

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**

**Justice.**

**TRIAL/IAS PART 12**

In the Matter of the Application of JOHN MARCIANO,

Petitioner-Plaintiff,

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

INDEX NO.: 001264/2006  
MOTION DATE: 08/07/2007  
MOTION SEQUENCE: 007 & 008

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:

Notice of Motion, Affirmation & Exhibits Annexed.....	1
Defendants' Statement of Material Facts As To Which There Is No Issue To Be Tried.....	2
Notice of Cross Motion, Affirmation, Affidavits & Exhibits Annexed.....	3
Petitioner's Statement Pursuant to Rule 19-a of the Commercial Division Rules.....	4
Exhibits to Affirmation in Support of Plaintiff's Cross Motion for Partial Summary Judgment, Volume I of II.....	5
Exhibits to Affirmation in Support of Plaintiff's Cross Motion for Partial Summary Judgment, Volume II of II.....	6
Respondents' Response to Petitioner's Rule 19-a Statement of Uncontested Facts.....	7
Affidavit of Gary Brustein dated 7/25/07.....	8

Reply Affirmation in Support of Respondents’ Motion to Dismiss the Petition Seeking Dissolution of Champion Motor Group, Inc. and in Opposition to Petitioner’s Cross Motion to Dismiss the Second and Fourth Affirmative Defenses (Estoppel and Unclean Hands) & Exhibit Annexed..... 9

Reply Affirmation in Further Support of Plaintiff’s Cross Motion for Partial Summary Judgment & Exhibits Annexed..... 10

Attorney Affirmation of Jeffrey G. Stark dated 8/7/07 & Copy of the Deposition of John Marciano taken on 7/25/07..... 11

Motion pursuant to CPLR 3212 and 3126 by the defendants-respondents for: (1) summary judgment dismissing the petition/complaint insofar as interposed against Champion Motor Group, Inc., d/b/a Bentley of Long Island; and (2) an order striking the plaintiff’s complaint pursuant to CPLR 3126[3], or alternatively, for an order compelling the plaintiff to produce stated documentary materials.

Cross motion pursuant to CPLR 3212 by the plaintiff-petitioner John Marciano for partial summary judgment dismissing the defendants-respondents’ second and fourth affirmative defenses sounding in estoppel and unclean hands.

As set forth in this Court’s September 5, 2006 and June 15, 2007 orders, this is a contentiously litigated, “hybrid” action and proceeding commenced by the plaintiff John Marciano [“Marciano” or the “plaintiff”] for, *inter alia*, dissolution of various corporate entities, including the respondent Champion Motor Group, Inc., d/b/a Bentley of Long Island [“CMG”].

Among other things, Marciano alleges that the individual defendants Gary Brustein and Michael Todd, both principals in the Champion entities, have engaged in oppressive and exclusionary conduct toward him within the meaning of Business Corporation Law § 1104-a, thereby entitling him to an order of dissolution.

The plaintiff’s combined petition and complaint further demands, *inter alia*, an accounting, as an individually asserted claim and derivatively on behalf of the Champion entities, and also alleges that the individual defendants breached their fiduciary duty to him (Cmplt., ¶¶ 66-71).

As documented by this Court’s prior orders, Marciano asserts in sum, that he holds what

he has repeatedly described as 38% “beneficial” interest in CMG – although, as this Court initially noted in its September 5, 2006 order, CMG’s “governing, corporate documents do not identify \* \* \* [the plaintiff] as a shareholder, director, officer – or a principal of any sort \* \* \*.”

More particularly, Marciano contends that prior to entering into the dealership agreement, the parties agreed, among other things, that he would receive a 38% beneficial interest in the newly acquired Bentley dealership – the so-called “handshake” agreement. Marciano claims it - his interest - is substantiated by a variety of documents establishing that the defendants and the Champion entities repeatedly recognized his status as owner and held him out as such, to various third parties including the Bank from which they sought financing and Bentley itself (Calica Aff., ¶ 3).

The defendants in response, have taken the position that the plaintiff lacks standing to maintain a dissolution action under BCL § 1104-a since, as to CMG, he does not own the requisite, twenty percent shareholder interest therein. Notably, CMG is a wholly owned, subchapter “S” subsidiary corporation of codefendant Champion Leasing Group [“GLC”].

It is undisputed that Marciano holds no stock in CMG, which actually owns and operates the dealership, and only a nominal 1% interest in GLC.

In support of their claim that Marciano is not a shareholder, beneficial or otherwise in CMG, the defendants assert that at all relevant times, and in accord with the parties’ express design, CLG (which is also a qualified, subchapter “S” corporation) has always owned 100% of CMG, Marciano therefore owns no stock at all in CMG (Stark Aff., ¶¶ 1, 7-14; Rosenblatt Aff., ¶¶ 2-3).

Not surprisingly, that the precise import and meaning of the GLC-CMG parent-subsidary relationship, and the parties’ ownership interests therein, are hotly disputed by the parties – although both sides agree the arrangement was motivated in part by potential tax considerations, including the alleged need to shelter or offset CMG’s profitable income from taxation by exploiting GCL’s previously incurred losses (Stark Aff., ¶¶ 9-11; Rosenblatt Aff., ¶¶ 5-6).

According to Marciano, however, the parent-subsidary structure, together with his

nominal, 1% interest in GLC and/or CMG, did not occur in isolation. Rather, the organizational structure was created by the defendants and their accountants for their own benefit, and constituted only one component of the overall arrangement by which Marciano became involved with the Champion entities (Calica Reply Aff., ¶¶ 3, 14).

More particularly, Marciano claims that GLC-CMG entities were so fashioned as an accommodation. Both Todd and Brustein had incurred substantial “carry forward losses, phantom income and other liabilities associated” with “their own prior leasing business” for which: (1) they effectively agreed to remain liable through the organizational structure proposed; and (2) for which they would have otherwise been required to reimburse Marciano (Marciano Aff., ¶¶ 7, 10; Calica Reply Aff., ¶ 3 *see*, Stark Aff., ¶ 13).

Nor was this alleged accommodation to the defendants in any sense intended to alter the underlying ownership agreement reached by the parties with respect to Marciano’s beneficial interest in the dealership entity (Marciano Aff., ¶ 8).

A related issue which has embroiled the parties in controversy from the outset, is the precise import and significance to be attributed to an unrelated federal criminal prosecution instituted against Marciano for securities fraud, which has been ongoing since 2004, and during pendency of this action.

Specifically, and as detailed in this Court’s earlier decisions, in July of 2004, Marciano was indicted by a federal Grand Jury, which issued a multi-count criminal indictment in the United States District Court for the Eastern District of New York (Defs’ Exh., “A”).

The indictment charged Marciano and others with conspiracy, money laundering, and securities fraud arising out of certain unrelated stock transactions and demanded the forfeiture of sums exceeding some \$16 million.

In December of 2005, and based in part upon the then-pending indictment, the defendants elected to bar Marciano from Champion’s business premises and preclude him from participating in its day-to-day operations.

According to the defendants, in light of the allegedly damaging fall-out from the indictment, they supposedly “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; Sept. 5 Order of Warshawsky, J., at 8).

Marciano has since pleaded guilty to Count I of a superseding federal indictment and admitted during his plea colloquy that, *inter alia*, he "agreed with others to launder the proceeds of a securities fraud" (P. 12-13).

Prior to the entry of Marciano's plea, however, this Court had declined to accord determinative import to the charges as a complete justification for the defendants' exclusionary conduct, at least within the context of the defendants' pre-discovery, motion to dismiss pursuant to CPLR 3211.

More particularly, in its September 5 order this Court observed, among other things, that "the defendants do not dispute that they terminated the plaintiff's involvement in the business, but rather, assert that their actions were reasonable as a matter of law since they were undertaken for an entirely legitimate business purpose, *i.e.*, to curtail allegedly damaging repercussions and concrete economic injury flowing from the plaintiff's December, 2004 criminal indictment" (Brustein Aff., ¶¶ 47, 62).

The Court determined, however, that based upon the evidence then submitted, "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" since, *inter alia*, "the purportedly negative impacts relied upon by the defendants were "in part anecdotal in nature" and questions existed "as to the accuracy and intensity of the claimed negative impacts identified by the defendants" (Order at 13).

The Court also reviewed the defendants' claims relative to the plaintiff's standing and his nominal interests in CLG/CMG, and similarly concluded that "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" (Sept. 5, Order at 11).

Discovery has progressed, and the defendants now move for: (1) summary judgment

dismissing the cause of action for dissolution with respect to CMG; and for (2) further relief pursuant to CPLR 3126 striking the plaintiff's complaint, or alternatively, compelling Marciano to produce stated documents and materials.

The defendants argue that dismissal is warranted upon the ground that, as a matter of law, Marciano is neither a legal nor beneficial owner of shares in CMG, and therefore lacks standing to maintain a dissolution proceeding pursuant to BCL § 1104-a (Stark Aff., ¶¶ 2-6; 7-24).

The defendants further assert that the plea agreement and/or Marciano's admission of criminal conduct, now fully support their decision to exclude him from Champion's business activities – thereby removing this factual theory as one upon which Marciano can rely in support of his dissolution cause of action.

Marciano opposes the defendants' application and cross moves for partial summary judgment dismissing the second and fourth affirmative defenses, sounding in unclean hands and estoppel.

Viewing the evidence “in the light most favorable to \* \* \* [the plaintiff], as is appropriate in the context of \* \* \* [a] motion for summary judgment” (*Fundamental Portfolio Advisors, Inc. v. Tocqueville*, 7 NY3d 96, 106 [2006]; *Mosheyev v. Pilevsky*, 283 AD2d 469), the Court concludes that the defendants' motion for summary judgment should be denied. The plaintiff's cross motion, however, is granted.

With respect to the plaintiff's standing and alleged shareholder status, it has been held that “the mere fact that \* \* \* [a party] was never formally issued stock certificates or that \* \* \* [he or she] did not physically possess stock certificates or a shareholder agreement” does “not preclude [a] finding that he had the rights of a shareholder” (*Blank v. Blank*, 256 AD2d 688, 693; *Dissolution of C & M Plastics Inc.*, 194 AD2d 1020, 1021 accord, *French v. French*, 288 AD2d 256; *Benincasa v. Garrubbo*, 141 AD2d 636, 638 see also, *Purnell v. LH Radiologist, P.C.*, 228 AD2d 360, 362, *affd*, 90 NY2d 524 [1997]; *Matter of M. Kraus, Inc.*, 229 AD2d 347, 348; *Hunt v. Hunt*, 222 AD2d 759, 760 *Serdaroglu v. Serdaroglu*, 209 AD2d 600 see generally, 11 Fletcher Cyclopedia Law of Private Corporations, § 5094).

Here, while the defendants assert – as they have previously claimed – that Marciano

owns no stock in CMG and possesses at best, a minimal interest in CLG, the additional documentary evidence submitted does not warrant a departure from this Court's prior holding. With respect to Marciano's claimed ownership interest in CMG, this Court's prior conclusion to the effect that "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" and CMG (Sept. 5, Order at 11).

Specifically, there is documentary evidence in the record, including the defendants' own deposition testimony, which supports Marciano's assertion that the parties intended him to be, and indeed treated him as if he were, a shareholding owner of CMG.

Among other things, Marciano's opposing, documentary submissions indicate that both Brustein and Todd admitted in their respective depositions that an oral or "handshake" agreement was reached with respect to Marciano's claimed interest in CMG; that distributions were later made in conformity with that oral agreement and the 38% share referred to by Marciano (*see*, A. Pet. ¶ 46[b]); that Marciano filed Federal 1099 forms and thus paid taxes on the foregoing distributions (Brustein Dep., 130-132; 139-140; 146-147; Todd Dep., 41, 44-45; 210-211 [July 17 Dep]; Calica Aff., ¶¶ 2-3; Seltzer Aff., ¶¶ 12-13); that Marciano made substantial monetary contributions and advances to the Champion entities in the expectation that he would receive the ownership interest in CMG on which he relies; and that the Champion entities openly held out to others, that Marciano was indeed a major shareholder in the corporations, as evidenced by the underlying dealership agreement itself, which describes Marciano as holding a significant, "voting" shareholder interest in CMG (Pltff's Exh., "M"; Brustein Dep., at 124; 166-167).

Moreover, Marciano has submitted documents drafted by, or submitted to, North Fork Bank, which further buttress the claim that, when it was beneficial for them to do so, the defendants apparently represented to the bank, as well as to Bentley, that Marciano was indeed an owner/principal in the key Champion entities (Pltff's Exhs., "D", "E").

Last, while the defendants have offered their account of the CLG-CMG parent-subsiary relationship and its attendant ownership structure, Marciano has credibly argued that the parent-subsiary structure was a device formulated exclusively by the defendants and their accountants

for their own benefit, and was incidental to, and in no sense intended to impact or dilute, the overarching ownership agreement reached by the parties including his interest in the dealership (Calica Aff., ¶¶ 12, 24, 29).

The record suggests that the defendants themselves blurred the distinction between the two corporations. Certain requisites of corporate formality were not consistently adhered to (*e.g.*, Pltff's Exh., "K"). Indeed, it is undisputed that no stock ledger was maintained for either GLC or CMG and that no shares in either entity were issued during the relevant time periods (*see*, Brustein Dep., 74-75).

In sum, the Court agrees that under the unusual circumstances presented, the manner in which the CLG-CMG entities may have been structured, organized and owned, is not conclusive of whether Marciano possesses the requisite, beneficial ownership interest in CMG so to confer standing to maintain the subject dissolution proceeding (Calica Aff., ¶¶ 15, 33[b]-38]) (*cf.*, *Matter of Steward*, 229 AD2d 500, 501 *see also French v. French, supra*, at 256; *Porco v. Catherwood*, 32 AD2d 983).

The Court similarly declines to assign determinative import to the newly entered plea, pursuant to which the defendant admitted guilt to certain charges unrelated to the conduct of the subject business.

The defendants claim that Marciano's plea now definitively establishes that he possess no legitimate interest in remaining an active player in the Champion entities (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 72-73 [1984]), particularly in light of the Bentley dealership agreement which authorizes termination upon a principal's conviction of a crime (Stark Reply Aff., ¶ 2-4).

According to Marciano, however, the defendants have from the inception, cynically utilized the indictment as a pretext to demonize and then oust him from the Champion entities, while simultaneously attempting to steal and misappropriate his 38% interest in the CMG (Calica Aff., ¶¶ 12-13).

Although the Bentley dealership agreement authorizes termination of the dealership if, *inter alia*, (1) a dealership principal is convicted of a crime; and (2) if, "in Bentley's opinion" the

