or Friedman knowingly disobeyed an unequivocal mandate of the court and that such conduct prejudiced his rights (*see* ***Delijani v Delijani***, 73 AD3d 972, 901 NYS2d 366 [2d Dept 2010]; ***Reback v Reback***, 73 AD3d 890, 905 NYS2d 178 [2d Dept 2010]; ***Giorgini v Goldfield***, 22 AD3d 800, 803 NYS2d 155; *compare* ***Incorporated Vil. of Plandome Manor v Ioannou***, 54 AD3d 365, 862 NYS2d 592 [2d Dept 2008]; ***Chew Wah Bing v Sun Wei Assn.***, 205 AD2d 355, 613 NYS2d 37).

The Court notes that even if an affidavit attesting to service of the moving papers on DTC was

included with the moving papers, Trimarco's submissions do not establish that DTC failed to comply with a clear and unequivocal order directing DTC "to supply plaintiff with all documents" relating to its settlement of patent infringement cases (*see* ***Muwwakkil v Metropolitan Suburban Bus Auth.***, 289 AD2d 309, 734 NYS2d 586 [2d Dept 2001]; *see also* ***Gerelli Ins. Agency, Inc. v Gerelli***, 23 AD3d 341, 806 NYS2d 71 [2d Dept 2005]). Instead, a review of the transcript of the hearing conducted by Justice Costello on August 8, 2007, which was so-ordered on August 27, 2007, shows the subject of such hearing was DTC's obligation to produce a list of shareholders and other related information. More specifically, the August 27, 2002 order of Justice Costello, affirmed by the Appellate Division in its order issued February 17, 2009 (*see* ***Trimarco v DataTreasury Corporation***, 59 AD3d 615, 873 NYS2d 701), required DTC to produce "a current list of shareholders with percentages of shares held by each," the dates that such shares were acquired, and the consideration paid for such shares. It also required that DTC provide detailed descriptions of the classes and privileges of the shares of stock, as well as the total number of outstanding shares in each class.

Trimarco's application for an order of attachment against DTC's property is denied. As prejudgment attachment is a harsh remedy in derogation of common law, the courts have strictly construed the attachment statute in favor of those against whom it may be employed (*see* ***Penoyar v Kelsey***, 150 NY 77, 44 NE 788 [1896]; ***Michaels Elec. Supply Corp. v Trott Elec.***, 231 AD2d 695, 647 NYS2d 839 [2d Dept 1996]; ***Elton Leather Corp. v First Gen. Resources Co.***, 138 AD2d 132, 529 NYS2d 769 [1st Dept 1988]). To obtain an order of attachment under CPLR 6201(3), a plaintiff must demonstrate that the defendant, with intent to defraud his or her creditors or to frustrate the enforcement of a judgment in favor of the plaintiff, has or is about to dispose of, encumber, or conceal property (*see* ***Benedict v Brown***, 289 AD2d 433, 735 NYS2d 404 [2d Dept 2001]; ***Mineola Ford Sales v Rapp***, 242 AD2d 371, 661 NYS2d 281 [2d Dept 1997]). A plaintiff seeking attachment must demonstrate, through affidavit or other written evidence, that a valid cause of action for a money judgment exists, that he or she will probably succeed on the merits, that he or she has satisfied one of the grounds enumerated in CPLR 6201, that the amount demanded from the defendant exceeds the amount of all counterclaims, and that such an order is needed (*see* CPLR 6212; ***A & M Exports v Meridien Bank Intl. Bank***, 207 AD2d 741, 616 NYS2d 621 [1st Dept 1994]; ***Computer Strategies v Commodore Bus. Mach.***, 105 AD2d 167, 483 NYS2d 716 [2d Dept 1984]). "The mere removal, assignment or other disposition of property is not grounds for attachment" (***Computer Strategies v Commodore Bus. Mach.***, *supra*, at 173, 483 NYS2d 716). In addition, the moving papers must contain evidentiary facts, not mere conclusions, proving the fraud (*see* ***Mineola Ford Sales v Rapp***, 242 AD2d 371, 661 NYS2d 281). "Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient" (***Societe Generale Alsacienne De Banque, Zurcih v Flemingdon***, 118 AD2d 769, 773, 500 NYS2d 278 [2d Dept 1986]).

Here, the application for attachment is premised on a conclusory assertion by plaintiff's counsel that such relief is warranted, "because defendant has been so secretive vis a vis its finances, has refused to comply with court-ordered discovery" and has shown a "willingness to corrupt the process by tampering with witnesses." Trimarco, however, failed to make an evidentiary showing that DTC has transferred, disposed, or secreted any of its property with an intent to defraud plaintiff (*see* ***Corsi v Vroman***, 37 AD3d 397, 829 NYS2d 234 [2d Dept 2007]; ***Benedict v Brown***, 289 AD2d 433, 735 NYS2d 404; ***Rosenthal v Rochester Button Co.***, 148 AD2d 375, 539 NYS2d 11[1st Dept 1989]). Significantly, though plaintiff's counsel alleges DTC is no longer qualified to conduct business in New York and has "picked up stakes and run out of town," the only proof offered in support of these allegations is a print out from the

Department of State's online Corporation and Business Entity Database showing that a domestic corporation named Datatreasury Technology Corporation was dissolved by proclamation in August 2010. Furthermore, Trimarco's submissions do not demonstrate that it is probable he will succeed on the merits, or that an order of attachment is necessary in this action (*see* ***Maitrejean v Levon Props. Corp.***, 45 AD2d 1020, 358 NYS2d 203 [2d Dept 1974]; *cf.* ***Olbi USA v Agapov***, 283 AD2d 227, 724 NYS2d 839 [2d Dept 2001]).

The application for the appointment of a temporary receiver to oversee the business and assets of DTC also is denied. The appointment of a temporary receiver is an extreme remedy which can be invoked only when there is a clear showing of the necessity for the conservation of property and the protection of the interests of the movant in such property (*see* ***Vardaris Tech, Inc. v Paleros Inc.***, 49 AD3d 631, 853 NYS2d 601 [2d Dept 2008]; ***Modern Collection Assoc. v Capital Group***, 140 AD2d 594, 528 NYS2d 649 [2d Dept 1988]; ***Schachner v Sikowitz***, 94 AD2d 709, 462 NYS2d 49 [2d Dept 1983]). While Trimarco claims he has an interest in DTC by virtue of the stock option agreement at issue in this action, he failed to show by clear and convincing evidence that there is a likelihood of irreparable loss or material injury to DTC or its assets if a receiver is not appointed (*see* ***Vardaris Tech, Inc. v Paleros Inc.***, 49 AD3d 631, 853 NYS2d 601; ***Secured Capital Corp. of N.Y. v Dansker***, 263 AD2d 503, 694 NYS2d 409 [2d Dept 1999]; ***Mandel v Grunfeld***, 111 AD2d 668, 490 NYS2d 225 [1st Dept 1985]).

The application for a preliminary injunction enjoining DTC from "selling, disposing, hypothecating, encumbering, transferring, gifting or otherwise causing to be carried away . . . all real and personal property" is denied. The purpose of a preliminary injunction is to maintain the status quo and to prevent the dissipation of assets that could render a judgment ineffectual (***S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC***, 81 AD3d 629, 630, 916 NYS2d 789 [2d Dept 2011]; ***Dixon v Malouf***, 61 AD3d 630, 630, 875 NYS2d 918 [2d Dept 2009]; ***Ruiz v Meloney***, 26 AD3d 485, 485-486, 810 NYS2d 216 [2d Dept 2006]). However, it is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief under the law and the undisputed facts (*see* ***Rowland v Dushin***, 82 AD3d 738, 917 NYS2d 702 [2d Dept 2011]; ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, 900 NYS2d 747 [2d Dept 2010]; ***Blake Agency v Leon***, 283 AD2d 423, 723 NYS2d 871 [2d Dept 2001]). To prevail on a motion for a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in favor of the movant (CPLR 6301; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 552 NYS2d 918 [1990]; ***Brookhaven Baymen's Assn., Inc. v Town of Southampton***, 85 AD3d 1074, 926 NYS2d 594 [2d Dept 2011]; ***Temple -Ashram v Satyanandji***, 84 AD3d 1158, 923 NYS2d 664 [2d Dept 2011]; ***Ying Fung Moy v Hohi Umeki***, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). Trimarco's submissions are insufficient to establish that he is likely to succeed on the merits, particularly in view of the dispute regarding the terms of the parties' agreements, or that he will suffer injuries that are not compensable by money damages if denied preliminary injunctive relief (*see* ***Blinds & Carpet Gallery, Inc. v E.E.M. Realty, Inc.***, 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]; ***Family-Friendly Media, Inc. v Recorder Tel. Network***, 74 AD3d 738, 903 NYS2d 80 [2d Dept 2010]; ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]; ***Copart of Conn., Inc. v Long Is. Auto Realty, LLC***, 42 AD3d 420, 839 NYS2d 791 [2d Dept 2007]; ***Sports Channel Am. Assoc. v National Hockey League***, 186 AD2d 417, 589 NYS2d 2 [1st Dept 1992]; ***Gulf & W. Corp. v New York Times Co.***, 81 AD2d 772, 439 NYS2d 13 [1st Dept 1981]). In addition, Trimarco failed to allege that denying the request for a preliminary injunction would cause greater injury to him than granting such relief would

impose on DTC (*see* ***Colby Group, LLC v Hasenfeld***, 46 AD3d 593, 847 NYS2d 239 [2d Dept 2007]; ***Copart of Conn., Inc. v Long Is. Auto Realty, LLC***, 42 AD3d 420, 839 NYS2d 791).

Trimarco's application for an order vacating the note of issue is denied, as are the applications under CPLR 3126 for an order striking DTC's answer with counterclaims, resolving all factual issues in favor of plaintiff or imposing monetary sanctions against DTC on the ground that it willfully and contumaciously failed to comply with his demands for disclosure and the disclosure order issued by Justice Costello in August 2007. The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that moving counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The Uniform Rules further state that the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR §202.7 [c]). Further, although parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]), the filing of a note of issue and certificate of readiness denotes the end of the discovery phase of litigation (***Arons v Jutkowtiz***, 9 NY3d 393, 411, 850 NYS2d 345 [2007]). Thus, a party who seeks discovery after the filing of the note of issue must move to vacate the note within 20 days after service of the note of issue and submit an affidavit demonstrating that the case is not ready for trial (22 NYCRR 202.21[e]). A party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21(e) must show "unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice" (22 NYCRR 202.21 [d]; *see* ***Utica Mut. Ins. Co. v P.M.A. Corp.***, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]). .

Trimarco failed to support his motion with an affirmation by his counsel detailing a good faith effort to resolve the dispute regarding DTC's disclosure of shareholder information and settlement agreements regarding it patent infringement actions (*see* ***Matter of Blauman-Spindler v Blauman***, 68 AD3d 1105, 892 NYS2d 143 [2d Dept 2009]; ***Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium***, 51 AD3d 784, 857 NYS2d 697 [2d Dept 2008]). Further, Trimarco waived his right to seek the imposition of sanctions under CPLR 3126 for alleged witness tampering and noncompliance with the August 2007 disclosure order by filing of the note of issue and certificate of readiness (*see* ***Iscowitz v County of Suffolk***, 54 AD3d 725, 864 NYS2d 78 [2d Dept 2008]; ***Simpson v City of New York***, 10 AD3d 601, 781 NYS2d 683 [2d Dept 2004]; ***Brown v Veterans Transp. Co.***, 170 AD2d 638, 567 NYS2d 65 [2d Dept 1991]). The Court notes that by written notice dated March 29, 2009, Trimarco withdrew, with prejudice, a motion for an order striking DTC's answer and disqualifying Friedman and his law firm from representing DTC based on allegations that Friedman and Lane tampered with two nonparty witnesses, Brian Blanchard and Martin Gelerman. The following year, in September 2010, Trimarco's counsel filed a note of issue and certificate of readiness in this action, stating that disclosure was complete and that there were no outstanding discovery issues.

Arguing in the moving papers that DTC, "its principals and their minions have a long and demonstrated history of looking to frustrate discovery . . . by looking to intimidate and sway witnesses by bribing them," Trimarco's counsel now claims Friedman and Lane "have sought to corrupt the orderly workings of this case" by tampering with Blanchard and Gelerman, as well as with other alleged

witnesses, namely Mark Holzwanger, Ted Doukas, Kenneth Baynes and Edward Collins. Significantly, no claim is made that the alleged "witness tampering" involving Holzwagner and Doukas was unknown at the time of the filing of the note of issue, and the allegations with respect to Baynes and Collins are premised only on conclusory allegations by plaintiff's counsel that their affidavits in support of DTC's summary judgment motion were false and "it is believed that Claudio Ballard made promises of financial reward and possibly a stock position" in exchange for providing such affidavits. Furthermore, no allegation has been made that additional disclosure is necessary to prevent substantial prejudice to Trimarco's prosecution of this action or to his defense to the counterclaims. Having failed to demonstrate unusual or unanticipated circumstances occurred after the filing of the note of issue and certificate of readiness that would warrant further disclosure proceedings (*see* ***Owen v Lester***, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]; ***Manzo v City of New York***, 62 AD3d 964, 880 NYS2d 310 [2d Dept 2009]; ***Romero v City of New York***, 272 AD2d 599, 708 NYS2d 156 [2d Dept 2000]; *cf.* ***Nathanson v Johnson***, 126 AD2d 475, 511 NYS2d 209 [1st Dept 1987]), the applications to compel DTC to provide further disclosure regarding its assets also are denied.

The application for leave to amend the complaint to add DeLucia, Lane and Ballard as party defendants is denied. Generally, leave to amend or supplement a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (*see* ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Zorn v Gilbert***, 60 AD3d 850, 875 NYS2d 245 [2d Dept 2009];***Barnes Coy Architects, P.C. v Shamoon***, 53 AD3d 466, 863 NYS2d 216 [2d Dept 2008]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]; *see generally* ***Fahey v County of Ontario***, 44 NY2d 934, 408 NYS2d 314 [1978]). However, when an amendment to a complaint is sought on the eve of trial, "judicial discretion in allowing such amendments should be 'discreet, circumspect, prudent and cautious'" (***Sampson v Contillo***, 55 AD3d 591, 592, 865 NYS2d 137 [2d Dept 2008], *quoting* ***Morris v Queens Long Is. Med. Group., P.C.***, 49 AD3d 827, 828, 854 NYS2d 222 [2d Dept 2008]), and the court should consider how long the party seeking the amendment was aware of the facts upon which the motion is predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (*see* ***Morris v Queens Long Is. Med. Group., P.C.***, 49 AD3d 827, 828, 854 NYS2d 222; ***Cohen v Ho***, 38 AD3d 705, 833 NYS2d 542 [2d Dept 2007]; *see also* ***Kyong Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [2d Dept 2003]; ***Volpe v Good Samaritan Hosp.***, 213 AD2d 398, 623 NYS2d 330 [2d Dept 1995]). Here, in addition to failing to submit a copy of the proposed amended complaint, plaintiff failed to proffer any excuse for the inordinate delay in seeking leave to add DeLucia, Lane and Ballard as party defendants, and failed to demonstrate a valid cause of action against the proposed additional defendants (*see* ***Kilkenny v Law Off. of Cushner & Garvey, LLP***, 76 AD2d 512, 905 NYS2d 661 [2d Dept 2010]; ***Tesser v Allboro Equip. Co.***, 73 AD3d 1023, 904 NYS2d 701 [2d Dept 2010]; ***Velez v South Nine Realty Corp.***, 57 AD3d 889, 871 NYS2d 614 [2d Dept 2008]; ***Shao v 39 Coll. Point Corp.***, 309 AD2d 850, 766 NYS2d 75 [2d Dept 2003]).

Finally, the application for an order imposing monetary sanctions against DTC, Friedman and Lane is denied. Pursuant to Part 130 of the Uniform Rules for the New York State Trial Courts, a court, in its discretion, may award costs and impose sanctions for frivolous conduct in a civil action or proceeding (22 NYCRR §130-1.1[c]). Sanctions for frivolous conduct may be ordered either upon a motion or upon the court's own initiative, yet the attorney to be sanctioned must be afforded a reasonable opportunity to be heard (22 NYCRR 130-1.1[a], [d]; ***Miller v Cruise Fantasies, Ltd.***, 74 AD3d 919, 903

NYS2d 481 [2d Dept 2010]; ***Kamen v Diaz-Kamen***, 40 AD3d 937, 837 NYS2d 666 [2d Dept 2007]). Conduct is regarded as frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," if "it asserts material factual statements that are false," or if it is undertaken to "delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR §130-1.1[c]). When determining whether conduct is frivolous and, therefore, sanctionable, a court must consider the circumstances under which the conduct took place and whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent (22 NYCRR §130-1.1[c]). Trimarco failed to demonstrate that DTC, Friedman or Lane engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1 (c) (*see* ***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; ***Mascia v Maresco***, 39 AD3d 504, 833 NYS2d 207 [2d Dept 2007]; ***Ofman v Campos***, 12 AD3d 581, 788 NYS2d 115 [2d Dept 2004], *lv dismissed* 4 NY3d 846, 797 NYS2d 422 [2005])

Dated: 29 Sept 2011

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION