

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60**

**ELDAN-TECH., INC., in the right and name of OCELOT PORTFOLIO
HOLDINGS, LLC,**

Plaintiff,

-against-

OCELOT CAPITAL MANAGEMENT, LLC,

Defendant,

-and-

OCELOT PORTFOLIO HOLDINGS, LLC,

Nominal Defendant.

**Index No. 651101/2010
(Fried, J.)**

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION TO DISMISS THE VERIFIED COMPLAINT OF PLAINTIFF
ELDAN-TECH. INC. PURSUANT TO C.P.L.R. § 3211(A)(1), (A)(3), AND (A)(7).**

SCHLAM STONE & DOLAN LLP

David J. Katz

**26 Broadway – 19th Floor
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677**

Attorneys for Defendants

Attorneys for Defendant Ocelot Capital Management LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

ARGUMENT 3

I. THE VERIFIED COMPLAINT MUST BE DISMISSED IN ITS ENTIRETY
ON THE PLEADINGS 3

 A. Standards For Granting Motion To Dismiss 3

 B. All Claims Alleged Are Derivative And Should Be Dismissed For
 Lack Of Standing 4

 C. The Constructive Trust Claim Should Be Dismissed As A Matter
 Of Law 5

 D. The Conversion Claim Should Be Dismissed As A Matter
 Of Law 5

CONCLUSION 7

TABLE OF AUTHORITIES

Abacus Federal Savings Bank v. Lim,
2010 N.Y. Slip Op. 06143, 2010 WL 2813453 (App. Div. 1st Dep’t July 20, 2010)5

Bansbach v. Zinn,
1 N.Y.3d 1, 769 N.Y.S.2d 175 (2003)4

EBCI, Inc. v. Goldman Sachs & Co.,
5 N.Y.3d 11, 832 N.Y.S.2d 26 (2005)3

Egnotovitch v. Katten Muchin Zavis & Roseman LLP,
2008 N.Y. Slip Op. 50140(U), 2008 WL 199757 (Sup. Ct. N.Y. Co. Jan. 23, 2008)6

Eldan-Tech., Ltd., et ano. v. Arfa, et ano.,
Sup. Ct. N.Y. Co. Index No. 602838/20091

In re Gupta,
38 A.D.3d 445, 834 N.Y.S.2d 23 (1st Dep’t 2007)5

Kim v. Ferdinand Capital LLC,
2008 N.Y. Slip Op. 50588(U), 2008 WL 763380 (Sup. Ct. N.Y. Co. Mar. 12, 2008)4

Maiorino v. Galindo,
65 A.D.3d 525, 883 N.Y.S.2d 589 (2d Dep’t 2009)5

NY Medscan, LLC v. JC-Duggan Inc.,
40 A.D.3d 536, 837 N.Y.S.2d 80 (1st Dep’t 2007)6

Ocelot Capital Management, Inc. v. Hershkovitz,
Sup. Ct. N.Y. Co. Index No. 602838/20092

Robinson v. Robinson,
303 A.D.2d 234, 757 N.Y.S.2d 13 (1st Dep’t 2003)3

Sacher v. Beacon Associates Management Corp.,
2010 N.Y. Slip Op. 50826(U), 2010 WL 1881951
(Sup. Ct. Nassau Co. Apr. 26, 2010)4

Tzolis v. Wolff,
10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008)4

RULES, STATUTES AND OTHER AUTHORITIES

C.P.L.R. § 3211(a)(1)1, 3

C.P.L.R. § 3211(a)(3)1

C.P.L.R. § 3211(a)(7)1, 3

Defendant Ocelot Capital Management ("OCM"), through his undersigned counsel Schlam Stone & Dolan LLC, submits this Memorandum of Law, together with the Affirmation of David J. Katz and the exhibits attached thereto, in support of its motion to dismiss the Verified Complaint of Plaintiff Eldan-Tech. Inc. ("Eldan"), pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7).¹

PRELIMINARY STATEMENT

This action is one of three actions involving the sale in February 2009 of the 100% membership interest of a New York limited liability company called OCG VI LLC from another New York limited liability company called Ocelot Portfolio Holdings ("OPH") to a Mr. Isaac Hershkovitz in consideration for, among other things, a \$350,000 promissory note (the "Hershkovitz Note") signed by Mr. Hershkovitz to OPH. In February 2009, OPH assigned the Hershkovitz Note to OCM ("OCM Assignment"), which at that time was the sole Manager of OPH. At that time, Eldan held an 80% membership interest in OPH, and OCM held the other 20% membership interest. At that time, Rachel Arfa was a Managing Member of OCM, and the sole officer and director of Eldan. She signed the OCM assignment in the following capacities: as Managing Member of OCM (the assignee), as Managing Member of the Manager (*i.e.*, OCM) of OPH (the assignor), and as the sole officer and director of Eldan (the 80% Member of the assignor). In May 2009, Ms. Arfa was removed as an officer and director of Eldan, and OCM was removed as the Manager of OPH.

In a related action pending before this court captioned *Eldan-Tech., Ltd., et ano. v. Arfa, et ano.*, Sup. Ct. N.Y. Co. Index No. 602838/2009 ("Eldan Action"), Eldan and its parent corporation, Eldan-Tech. Ltd., are suing Ms. Arfa for her role in these events and, in particular,

¹ A copy of the Verified Complaint is attached as Exhibit 1 to the Affirmation of David J. Katz.

for allegedly breaching her fiduciary duties to Eldan. Ms. Arfa has not moved to dismiss this action on the pleadings, has answered and counterclaimed against the plaintiffs, and discovery in this action is ongoing.

In another related action that was recently pending before this court captioned *Ocelot Capital Mgmt., Inc. v. Hershkovitz*, Sup. Ct. N.Y. Co. Index No. 602838/2009 (“Hershkovitz Action”), OCM sued Mr. Hershkovitz as assignee of the Hershkovitz Note and recently obtained summary judgment against him. Eldan unsuccessfully attempted to intervene in this action.

The current action is based on the same factual allegations as the Eldan Action and the Hershkovitz Action. It should be dismissed on the pleadings for three reasons. First, this action is brought as a derivative action by Eldan on behalf of OPH. Yet the Verified Complaint contains no allegations that Eldan has demanded that OPH bring this action and that OPH has refused to do so or that it would be futile to make such a demand. Indeed, the documentary evidence submitted by OPH conclusively establishes that Eldan is in complete control of OPH and that nothing prevents Eldan from causing OPH to bring an action against OCM in its own name. Thus, this action must be dismissed for failure to satisfy the conditions precedent of a derivative action and lack of standing.

Second, the constructive trust cause of action fails to state a claim upon which relief can be granted because it does not allege all the required elements. Specifically, there are no allegations of a promise having been made to Eldan by OCM or of a transfer in reliance on such a promise.

Third, the conversion claim fails to state a claim upon which relief can be granted. Specifically, the allegations in the Complaint and the documentary evidence submitted by OCM conclusively establish, as a matter of law, that OCM did not exercise **unauthorized** dominion

and control over the Hershkovitz Note and that the Hershkovitz assignment was expressly authorized.

Accordingly, for the reasons set forth below, the Verified Complaint should be dismissed on the pleadings.

STATEMENT OF FACTS

For the purpose of the instant motion to dismiss, the facts alleged in the Verified Complaint must be accepted as being true. See *EBCI, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19, 832 N.Y.S.2d 26, 31 (2005). The facts set forth in the Affirmation of David J. Katz (“Katz Affirm.”) filed in support of this motion are incorporated herein by reference.

ARGUMENT

I. THE VERIFIED COMPLAINT MUST BE DISMISSED IN ITS ENTIRETY ON THE PLEADINGS

A. Standards For Granting Motion To Dismiss

“On a motion to dismiss pursuant to CPLR 3211(a)(1), [OCM has] the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that [Eldan’s claims] fail as a matter of law. While a complaint is to be liberally construed in favor of plaintiff on a CPLR § 3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts.” *Robinson v. Robinson*, 303 A.D.2d 234, 235, 757 N.Y.S.2d 13, 14 (1st Dep’t 2003) (citations omitted). Moreover, on a motion to dismiss pursuant to CPLR 3211(a)(7), “the [C]ourt must afford the pleadings a liberal construction, take the allegations of the [Complaint] as true and provide [Plaintiffs] the benefit of every possible inference.” *EBC I, Inc.*, 5 N.Y.3d at 19, 832 N.Y.S.2d at 31. The same pleading standards for motions to dismiss for failure to state a claim apply for motions to dismiss for lack of standing.

See, e.g., *Kim v. Ferdinand Capital LLC*, 2008 N.Y. Slip Op. 50588(U), 2008 WL 763380 (Sup. Ct. N.Y. Co. Mar. 12, 2008) (Cahn, J.). For the reasons set forth below, all the claims asserted against OCM should be dismissed on the pleadings.

B. All Claims Alleged Are Derivative And Should Be Dismissed For Lack Of Standing

In *Tzolis v. Wolff*, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008), the Court of Appeals held that a member of a New York limited liability company can bring a derivative action on behalf of the LLC even though there is no provision authorizing such an action in the New York Limited Liability Company Law. Where a member of a New York LLC brings a derivative action on behalf of the LLC, “the complaint must set forth with particularity [the member’s] demand upon the board of directors [or the Manager of the LLC] to bring the action, or the reasons that a demand would have been futile.” *Sacher v. Beacon Assocs. Mgmt. Corp.*, 2010 N.Y. Slip Op. 50826(U), 2010 WL 1881951, at *8 (Sup. Ct. Nassau Co. Apr. 26, 2010) (Bucaria, J.) (citing *Bansbach v. Zinn*, 1 N.Y.3d 1, 769 N.Y.S.2d 175 (2003)). The reasons for this pleading requirement are: “Shareholder derivative suits are not favored because they ask courts to second-guess the business judgment of the individuals charged with managing the company. On the other hand, derivative actions protect minority shareholders against officers and directors who place other interests ahead of the corporation.” *Id.*

Here, the Verified Complaint plainly pleads that all the causes of action are pled by Eldan, on behalf of OPH, and that all the injuries for which relief is sought were sustained by OPH. Yet OPH is not named as an individual plaintiff. Moreover, no allegations are pled that Eldan demanded that the Manager(s) of OPH commence this action and that such a demand was denied or that such a demand would have been futile. Indeed, the absence of these allegations is even more strange given that the documentary evidence submitted by OCM—the OPH operating

agreement and the written consent removing OCM as the Manager of OPH in May 2009, *see* Katz Affirm. Exhs. 2 & 3—conclusively establishes that Eldan is an 80% member of OPH and not a minority member of OPH and that Eldan has the authority both to remove and to appoint the Manager of OPH. Thus, it is not permissible for Eldan to bring the claims alleged in the Verified Complaint—all of which are derivative claims—on behalf of OPH. Instead, OPH would have to bring those claims in its own name. Accordingly, the Verified Complaint must be dismissed on the pleadings for lack of standing.

C. The Constructive Trust Claim Should Be Dismissed As A Matter Of Law

“The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment.” *Abacus Fed. Sav. Bank. v. Lim*, 2010 N.Y. Slip Op. 06143, 2010 WL 2813453, at *1 (App. Div. 1st Dep’t July 20, 2010) (citing *In re Gupta*, 38 A.D.3d 445, 446, 834 N.Y.S.2d 23, 24 (1st Dep’t 2007)). Here, Eldan has failed to allege any promise made by OCM to Eldan or a transfer made in reliance on any such promise. Accordingly, Eldan’s constructive trust claim must be dismissed on the pleadings as a matter of law. *See Maiorino v. Galindo*, 65 A.D.3d 525, 527, 883 N.Y.S.2d 589, 590-91 (2d Dep’t 2009) (dismissing on the pleadings plaintiff’s constructive trust claim) (“While there was a confidential relationship between the plaintiff and [defendant] as 50% shareholders in [the corporation], and [defendant] may have been unjustly enriched by the alleged diversion of [the corporation’s] assets, there was no promise to either the plaintiff or [the corporation] with respect to the [disposition of the] property and no transfer of that property in reliance on any promise.”).

D. The Conversion Claim Should Be Dismissed As A Matter Of Law

The elements of a conversion claim are “legal ownership or an immediate superior right of possession to specifically identifiable property, and . . . that the defendant exercised

unauthorized dominion over that property to the exclusion of the plaintiff's rights." *NY Medscan, LLC v. JC-Duggan Inc.*, 40 A.D.3d 536, 537, 837 N.Y.S.2d 80, 81-82 (1st Dep't 2007); *Egnotovich v. Katten Muchin Zavis & Roseman LLP*, 2008 N.Y. Slip Op. 50140(U), 2008 WL 199757, at *10 (Sup. Ct. N.Y. Co. Jan. 23, 2008) (Fried, J.). Here, both the documentary evidence submitted by OCM and the factual allegations in the Verified Complaint conclusively establish, as a matter of law, that OCM did not exercise **unauthorized** dominion over that property to the exclusion of the plaintiff's rights, and that such dominion was expressly authorized.

First, the Verified Complaint alleges that, in February 2009, OCM was the sole Manager of OPH, that Ms. Arfa was the sole officer and director of Eldan, and that Eldan was the 80% member of OPH. Katz Affirm. Exh. 1 at p. 1 & ¶ 3. These facts are also conclusively established by the OPH operating agreement. *See* Katz Affirm. Exh. 2 § 6.02 & Sch. A.

Second, the OPH operating agreement conclusively establishes that, as the sole Manager of OPH, OCM could take any actions on behalf of OPH, subject to certain actions requiring the consent of Eldan. *Id.* § 6.01. There is no requirement in the OPH operating agreement that any actions taken by OPH be approved by Eldan-Tech. Ltd., the sole shareholder of Eldan.

Third, the both the OCM Assignment and the allegations in the Verified Complaint conclusively establish that both the sole Manager of OPH (*i.e.*, OCM) and the 80% member of OPH (Eldan), the latter acting through its sole officer and director, Ms. Arfa, duly authorized the assignment of the Hershkovitz Note from OPH to OCM. *See* Katz Affirm. Exh. 1 ¶¶ 5-6, Exh. 4. Thus, the assignment of the Hershkovitz Note from OPH to OCM was authorized as matter of law, and as a matter of law, OCM could not have converted that note. Indeed, there are no allegations in the Verified Complaint that OCM exercised unauthorized dominion over that

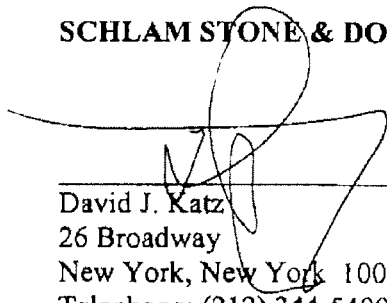
property to the exclusion of OPH's rights. Accordingly, the conversion claim must be dismissed on the pleadings as a matter of law.

CONCLUSION

For the foregoing reasons, OCM respectfully requests that this Court grant its motion to dismiss the Verified Complaint on the pleadings as a matter of law.

Dated: New York, New York
August 5, 2010

SCHLAM STONE & DOLAN LLP



David J. Katz
26 Broadway
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677

*Attorneys for Defendant
Ocelot Capital Management LLC*