

NORTH CAROLINA  
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
06 CVS 10500

LEONARD J. KAPLAN,  
Plaintiff,

v.

O.K. TECHNOLOGIES, LLC, LAURENT  
OLIVIER, DAVID F. MESCHAN, JEFFREY  
BOWMAN, and AQUATIC EVOLUTION  
INTERNATIONAL, INC.,  
Defendants.

**REPLY BRIEF IN SUPPORT OF MOTION OF PLAINTIFF  
LEONARD J. KAPLAN FOR SUMMARY JUDGMENT**

Pursuant to Rule 15.7 of the General Rules of Practice and Procedure for the North Carolina Business Court, plaintiff Leonard J. Kaplan (“Kaplan”) submits this Reply Brief in further Support of his Motion for Summary Judgment.

**I. ISSUES NEWLY RAISED BY THE RESPONSE OF LAURENT OLIVIER AND JEFFREY BOWMAN.**

**A. Kaplan Did Not Breach Fiduciary Duties.**

In their Response Brief in Opposition to Kaplan’s Motion for Summary Judgment, Laurent Olivier (“Oliver”) and Jeffrey Bowman (“Bowman”) contend that Kaplan owed “enhanced” fiduciary duties to them by virtue of his contributions to O.K. Technologies, LLC (“O.K.”). They further contend that Kaplan breached these fiduciary duties by characterizing the contributions as loans and then demanding that O.K. repay the debt. These contentions are not supported by the facts or law, and Kaplan is entitled to summary judgment on the breach of fiduciary duty claim.

First, Kaplan did not owe “enhanced” fiduciary duties because he was making contributions to the company. Kaplan’s duties to Olivier and Bowman were defined by section 5.3 of the Operating Agreement, and there is no authority for the proposition that Kaplan, a minority member of a member-managed LLC, had “enhanced” duties. In fact, the authority is to the contrary in that the members of O.K. owed fiduciary duties to Kaplan, in his capacity as the only creditor of the company, once the company entered dissolution. See e.g., Whitley v. Carolina Clinic, Inc., 118 N.C. App. 523, 528, 455 S.E.2d 896, 900 (1995) (directors of a corporation owe a fiduciary duty to creditors of the corporation when there exist “circumstances amounting to a winding up or dissolution of the corporation”).<sup>1</sup>

Second, Olivier and Bowman have not proffered any facts that preclude Kaplan’s motion for summary judgment on their breach of fiduciary duty claim. None of the allegations set forth in their Response Brief rise to a violation of section 5.3 of the Operating Agreement, which specifically sets forth the duties of the members to one another.

- *Kaplan’s characterization of his contributions as debt and demanding repayment of the debt is not a breach of fiduciary duty.* As set forth in Kaplan’s principal Brief, the evidentiary record contains numerous admissions by Olivier, Bowman and Meschan that Kaplan’s contributions were loans and not additional capital contributions. (See Brief in Support of Motion for Summary Judgment, pp. 9-10). Demanding repayment of that debt does not give rise to a breach of fiduciary duty.

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<sup>1</sup> Meschan recognized this duty in his letter of June 19, 2006, noting that “each of us owes a fiduciary duty to such creditor [Kaplan] to use his best efforts to get him paid—to the fullest extent possible—from corporate assets.” (Meschan Ex. 19).

- *Kaplan's request for recapitalization is not a breach of fiduciary duty.*

During the January 17, 2006 meeting of the members, Kaplan proposed that the LLC be recapitalized by converting his debt into capital. The other members present<sup>2</sup> requested time to review the proposal and ultimately rejected it. Thus, as of that meeting, they knew that Kaplan believed the contributions were loans, and they rejected his request that such debt be converted to capital. Requesting that O.K. be recapitalized is not a breach of fiduciary duty.<sup>3</sup>

- *Kaplan was not required to pay the other members' expenses to evaluate his recapitalization proposal.* After the January 17, 2006 meeting, the other members demanded that Kaplan pay for an independent appraiser and attorney to assist them in evaluating his recapitalization proposal. (Bowman pp. 141-46). Kaplan had no duty to fund other members' analysis of his proposal. Indeed, Olivier and Bowman conceded that they could have sought expertise of their own, but chose not to do so. (Olivier pp. 135-38; Bowman pp. 145-50). They hired counsel who made demands on Kaplan, further illustrating that Kaplan had no duty to assist the other members in evaluating his own proposal.

- *Kaplan's opposition to manufacturing and selling products was not a breach of fiduciary duty.* As set forth in Kaplan's principal Brief, his opposition to manufacturing and selling components of O.K.'s technology was not a breach of fiduciary duty. (See Brief in Support of Motion for Summary Judgment, p. 15). In fact,

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<sup>2</sup> Olivier did not attend this meeting.

<sup>3</sup> The other members knew at least by the January 17, 2006 meeting that Kaplan's position was that his ongoing contributions to O.K. were loans. They did not object to his characterization and continued to accept and spend his contributions through July 31, 2006.

Meschan was also opposed to manufacturing component products. (Meschan Vol. II pp. 93-95). As such, even if Olivier and Bowman had requested that the members vote on selling products, which they did not, Meschan and Kaplan would have defeated their proposal.

- *Kaplan's meeting with Olivier in April 2006 does not form the basis of a breach of fiduciary duty.* In April 2006, Olivier met with Kaplan to discuss the direction of O.K. Olivier recorded their conversation without obtaining Kaplan's consent and without informing him of the surreptitious recording. While Olivier has produced a tape of the conversation in discovery, it is largely inaudible. Indeed, while Olivier's Affidavit dated January 23, 2008 includes several "quotes" that he attributes to Kaplan, Olivier concedes in the Affidavit that such "quotes" are made only from his memory. (Olivier Aff. ¶ 2).

Assuming *arguendo* the alleged "quotes" are competent evidence, they do not raise a genuine issue of fact to defeat summary judgment. By April 2006, Kaplan and Olivier were at odds over recapitalization; Olivier's attorney had sent Kaplan two demand letters; and Olivier had indicated that he would no longer work on the company's projects. (Olivier Exs. 8, 11, 12). The duties Kaplan owed to Olivier at that time, if any, must be viewed light of those circumstances. See, e.g., Piedmont Institute of Pain Management v. Staton Foundation, 157 N.C. App. 577, 583, 581 S.E.2d 68, 72-73 (2003) (relation of trust and confidence is terminated when counsel is retained and duties abrogated). Moreover, even if duties remained, the alleged "quotes" do not raise a genuine issue of fact. Rather, they illustrate that Olivier and Kaplan were continuing to

vet their differences and talk with one another about how to continue the business of O.K. in light of their differences.

**B. Kaplan did not Engage in Fraud.**

Olivier's and Bowman's fraud claim is based on the following allegation:

“Kaplan knew at the time the parties formed O. K. that he had no intention of pursuing the manufacture and sale of the denitrator and AEI's other products and that the pursuit of the animal waste and aquaculture applications, without revenue, would result in drastic dilution or elimination of [these defendants'] ownership interests in O.K.” (Response Brief, p. 10). First, there is no factual authority for this allegation, and Olivier and Bowman cite none. Indeed, Bowman's testimony undermines this allegation. (See Brief in Support of Motion for Summary Judgment, p. 21, citing Bowman pp. 194-95).

Second, the record establishes that Olivier and Bowman understood that O.K.'s focus would be more sophisticated than manufacturing denitrators, and that such focus would require substantial resources. (Bowman pp. 192-93). Within months of O.K.'s formation, Olivier and Bowman completed a strategic plan for developing the technology into specific areas of usage, including aquariums, animal waste and aquaculture. (Bowman pp. 69-73 & Ex. 2). Their strategic plan projected the funds required to advance each area of development and recommended that the company proceed simultaneously with the aquarium and aquaculture projects. (Bowman Ex. 2). Thereafter, the members continued to vote on the company's priorities and provide input on how funds were spent. (See e.g., Bowman Exs. 4, 9). These circumstances show that Olivier and Bowman did not rely on alleged pre-incorporation statements by Kaplan. They also understood the funds that would be required to pursue the varying applications

of the technology; indeed, they drafted a strategic plan outlining the funds that would be required. (Bowman Ex. 2). Accordingly, defendants' fraud claim fails.

**C. The UDTPA Claims Fails.**

Olivier and Bowman concede that the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") has limited application. (See Response Brief, at pp. 12-13) (citing HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991) and Haynes v. B&B Realty Group, LLC, 179 N.C. App. 104, 633 S.E.2d 691 (2006)). Nonetheless, they contend that a UDTPA claim is viable in this case because they "contributed their interests in certain intellectual property" to O.K., "continued to provide research and development" for O.K., and "continued to use best efforts even though the company was not solvent." (See Response Brief, at 13).

These allegations, taken in the light most favorable to defendants, fail to state a claim under the UDTPA. No commerce was affected by Olivier's and Bowman's actions. No consumer was involved or aggrieved. Rather, the allegations involve nothing more than internal discord and disagreement among members of an LLC, which as a matter of law falls outside the scope of the UDTPA. Accordingly, defendants' UDTPA claim should be dismissed.<sup>4</sup>

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<sup>4</sup> Although Olivier, Bowman and AEI asserted claims for constructive fraud, negligent misrepresentation and punitive damages, they have not opposed Kaplan's Motion for Summary Judgment on those claims. Similarly, they have not responded in opposition to Kaplan's Motion for Summary Judgment on their rescission claim. As such, Kaplan is entitled to judgment as a matter of law on these claims.

## **II. ISSUES NEWLY RAISED BY THE RESPONSE OF DAVID MESCHAN.**

### **A. No Member Disputes that Kaplan is O.K.'s Only Creditor.**

In his Response Brief (“Meschan’s Brief”), Meschan fails to discuss or deny his numerous admissions that Kaplan’s contributions were loans and that Kaplan is O.K.’s creditor. (See Brief in Support of Motion for Summary Judgment pp. 9-11). Instead, Meschan’s Brief focuses on whether the members of O.K. agreed that Kaplan’s contributions were subject to the ten-day demand provision in section 2.4 of the Operating Agreement.

Whether the loans were made pursuant to section 2.4 of the Operating Agreement is immaterial. There is no dispute that Kaplan is the company’s only creditor. Thus, O.K.’s assets must first be applied to Kaplan, whether they were authorized by section 2.4 or not. N.C.G.S. § 57C-6-05 (2005) (“Upon the winding up of a limited liability company, its assets shall be applied . . . [first] to creditors, including members who are creditors.”). This result is also consistent with section 10.4 of the Operating Agreement, which provides that proceeds from the disposition of O.K.’s noncash assets are to be distributed first to the LLC’s creditors. (Op. Agrmt. pp. 20-21).<sup>5</sup>

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<sup>5</sup> Kaplan has acknowledged that the members did not approve in writing each loan in excess of the initial \$500,000 loan required of him. Nonetheless, members knew that Kaplan was loaning the company money, and no one objected to his doing so. (Olivier pp. 226-27). In fact, the members continued to accept Kaplan’s loans even after Kaplan requested recapitalization in January 2006, which recapitalization would have converted the debt into capital. Under these circumstances, the members of O.K. ratified the loans and the company should be held to the repayment obligation as set forth in section 2.4.

**B. Meschan's Affirmative Defenses do not Offset or Negate Kaplan's Right to Recover his Debt from O.K.**

Meschan has not filed any counterclaim against Kaplan. Yet, in an effort to offset debt O.K. owes to Kaplan, Meschan purports to assert various affirmative defenses. These defenses simply restate claims that Olivier and Bowman have asserted and fail for the same reasons.<sup>6</sup> For example, even if Kaplan attempted to “contrive superficial reasons for firing Olivier,” which is denied, he had no authority to fire Olivier and in fact did not do so. Kaplan was a minority member of O.K. He was unable to control management decisions and could have been outvoted by the other members on any issue at any time. Kaplan's minority position—coupled with the heightened standard set by section 5.3 of the Operating Agreement—defeat all of Meschan's purported defenses.

Indeed, the essence of Meschan's argument is that Kaplan was obligated to continue funding O.K. *ad infinitum*, without consideration for his personal pecuniary position. Kaplan told the other members he would loan as much as \$2 million to O.K., *and he did so*. As the \$2 million limit approached, Kaplan sought to secure his growing debt by recapitalizing the debt of the company. The others rejected all attempts at a fair recapitalization, yet continued to accept Kaplan's contributions knowing that the \$2 million ceiling was nearing. Meschan—counsel to O.K. and an author of the Operating Agreement—cannot now complain that Kaplan has sought to protect his interest in light of the events and circumstances that transpired in 2006.

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<sup>6</sup> Meschan submitted a 21-page affidavit in support of his defenses. The affidavit is wholly self-serving, appears inconsistent with portions of his deposition testimony, and contains numerous allegations that are based on hearsay or have no factual support. Meschan's affidavit should be reviewed with utmost skepticism and in light of the obvious attempt to rewrite O.K.'s history in his favor.

**C. The Independent Contractor Agreement is Immaterial.**

In his Response Brief, Meschan contends that the Independent Contractor Agreement between Kaplan and O.K., dated September 3, 2003, was not assigned by the Receiver to Scientific Associates, LLC. Based on this premise, Meschan argues that Kaplan has violated the noncompetition covenant contained in the Agreement by virtue of his ownership of Scientific Associates, LLC.

Meschan's argument ignores the Receiver's position that the agreement was an asset of O.K., title to which passed to the Receiver and then to Scientific Associates, LLC. See Receiver's Response, filed September 18, 2007. Meschan's argument also ignores the fact that this Court has previously approved the sale of O.K.'s assets to Kaplan's designee, and that no party sought to enjoin that sale on the basis that it would somehow violate the agreement. Under these circumstances, the terms of the Independent Contract Agreement are immaterial to the claims at issue in this case.

**D. "Equitable Subordination" is not a Remedy Recognized by North Carolina Law.**

Meschan urges this court to apply the doctrine of "equitable subordination" to reduce or eliminate Kaplan's interest in O.K. North Carolina courts have not adopted or applied "equitable subordination" in any context, and the court need not recognize a new cause of action in this case. By executing the Operating Agreement, the members of O.K. agreed to limit their liability to one another and to provide for certain contractual rights and remedies.<sup>7</sup> Moreover, the North Carolina Limited Liability Company Act does not provide for equitable subordination of a members' interest. Given the adequate

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<sup>7</sup> Section 1.1 of the Operating Agreement provides in part: "The rights and obligations of the members and the terms and conditions of the LLC shall be governed by this Agreement."

contractual and statutory remedies that govern this case, “equitable subordination” is an inappropriate remedy.

**CONCLUSION**

For the reasons discussed herein and in his principal Brief in Support of Motion for Summary Judgment, Kaplan respectfully requests that his Motion for Summary Judgment be granted.

This the 15<sup>th</sup> day of February, 2008.

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CERTIFICATE OF SERVICE

This is to certify that on February 15, 2008, the undersigned counsel for Plaintiff filed the foregoing Reply Brief with the North Carolina Business Court using the Electronic Filing system, which will send notification of such filing to the following: David F. Meschan, Pro Se; James W. Miles, Jr., Counsel for Defendants Laurent Olivier, Jeffrey Bowman and Aquatic Evolution International Inc.; and James C. Lanik, Counsel for the Receiver of OK Technologies, LLC, William P. Miller.

/s/ Manning A. Connors  
Manning A. Connors  
*Attorney for Plaintiff Leonard J. Kaplan*