SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

ALLAN T. BOMBARD,

Plaintiff,

-against-

XITENEL, INC., LEONARD KELLNER and BIO-REFERENCE LABORATORIES, INC.,

Defendants.

----------X

Index No.: 600442/10

Return Date:
March 29, 2011

MEMORANDUM OF LAW OF MOTION BY DEFENDANTS XITENEL, INC. AND LEONARD KELLNER FOR PARTIAL SUMMARY JUDGMENT TO DISMISS PLAINTIFF'S SECOND THROUGH SIXTH CAUSES OF ACTION

ROSENBERG CALICA & BIRNEY LLP
Attorneys for Defendants Xitenel, Inc. and Leonard Kellner
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases Page

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

Federal Cases

Statutes

PRELIMINARY STATEMENT

Defendants, Xitenel, Inc. ("Xitenel")[1] and Leonard Kellner ("Kellner"), respectfully submit this memorandum of law in support of their motion, pursuant to CPLR 3212(b) and (e), for partial summary judgment to dismiss the second through sixth causes of action asserted by plaintiff, Allan T. Bombard ("Bombard") in the Complaint[2] since there are no genuine triable issues of fact and such causes of action should be dismissed as a matter of law.

Bombard's second through sixth causes of action are based on the conclusory and unsupportable allegation that he was a 10% shareholder of Xitenel when he was hired as its CEO in October 2008. However, as more fully detailed in Kellner's supporting Affidavit and the documents submitted therewith, Bombard was never a shareholder of Xitenel, let alone a "shareholder of record" based on, *inter alia*, the following undisputed facts:

- Xitenel's Stock Registration Ledger establishes that, from the time of Xitenel's formation until its assets were sold to BRL in March 2010, Kellner was its sole shareholder and held the only fifty (50) shares of stock issued by Xitenel. (See Kellner Aff., ¶5, Exhibits D, E and F).

- During his brief three months of employment, Bombard never entered into any agreement with Xitenel and/or Kellner pertaining to his term of employment and/or his receipt of stock ownership in Xitenel. (See Kellner Aff., ¶¶10-13, Exhibit G).

- At no time after Bombard left Xitenel, and prior to the Sale in March 2010, did Bombard ever request that Xitenel issue a stock certificate to him to document his alleged 10% ownership. (See Kellner Aff., ¶¶17-18, Exhibit I).

- Bombard never requested that Xitenel issue K-1 statements to him in connection with his claimed stock ownership of Xitenel, and Xitenel only issued K-1

[1] Hereinafter, reference to Xitenel shall mean Xitenel and/or Lenetix.

[2] All terms defined in the Affidavit of Leonard Kellner, dated March 1, 2011 (the "Kellner Aff."), will have the same meaning herein.

statements to Kellner as its sole shareholder. (See Kellner Aff., ¶¶20-21, Exhibit K).

- Bombard did not report to the IRS that he was a shareholder of Xitenel on his 2008 and 2009 tax returns, which he certified to be true and accurate. (See Kellner Aff., ¶22 Exhibits L and M, respectively).

Not only is Bombard's claim meritless as evidence by the undisputed documentary evidence, but it is disturbing in view of the additional undisputed fact that, prior to joining Xitenel as its CEO, Bombard had already accepted employment as the Chief Medical Officer of Sequenom, a competitor of Xitenel, pursuant to an August 26, 2008 letter agreement which he counter-signed on September 9, 2008 and in which he accepted very specific terms of employment with the understanding that his "**start date will be mutually agreed upon.**" (emphasis added). (See Kellner Aff., Exhibit N).

Clearly, Bombard does not come to this Court with clean hands as he seeks substantial money damages and extensive equitable relief based on a false and unsupportable claim of stock ownership of a company to which he showed no loyalty during the three short months he faithlessly performed his responsibilities as CEO.

Accordingly, the second through sixth causes of action should be dismissed as a matter of law.

STATEMENT OF FACTS

Defendants, Xitenel and Kellner, respectfully refer the Court to the accompanying Affidavit of Leonard Kellner sworn to on March1, 2011 and Statement of Uncontested Material Facts Pursuant to Commercial Division Rule 19-A dated March 2, 2011, for a detailed recitation of the pertinent and undisputed facts with respect to this motion for summary judgment.

ARGUMENT

POINT I

BOMBARD'S SECOND THROUGH SIXTH CAUSES OF ACTION LACK MERIT AND SHOULD BE DISMISSED AS A MATTER OF LAW

Bombard's second through sixth causes of action rest upon the false, conclusory and unsupportable allegation that he was a shareholder of Xitenel prior to the Sale in March 2010. (Kellner Aff., Exhibit A, ¶¶ 29, 58). As such, each of these causes of action lack merit and should be dismissed based on concededly genuine documentary evidence and governing law.

Summary judgment is viewed favorably as an effective remedy (Merritt Hill Vineyards Incorporated v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 111, 472 N.Y.S.2d 592, 596 (1984)), which provides for the expeditious resolution of cases which may properly be resolved as a matter of law. See Ona Brill et al. v. City of New York, 2 N.Y.3d 648, 651, 814 N.E.2d 431, 433 (2004). ("Summary judgment permits a party to show by affidavit or other evidence, that there is no material issue of fact to be tried and that judgment may be directed as a matter of law, thereby avoiding needless litigation and delay."). If no genuine issues of material fact are present, then a motion for summary judgment should be granted. Sun Yau Ko. v. Lincoln Savings Bank, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dep't 1984), aff., 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984).

We anticipate that Bombard will argue the tired generality that summary judgment is a drastic remedy. It is drastic only in the sense that it prevents a party, like Bombard, from raising a smoke screen at trial where, as here, when viewed under the substantive law applicable to the particular dispute, the material facts are not in dispute. See Hart v. Carro Spanbock, 211 A.D.2d 620, 621, 620 N.Y.S.2d 850, 851 (2d Dep't 1995); see also Thebaud v. Callari, 200 A.D.2d 565, 567, 606 N.Y.S.2d 330, 332 (2d Dep't 1994).

Here, there are no genuine triable issues of material fact concerning the second through sixth causes of action, and Xitenel and Kellner are entitled to partial summary judgment dismissing these deficient and baseless claims because, *inter alia*, they are flatly contradicted by concededly genuine documentary evidence. See Coleman v. Norton, 289 A.D.2d 130, 734 N.Y.S.2d 169 (1st Dep't 2001) (conclusory and unsubstantiated allegations in verified pleadings are insufficient to avoid summary judgment when they are contradicted by documentary evidence); U.S. 7 Inc. v. Transamerica Insurance Co., 173 A.D.2d 311, 312. 569 N.Y.S.2d 696, 698 (1st Dep't 1991) (summary judgment cannot be avoided on the basis of general, conclusory and unsubstantiated allegations).

As more fully discussed below, there are no triable issues of fact and, therefore, the burden now "shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 925 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Further, it is well settled that "[g]eneral allegations which are merely conclusory and unsupported by competent evidence are insufficient to defeat a motion for summary judgment." New York National Bank v. Harris, 182 A.D.2d 680, 482 N.Y.S.2d 278 (2d Dep't 1992).

As the New York Court of Appeals has observed, "[a] court it is fundamental, should never take from a jury doubtful questions of fact, but it is equally basic that a court shirks its duty if it creates an issue, when none exists, solely to foist decision upon a jury." Crane v. New York World Telegram Corp., 308 N.Y. 470, 479, 480, 126 N.E.2d 753, 759 (1955). This Court should not "shirk" its duty based on any feigned issues of fact raised by Bombard since relevant documentary evidence and governing law require a summary dismissal of his second through sixth causes of

action.

A. Bombard's Third and Sixth Causes of Action Under Business Corporation Law § 909 Should Be Dismissed As a Matter of Law.

Bombard asserts two separate causes of action against defendants Xitenel and Kellner under Business Corporation Law ("BCL") § 909. Specifically, in the third cause of action, Bombard seeks to recover monetary damages against Xitenel and Kellner based upon their alleged failure to provide Bombard, as a purported 10% shareholder of Xitenel, with prior notice of the Sale, as required under BCL § 909(a). In the sixth cause of action, Bombard seeks rescission of the Sale based upon the same alleged failure to provide him with prior notice.

These causes of action fail, as a matter of law, because Bombard was never a "shareholder of record" of Xitenel, as required by BCL § 909, and, as such, neither Xitenel nor Kellner were required to give Bombard prior notice of the Sale.

1. Third Cause of Action – Monetary Damages.

BCL § 909(a) provides that a corporation "shall" give notice to each "shareholder of record" prior to any proposed transaction to sell "all or substantially all the assets" of such corporation and obtain approval of the proposed transaction of two-thirds of all shareholders entitled to vote:

> (a) A sale, lease, exchange or other disposition of all or substantially all the assets of a corporation, if not made in the usual course of business actually conducted by such corporation, shall be authorized only in accordance with the following procedure:
>
> (1) The board shall authorize the proposed sale, lease, exchange or other disposition and direct its submission to a vote of shareholders.
>
> (2) Notice of meeting shall be give to each shareholder of record, whether entitled to vote or not.
>
> (3) The shareholders shall approve such sale, lease, exchange or other disposition and may fix, or may authorize the board to fix, any of the terms and conditions thereof and the consideration to be received by the

> corporation therefore, which may consist in whole or in part of cash or other property, real or personal, including shares, bonds or other securities of any other domestic or foreign corporation or corporations, by vote at a meeting of shareholders of (A) for corporations in existence on the effective date of this clause the certificate of incorporation of which expressly provides such or corporations incorporated after the date of this clause, a majority of the votes of all outstanding shares entitled to vote thereon or (B) for other corporations in existence on the effective date of this clause, two-thirds of the votes of all outstanding shares entitled to vote thereon. Id. (emphasis added)

BCL § 612(a) provides that "[e]very shareholder of record shall be entitled at every meeting of shareholders to one vote for every share standing in his name on the record of shareholders . . . ." (emphasis added). Id. Thus, shareholders of a corporation who seek the right to vote at a meeting must obtain certificates of shares in their names and take steps to record their names on the books of the corporation "if they desire the right to vote." In re D.J. Salvator, Inc., 268 A.D.2d 919, 51 N.Y.S.2d 342 (2d Dep't 1944). In the absence of actual stock certificates and/or efforts to obtain recorded shareholder status, there is a "presumption that they intended to permit the present record holders to vote the stock." Id. at 51 N.Y.S.2d at 19; see also In re Stewart Becker Ltd., 94 Misc.2d 766, 405 N.Y.S.2d 571 (Sup.Ct. Suffolk Co. 1978) ("The record of shareholders is conclusive upon the election inspectors and they may not look behind the list to determine whether or not the record owners are the true owners entitled to vote . . . The beneficial or true owners or any other person entitled to possession of shares have no right to vote if they are not record owners.").

The holding in In re D.J. Salvator, Inc., *supra*, is instructive. The petitioners claimed to be shareholders of the corporation entitled to vote on the elections of directors and officers, and sought to set aside those elections since, as petitioners claimed, certain individuals who voted in the elections should not have been allowed to vote shares that rightfully belonged to petitioners. 268 A.D. at 919. However, the court rejected petitioners' attempt to set aside the elections holding they

were not "stockholders of record" and, thus, not entitled to vote:

> "If Charles Masholie and the receiver are entitled to be recorded on the books of the corporation as owners of the stock, as they claim, it is their obligation to procure certificates of the shares in their names and make application for transfer if they desire the right to vote." Id.

Importantly, Bombard does not allege that shares of Xitenel stock were ever issued in his name, or that he was ever a "shareholder of record" entitled to vote. (See Kellner Aff., Exhibit A, ¶¶34-38). The only reference to Bombard's purported receipt of stock in the Complaint is the conclusory and false allegation that "[p]ursuant to the employment agreement between Xitenel and plaintiff, plaintiff received 10% of the Xitenel stock when plaintiff accepted Xitenel's offer of employment which, among other things, contained the grant of 10% of Xitenel's stock." (See Kellner Aff., Exhibit A, ¶29). Clearly, Bombard does not properly allege, by this sole, conclusory reference to purported stock ownership, that he was a shareholder of record as Section 909 requires.

Moreover, Xitenel's Stock Registration Ledger clearly establishes beyond any legitimate dispute that, from the time of Xitenel's formation until the Sale in March 2010, Kellner was its sole shareholder and "shareholder of record" holding the only fifty (50) shares of stock issued by Xitenel. (See Kellner Aff., ¶5, Exhibits D, E and F).

Based upon the foregoing, since Kellner was the only shareholder, indeed, only record shareholder, of Xitenel with a right to vote, Bombard was not entitled to any notice so he could vote on the proposed sale of Xitenel's assets to BRL. Bombard's third cause of action based upon Xitenel's alleged willful failure to give notice under BCL § 909(a) should therefore be dismissed as a matter of law.

2. Sixth Cause of Action – Rescission of the Sale.

Since neither Xitenel nor Kellner were required to give the statutory notice under BCL

§909(a) because Bombard was never a "shareholder of record," Bombard's sixth cause of action to rescind the Sale -- based upon Xitenel's and Kellner's alleged failure to provide such notice -- should also be dismissed as a matter of law.

In addition, the rescission cause of action also fails, as a matter of law, because courts have held that minority shareholders who seek to rescind alleged improper corporate transactions are required to bring a derivative action. See, e.g., Bassett v. Battle, 253 A.D. 893, 1 N.Y.S.2d 869 (2d Dep't 1938) (cause of action for rescission belongs to the corporation); see also Burg v. Burg Trucking Corporation, 26 Misc.2d 619, 203 N.Y.S.2d 699 (S.Ct. NY Co. 1960) ("[n]or may the minority shareholders sue for rescission save by derivative action and upon allegations sufficient to ground a cause for rescission"). Clearly, Bombard does not assert this cause of action, or any other, in a derivative capacity. Therefore, assuming *arguendo* Bombard was a shareholder of record (which he was not), dismissal of the rescission claim is nevertheless warranted as a matter of law.

B. Bombard's Breach of Fiduciary Duty Claim Against Kellner Lacks Merit and Should Be Dismissed As a Matter of Law.

Although Bombard characterizes his second cause of action as a breach of fiduciary duty claim, he merely repeats the same baseless allegations of a violation of BCL §909. Specifically, he alleges that Kellner and Xitenel breached their purported fiduciary duties to him as a minority shareholder by failing to give him prior notice of the proposed sale of Xitenel. (See Kellner Aff., Exhibit A, ¶¶29-32).

1. Since Bombard Was Not a Shareholder of Record Entitled to Vote On the Proposed Sale of Xitenel's Assets, Any Alleged Failure By Xitenel and/or Kellner to Provide Him With Notice Was Not a Breach of Fiduciary Duty.

As demonstrated in Point I.A., Bombard was not a "shareholder of record" because Xitenel

never issued shares of its stock to him. Indeed, Xitenel's Stock Registration Ledger confirms that Kellner was the sole shareholder holding the only fifty (50) shares of stock issued by Xitenel. (See Kellner Aff., ¶5, Exhibits D, E and F). Pursuant to BCL§909, Bombard was not entitled to vote on the proposed sale and, therefore, not entitled to prior notice of the Sale. Thus, in the first instance, any purported breach of fiduciary duty based upon Xitenel's or Kellner's alleged failure to provide Bombard with prior notice of the Sale fails as a matter of law.

2. Additionally Bombard Has Failed to Establish the Elements of a Breach of Fiduciary Duty Claim.

Bombard cannot establish the elements of his breach of fiduciary duty claim which require a plaintiff to demonstrate the existence of a fiduciary relationship, misconduct by the defendant and damages caused by such misconduct. See Kurtzman v. Bergstol, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644, 646 (2d Dep't 2007).

a. No Fiduciary Relationship Exists Between Bombard and Kellner and/or Xitenel.

Bombard falsely alleges that he had a fiduciary relationship with Xitenel and Kellner based on his purported status as a minority 10% shareholder of Xitenel. (See Kellner Aff., Exhibit A, ¶¶29-32). Specifically, Bombard alleges that "[p]ursuant to the employment agreement between Xitenel and plaintiff, plaintiff received 10% of the Xitenel stock when plaintiff accepted Xitenel's offer of employment which, among other things, contained the grant of 10% of Xitenel's stock." (See Kellner Aff., Exhibit A, ¶29) However, the record demonstrates that Bombard's allegations are utterly false and unsupportable.

The documentary and testimonial evidence supporting this motion conclusively establish that there was no agreement, written or otherwise, entitling Bombard to a 10% stock ownership interest

in Xitenel. First, the record establishes that Bombard was not a shareholder of Xitenel, let alone a shareholder of record. And, in fact, Kellner was the sole shareholder of Xitenel. (See Kellner Aff., ¶5, Exhibit D). Although Bombard drafted a letter agreement regarding his employment as CEO to be placed on Xitenel's letterhead and signed by Kellner, which provided for a three (3) year term of employment and Bombard's receipt of a 10% stock interest in Xitenel, (See Kellner Aff., ¶11, Exhibit G), the agreement was never finalized and signed by Bombard and Xitenel. (See Kellner Aff., ¶12, Exhibit G). Instead, Bombard accepted the CEO position at a yearly salary of $450,000 without any agreement as to his term of employment and/or his receipt of stock ownership of Xitenel. (See Kellner Aff., ¶12, Exhibits E, F and G).

Clearly, there was never a meeting of the minds regarding, *inter alia*, the term of Bombard's employment and the issuance of Xitenel stock to him. At best, there was merely an unenforceable agreement to agree that did not contain all the material terms of a binding agreement. See, e.g., Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 249 (1981) ("it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable."); see also Teutel v. Teutel, 79 A.D.3d 851, 912 N.Y.S.2d 664, 665-66 (2d Dep't 2010) ("here, the parties merely agreed to later agree on a procedure for determining fair market value, in which case it cannot be said that the parties intended to create 'a complete and binding contract (citation omitted)"); Venture Manufacturing (Singapore) Ltd. v. Matco Group, Inc., 6 A.D.3d 850, 775 N.Y.S.2d 105 (3d Dep't 2004) (court held that, despite preliminary negotiations and a draft letter agreement regarding proposed sublease, there was no binding agreement since letter agreement was never executed and plaintiff walked away from the deal); Lupoli v. West Hills Neighborhood Assoc., 140 A.D.2d 312,

313, 527 N.Y.S.2d 818, 819 (2d Dep't 1988) ("The more formal agreement which the parties had hoped to reach never materialized and it is clear from all the evidence in the record that no meeting of the minds ever occurred.").

The facts in Venture Manufacturing, *supra*, are sufficiently analogous to the facts here. There, plaintiff entered into negotiations regarding a sublease of a manufacturing facility in Mexico from a subsidiary of defendant. The negotiations resulted in an October 4, 2000 letter agreement typed on defendant's letterhead, which was never signed by plaintiff. Plaintiff also deposited over $390,000 with defendant's attorneys to secure its obligations under the intended arrangement. 6 A.D.3d at 850. The parties' correspondence memorialized that there were open material terms that needed to be resolved prior to execution of a final agreement. Plaintiff walked away from the deal after the parties failed to execute a more formal agreement. Id. at 850-51. The trial court held that plaintiff was entitled to summary judgment for the return of its deposit finding that there was never a binding agreement or meeting of the minds, and the Appellate Division, Third Department affirmed. Id. at 851.

Here, similar to Venture Manufacturing, the parties' preliminary negotiations resulted in a proposed employment agreement – drafted by Bombard -- which provided for a three (3) year term of employment and the issuance of stock to him upon execution. However, the agreement was never finalized and executed by Bombard and Xitenel. On this record, there was never a meeting of the minds between Xitenel and Bombard either as to his employment term or the issuance of stock to him.

Not only does Bombard fail to provide documentation, or other evidence, of an agreement supporting his alleged ownership interest in Xitenel, Bombard's conduct after leaving Xitenel is

entirely inconsistent with the 10% ownership interest he now falsely claims.

First, prior to abruptly resigning from Xitenel, Bombard never requested that Xitenel issue shares in his name and/or record his shareholder status on its books. (See Kellner Aff., ¶15).

Second, after resigning from Xitenel, Bombard never requested that shares of Xitenel be issued in his name to document his purported 10% ownership, and he never even inquired about the status of Xitenel's operations or its financial performance. In fact, although Bombard sent numerous emails to Kellner requesting payment of certain alleged deferred salary he claimed was due to him, he never once inquired about or even mentioned his purported ownership interest in Xitenel in such communications. (See Kellner Aff., ¶17, Exhibit I).

Third, in his first email to Kellner after the Sale, Bombard simply conveyed his congratulations and best wishes. He did not even mention his alleged shareholder status, much less make any claim that as a shareholder he was entitled to notice of the Sale or entitled to receive 10% of the proceeds of the Sale. (See Kellner Aff., ¶18, Exhibit J).

Finally, Bombard's personal income tax filings with the IRS for years 2008 and 2009 belie his claim that he was a 10% owner Xitenel stock. Although the IRS requires that a K-1 form be issued for each shareholder of an S-Corporation each year so that when the shareholder files an income tax return, he/she may report, among other things, his/her pro-rata share of net income or loss, Xitenel never issued a K-1 for Bombard, and Bombard never requested that Xitenel issue a K-1 to him with respect to his claimed ten (10) percent ownership of the company. In fact, the only K-1s issued by Xitenel were to Kellner, its sole shareholder. (See Kellner Aff., ¶¶20-21, Exhibit K).

Importantly, Bombard certified the accuracy of the information set forth in his 2008 and 2009 income tax returns under penalty of perjury, in which he did not declare to the IRS that he was a

shareholder of Xitenel. (See Kellner Aff., ¶22, Exhibits L and M).

The same policies and principles underlying the doctrine of judicial estoppel have been applied to non-judicial circumstances and New York federal and state courts have consistently held that "a party to a litigation may not take a position contrary to a position taken on an income tax return." Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 422, 881 N.Y.S.2d 369, 373 (2009), citing, Meyer v. Insurance Co. of America, 1998 WL 709854 (S.D.N.Y. 1998); see also Naghavi v. New York Life Ins. Co., 260 A.D.2d 252, 688 N.Y.S.2d 530 (1st Dep't 1999); Gagen v. Kipany Productions, Ltd., 18 Misc.3d 1144(A), 2004 WL 5544358 (Sup. Ct. Albany Co. 2004).

In Mahoney, which involved an appeal in a divorce action, the husband argued that $1,800,000 he received from the sale of his corporate interests to his father were proceeds from the sale of stock and, thus, separate property not subject to equitable distribution. 12 N.Y.3d at 419-420. However, on his tax returns, the husband reported the funds as business income on the parties' joint tax returns. In light of his sworn statements on the joint tax returns, the trial court held that in the litigation he was estopped from claiming the proceeds were not marital property and the Appellate Division affirmed. Id. at 420. The Court of Appeals granted leave to appeal and affirmed, holding:

> "Here, husband does not dispute that, in accordance with his settlement agreement, he reported the $1,800,000 in settlement proceeds as business income on his federal income tax return, in which he swore that the representations contained within it were true. We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under penalty of perjury on income tax returns." Id. at 422.

In Meyer, the plaintiff had applied for and received total disability benefits from the defendant insurer beginning in 1998. However, the plaintiff stated on her tax returns that she was employed full time in the capacity as a trader of options, commodities and futures. Based on her

sworn representations on the tax returns, the insurer took the position that plaintiff was not disabled and demanded a return of the paid benefits. The district court noted that:

> "It has often been stated that cheating on one's tax return is American as apple pie. In this case, plaintiff's statements on her 1992 tax return whether truthful or an example of tax cheating in order to obtain a business expense deduction has cost her a much larger benefit under a long-term disability policy." 1998 WL 709854 at *1.

The district court also observed that IRS regulations require that all tax returns contain or be verified by a signed declaration by the taxpayer, under penalty of perjury. By signing her tax return plaintiff declared all the statements therein to be true under penalty of perjury. The district court ultimately determined that defendant insurer was entitled to a refund since plaintiff was "estopped from now taking a position inconsistent with [her] representations to the IRS." Id. at *10 (citations omitted).

Similarly, in Gagen, plaintiff brought claims for unpaid overtime and attorneys fees under New York Labor Law §190 based upon his purported status as an employee of the defendant corporation. Defendant asserted that there was no employer-employee relationship between the parties since the parties never executed a written contract to govern their business relationship and moved for summary judgment to dismiss plaintiff's labor law claims..." 2004 WL 5544358 at *1. The court found that "plaintiff's tax returns for the years in question establish his status as an independent contractor and not as he alleges an employee of the plaintiff." Id. at *2. Notably, the court found, *inter alia*, plaintiff did not declare any W-2 wages, took deductions for business expenses and declared depreciation of business assets associated with independent contractor status. The court determined that:

> "The plaintiff has not produced any admissible evidence to rebut the proof or create a question of fact regarding the plaintiff's status as an

> independent contractor as supported by his 1995, 1996 and 1997 tax filings. The plaintiff is bound by the representations set forth in his tax returns." Id. at *2.

It is fatal to Bombard's claim of purported stock ownership in Xitenel that he declared the income earned as CEO of Xitenel in both his 2008 and 2009 tax returns, but did not declare that he owned any stock in Xitenel. The undisputed fact that Bombard did not declare his purported stock ownership interest on the 2008 and 2009 income tax returns is consistent with the undisputed fact that he never requested Xitenel to issue him a K-1. It is also consistent with the undisputed fact that Xitenel never issued any stock to him nor listed him as a shareholder of record on its books.

Therefore, based on the foregoing controlling legal authority, Bombard is precluded from taking a position regarding his shareholder status in this litigation contrary to the position in his certified income tax returns.

Accordingly, the record establishes that Bombard was not a shareholder of Xitenel and, thus, there was no fiduciary relationship between him and Xitenel and/or Kellner.

b. There Was No Misconduct By Kellner and/or Xitenel.

Additionally, with respect to the element of his breach of fiduciary duty claim concerning misconduct, the only alleged misconduct is Xitenel's and/or Kellner's alleged failure to give him prior notice of the Sale. As more fully discussed above, since Bombard was not a record shareholder he was not entitled to notice of the Sale under BCL § 909, and, therefore, any allegation of misconduct is false and meritless.

Accordingly, Bombard cannot establish any of the elements of his second cause of action and dismissal thereof is warranted as a matter of law.

C. Bombard's Fourth and Fifth Causes of Action to Impose a Constructive Trust On the Sale Proceeds Also Lack Merit and Should Be Dismissed As a Matter of Law.

Bombard's fourth and fifth causes of action, respectively, seek to impose a constructive trust on funds held by BRL (Bombard alleges BRL is holding funds which represent proceeds from the Sale in a Claim Fund in the event Xitenel had receivables due or claims brought against it for actions taken prior to the Sale), and the proceeds of the Sale that were distributed to Kellner. (Kellner Aff., Exhibit A, ¶¶ 39-54). Each of these claims lacks merit and should be dismissed.

Initially, Bombard's BCL § 909 claims lack merit because he is not a "shareholder of record." Thus, there is no basis for this Court to award him monetary damages based upon his claimed entitlement to 10% of the proceeds of the Sale, and, consequently, Bombard is not entitled to the imposition of a constructive trust with respect to the proceeds of the Sale.

1. Bombard Cannot Establish the Elements of His Constructive Trust Claims.

Additionally, Bombard cannot satisfy his burden of establishing the elements of a constructive trust. In order to impose a constructive trust, a party must establish the following: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment. See, e.g., Nathanson v. Nathanson, 20 A.D.3d 403, 799 N.Y.S.2d 83, 84 (2d Dep't 2005); Cerabono v. Price, 7 A.D.3d 479, 775 N.Y.S.2d 585 (2d Dep't 2004). "The ultimate purpose of a constructive trust is to prevent unjust enrichment and, thus, a constructive trust may be imposed 'when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest.'" Cruz v. McAneney, 31 A.D.3d 54, 58-59, 816 N.Y.S.2d 486 (2d Dep't 2006) (quoting Sharp v. Kosmalski, 40 N.Y.2d 119, 121, 386 N.Y.S.2d 72 (1976)).

a. There Is No Confidential or Fiduciary Relationship Between Bombard and Either Kellner or Xitenel.

As demonstrated above, despite his repeated false allegation that he was a shareholder of Xitenel (Kellner Aff., Exhibit A, ¶40), Bombard was not a shareholder of Xitenel, and, therefore, he did not have a confidential or fiduciary relationship with Kellner or Xitenel. For this reason alone, Bombard cannot establish his entitlement to a constructive trust by reason of a mere employer-employee relationship. See, e.g., Abacus Federal Savings Bank v. Lim, 75 A.D.3d 472, 474, 905 N.Y.S.2d 585, 588 (1st Dep't 2010) (employer-employee relationship did not rise to the level of a confidential or fiduciary relationship for purposes of a constructive trust).

b. There Was No Transfer In Reliance On a Promise.

Bombard also fails to properly allege, let alone demonstrate, that he made any transfer of property or funds to Xitenel and/or Kellner in reliance on a promise made to him. Specifically, Bombard alleges the following:

> "In return for plaintiff's promise to so perform [work as CEO of Xitnel], plaintiff received from Kellner a promise that Kellner, as sole shareholder of Xitenel, would ensure that plaintiff received his agreed-upon salary, reimbursement of his out-of-pocket expenses incurred on Xitenel's behalf and 10% of the Xitenel stock. (See Kellner Aff., Exhibit A, ¶51.)

"In order to establish that there was a transfer in reliance on the promise, it must be shown that the party seeking to impose the constructive trust had some interest in the property prior to obtaining the promise that the property would be conveyed, and the this interest was parted with in reliance on the promise." Bontecou v. Goldman, 103 A.D.2d 732, 733, 477 N.Y.S.2d 192, 195 (2d Dep't 1984); see also Mance v. Mance, 128 A.D.2d 448, 513 N.Y.S.2d 141, 143 (1st Dep't 1987) ("A constructive trust has been imposed where property is parted with on the faith of an oral promise

[citation omitted], but none may be imposed by one who has no interest in the property prior to obtaining a promise that such an interest will be given to him...").

In Mance, plaintiff sought to impose a constructive trust on 50% of the stock and assets of defendant Beacon Rental Corp. ("Beacon"), which was solely owned and controlled by his father. Plaintiff alleged that he agreed to work for Beacon at a minimal salary based on the promise that he would receive 50% of the company when his father turned 75 years of age. The First Department reversed the trial court's order denying summary judgment on the constructive trust claim and held that "plaintiff possessed no prior interest in the company" and therefore did not relinquish such interest "in reliance on the alleged promise." 128 A.D.2d at 448. Further, the constructive trust claim did not properly lie based on the court's determination that title to the company was held in his father's name, no partnership papers were ever filed, and plaintiff received a salary while he was working for the company. Id. at 448-49.

Bombard's constructive trust claim should be dismissed, as a matter of law, since here, as in Mance, Kellner was the sole owner of Xitenel and Bombard never had any interest in Xitenel's stock. Further, Bombard never transferred any stock (or other property), and he received a salary for his services as CEO prior to his departure after only three months.

c. Xitenel and/or Kellner Have Not Been Unjustly Enriched.

Bombard's assertion that Kellner and/or Xitenel have somehow been unjustly enriched at Bombard's expense is simply disingenuous because, *inter alia*, Kellner was the only shareholder of Xitenel and rightfully entitled to the proceeds of the Sale. Bombard had no ownership interest in Xitenel, was not entitled to vote on the proposed transaction or entitled to share in the proceeds of the Sale. Instead, he received a generous salary from Xitenel for about three months prior to

resigning to start his employment as the Chief Medical Officer for Sequenom. Under the circumstances, Bombard has not provided, and cannot provide, any basis to support his position that Kellner and/or Xitenel have been unjustly enriched by the Sale of Xitenel's assets.

In fact, Bombard improperly accepted employment with Sequenom before agreeing to work as Xitenel's CEO, and was merely biding his time until he reached an agreement with Sequenom as to a start date as provided in the employment agreement with Sequenom he signed prior to joining Xitenel.

Since the unjust enrichment element of Bombard's constructive trust claim involves the application of principles of "equity" and "good conscience" (see Marini v. Lombardo, 79 A.D.3d 932, 912 N.Y.S.2d 693, 697 (2d Dep't 2010)), Bombard's faithless performance of his duties as CEO for three short months destroys any assertion of unjust enrichment.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court grant Defendants' motion for summary judgment dismissal of Plaintiff's second through sixth causes of action set forth in the Complaint as a matter of law, sever the first cause of action for trial and grant such other, further and different relief as to the Court may seem just and proper.

Dated: Garden City, New York
March 4, 2011

Respectfully submitted,

ROSENBERG CALICA & BIRNEY LLP

By:_____
John S. Ciulla, Esq.
Counsel for defendants, Xitenel, Inc. and Leonard Kellner
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400