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.

BRIEF OF DEFENDANTS LAURENT OLIVIER, JEFFREY BOWMAN, AND AQUATIC EVOLUTION INTERNATIONAL, INC. IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants, Laurent Olivier ("Olivier"), Jeffrey Bowman ("Bowman") and Aquatic Evolution International, Inc. ("AEI") submit their Brief in response to Plaintiff Leonard Kaplan's ("Kaplan") Motion for Summary Judgment, pursuant to Rule 15 of the General Rules of Practice and Procedure for the North Carolina Business Court.

STATEMENT OF PROCEDURAL HISTORY

Olivier, Bowman and AEI (collectively "Responding Defendants") concur in the Statement of Procedural History contained in Kaplan's Brief in Support of Summary Judgment ("Kaplan's Brief"). In addition thereto, Responding Defendants filed an Answer and Counterclaim in this action on December 11, 2006, alleging, *inter alia*, breaches of fiduciary duty and fraud by Kaplan. Also, on December 4, 2007, Responding Defendants moved for leave to amend their Counterclaim to allege derivative claims on behalf of OK Technologies, LLC ("OK"), also alleging breaches of fiduciary duty and fraud against Kaplan, which motion is currently pending.

STATEMENT OF PERTINANT FACTS

OLIVIER, BOWMAN AND AEI

Olivier was born in France and grew up in New Caledonia. (Olivier Dep. p. 5). He completed high school and a two year course of study in business at Jules Garnier, a university in New Caledonia. (Olivier Dep. p. 6) After graduation, he worked for the government of New Caledonia for approximately seven years, and thereafter operated his own business catching and exporting exotic tropical fish and selling and marketing aquariums for approximately two years. (Olivier Dep. pp. 9-10)

In 2000, Olivier came to the United States to work for one of his former customers, Marine Life Designs, providing design, installation, filtration, and fish care services for business customers and wealthy individuals. (Oliver Dep. p. 11) In 2002, Olivier and Bowman began business as AEI to develop, manufacture and sell components for home and commercial aquariums, and continued the development and sale of its products until September 2003, when AEI assigned its intellectual property to OK. (Olivier Dep. pp. 12, 54-55)

In 2003, Bowman, who serviced Kaplan's salt water aquarium at his home in Boca Rotan, Florida, told Kaplan about AEI and its products, and inquired about Kaplan's knowledge of patent applications. Kaplan responded that he was very knowledgeable about business and patents. (Bowman Dep. p. 32) After further discussions between Olivier, Bowman and Kaplan the parties agreed to form OK. (Bowman Dep. pp. 33, 36, 37)

FORMATION OF OK

On September 3, 2003, OK was organized with Kaplan's agreeing to contribute $200,000 in equity and to guaranty a loan to OK up to $500,000, and acquiring a 51% membership interest

in OK. (Operating Agreement, p. 3; Hardin Dep. Ex. 2) Olivier and Bowman contributed their and AEI's interests in the intellectual property relating to AEI's products, including the denitrator, a water purifying device that was the basis for AEI's business. (Operating Agreement, p. 3) At its formation, the membership interests in OK were Kaplan, 51%; Olivier, 43%; and Bowman, 6%. (Operating Agreement, p. 3) In July 2004, David S. Meschan was admitted as a member in OK, resulting in the following membership interests: Kaplan, 41.5%; Olivier, 37.5%; Meschan, 15%; and Bowman, 6%. (Operating Agreement, p. 5)

KAPLAN'S CONTRIBUTIONS

After the formation of OK, Kaplan contributed $200,000 as equity capital. (Kaplan Aff., Ex A) These funds were provided on an as needed basis to meet current expenses, and deposited into an account maintained by Kaplan in Greensboro; no other member had access to the OK account or check-writing authority.[1] (Patty Dep. pp. 16-18)

In May 2004, Kaplan completed his $200,000 equity contribution to OK. (Kaplan Aff., Ex A) However, without obtaining the agreement of the other members or the execution of any promissory notes or other documents, Kaplan continued to make deposits to, and approve payments from the OK checking account in the amount totaling $1,864,749.00 through July 31, 2006. (Kaplan Aff., ¶ 4) These contributions were not approved by the members as required by the Operating Agreement. (Operating Agreement, Sec. 2.3 & 2.5, pp. 5, 6) During this period, when Olivier and Bowman questioned Kaplan regarding OK's financial situation and Kaplan's continued funding beyond his obligation under the Operating Agreement, Kaplan said "do not worry about the money." (Olivier Dep. p. 123)

[1] Costs of operations of the OK facility were either paid directly from the OK checking account or were paid by Olivier, Bowman or others who were reimbursed by OK as approved and authorized by Kaplan. (Olivier Dep. p. 213)

OK'S INTERNAL DISPUTES

At the time of OK's formation, Olivier, Bowman, and Kaplan had agreed to fund OK's manufacture and sale of AEI's aquarium products including the denitrator, while also pursuing its more long-range projects. (Olivier Aff., ¶ 1.c; Operating Agreement, Article 9, p. 19; Hardin Dep. pp. 23-25) From 2003 through 2006, Olivier worked primarily on patent applications and the development of equipment that was intended to treat hog waste and the development of a shrimp acquaculture prototype. (Olivier Dep. pp. 224-225, Olivier Aff. ¶ 3) During this time Olivier and Bowman expressed their concern that OK was expanding its R&D efforts without a business plan or expectation of revenue. (Olivier Aff. ¶ 1.c) Throughout OK's business operations, Olivier and Bowman requested that OK proceed with the marketing, manufacture and sale of AEI's component products to generate revenue, but Kaplan refused. (Olivier Dep. 230-231) In February 2005, Aquatic Evolution Technologies, Inc. was formed with the expectation that it would proceed with the sale of component products as a wholly owned subsidiary of OK. (Hardin Dep. pp. 35-40, Exs 4 & 5) However, Kaplan refused to provide any funds for this business. (Olivier Dep. 230-231)

In May 2005, Kaplan demanded that OK give him a demand promissory note for the undefined contributions he had made in excess of his equity contribution as provided in the Operating Agreement. (Meschan Dep. pp. 52-55, 60-62, Exs 4 & 6) Through the second half of 2005 and the first quarter of 2006, the members attempted to negotiate reasonable terms for the recognition of Kaplan's contribution as either debt or equity, without success. (Meschan Dep. pp. 52-55, 60-62, Exs 4 & 6) As these discussions dragged on, the relationships among the members of OK deteriorated, resulting in internal conflicts that negatively affected OK's operations, and ultimately resulted in its demise. (McDonald Dep. 128-130)

LEGAL STANDARD

Rule 56 of the North Carolina Rules of Civil Procedure, N.C.G.S. § 1A-1, Rule 56(c), provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...." An issue is deemed to be "material" if the facts alleged would create a legal defense, or if resolution of the fact would prevent the party against whom it is resolved from prevailing. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "Genuineness" is found where the issue may be maintained by substantial evidence. *Id*

Summary judgment is a "drastic remedy." *First Federal Savings & Loan Assoc. v. Branch Banking & Trust Co.* , 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972). Summary judgment should be "cautiously used" so as not to deprive someone of a trial on a genuine disputed issue of fact. *Koontz, supra.* The rule requires the moving party to affirmatively show (1) that it would be entitled to judgment from the evidence contained in the materials submitted; and (2) that there can be no other evidence from which a jury could reach a different conclusion as to a material fact (i.e. that there is no triable issue). *Goode v. Tait, Inc.*, 36 N.C. App. 268, 243 S.E.2d 404 (1978).

Rule 56 is not to be used by a court to decide an issue of fact, but authorizes the court only to determine whether an issue of fact exists. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E. 2d 379, 381 (1975). Nor should the court undertake to determine the question of credibility. See, e.g., *Shearin v. National Indemnity Co.*, 27 N.C.App. 88, 218 S.E.2d 207 (1975).

Instead, in order to qualify for summary judgment, a moving party (Plaintiff Kaplan) must "clearly establish[ ] the lack of a triable issue" and its papers are "carefully scrutinized...." *Alford v. Shaw,* 72 N.C.App. 537, 542, 324 S.E.2d 878, 883 n. 2 (1985), *aff'd and modified on other grounds,* 320 N.C. 465, 358 S.E.2d 323 (1987)(applying summary judgment standard in breach of fiduciary duty case)(*quoting Vassey v. Burch*, 301 N.C. 68, 269 S.E.2d 137 (1980)). Conversely, the papers of the opposing party are "indulgently regarded...." *Id.*

ARGUMENT

1. KAPLAN'S UNAUTHORIZED AND UNDEFINED CONTRIBUTIONS CREATED ENHANCED FIDUCIARY DUTIES TO OK AND TO RESPONDING DEFENDANTS.

For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704, 707 (2001)(subsequent history omitted). Although North Carolina courts have been reluctant to define conclusively the term "fiduciary relationship," the North Carolina Supreme Court broadly defines such relationship as one "where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and due regard to the interests of the one reposing confidence. "*Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc.*, 243 F. Supp. 2d 386, 404 (M.D.N.C. 2002) *quoting Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E.2d 896, 906 (1931). Ultimately, the question of the existence of a fiduciary relationship is "determined by the specific facts and circumstances of the case" and is "a question of fact for the jury." *Panell v. Omli*, 110 N.C. App. 336, 347, 429 S.E.2d 774, 770 (1993).

In his brief, Kaplan appears to initially concede that he owed fiduciary duties to OK and

its members, arguing only that he owed no duty to AEI, arguing that Section 5.3 of OK's Operating Agreement limited the duties owed, and arguing that Kaplan did not breach his fiduciary duties. (Kaplan's Brief in Support of Summary Judgment pp 13-18; hereafter "Kaplan's Brief") Later however, without citing authority, Kaplan argues that Responding Defendants breach of fiduciary duty claims fail as a matter of law because "Kaplan was at all relevant times a minority member in the LLC." (Kaplan's Brief p.18) This argument ignores that fact that OK and its other members were entirely dependant upon Kaplan's financial contributions and completely subject to his control of the contribution often he made them. In *Dalton v. Camp*, which involved an employer-employee relationship, the North Carolina Supreme Court emphasized that a even where a position of trust or confidence is present, a fiduciary relationship does not exist without facts tending to show "*resulting domination and influence....*" *Dalton,* 353 N.C. at 651 (emphasis in original). Applying North Carolina law, the Fourth Circuit explained that: "[w]hen one party figuratively holds all the cards – all the financial power or technical information, for example the special circumstance of a fiduciary relationship has arisen", *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F. 3rd 331, 348 (4th Cir. 1998). Similarly, the *Volumetrics* Court stated that a fiduciary duty may arise when one party has control of or directs another's activities or interests. *Volumetrics*, 243 F. Supp.2d at 407.

From May 2004 to July 2006, Kaplan made unauthorized and undefined contributions to OK in the amount of $1,864,749, and maintained complete control over all expenditures, which created enhanced fiduciary duties on his part to deal with the characterization and terms of these contributions in a manner that of OK and Responding Defendants, and not Kaplan. Whether the trier of fact ultimately decides that Kaplan's contributions are debt or equity, they created

additional fiduciary duties on his part to deal fairly with OK and its members regarding the terms of repayment of debt, and the dilutive effect of equity.

From September 3, 2003, to July 2004, the date of Meschan's admission, Kaplan was the owner of 51% of OK. After Meschan's admission Kaplan's interest was reduced to 47.5%, however throughout the existence of OK, Kaplan dominated its finances that his fiduciary duty grew from that of a member, whether of a majority or not, to a member/lender or a member with a significantly increased majority interest from his original 51%. (Patty Dep. pp. 21-28)

2. KAPLAN'S BREACH OF FIDUCIARY DUTIES

During the period Kaplan made unauthorized and uncharacterized contributions to OK in the total amount of $1,864,749, he breached his fiduciary duties arising from his membership in OK and from these contributions which include:

1. Kaplan made contributions of $1,864,749 to OK between May 2004 and July 31, 2006, without obtaining agreements with the members as to the nature and terms of such contributions, as required by Section 2.3 and 2.4 of the Operating Agreement, and told members, "not to worry about money." As a result, the Responding Defendants had no say as to the terms or characterization of Kaplan's contributions until he demanded a demand note or a substantial restructuring of the member ownership interests.

2. Kaplan demanded that his entire contribution of $1,864,749 be characterized as debt and be subject to a payment on demand provision, which OK was incapable of satisfying.

3. Kaplan demanded that the entire contribution $1,864,749 be characterized as equity with dilution based on a valuation unilaterally determined by Kaplan without negotiation and without evaluation by third party experts as requested by the members.

4. Kaplan refused to fund the manufacture and sale by OK or AEI of market-ready components to generate revenue.

5. Kaplan conspired with Olivier, Meschan, Glen McDonald and others in an attempt to recruit members in a new entity Kaplan intended to form after he acquired OK's assets. (Meschan Dep. pp. 126-127; McDonald Dep. pp. 55-62; Maillet Dep. p. 18; Carney Dep. pp. 16-18; Olivier Aff. ¶ 1.d&c)

6. Kaplan demanded repayment of his "debt" and OK took legal action against OK with the intention that OK would be dissolved and liquidated, and that he would acquire all of OK's assets at a judicial sale, and that Responding Defendants would receive nothing. (Olivier Aff. ¶ 1.e; Olivier Dep. pp. 131-133)

3. OLIVIER'S ALLEGED BREACH OF FIDUCIARY DUTY

Kaplan alleges Olivier breached his fiduciary duties to Kaplan and breached the operating agreement. (Kaplan's Brief pp. 12, 13) Olivier denied these breaches.

1. Olivier admits discussing OK's internal conflicts with Steve McCorkle, which were true. Olivier denies that any partnership opportunity existed between OK and McCorkle, other than McCorkle's desire for an investment by OK in his company. (Olivier Dep. pp. 235-238)

2. Olivier denies unauthorized use of OK's truck and bobcat for personal use. (Olivier Dep. pp. 22, 28, 242, 243)

3. Olivier located a Kava grinder at OK's facility, however it was not used on company time, nor at any expense to OK. (Olivier Dep. pp. 18-21; Bowman Dep. pp. 21-24)

4. Olivier denies that the computer he used while providing services to OK through AEI was OK's property. (Olivier Dep. p. 28)

5. Olivier did seek to find buyers for OK's assets. (Olivier Dep. pp. 173-174) He did remove property from the OK facility, but returned all such property, subject of a determination as to its ownership in this action. (Olivier Dep. p. 28)

6. Olivier denies that he creating a hostile working environment for employees or behaving inappropriately in their presence. Sean Carney and Kimberly Maillet, OK's two employees other than Steve Massar, testified that Olivier continued to do his work at OK, and continues to provide them help and assistance. (Carney Dep. pp. 18-19; Maillet Dep. pp. 15-16)

7. Olivier denies that he ceased working on OK's technologies, and simply followed Kaplan's and Massar's instructions. (Carney Dep. pp. 18-19; Maillet Dep. pp. 15-16)

Kaplan's allegations of Olivier's breach of fiduciary duty and breach of the Operating Agreement create, at most, genuine issues of material facts that preclude summary judgment.

KAPLAN'S FRAUD

Prior to the formation of OK, Bowman, Olivier and Kaplan agreed that the development, patent application, manufacturing and marketing of the denitrator would be OK's business focus and the basis for its initial capitalization. (Hardin Dep. 23-25; Operating Agreement, Article IX, p. 19; Olivier Aff. ¶ 1.c) After OK's formation, Kaplan turned the focus of the company to patent application and research and development of animal waste and shrimp aquaculture patent and prototype. Kaplan refused to provide funds for AET that had been formed to manufacture and sell AEI's original market-ready aquarium products. Kaplan knew at the time the parties formed OK 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 the Responding Defendants ownership interests in OK.

UNFAIR AND DECEPTIVE ACTS

The parties do not disagree with the elements required to establish a claim under the North Carolina Unfair and Deceptive Trade Practices Act (UDTPA). Specifically, to establish the validity of its counterclaim, Defendants must show that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." N.C. Gen.Stat. § 75-1.1 and *Pleasant Valley Promenade v. Lechmere, Inc.,* 120 N.C.App. 650, 664, 464 S.E.2d 47, 58 (1995) (citation omitted). While unfair and deceptive practices tend to involve buyer and seller relationships, *Holley v. Coggin Pontiac, Inc.,* 43 N.C.App. 229, 259 S.E.2d 1, *disc. review denied,* 298 N.C. 806, 261 S.E.2d 919 (1979), actions based on other types of commercial relationships, including those outside of contract, have been recognized. See, e.g. *J.M. Westall & Co., Inc. v. Windswept View of Asheville, Inc.,* 97 N.C.App. 71, 387 S.E.2d 67, *disc. review denied,* 327 N.C. 139, 394 S.E.2d 175 (1990).

" 'The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State [,] and [it] *applies to dealings between buyers and sellers at all levels of commerce.*' " *Bhatti v. Buckland,* 328 N.C. 240, 245, 400 S.E.2d 440, 443-44 (1991), (quoting *United Va. Bank v. Air-Lift Assocs.,* 79 N.C.App. 315, 319-20, 339 S.E.2d 90, 93 (1986)) (alterations in original). However, courts have not limited the applicability of the UDTPA to cases involving consumers only. After all, unfair trade practices involving only businesses affect the consumer as well." *United Labs., Inc. v. Kuykendall,* 322 N.C. 643, 665, 370 S.E.2d 375, 389 (1988) (citation omitted).

Proof of fraud necessarily constitutes a violation of the statute. *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346, *aff'd*, 288 N.C. 303, 218 S.E.2d 342 (1975).

Importantly, Plaintiff has not asked the Court to determine that certain acts were or were not deceptive or unfair, or that defendants were not injured. Instead, Plaintiff's sole argument against Defendants' claim under the UDTPA is founded upon the argument that his acts did not affect commerce. Before a claimant is entitled to the remedies afforded by the UDTPA, it must first establish that the conduct complained of was "in or affecting commerce" before the question of unfairness or deception arises. *Johnson v. Insurance Co.,* 300 N.C. 247, 266 S.E.2d 610 (1980). The UDTPA assists in the interpretation of the word "commerce" by asserting that it "includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b). While the statutory definition is expansive, it is also clear that Courts have found that the Act does not apply in certain circumstances, such as employer-employee relations, *Buie v. Daniel International,* 56 N.C.App. 445, 289 S.E.2d 118, *disc. rev. denied,* 305 N.C. 759, 292 S.E.2d 574 (1982), and securities transactions, *Skinner v. E.F. Hutton & Co.,* 314 N.C. 267, 333 S.E.2d 236 (1985).

In *Haynes v. B&B Realty Group, LLC,* 170 NCApp 104, 633 Se2d 691 (2006), the Court affirmed summary judgment that the UDTPA did not cover a breach of contract dispute where no "aggravating circumstances" were established and where the contract, governing the relationship between the company and an employee, had no impact beyond the individual parties. 170 NCApp at 112, 633 SE2d at 696. Similarly, the court dismissed a claim under the UDTPA when the only allegation involved the modification of a corporation's by-laws to, allegedly, keep certain former employees from serving on a corporation's board of directors.

Lastly, the failure of a company to retire revolving fund certificates – granted during the formation of the company and reflecting investment in the company – did not constitute an unfair trade practice since they only related to the creation, transfer or retirement of securities. *HAJMM Co. v. House of Raeford Farms,* 328 N.C. 578, 403 S.E.2d 483 (1991).

In the instant case, however, Defendant's claim goes beyond a mere breach of contract and goes beyond a securities transaction. Defendants contributed their interests in certain intellectual property based upon the promises of Plaintiff. Defendants continued to provide research and development and prototypes based upon certain promises made by Plaintiff. Defendants continued to use their best efforts even though the company was not solvent and, therefore, the prototypes have not progressed to a stage where any commercial value could be appreciated from them. Blocking efforts to sell market-ready aquarium products affects commerce in that market; controlling the new-developed technology so as to block its further development, production and its entry into the market affects commerce.

The complaint and the other information provided establish that it is premature to provide summary judgment on claims under the UDTPA. Instead, the allegations of fraud go beyond issues related to internal corporate governance, are not merely claims of breach of contract, and do not involve a securities transaction. With the expansive definition of "commerce," this Court should allow defendants' claims to go forward.

EQUITABLE OFFSET

OK and Responding Defendants are entitled to an equitable offset of the amount of damages resulting from Kaplan's breach of fiduciary duty and fraud, against the amount of any debt found to be owed by OK to Kaplan in this action.

CONCLUSION

For the reasons stated herein, Plaintiffs' Motion for Summary Judgment should be denied.

This is the 23rd day of January, 2008.

/s/James W. Miles, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2008, I electronically filed the foregoing with the Clerk of the Court using the NC Business Court Electronic Filing system which will send notification of such filing to the following: Alan W. Duncan and Manning A. Connors, Counsel for Plaintiff Leonard J. Kaplan, James C. Lanik, Counsel for Receiver, William P. Miller, and David F. Meschan, Pro Se

/s/James W. Miles, Jr.
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