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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 14

In the Matter of the Application of
JOHN MARCIANO,

Petitioner-Plaintiff,

INDEX NO.: 001264/2006
MOTION DATE: 05/26/2006
MOTION SEQUENCE: 001, 002 and 003

for a Judgment pursuant to Business Corporation Law § 1104-a, dissolving CHAMPION MOTOR GROUP, INC., d/b/a Bentley of Long Island,

Respondent,

- and -

GARY BRUSTEIN, MICHAEL TODD, 115 SOUTH SERVICE ROAD, LLC, BENTLEY LONG ISLAND, LLC, GOLD COAST LUXURY AUTO, LLC, BTM GROUP, LLC, CHAMPION MOTOR SERVICE, INC., CHAMPION AUTO BROKERS, INC. and CHAMPION LEASING GROUP, INC.,

Additional Respondents-Defendants.

The following papers read on this motion:

Order to Show Cause, Summons, Combined Verified Petition and Complaint & Exhibits Annexed	1
Petitioner's Memorandum of Law in Support of the Petition for Judicial Dissolution	2
Notice of Cross-Motion to Dismiss the Petition/Complaint, Affidavits & Exhibits Annexed	3
Respondents' Brief in Support of their Cross-Motion to Dismiss the Petition/Complaint	4
Notice of Motion for Appointment of Limited Receiver or Financial Monitor and for Additional Interim Relief	5
Reply Affirmation of Edward M. Ross, Affidavits & Exhibits Annexed	6

Order to show cause by the petitioner John Marciano for an order, *inter alia* (1) pursuant to Business Corporation Law § 1104-a, judicially dissolving the respondent Champion Motor Group, Inc., d/b/a Bentley of Long Island, Champion Leasing Group, Inc and Champion Motor Service, Inc. upon the grounds of, *inter alia*, oppressive conduct committed by the individually named respondents; and (2) under Limited Liability Company Law § 702 judicially dissolving additional respondents 115 South Service Road, LLC, Bentley Long Island, LLC, BTM Group, LLC, and Gold Coast Luxury Auto, LLC upon the grounds that it is not reasonably practical to continue the business of the aforementioned entities.

Cross motion by the defendants pursuant to CPLR 404[a] and 3211 for an order dismissing the combined verified petition and complaint.

Order to show cause by the petitioner John Marciano for an order, *inter alia*, (1) directing the defendants to reinstate Marciano in the co-management of the Champion Motor Group, Inc; (2) appointing a limited receiver and/or "financial monitor" to oversee the management and operation of the businesses; (3) directing defendant Brustein and Todd to post an undertaking pursuant to BCL § 1118 and permitting Marciano full and unfettered access to all of the corporation's books and records pursuant to BCL § 624; (4) precluding Brustein and Todd from taking, among other things, any "salary, perks or distributions" pending resolution of the instant dissolution proceeding; (5) enjoining respondents from utilizing Marciano's personal credit, including, *inter alia*, a million dollar line of credit secured by Marciano's own personal assets; (6) directing the defendants to account for all customer deposits; (7) restraining the defendants from using corporate funds for payment of legal fees in this proceeding; (8) enjoining the

defendants from engaging in any business or transaction on behalf of the corporation except in the ordinary course of business pursuant to BCL § 1115; and (9) directing that all corporate funds be deposited in the Corporation's regular bank account.

In this hybrid action and proceeding for, *inter alia*, dissolution of the respondent Champion Motor Group, Inc., d/b/a Bentley of Long Island ["Champion"], the plaintiff John Marciano ["Marciano or the "plaintiff"] alleges in sum, that the individual defendants Gary Brustein and Michael Todd – both principals in Champion – have engaged in oppressive conduct toward him within the meaning of Business Law § 1104-a[a][1](*see also*, Limited Liability Company Law § 702).

Prior to 2001, the defendants Brustein and Todd, operated a high-end, automobile dealership engaged in the sale and service of luxury automobiles through Champion – which is currently a qualified, subchapter S subsidiary of codefendant Champion Leasing Group., Inc ["CLG"] (Pet., ¶ 5; Brustein Aff., ¶ 11; Abraham, Aff.,¶¶ 3-4).

According to the plaintiff Marciano, at some point in 2001, Brustein and Todd invited him to join Champion, allegedly as a co-manager and co-owner in the company (Pet.,¶¶ 33-36). In contrast, the defendants assert that they originally became acquainted with Marciano as a Champion customer, and that it was he who approached them first about becoming involved in the business (Brustein Aff.,¶¶ 12-13).

In any event, and according to Marciano, prior to his involvement in Champion, the defendants' automobile business was a "'sinking ship," since – among other things – the business allegedly lacked a viable franchise and was "plagued by declining sales * * * and high risk lease endeavors," resulting in spiraling debt and excessive liability (Pet., ¶¶ 31-32).

The plaintiff contends that the purpose of his proposed involvement in Champion was "to combine * * * [the defendants'] prior experience in the automobile leasing industry with * * * [his] superior business contacts, access to capital and business acumen, * * *" (Pet., ¶ 34).

Marciano claims that negotiations among the parties ensued, and that it was ultimately agreed that he would become a 40% beneficial owner in Champion (later reduced to 38%). In fact, he contends that the parties' respective ownership interests in Champion are currently as follows: Brustein: 38%; Marciano: 38%; and Todd: 24% (Pet., ¶¶ 36, 46-47).

It is undisputed, however, that Champion's governing, corporate documents were never modified so as to formally identify him as a shareholder, director, officer – or a principal of any sort in that entity. However, and at the same time he became involved in Champion, Marciano did became a record shareholder in several of the above-named, related corporate entities and LLCs (Pet., ¶¶ 25, 46[d]).

The plaintiff claims that when he joined Champion, the parties were intent upon formulating a new business strategy, the cornerstone of which would be the acquisition of new, "highly lucrative" Bentley Motors franchise which had become available and which was later successfully obtained – allegedly with Marciano's assistance (Pet.,¶¶ 35-38, 40-41).

Marciano further asserts that as a Champion principal, he contributed his skill and expertise to the enterprise by, among other things, advancing capital, operating funds, and credit to the business, including a $1 million letter of credit secured by a pledge of his "personal assets". He was also allegedly instrumental in locating Champion's new and current dealership premises in Jericho, New York and performed a variety of day-to-day business activities (Pet., ¶¶ 41-45).

Although the plaintiff is not identified in Champion's controlling documents as a record shareholder, officer or director, he claims that Champion's actual dealings with third parties – and with each other – confirm and evidence his true and beneficial ownership interest in Champion (Pet., ¶¶ 36, 46).

In particular, the plaintiff advises, among other things that: (1) he is listed as a "30%" owner and as "secretary/treasurer" in a "Statement of Ownership and Management" executed by the parties and submitted to Bentley in 2002 (Pltff's Exh., "D"); (2) corporate distributions were made as recently as August and December of 2005 in conformity with the above-referenced ownership percentages; and (3) the respective shares and membership interests in the various related or intertwined entities are held in similar percentages (Pet., ¶ 46).

According to the defendants Brustein and Todd, however, the absence of any reference to Marciano's shareholder status was by express design and at Marciano's affirmative request (Brustein Aff., ¶¶ 18-19).

Specifically, the defendants contend that the new shareholders agreement was never

executed since Marciano himself allegedly "insisted that he did *not* want to be reflected in any shareholders agreement; * * * did *not* want to be issued stock; and did *not* want anything in writing to reflect his ownership" in Champion or CLG (Brustein Aff., ¶ 18 [emphases in original] *see also,* Abrahams Aff., ¶¶ 3-4).

More particularly, and with respect to Marciano's ownership interest, Champion's accountant, Kenneth Abrahams, contends that prior to Marciano's involvement with Champion, he met with Marciano's accountants at length and allegedly: (1) apprised them of his practice of filing consolidated tax returns for CLG and Champion; and (2) also provided documents requested by Marciano's accountants as part of their due diligence inquiry into the Champion entities (Abraham Aff., ¶ 5).

Later, and after Marciano joined the company, Abrahams inquired about securing documentation reflecting Marciano's ownership interest therein, but was supposedly informed by Marciano that "there would be no documentation" showing that interest (Abrahams Aff., ¶¶ 3-5).

Abrahams claims to have responded that if there was no documentation reflecting Marciano's ownership interest in Champion, he would be unable to properly file the consolidated tax returns for CLG or Champion (Abrahams Aff., ¶¶ 3-4; Abrahams Reply Aff., ¶¶ 2-3). Abrahams further advised that in order to file those consolidated returns, CLG and Champion would have to list the same shareholders – with the same ownership percentages (Abrahams Reply Aff., ¶ 2).

Eventually, Marciano allegedly advised Abrahams that he would agree to the record ownership of only one share of stock in CLG (representing a 0.99% share).

In May of 2002, and in apparent conformity with this arrangement, Abrahams received a written agreement executed by Marciano which acknowledged and memorialized his receipt of the single, CLG share after which the tax returns were filed (Defs' Exh., "S"; Abrahams,¶¶ 5-6). There is, however, no reference in the May, 2002 document to Marciano's shareholders status in Champion.

Abrahams notes that when Champion later made distributions to its shareholders, the distributions to Todd and Brustein were shown as shareholder distributions on their K-1's, but "[i]n contrast the distributions to Marciano * * * have not been reflected in his K-1, but instead

have been reported in a 1099" tax form." (Abrahams Aff., ¶ 7; Exhs., "U", "V").

The plaintiff concedes that he subsequently received K-1 tax returns, which allegedly reflected his less than one percent interest in CLG and Champion – although Marciano claims that he never agreed to anything specific with respect to Champion and never inspected the corporate, K-1 returns which reflected this minimal ownership interest (Defs' Exh., "S"; Marciano [May 1] Reply Aff., ¶ 26; Abrahams Aff., ¶ 6, fn 2-3).

Significantly, no formal shares or share certificates were ever issued by Champion (Marciano [May 1] Reply Aff., ¶ 1).

In July of 2004, Marciano was indicted by a federal Grand Jury,
which issued a 64-count criminal indictment in the United States District Court for the Eastern District of New York (Defs' Exh., "A").

The currently pending indictment, which was later publicized in *Newsday,* the *Washington Post* and on the internet – charges Marciano and others with, *inter alia*, conspiracy, money laundering, and securities fraud arising out of certain unrelated stock transactions.

The indictment also seeks the forfeiture of sums exceeding some $16 million (Indictment, ¶ 35[a]). In March of 2006, various counts were dismissed upon consent as barred by the statute of limitations, so that there are now some 14 criminal counts currently pending (Marciano [May 1] Reply Aff., ¶ 30 fn 4; Exh., "C").

According to the defendants, Marciano was aware of the government investigation as early as 2001, and deliberately attempted to hide or minimize his alleged shareholder-ownership interest in Champion from "the Internal Revenue Service, the Federal Prosecutor, or other creditors" (Brustein Aff., ¶ 66).

Although the plaintiff concedes that he was contacted and interviewed by the authorities in 2001, he vigorously asserts that he was not aware the he was under serious investigation at the time (Marciano [May 1] Reply ¶ 29).

Moreover, while he did attempt to limit his record ownership interest in CLG – as opposed to Champion – he contends that his decision to do so was predicated solely upon prudent and entirely reasonable economic considerations. Specifically, he claims that he "was extremely reluctant and unwilling to assume any incidents of ownership or liabilit[y]" in CLG

because CLG had allegedly experienced serious financial difficulties in the past (Marciano Reply Aff., ¶¶ 19, 26; Ross Reply Aff., ¶ 21).

Notably, the Bentley Dealer Agreement contains several provisions authorizing termination of the franchise agreement in the event of dealer misconduct.

In particular, Article 14 of the "Bentley Retailer Agreement" (Defs' Reply Exh.,"Y"), entitled "immediate termination," provides, in part, that the franchise could be terminated upon "[c]onviction of Retailer or any of Retailer's Owners or Retailer's Executives" of any felony or misdemeanor involving fraud, deceit or unfair business practices if, in Bentley's opinion, the conviction may "adversely affect the conduct of Retailer's business" or Bentley's goodwill or reputation (Agreement, Article 14, ¶ [1][h], at 17-18).

Further, termination upon 60 day's notice is authorized where Bentley discovers facts which tend to "impair" the franchisee's "reputation or financial standing" (Agreement, Article 14,¶ [2][b], at 18).

The defendants have set forth a litany of negative business impacts allegedly flowing from the publication of the indictment – including negative feedback from Bentley Motors – (Brustein Aff., ¶¶ 29-46), although it appears that Champion is currently a viable business concern which is, to date, earning profits and experiencing increased sales (Brustein Aff., ¶ 67; Mucciolo Aff., ¶¶ 2-4).

After the indictment was publicized, the parties engaged in discussions focusing on, among other things, the impact of the indictment and the plaintiff's role in the Champion entities in light of the pending charges. Reflecting these discussions, is a July 2005, letter to the defendants authored by the plaintiff in which he described the indictment as "scandalous" and observed that "there is no doubt explanations are necessary * * *"(Defs' Exh., "G," ¶ 16).

Although the letter goes on to suggest, *inter alia*, that any negative impact is overstated and that the business was as viable as ever, the plaintiff nevertheless agreed that if the defendants felt that he was not "deserving of any consideration that would let us jointly grow our business * * * I will accept such decision" (Defs' Exh., "G" ,¶ 19)

In the fall of 2005, Marciano and the defendants were engaged in negotiations concerning a final appraisal of Marciano's interest in Champion and its related entities – although these

discussions became acrimonious and ultimately unproductive (Guardino Reply Aff., ¶¶ 2-4; Marcus Aff., ¶¶ 17-18).

During this time period, the plaintiff contends that he sought permission, as a shareholder, to inspect relevant corporate books and records (*see,* BCL § 624), but that in general access was provided in a "piecemeal, tardy and incomplete fashion, * * *"(Guardino Reply Aff., ¶ 4 *see,* Guardino Letter of Oct, 31, 2005 [Defs' Exh., "N"]).

According to the defendants, however: (1) they have, to date, cooperated and produced all relevant materials; (2) the plaintiff's additional document demands are excessive; and (3) the plaintiff's accountants were improperly attempting to "audit" not appraise, the Champion entities (Brustein Aff., ¶ 47).

In December of 2005 – and allegedly since negotiations with Marciano had stalled and negative fall-out from the indictment was mounting – the defendants elected to bar Marciano from Champion's business premises and preclude him from participating in its day-to-day operations.

In support of their decision, the defendants assert that "[i]n light of the damage allegedly resulting from the indictment we had "no choice but to remove * * * [Marciano] from the day-to-day operations of the business" since "no reasonable businessman would expect to continue dealing with lenders or the public on behalf of a Bentley franchise while awaiting trial on a major felony fraud indictment" (Brustein Aff., ¶¶ 47, 62-63).

In January of 2006, the plaintiff commenced the within combined action and proceeding seeking, *inter alia*, dissolution of Champion and the LLC's (with the exception of BTM Group, LLC) pursuant to BCL § 1104-a and LLC § 702 (Pet., ¶¶ 56-62 [1st and 2nd causes of action]).

The complaint-petition also contains claims for monetary damages, breach of fiduciary duty, an accounting and stated declaratory relief to the effect that, among other things, Marciano is the beneficial owner of a 38% interest in Champion (Pet., ¶ 65[a]).

Notably, the parties' submissions indicate that codefendants Gold Coast Luxury Auto, LLC and Bentley Long Island, LLC, are inactive entities "formed for purposes that never came to fruition" and currently have neither assets nor liabilities (Brustein Aff., ¶ 11, fn 2, 3; Pet., ¶¶ 17-18).

With the exception of BTM Group, LLC, CLG, and 115 South Service Road, LLC, the additionally named respondent entities are also apparently inactive (Defs' Brief at 5, fn 1; Pet., ¶¶ 17-18; 26-27). The plaintiff advises that these inactive corporations and LLC's were named solely as "nominal parties" for the purpose of making them amenable to the subsequent orders of the Court (Pet., ¶ 29).

The plaintiff's petition for dissolution of defendant Champion and the related LLCs is now before the Court, together with the separately noticed motion for various elements of interim relief ancillary to the plaintiff's dissolution claims.

The defendants have cross moved for an order dismissing the proceeding pursuant to CPLR 3211, arguing that Marciano does not hold the requisite, twenty percent shareholder interest in Champion and thereby lacks standing to maintain a dissolution action under BCL § 1104-a (Resps' Brief at 10-12). The defendants argue that Marciano has "unclean hands" since he allegedly hid his interest in Champion and also received – without objection – K-1 tax returns denoting and confirming his minimal shareholder interest in that entity.

Alternatively, the defendants assert that, as a matter of law, there was no oppression since their conduct in barring the plaintiff from the business was reasonable in light of the pending criminal indictment. The parties' respective applications are determined as follows.

As to the unclean hands defense, the "doctrine rests on the premise that one cannot prevail in an action to enforce an agreement where the basis of the action is 'immoral and one to which equity will not lend its aid'" (*Smith v. Long*, 281 AD2d 897, 898, *quoting from*, *Muscarella v. Muscarella*, 93 AD2d 993 *see also*, *National Distillers & Chemical Corp. v. Seyopp Corp.*, 17 NY2d 12, 15 [1966]; *Weiss v. Mayflower Doughnut Corp.*, 1 NY2d 310, 316 [1956]; *Fade v. Pugliani/Fade*, 8 AD3d 612).

However, "the doctrine is applicable only 'when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct'"(*Welch v. DiBlasi*, 289 AD2d 964, 965, *quoting from*, *Weiss v. Mayflower Doughnut Corp., supra*, at 316 *see also*, *Unger v. Leviton*, 25 AD3d 689; *Rooney v. Slomowitz*, 11 AD3d 864, 868).

One "seeking to invoke the doctrine of unclean hands has the initial burden of showing,

prima facie, that the elements of the doctrine have been satisfied" (*Fade v. Pugliani/Fade*, *supra*, at 615; *see*, *Kaufman v. Kehler*, 5 AD3d 564; *Kopsidas v. Krokos*, 294 AD2d 406) and "[c]onclusory allegations are insufficient to support" the defense (*Clifton Country Road Associates v. Vinciguerra*, 195 AD2d 895, 897). The defendants have not made the requisite showing.

There is merit to the defendants' claims concerning the allegedly improper motives underlying Marciano's conduct, i.e. that they largely are speculative and unsubstantiated. While the plaintiff may have attempted to minimize his formal, record ownership interest in CLG – and allegedly in Champion – there is nothing of a definitive nature in the record establishing that Marciano's conduct was necessarily motivated by an "immoral or unconscionable" intent to hide assets from the government years prior to the issuance of the indictment in 2004 (*cf.*, *Kopsidas v. Krokos*, *supra*, at 407).

Indeed, the defendants themselves have observed that they "do not know the reason for Marciano's [alleged] refusal to receive stock or to sign a shareholder's agreement * * *"(Defs' Reply Brief at 4; Stark Reply Aff., ¶ 10). Yet, plaintiff does not hasten to add one word of explanation.

In short, and whatever the reasons underlying Marciano's conduct may have been, they cannot be assessed with any measure of certainty at this pre-discovery, "3211 motion stage" of the proceedings (*see*, *Held v. Kaufman*, 91 NY2d 425, 434 [1998]).

In any event, the defendants have not established as a matter of law that they sustained the requisite, proximately ensuing injury within the meaning of the "unclean hands" doctrine, *i.e.*, injury which flows directly from the plaintiff's purportedly inequitable and immoral conduct (*Welch v. DiBlasi. supra*; *Kopsidas v. Krokos*, *supra*). To the extent that relevant injury flowed from Marciano' s conduct, the injury, if any, is as likely inflicted upon those from whom the assets were allegedly hidden – not the defendants who apparently raised no objection to the manner in which the plaintiff's ownership interest in Champion and CLG was to be reflected, and willingly paid the taxes on the distribution.

Further, it has been held that "the doctrine of 'unclean hands' is not an automatic bar to relief under Business Corporation Law § 1104-a * * * [since] [o]nly when a minority shareholder

whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complaint of oppression should relief be barred" (*Burack v. I. Burack, Inc.*, 137 AD2d 523, 527 *see also, Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 74; *Gunzberg v. Art-Lloyd Metal Products Corp.*, 112 AD2d 423, 424).

There is no claim here – much less a determinative evidentiary showing – that the plaintiff's action was "undertaken with a view toward forcing an involuntary dissolution"(*Brack v. I. Burack, Inc., supra see also, Matter of O'Neill*, 214 AD2d 736, 738). Lastly, and under the circumstances presented here, the K-1 tax returns filed by the defendants are not conclusive of the plaintiff's shareholder status (*cf., Perfume & Cosmetics Palace, Inc. v. CGU Ins. Co.*, 295 AD2d 215, 216).

Nevertheless, unresolved factual issues exist with respect to precisely what sort of ownership and/or shareholder rights – if any – the parties actually intended the plaintiff to possess upon his involvement in Champion.

While the plaintiff depicts himself as a sophisticated, counseled businessman possessing "superior * * * business acumen," (Pet., ¶ 34), it is undisputed that despite the substantial investment he claims to have made in Champion, he never executed a new shareholders agreement reflecting his alleged 38% owner interest. Nor did he – insofar as the record reveals – later insist that the defendants revise the key corporate documents so as to formally memorialize his valuable, shareholder status in Champion (Ross Reply Aff., ¶ 10).

Further, and assuming that the plaintiff's intent was merely to limit his record ownership interest in CLG (Marciano Reply Aff., ¶ 25), it has not been persuasively explained precisely why the plaintiff would – as he apparently did – acquiesce in the omission of all reference to his formal ownership status in Champion's controlling, corporate documents.

It also bears noting that the plaintiff's monetary distributions were not reported on Champion's K-1 tax returns as shareholder income, thereby arguably buttressing the defendants' claim that the plaintiff may have attempted to minimize his formal shareholder interest in Champion.

In short, despite the additional indica of ownership on which the plaintiff relies, factual questions exist as to whether, by his own election and affirmative conduct, the plaintiff

effectively agreed to forego the rights and benefits which would otherwise inure to him as a formally denominated 38% shareholder in Champion (*In re Ruivo,* 305 AD2d 688, 689; *Singer v. Evergreen Decorators, Inc.*, 205 AD2d 694, 694 *see also, Benincasa v. Garrubbo*, 141 AD2d 636, 638).

As to defendants' second claim, assuming, *arguendo*, that the requisite 20% percent stock ownership can be demonstrated, the Court does not find conclusive the defendants' alternative theory that their conduct in excluding the plaintiff from the business was necessarily reasonable as a matter of law, thereby warranting outright dismissal pursuant to CPLR 3211 at this early juncture of the proceedings.

It is settled that pursuant to BCL § 1104-a, and upon application by "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation," a Court may dissolve a corporation where the "directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders" which, *inter alia*, "substantially defeats" a petitioner's reasonable expectations in joining the venture (Business Corporation Law § 1104-a[a] *see, Matter of Kemp & Beatley, Inc., supra*, 64 NY2d 63, 72-73; *see also, In re Quail Aero Service, Inc.*, 300 AD2d 800, 802-803; *In re Charleston Square, Inc.*, 295 AD2d 425, 426; *In re Dissolution of Upstate Medical Associates P.C.*, 292 AD2d 732, 733; *Burack v. I. Burack, Inc., supra; In re Maybaum*, 6 Misc.3d 1019(A), 800 NYS2d 349 (Slip Opn at 3-4) [Supreme Court, Nassau County, 2005] *see also, Di Mino v. De Veaux Services, Inc.*, 238 AD2d 943, 944; *Matter of HGK Asset Management, Inc. (Greenhouse),* 228 AD2d 246).

The appropriateness of an order of dissolution, "is in every case vested in the sound discretion of the court" *(Matter of Kemp & Beatley, Inc., supra*, 64 NY2d 63, 73) and "[a] corporation should be dissolved only as a last resort" (*In re Maybaum, supra).*

Upon favorably viewing the petition-complaint, together with the opposing affidavits submitted (*AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]; CPLR 3211]), the Court finds that the plaintiff has plead at least a *prima facie* showing of actionable, conduct within the meaning of BCL § 1104-a by alleging, *inter alia*, that the defendants' conduct in excluding him from the business would substantially defeat

"expectations that, objectively viewed, were both reasonable under the circumstances and * * * central to * * * [his] decision to join the venture" (*Matter of Kemp & Beatley, Inc., supra,* at 73; *Di Mino v. De Veaux Services, Inc., supra*; *Matter of HGK Asset Management, Inc. (Greenhouse), supra see also, Giordano v. Stark*, 229 AD2d 493, 494 *cf., North Fork Preserve, Inc. v. Kaplan*,___AD3d ___ [2nd Dept. 2006).

The opposing argument is that their actions terminating him from any involvement in the business were reasonable as a matter of law since they were undertaken for an entirely legitimate business purpose, *i.e.*, to curtail damaging repercussions and concrete economic injury flowing from the plaintiff's December, 2004 criminal indictment (Brustien Aff., ¶¶ 47, 62). However, it appears that many of the purportedly negative impacts relied upon by the defendants are, in part, anecdotal in nature and lack – at his juncture – determinative foundational support in the record. Moreover, the plaintiff's opposing submissions have raised questions as to the accuracy and intensity of the claimed negative impacts identified by the defendants (Marciano [May 24] Reply Aff., ¶¶ 10-11, [May 1] 48-57). These must be weighed against the termination clauses in the Bentley franchise.

On the other hand, the plaintiff himself essentially conceded in his July, 2005 letter, that termination of his involvement in Champion (upon appropriate terms) was a reasonable option in light of, among other things, the pending charges and the negative perceptions and impacts potentially flowing from the indictment *(cf., Matter of O'Neill, supra,* 214 AD2d 736, 738; *In re Maybaum, supra, Gimpel v. Bolstein*, 125 Misc.2d 45, 52-53 [Supreme Court, Queens County 1984]).

Under these circumstances, any conclusion relative to the claimed propriety and reasonableness of the defendants' exclusionary conduct must await further factual development through discovery in the underlying action (*see, Singer v. Evergreen Decorators, Inc., supra,* at 695 *see also, In re Ruivo, supra,* at 689; *In re WTB Properties, Inc.*, 291 AD2d 566, 567).

That branch of the petition which is for dissolution of the defendant Limited Liability Corporations is granted in part and denied in part.

Pursuant to Limited Liability Company Law § 702, "[o]n application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is

located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement"(*see generally, Widewaters Herkimer Co., LLC v. Aiello*, 28 AD3d 1107; *Horning v. Horning Const., LLC,* 12 Misc.3d 402, 407-409 [Supreme Court, Monroe County 2006]; *Spires v. Casterline*, 4 Misc.3d 428, 436 [Supreme Court, Monroe County 2004]; *Schindler v. Niche Media Holdings, LLC*, 1 Misc.3d 713 [Supreme Court, New York County 2003]).

The foregoing standard has been interpreted to "mean that judicial dissolution will be ordered only where the complaining member can show that the business sought to be dissolved is unable to function as intended, or else that it is failing financially" *(Schindler v. Niche Media Holdings, LLC, supra,* at 716 *see also, Horning v. Horning Const., LLC, supra*). "Dissolution under the Limited Liability Company Law is not as easy as dissolution under the Business Corporation Law," *(Horning v. Horning Const., LLC, supra,* at 408), and "[t]he appropriateness of an order of dissolution of a limited liability company is vested in the sound discretion of the court hearing the petition"(*In re Extreme Wireless, LLC.*, 299 AD2d 549, 550 *see, Widewaters Herkimer Co., LLC v. Aiello, supra*).

Here, the record as developed at this juncture, establishes that the currently active LLC's (115 South Service Road, LLC and BTM Group, LLC) are functioning, financially stable entities, with respect to which dissolution is therefore inappropriate.

However, certain LLC's are now inactive, because – as the defendants themselves concede – the purposes for which they were formed "never came to fruition"(Brustein Aff., ¶ 11)(*e.g.*, Gold Coast Luxury Auto, LLC and Bentley Long Island, LLC). Accordingly, it is reasonable to conclude that these entities are "unable to function as intended" and are properly subject to dissolution pursuant to LLC § 702. (*see, Spires v. Casterline, supra*, at 438-438; LLC Law, §§ 703-705).

The plaintiff also moves for extensive pendente lite relief, including, *inter alia*, the appointment of a limited receiver or "financial monitor" to oversee the Champion entities; the granting of full and unfettered access to "all" corporate books, records and documents; and stated injunctive relief pertaining to the manner in which the named business entities should be managed during the pendency of the action. (*see*, BCL §§ 624, 1113, 1115, 1118). He asserts

that his 2.2 million dollar investment must be protected.

The plaintiff's motion for stated interim relief is granted in part and denied in part.

With respect to the appointment of a receiver, the general rule is that "the provisional remedy of receivership may be invoked only in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting that party's interests" *(Kistensen v. Charleston Square, Inc.*, 273 AD2d 312 *see generally, North Fork Preserve, Inc. v. Kaplan, supra*, ___AD3d ___ [2nd Dept. 2006]; *Lee v. 183 Port Richmond Ave. Realty, Inc.*, 303 AD2d 379, 380 *see*, BCL § 1202[a]). Additionally, "courts of equity exercise extreme caution in appointing receivers Pendente lite" in dissolution proceedings. (*Hahn v. Garay*, 54 AD2d 629 *see also, In re Application of Chiovitti,* 280 AD2d 412; *B.D. and F. Realty Corp. v. Lerner*, 232 AD2d 346).

The Court in its discretion finds that the plaintiff has failed to demonstrate that the "appointment of a receiver is necessary to preserve the assets of the corporation, operate the business, or protect the interests of the parties" *(Matter of Steinberg*, 249 AD2d 551, 553; *Ronan v. Valley Stream Realty Co.*, 249 AD2d 288, 290 *see also, Hoffman v. Eagle Box Company, Inc.*, 305 AD2d 544, 545; *Schachner v. Sikowitz*, 94 AD2d 709; BCL §§ 1113, 1202[a]). The Court's prior holding that Marciano has yet to even establish his claimed 38% shareholder status is a relevant factor, and the Court agrees that there is nothing of a probative nature in the record suggesting that the assets of Champion are at risk or that the current state of its business requires the appointment of an outside monitor to ensure that it is effectively and properly operated without prejudice to plaintiff.

There is no material dispute that the business is a viable going concern, which is currently profitable. The plaintiff's claims relative to the alleged misuse of customer trust funds and/or excessive salary and other expenditures by defendants are unsubstantiated by adequate foundational evidence, and materially disputed by the defendants' expert's submissions. It bears noting that the allegedly objectionable trust fund/excessive expense practices identified by the plaintiff were apparently in existence prior to the plaintiff's departure and never drew any significant objection from him insofar as the record indicates (Marciano Reply [May 24] Aff., ¶ 20).

For similar reasons, the Court also declines to exercise its discretion to require the defendants to post a $2 million undertaking (BCL 1118[c][2]) or by granting the plaintiff's broadly framed demand for relief precluding the defendants from " taking salary, perks * * * or distributions pending the outcome of this dissolution proceeding * * *".

Moreover, while BCL § 1115 permits the Court in its discretion to, *inter alia*, restrain the defendants from "unauthorized business [transactions] and from exercising any corporate powers, except by permission of the court," the plaintiff's submissions have not established that there is currently a need to preclude the defendants from engaging in any activities outside the ordinary course of business (Pltff's Reply Brief at 22).

That branch of the plaintiff's motion which is for an order enjoining the defendants from using the Champion's funds to pay for their legal fees is granted to the extent interposed against the individual defendants Brustein and Todd (*see,* BCL § 1115) (Pltff's Notice of Motion, ¶ [I]; Reply [May 25] Brief at 13).

Within the context of a BCL dissolution proceeding, courts have generally precluded individual shareholders "from using corporate funds to pay counsel fees incurred in defending this dissolution proceeding" (*Park Inn Ford, Inc. v. Willis*, 249 AD2d 307; *Petition of Levitt*, 109 AD2d 502, 511; *Matter of Rappaport*, 110 AD2d 639, 641["This court has previously held that there is no authority for the allowing of counsel fees incurred in defending a dissolution proceeding of this type to be paid out of corporate funds"] *accord, Matter of Dissolution of Penepent Corp., Inc.*, 198 AD2d 782, 783; *Reinschreiber v. Lipp*, 70 AD2d 596).

The rationale underlying the rule is that a corporation generally appears as a nominal party in a dissolution proceeding since the real dispute is actually between the shareholders (*Petition of Levitt, supra*, at 511). Accordingly, and for this reason, corporate funds may not be used to discharge counsel fees obligations incurred by the individual shareholders in defending against a dissolution proceeding *(Park Inn Ford, Inc. v. Willis, supra; Matter of Dissolution of Penepent Corp., Inc., supra; Petition of Levitt, supra).*

The Court notes that the defendants have not specifically addressed this branch of the plaintiff's motion.

The plaintiff also demands interim relief enjoining the defendants from using or utilizing

Marciano's "personal credit" including the "million dollar letter of credit secured by Marciano's own personal assets" (Notice of Mot., ¶ [g]; Pet., ¶ 43)(Pltff's Reply [May 25] Brief at 12).

The defendants' opposition to this branch of the motion is limited to a brief, two-sentence assertion which notes that the letter of credit – which is apparently not in the record – is irrevocable and cannot be modified inasmuch as the issuer, North Fork Bank, has not been made a party to the action (Stark Reply Aff., ¶ 23[d]). No case law has been cited by either party in connection with the foregoing issue.

Plaintiff speaks repeatedly of his 2.2 million dollar investment. Little understanding of it can be gleaned from the rather extensive record. If, in fact, the letter of credit is collaterialized and/or secured in some respect by the plaintiff's "personal assets," it is troubling to permit the defendants to rely upon those assets indefinitely while they have, at the very same time, excluded him from involvement in the business. However, neither the plaintiff nor the defendants have provided adequate explanatory discussion illuminating, to any relevant degree, the specific terms and conditions of the letter of credit or the manner in which – if at all – it can be cancelled, revoked or terminated to achieve the result sought by the plaintiff.

Accordingly, upon the record presented, the Court denies the foregoing branch of the application without prejudice to renew. Absent is any discussion of the relevant terms of the letter of credit; the manner in which it is allegedly secured by the plaintiff's "personal credit;" and the precise way in which it can be revoked, cancelled or replaced to achieve the relief sought by the plaintiff, *i.e.*, relief which effectively precludes the defendants from utilizing the plaintiff's "personal credit."

That branch of the motion which is for interim relief requiring that the defendants deposit "all corporation funds in the Corporation's [presumably Champion's] regular bank account[s]," is granted, as unopposed.

Lastly, the plaintiff broadly seeks additional relief compelling the defendants "to grant to Marciano and his professionals full and unfettered access to *all* of Champion's and the LLC's books, records and documents" (Notice of Motion, ¶ [d])[emphasis supplied].

The plaintiff's notice of motion does not expressly identify the statutory or legal authority underlying his demands for document access, although his supporting papers make reference to

BCL § 624[b] – which primarily authorizes access to certain shareholder records (Pltff's [May 25] Reply Brief at 11).

According to the plaintiff, only piece meal, grudging and incomplete document access has been afforded – although the defendants just as vigorously assert that they have fully cooperated to the extent reasonable and that the plaintiff's current requests are excessive (Liebman Aff.,¶¶ 10-20). The plaintiff's application should be granted to the extent indicated below.

There is no dispute that a shareholder has both a statutory and common law right to examine corporate documents, including, among other things, certain shareholder records, corporate books of account, annual balance sheets, and profit and loss statements (BCL § 624[b], [c], [f]; *Dyer v. Indium Corp. of America*, 2 AD3d 1195; *Wisniewski v. Polish and Slavic Center, Inc.*, 309 AD2d 869; *Troccoli v. L & B Contract Industries, Inc.*, 259 AD2d 754).

However, the access available is generally limited to relevant and/or statutorily enumerated documents, and then only "so long as the inspection is sought in good faith and for a proper purpose" (*Dyer v. Indium Corp. of America, supra*; *Tatko v. Tatko Bros. Slate Co., Inc.*, 173 AD2d 917, 918 *see, Crane Co. v. Anaconda Co.*, 39 NY2d 14, 18-19 [1976]; *Ochs v. Washington Heights Federal Sav. and Loan Ass'n*, 17 NY2d 82, 89 [1966]; *Niggli v. Richlin, Machinery, Inc.*, 257 AD2d 623). Notably, among those "proper purposes," is document access relevant to the valuation of a corporation's shares (*Berkowitz v. Astro Moving and Storage, Co., Inc.*, 240 AD2d 450 *see*, *Dyer v. Indium Corp. of America, supra*).

Here, upon the thicket of inconclusive and conflicting allegations advanced by the parties, the Court cannot definitively resolve the extent to which – if at all – the plaintiff is entitled to further access to additional corporate documents and materials (*cf.*, *Singer v. Evergreen Decorators, Inc.*, *supra*, 205 AD2d at 695). The Court notes, however, that neither BCL § 624, nor applicable common law principles, authorizes unlimited access to "all" documents in a corporation's possession – as literally requested by the plaintiff's broadly framed motion demand *(cf., Cvar v. Arthur Young & Co.*, 184 AD2d 314; *Hudson Valley Tree, Inc. v. Barcana, Inc.*, 114 AD2d 400, 401).

Under these circumstances, the matter shall be set down for a conference before the

undersigned on September 20, 2006, at 10:30 A.M., during which the Court shall consider (1) the extent of any further document access permissible and appropriate under the common law and/or BCL § 624; and (2) the scheduling of further discovery pursuant to CPLR article 31 in the underlying action.

With respect to the former issue dealing with document access under BCL § 624, the plaintiff shall be prepared at the conference to, *inter alia*, identify: (1) the additional documentary materials sought; (2) the reasons why the documents have been sought; and (3) the statutory and/or common law authority establishing his entitlement to inspect the materials which have been identified.

The Court has considered the additional claims advanced by the parties and concludes the none warrants the granting of relief in excess of that awarded above.

The foregoing constitutes the decision and order of the Court.

Dated: September 5, 2006

J.S.C.