

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,
STATE OF FLORIDA,

Plaintiff,

-against-

BOTFLY, LLC, DAVID R. LEWALSKI, JON J.
HAMMILL, and JON J. HAMMILL P.A.,

Defendants.

Case No: 51-2010-CA-2912-WS/G

**BOTFLY, LLC AND DAVID R. LEWALSKI'S
MOTION TO DISMISS THE AMENDED COMPLAINT**

Defendants, Botfly LLC ("Botfly") and David R. Lewalski ("Lewalski") (collectively, "Movants"), by and through undersigned counsel, and pursuant to Rule 1.140(b)(6) of the Florida Rules of Civil Procedure, respectfully move this Court for an Order Dismissing Plaintiff's Amended Complaint. In support thereof, Movants state:

1. On April 1, 2010, Plaintiff filed a Complaint, based solely on the interview of a single individual, asserting claims against Botfly and Lewalski arising under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), § 501.201, Fla. Stat., and the Florida Securities and Investor Protection Act ("FSIPA"), § 517.301, Fla. Stat.

2. On the same day, the Court issued ex parte Orders appointing a Receiver and freezing the assets of Botfly, Lewalski and co-Defendant Jon Hammill. This asset freeze has significantly impaired Movants' ability to retain counsel to defend the claims asserted against them.

3. On July 12, 2010, Plaintiff filed an Amended Complaint alleging that Lewalski devised and operated a Ponzi scheme through Botfly and that people who invested in Botfly executed a promissory note at the time of their investment containing two allegedly false representations made by Movants: (a) that the principal amount of the investment would be held for “investment and margin purposes only” and (b) that investors would receive a 10% monthly return on their investment. (Am. Compl. ¶¶ 16-28, 37.) Significantly, there is no allegation, nor is there any evidence, that Movants failed to pay investors as promised.

4. Plaintiff’s FDUTPA claim must be dismissed because FDUTPA does not reach securities transactions and the allegations in the Amended Complaint relate solely to securities transactions - the purchase and sale of Botfly promissory notes. *See Rogers v. CISCO Sys., Inc.*, 268 F. Supp. 2d 1305, 1316-17 (N.D. Fla. 2003) (dismissing FDUTPA claim based on securities transactions upon finding that FDUTPA does not regulate securities); *Crowell v. Morgan, Stanley, Dean Witter Servs., Co.*, 87 F. Supp. 2d 1287, 1295 (S.D. Fla 2000) (FDUTPA claim dismissed because FDUTPA not applicable to misrepresentations in the sale of securities).

5. Furthermore, the Amended Complaint fails to satisfy the heightened pleading standard imposed on FSIPA claims by Rule 1.120(b) of the Florida Rules of Civil Procedure. *See Fine v. First Southwest Co.*, 2005 WL 2063832 at * 3 (M.D. Fla. Aug. 18, 2005) (applying the heightened pleading requirements of Rule 1.120(b) to FSIPA claim); *In re Sahlen & Assocs., Inc. Sec. Litig.*, 773 F. Supp. 342, 371 (S.D. Fla. 1991) (requiring proof of common law fraud elements to establish a claim under FSIPA because it is a “fraud-related claim”). The Amended Complaint fails to articulate specific facts establishing the falsity of the alleged representations, fails to plead the circumstances constituting the fraud with particularity as required by Rule 1.120(b) as it fails to make anything more than speculative, conclusory allegations about

Movant's knowledge that the alleged representations were false at the time they were made, and fails to adequately plead reliance by investors on the alleged representations. Accordingly, Plaintiff's pleading of its FSIPA claim is woefully deficient and the claim should be dismissed.

WHEREFORE, based on the foregoing arguments and authorities set forth above and in the Memorandum of Law in Support of this Motion to Dismiss the Amended Complaint, incorporated herein, Botfly and Lewalski pray for an Order Dismissing Plaintiff's Amended Complaint.

Dated: September 22, 2010



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished via U.S. Mail this 22^d day of September, 2010

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