

**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

Plaintiff-Petitioner’s Memorandum of Law: (1) in Reply and Further Support of the Petition for Judicial Dissolution; (2) in Support of Application for Appointment of a Limited Receiver or Financial Monitor, and for Additional Interim Relief; and (3) in Opposition to Cross-Motion to Dismiss.....	7
Respondents’ Reply Memorandum in Support of their Motion to Dismiss and in Opposition to Petitioner’s Motion for Pendente Lite Relief.....	8
Reply Affidavit of Kenneth Abrahams, Affidavits, Affirmation of Jeffrey G. Stark & Exhibits Annexed.....	9
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Plaintiff-Petitioner’s Reply Memorandum of Law in Further Support of Motion for Appointment of a Limited Receiver and Interim Relief.....	11

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 become 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 [1<sup>st</sup> and 2<sup>nd</sup> 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).

