

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

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**In the Matter of the application of
CHEUNG NAI KAN a/k/a KEN KAN, an
individual, the holder of fifty percent of all
outstanding shares of stock of**

**3 WIN, INC., KCL EXPRESS INC.,
ALPHA TRANSPORTATION N.Y.
INC., EVERGREEN KC DEVELOPMENT, INC.,**

Petitioner,

**Index No. 6265/09
Motion Date: 5/20/09
Cal No. 27**

**for the Judicial Dissolution of
3 WIN, INC., KCL EXPRESS INC.,
ALPHA TRANSPORTATION N.Y.
INC., EVERGREEN KC DEVELOPMENT, INC.,
ABC CORP 1 INC. (name unknown)
ABC CORP 1 INC. (name unknown)**

five domestic corporations.

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The following papers numbered 1 to 18 read on this application by Petitioner for an order pursuant to Business Corporation Law ("BCL") § 1104(a)(1) and (2) dissolving **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC.** ; adjusting the rights and interests of the shareholders of **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC** pursuant to BCL § 1104-a(d); imposing a surcharge on Yi Hang Cheng, a/k/a Edmond Cheng, Ronnie Yuenmei Chan a/k/a Ronnie Chan pursuant to BCL § 1104-a(d); appointing a temporary receiver of the property and effects of **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC**; and enjoining and restraining **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC** pursuant to BCL § 1115(a) from transacting any unauthorized business and from exercising any corporate powers; except in the ordinary course of business, from collecting or receiving any debt or other property of the corporation, from taking any action to dissolve the corporations, and otherwise compelling respondents to maintain the status quo during the pendency of this application, and awarding petitioner the costs and disbursements in this special proceeding; and cross-motion by respondents for an order dismissing the petition for lack of jurisdiction, or for an order allowing respondents to move the trucking business to New Jersey.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affirmation-Exhibits.....	1-3
Affidavits of Service.....	4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Opposition and Reply-Exhibits.....	9-10
Affidavit of Service.....	11
Affirmation in Reply.....	12-13

Upon the foregoing papers, the application by petitioner for an order pursuant to Business Corporation Law (“BCL”) § 1104(a)(1) and (2) dissolving **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC.** ; adjusting the rights and interests of the shareholders of **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC** pursuant to BCL § 1104-a(d); imposing a surcharge on Yi Hang Cheng, a/k/a Edmond Cheng, Ronnie Yuenmei Chan a/k/a Ronnie Chan pursuant to BCL § 1104-a(d); appointing a temporary receiver of the property and effects of **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC**; and enjoining and restraining **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC** pursuant to BCL § 1115(a) from transacting any unauthorized business and from exercising any corporate powers; except in the ordinary course of business, from collecting or receiving any debt or other property of the corporation, from taking any action to dissolve the corporations, and otherwise compelling respondents to maintain the status quo during the pendency of this application, and awarding petitioners their costs and disbursements in this special proceeding; and cross-motion by respondents for an order dismissing the petition for lack of jurisdiction, or for an order allowing respondents to move the trucking business to New Jersey are decided as follows:

Petitioner claims, *inter alia*, that he is a 50% owner of the outstanding shares of **3 WIN, INC., KCL EXPRESS INC., ALPHA TRANSPORTATION N.Y. INC., EVERGREEN KC DEVELOPMENT, INC., ABC CORP 1 INC. (name unknown) ABC CORP 1 INC. (name unknown)** and Yi Hang Cheng, a/k/a Edmond Cheng is the other 50% owner. No stock certificates have been issued reflecting the ownership interests of the petitioner or Mr. Cheng. Petitioner claims that Mr. Cheng has been acting as director of 3 Win Inc. and has engaged in illegal, fraudulent, and oppressive acts towards petitioner; specifically, he has looted, diverted, and wasted assets of the corporations. Petitioner claims that he and Mr. Cheng operated the businesses together and over a course of time Mr. Cheng wrongfully appropriated corporate money and purchased his private residence. He also claims money was used for other non-corporate purposes. Mr. Cheng opposes this motion claiming the

court lacks personal jurisdiction and petitioner does not have standing to bring this proceeding.

Regarding the claim of lack of jurisdiction, the Court finds petitioner has submitted sufficient proof, in the form of affidavits of service, that indicate service was properly effectuated upon the respondents. In response, respondents have failed to submit sufficient evidence to rebut the presumption of proper service. Accordingly, the branch of the cross-motion seeking dismissal for lack of jurisdiction is denied.

Regarding the standing issue, in pertinent part, Business Corporation Law § 1104-a, reads as follows:

Petition for judicial dissolution under special circumstances

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, . . . entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders.

The appropriateness of an order of dissolution pursuant to Business Corporation Law § 1104-a "is in every case vested in the sound discretion of the court considering the application" In the present case, in view of the parties' conflicting assertions, the Supreme Court should have held an evidentiary hearing. In re Fancy Windows & Doors Mfg. Corp., 244 A.D.2d 484 (N.Y. App. Div. 2d Dep't 1997) (citations omitted.) Petitioner has sufficiently pleaded a cause of action for dissolution under Business Corporation Law § 1104-a (a) (1) the allegations of which, if borne out, would entitle him to relief. However, this evidence is not sufficient to entitle him to the granting of his Petition since Mr. Cheng has submitted evidence that raises an issue of fact regarding petitioner's ownership interests. In light of the above and in the face of the Corporation's denial that petitioner held any interest in the corporations, the court orders a hearing to determine whether the petitioner was a shareholder and held the requisite amount of shares (20% or more) to bring a proceeding pursuant to Business Corporation Law § 1104-a LaBarbera v. D'Amico, 240 A.D.2d 640 (N.Y. App. Div. 2d Dep't 1997.) The Parties shall appear in Part 17, on June 8, 2009 at 9:30 a.m. for a hearing to determine petitioner's standing to seek dissolution of the corporations. .

The branches of the application for orders enjoining the respondents from, in essence, doing any business other than that which is done in the ordinary course and preserving the status quo with the corporations is granted to the following extent: A preliminary injunction may issue only if the moving party can demonstrate (1) the likelihood of success on the merits; (2) irreparable injury if the preliminary injunction is not granted, and (3) a balancing of the equities in its favor. (Doe v Axelrod, 73 NY2d 748; Preston Corp. v Fabrication Enters., 68 NY2d 397; W.T. Grant Co. v Srogi, 52 NY2d 496.) "Preliminary injunctive relief is a drastic remedy that will not be granted unless a clear right to it is established under the

law . . . and the burden of showing an undisputed right rests upon the movant." (Zanghi v State of New York, 204 AD2d 313, 314.)

As noted, this action is for the dissolution of a several trucking corporation and there is conflicting evidence regarding petitioner being an owner of these corporations. The Court notes that the mere existence of an issue of fact does not preclude a finding of the likelihood of success on the merits and this Court finds that the submitted evidence suggests that, assuming standing is found, the resolution of this matter is likely to be resolved with the dissolution of the corporation. Consequently, Petitioner has established the first element in procuring injunction relief, likelihood of success on the merits.

Regarding the second element in procuring injunctive relief, establishing irreparable injury, in the instant case, petitioner seeks to recoup corporate assets and preventing further looting of the corporations. This is sufficiently unique to warrant the granting of an injunction. *See, Schragar v. Klein*, 267 AD2d 296. As such, petitioner has established element two, irreparable injury.

In regard to the third element, the weight of the equities, petitioner has demonstrated that the alleged irreparable injury to be sustained by him is more burdensome to him than the harm that will be caused to the corporations through imposition of the injunction. *See, Reuschenberg v Town of Huntington*, 16 AD3d 568 (2d Dept 2005.) Under these circumstances, to enjoin and restrain the corporations from doing any business other than that in the ordinary course, which would prevent certain activity, including the sale of the corporations or the moving of the corporations to New Jersey would be not be unduly burdensome to the corporations. As such, petitioner has established the third element, the balance of equities in their favor.

Consequently, petitioner's submissions have established the necessary elements for obtaining the requested injunctive relief and the instant application for such is granted. However, this injunction shall remain in effect until the hearing on June 8 to determine petitioner's standing. If petitioner is found to have standing, the Court shall extend the injunction and set an undertaking. Similarly, the Court's decision on the other relief sought by petitioner is held in abeyance until the Court's determination on the standing issue. A copy of this order is being sent to the parties by means of facsimile transmission on May 22, 2009.

Dated: May 22, 2009

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ORIN R. KITZES, J.S.C.