

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-Appellant,*

*-against-*

OCELOT CAPITAL MANAGEMENT, LLC,

*Defendant-Respondent,*

*-and-*

OCELOT PORTFOLIO HOLDINGS, LLC,

*Nominal Defendant.*

N.Y. Co. Index No. 651101/2010  
(Fried, J)

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS  
MOTION TO DISMISS THE VERIFIED COMPLAINT  
OF PLAINTIFF ELDAN-TECH., INC.

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Defendant Ocelot Capital Management (“OCM”), through his undersigned counsel Schlam Stone & Dolan LLC, submits this Reply Memorandum of Law in further 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).

### **PRELIMINARY STATEMENT**

In opposing OCM’s motion to dismiss this action with prejudice on the pleadings, Eldan repeatedly conflates distinctions among: (i) Eldan; (ii) Eldan’s parent corporation, Eldan-Tech. Ltd. (“ETL”); and (iii) Eldan’s wholly-owned subsidiary, Ocelot Portfolio Holdings (“OPH”), as well as the distinctions between (iv) the events leading up to the closing of the transaction involving the sale of OPH’s 100% membership interest in OCG VI LLC (which are the subject of the related pending action by Eldan and ETL against Ms. Arfa and Mr. Hershkovitz) and (v) the events leading up to the assignment of the promissory note signed by Mr. Hershkovitz at the OCG VI LLC closing in favor of OPH (“Hershkovitz Note”) from OPH to OCM. As discussed in detail below, these distinctions are crucial because they explain why OPH and not Eldan is the proper party to bring the claims alleged in this action and why those claims fail as a matter of law, in any event, in contrast to the claims alleged by Eldan and ETL in the related litigation against Ms. Arfa, which she did not move to dismiss on the pleadings.

Accordingly, for the reasons set forth below and in OCM’s moving papers, the Verified Complaint should be dismissed on the pleadings without leave to replead.

## ARGUMENT

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

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

In OCM's moving papers, it demonstrated that this action must be dismissed for lack of standing because OPH—and not Eldan—is the only entity that has standing to bring the claims alleged in the Verified Complaint. In Eldan's opposition papers, it does not dispute that all of the harms alleged in its Verified Complaint were allegedly suffered by OPH. Instead, Eldan argues that the Court of Appeals' decision in *Tzolis v. Wolff*, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008)—which established a common-law right for New York LLC members to file derivative actions in the absence of express statutory language in the New York Limited Liability Company Law authorizing them to do so—made clear that an LLC member's right to bring a derivative claim on behalf of an LLC is permissive rather than mandatory, relying on language from *Tzolis* and Justice Demarest's recent decision in *RCGLV Maspeth LLC v. Maspeth Properties LLC*, 2010 N.Y. Slip Op. 50503(U), 2010 WL 1133245 (Sup. Ct. Kings Co. Mar. 25, 2010). See Opp'n MOL at 2-4. It is Eldan's apparent position that a claim on behalf of an LLC can be brought derivatively by its majority member regardless of whether the usual requirements of a derivative action are met, such as demand for the party in interest to bring the action in its own name. But this argument is a non sequitur because these cases stand for the unremarkable proposition that "there is no prohibition against individual suits brought by members **based upon that member's own rights**. The language in *Tzolis* is permissive and does not in any way impose a mandate upon all members to file suits derivatively." *Id.* at \*3 (emphasis added). Thus, these cases would permit Eldan to file a lawsuit in its own name if it could allege harm to

itself. But these cases do not authorize Eldan to bring an action on behalf of OPH where the only harms alleged in the action are to OPH.

In a footnote, Eldan obliquely provides the real reason why this action is being brought derivatively by Eldan on behalf of OPH. According to Eldan, OPH “no longer has, but did have, a managing member, [OCM]. [OCM] *qua* [M]anager was fired in May 2009 . . . and Eytan Shafir—whom Eldan named as [OPH’s] [M]anager in May 2009 in place of [OCM] . . . , resigned a few months later.” Opp’n MOL at 4 n.4<sup>1</sup> Thus, Eldan is arguing that, because OPH no longer has a Manager to take actions on its behalf, OPH should be able to act through its majority member. This argument should be rejected. First, OPH’s operating agreement makes clear that OPH is a “manager-managed” rather than a “member-managed” LLC, *see* Katz Aug. 5, 2010 Affirm. Exh. 2 § 6.01(a), and further expressly delegates the authority to “commence lawsuits and other proceedings” to OPH’s Manager, *see id.* Second, Section 416 of the New York Limited Liability Company Law provides that where, as is the case here, an LLC’s operating agreement is silent with respect to the filling of a vacancy created by the resignation of an LLC’s Manager in a Manager-managed LLC, the majority member may fill that vacancy.

Thus, the reason why Eldan is attempting to sue derivatively on behalf of OPH instead of causing OPH to bring an action on its own behalf appears to be that Eldan has consciously chosen not fill the vacancy created when Mr. Shafir resigned as OPH’s Manager. The likely

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<sup>1</sup> This footnote is inaccurate in two respects. First, OCM was OPH’s Manager and not its Managing Member, as Section 6.01 of OPH’s Operating Agreement makes clear. *See* Katz Aug. 5, 2010 Affirm. Exh. 1 § 6.01 (“Except as otherwise provided in this Agreement, the management of the Company and all decisions concerning the conduct of the Company’s ordinary course of business and day-to-day operation and affairs of the Company, shall be conducted or made by the Manager.”). Thus, the OPH operating agreement does not reference a “Managing Member” of OPH; it refers only to a Manager and members. Second, Mr. Shafir’s November 4, 2009 resignation letter makes clear that he was resigning only from his positions “as president and a director of Eldan-Tech., Inc.” and not from his position as the Manager of OPH. *See* Krol. Affid. Exh. F. For the purposes of this motion, however, if Eldan is representing in its opposition papers to this motion that Mr. Shafir is no longer the Manager of OPH and that OPH currently does not have a Manager, OCM will accept this representation as a binding judicial admission even in the absence of a documentation confirming this fact.

reasons Eldan has chosen not to replace Mr. Shafir with a new Manager are that Eldan chooses not to appoint someone to take on the fiduciary duties that come with being the Manager of OPH or that none of ETL's people in Israel wish to submit themselves to personal jurisdiction in New York. Regardless of what Eldan's and ETL's motivations are for leaving OPH without a Manager, this Court should not permit Eldan to reap the benefits of its decision not to install a new Manager over OPH while at the same time avoiding the disabilities that are the natural result of this decision, i.e., being unable to prosecute a lawsuit directly by OPH or on OPH's behalf. Accordingly, this action must be dismissed for lack of standing.

**B. The Constructive Trust Claim Should Be Dismissed as a Matter of Law**

In its moving papers, OCM demonstrated that Eldan's claim for a constructive trust should be dismissed on the pleadings for failure to allege a promise and a transfer in reliance thereon. Eldan raises several arguments in an attempt to salvage this cause of action, none of which has any merit.

First, Eldan argues that OCM owed a fiduciary duty to OPH as OPH's Manager. For purposes of this motion, OCM does not dispute this argument, which actually supports OCM's position that Eldan's constructive trust claim must be dismissed as a matter of law. Opp'n MOL at 5-6. Specifically, it is undisputed that at the time the Hershkovitz Note was assigned from OPH to OCM, OCM was OPH's sole Manager, Eldan and OCM were OPH's only two members, Ms. Arfa was the sole officer and director of Eldan, and Ms. Arfa (in her capacities as Eldan's sole officer and director and OCM's Managing Member) consented in writing to the assignment of the Hershkovitz Note from OPH to OCM. Thus, as a matter of law, the assignment of the Hershkovitz Note from OPH to OCM was ratified by OPH through its sole Manager and its two members, and, as a matter of law, no fiduciary duty to OPH could have been breached by OCM and OCM could not have been unjustly enriched. Whether Ms. Arfa's acts violated any

fiduciary duties she owed to Eldan is not resolved by OPH's ratification, and that issue is pending in the related litigation pending in this Court between Eldan and Ms. Arfa. Indeed, the facts of this case are on all fours with a case recently decided by the First Department (coincidentally involving Ms. Arfa) in which a breach of fiduciary duty claim was dismissed on the pleadings against Ms. Arfa and her co-defendants. See 546-552 W. 146th St. LLC v. Arfa, 54 A.D.3d 543, 863 N.Y.S.2d 412 (1st Dep't 2008), *lv. denied*, 12 N.Y.3d 840, 881 N.Y.S.2d 13 (2009) ("*146 St. LLC*").

In *146 St. LLC*, several limited liability companies sued their former Managers for, inter alia, breach of fiduciary duty in connection with the Managers' alleged failure to disclose to the LLCs that the former Managers had received certain compensation from the third parties that had sold real properties to the LLCs (the "Sellers"). Justice Ramos dismissed this action on the pleadings for lack of standing, and the First Department affirmed. As the First Department explained, at the time the Sellers contracted with the former Managers to pay the allegedly undisclosed compensation to them, the former Managers were the only Managers and/or members of the plaintiff LLCs. Thus, the former Managers' knowledge of the allegedly undisclosed compensation was imputed to the plaintiff LLCs as a matter of law, and any misconduct by the former Managers had been ratified by the LLCs as a matter of law. 54 A.D.3d at 544-45, 863 N.Y.S.2d at 414-15. In affirming this dismissal of this action on the pleadings, the First Department also relied on the fact that a related action brought by the members of the plaintiff LLCs was already pending against the defendants. *Id.*

Here, the facts are on all fours with *146 St. LLC*. Specifically, Ms. Arfa's knowledge of and approval of the assignment of the Hershkovitz Note to OCM from OPH on behalf of OPH's sole Manager and its two members ratified that assignment as a matter of law. And redress



relating to the alleged impropriety of this assignment is being sought in the related action pending in this Court against Ms. Arfa by OPH's majority member (Eldan), which action Ms. Arfa has not moved to dismiss on the pleadings. Thus, a constructive trust claim has not been pled as a matter of law because the ratification by the alleged victim—OPH—makes such a claim legally impossible.

Second, Eldan argues that, under the relaxed pleading standards applied to cases alleging a constructive trust, a promise can be implied by the fiduciary relationship between OPH and OCM and by the OPH operating agreement. According to Eldan, OCM implicitly promised OPH that OCM would manage OPH for the benefit of OPH's members and without engaging in self-dealing, and that OCM would close the OCG VI LLC transaction in accordance with the contract approved by Eldan and would preserve the proceeds from this transaction for OPH. Opp'n MOL at 6-7. This argument suffers from several fatal flaws, however. For example, the parties to the OPH operating agreement are not OPH and OCM, but OCM and Eldan. *See* Katz Aug. 5, 2010 Affirm. Exh. 1 at 1 (“THIS LIMITED LIABILITY COMPANY AGREEMENT of Ocelot Portfolio Holdings LLC . . . is by and among the persons or entities named on Schedule A attached hereto, each of whom is referred to as a ‘Member,’ and the Manager (as defined herein)”); *id.* Exh. 1 Sch. A (listing OCM and Eldan and not OPH). Thus, the implied contractual promise that Eldan claims is based on the OPH operating agreement is a promise made by OCM to Eldan and not to OPH. Moreover, the integration clause in Section 10.06 of the OPH Operating Agreement makes clear that “[t]here are no promises . . . among the parties hereto with respect to the subject matter of this Agreement, other than as set forth in this Agreement.” *Id.* Exh. 1 § 10.06. Thus, the integration clause precludes Eldan from relying on any implied promises not contained in the OPH operating agreement. In any event, as discussed above, even

if Eldan has sufficiently pled an implied promise and a transfer made thereon, the actions upon which Eldan's constructive trust claim rests cannot form the basis for its claim because these acts were ratified as a matter of law.

Third, Eldan argues that, unlike the plaintiff in *Maiorino v. Galindo*, 65 A.D.3d 525, 883 N.Y.S.2d 589 (2d Dep't 2009)—a case relied on by OCM in its moving papers where the Second Department dismissed a constructive trust claim on the pleadings—OPH had a preexisting interest or expectation of an interest in the proceeds of the sale of OPH's 100% membership interest in OCG VI LLC, including the Hershkovitz Note, and that equity demands that a constructive trust be imposed here even in the absence of the traditional elements of such a cause of action (and these elements are certainly absent here). Opp'n MOL at 7-9. But, as OCM successfully argued in opposing Eldan's earlier motion for a TRO and a preliminary injunction, there are no longer any identifiable proceeds over which to impress a constructive trust (if there ever were any) because, during the roughly nine months that Eldan was aware of OPH's assignment of the Hershkovitz Note to OCM and sat on its rights, the Hershkovitz Note was reduced to a judgment by this Court in a related action in which Eldan untimely and unsuccessfully attempted to intervene. Eldan has cited no cases in support of its novel argument that a money judgment constitutes identifiable proceeds that can be the subject of a constructive trust claim, and we can find none. And, once again, any equitable claim that Eldan has here must fail as a matter of law as the result of OPH's ratification of the assignment of the Hershkovitz Note to OCM. Accordingly, Eldan's constructive trust claim must be dismissed on the pleadings for failure to state a claim.

**C. The Conversion Claim Should Be Dismissed as a Matter Of Law**

For essentially the same reasons discussed above regarding ratification by OPH of the assignment of the Hershkovitz Note to OCM, OCM also demonstrated in its moving papers that

Eldan's conversion claim must be dismissed on the pleadings as a matter of law because Eldan has not pled that OCM exercised unauthorized dominion over the HersHKovitz Note. In its opposition papers, Eldan raises several meritless arguments in an attempt to salvage its conversion claim.

First, after admitting that OPH's operating agreement does not require ETL's consent for any actions taken by or on behalf of OPH, Eldan points to the contract of sale of OPH's 100% membership interest in OCG VI LLC, which required ETL's consent to that sale before it closed. *See Krol Affid. Exh. B.* Eldan then argues that the OCG VI LLC transaction closed on terms that were not approved by ETK. *Opp'n MOL at 11.* But all of this is beside the point, because these allegations and arguments relate to the related action brought by Eldan and ETL against Ms. Arfa alleging that she breached her fiduciary duties to Eldan by causing this transaction to close on terms not approved by ETL. Here, Eldan is alleging that OCM converted the HersHKovitz Note shortly after the OCG VI LLC closing took place, and there is nothing in the Verified Complaint, in the affidavits submitted by Eldan in opposition to OCM's motion to dismiss, or in the OCG VI LLC transaction's contract of sale indicating that ETL's consent was required to assign the HersHKovitz Note **after** the OCG VI LLC transaction closed. Thus, Eldan's argument that ETL's consent to the post-closing assignment is required is meritless.

Second, Eldan argues that, "at all relevant times," Ms. Arfa was not Eldan's sole officer and director because, shortly before the OCG VI LLC transaction closed, Mr. Shafir resigned his position as the only other officer and director of Eldan. *Opp'n MOL at 12.* In support of this argument, Eldan attaches a letter from Mr. Shafir dated February 9, 2009, resigning his positions

as an officer and director of Eldan. *See* Krol Exh. D.<sup>2</sup> Given that the OCG VI LLC transaction closed on February 10, that the assignment of the Hershkovitz Note to OCM was signed on February 11, and that the subject of Eldan's conversion claim in this action is the assignment of the Hershkovitz Note to OCM, the time that is relevant to Eldan's conversion claim is the period February 10 (the date of the assignment to OCM) to February 11 (the date the assignment to OCM was signed), 2009, and not any time prior to February 10, 2009, when Ms. Arfa admittedly was not the sole officer and director of Eldan. Thus, this is yet another example of Eldan mixing apples and oranges between the claims in this action and the related action against Ms. Arfa relating to the terms of the OCG VI LLC transaction. Accordingly, Eldan's conversion cause of action should be dismissed on the pleadings for failure to state a claim.

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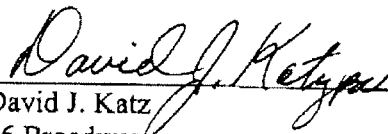
<sup>2</sup> In its opposition papers, Eldan submits an affidavit from Zeev Zur, the Treasurer of ETL, in which Mr. Zur states (at ¶ 5) that, in May 2009, he was told by Mr. Shafir that Mr. Shafir resigned at the February 10, 2009 OCG VI LLC transaction closing because Ms. Arfa had "threatened the lives and safety of his children." Tellingly, Eldan has submitted no affidavit from Mr. Shafir in support of this wild and unsubstantiated hearsay, which is directly contradicted by documentary evidence in the form of the resignation letter of Mr. Shafir submitted by Eldan (Krol Affid. Exh. D), which is dated the day before the February 10 closing and says that Mr. Shafir's resignation is effective immediately. Indeed, Eldan hypocritically and self-servingly argues that Mr. Shafir resigned as an officer and director of Eldan in February 2009 due to improper coercion from Ms. Arfa but, after having permitted himself to be reappointed to these very same positions by ETL in May 2009, Mr. Shafir again resigned from these positions in November 2009, without having been subjected to any improper influence by Eldan or ETL. OCM respectfully requests that this Court ignore this self-serving hearsay given that it is flatly contradicted by Eldan's own documentary evidence and its irrelevance to whether Eldan has pled cognizable causes of action.

**CONCLUSION**

For the foregoing reasons and the reasons set forth in OCM's moving papers, OCM respectfully requests that this Court grant its motion to dismiss the Verified Complaint without leave to replead.

Dated: New York, New York  
August 25, 2010

**SCHLAM STONE & DOLAN LLP**

A handwritten signature in cursive script that reads "David J. Katz". The signature is written over a horizontal line.

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