

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
CASE NO. 4D06-3159
LT NO. 2003 CA 4269 AG

EWALD J. DIENHART, an individual, and ROBERT MANIACI, an individual,
on behalf of themselves and all others similarly situated,

Appellants,

v.

RICHARD MATEER, an individual, and REFCO GROUP LTD., LLC, a Limited
Liability Company licensed to do business in Florida, and CMC GROUP, PLC, a
corporation licensed to do business in Florida,

Appellees.

ANSWER BRIEF OF CMC GROUP, PLC

On appeal from the Circuit Court of the Fifteenth Judicial Circuit,
in and for Palm Beach County
Honorable John J. Hoy

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PRELIMINARY STATEMENT

The plaintiffs in this case allege that they were the victims of a pyramid scheme operated by a now-defunct investment firm called Sunstate FX, Inc. Sunstate was shuttered by federal regulators in 2001, and one of its officers has gone to jail.

Desperate to recover the money they claim to have lost by investing with Sunstate, the plaintiffs have sued (among other defendants) CMC Group, PLC, which acted as one of Sunstate's "clearing brokers." Clearing brokers are large firms that are typically hired by small "introducing brokers" like Sunstate to process the smaller firm's trades and perform other ministerial functions. The Third Amended Complaint ("Complaint") does not allege that CMC actually participated in Sunstate's fraud or even knew about it. Nevertheless, the suit asserts common law and statutory claims against CMC for "aiding and abetting" Sunstate's fraud.

Under Florida law, however, clearing brokers are no more liable for the fraudulent activities of their clients than a landlord is legally responsible for a fraud perpetrated by one of his tenants. (Indeed, despite extensive investigation into this fraud by the SEC and CFTC – resulting in civil enforcement actions by both entities and a significant prison term for at least one of Sunstate's officers – there has never been any allegation by federal regulators that CMC did anything wrong.)

Recognizing this well-established principle, the trial court dismissed the Complaint.

On this appeal, the plaintiffs attempt to recast their Complaint, asserting that they have alleged that “CMC[’s] relationship with Sunstate far exceeded that of a normal relationship between an introducing firm and its clearing firms.” Br. 4. But the actual allegations of the Complaint, if proven true, would demonstrate nothing of the sort. CMC is alleged simply to have fulfilled the responsibilities of an ordinary clearing broker. The plaintiffs argue that it is reasonable to infer from the Complaint that CMC “possessed actual knowledge of Sunstate’s fraud (or at least [was] reckless in not knowing about it).” Br. 12. But the Complaint alleges that CMC had the same information about Sunstate that every clearing broker has about every client. Nothing in the Complaint, even if proven true, could establish that CMC knew about Sunstate’s fraud, should have known about it, or in any way participated in it. The trial court correctly dismissed the Complaint – the fourth attempt by these plaintiffs to establish a viable claim – and this Court should affirm.

COUNTERSTATEMENT OF FACTS

The relevant facts are not complicated. Between 1999 and 2001, the plaintiffs allege that they invested money with a Florida corporation called

Sunstate FX, Inc. R. 6-7.¹ Sunstate allegedly promised its clients that it would invest their money in foreign currency, creating profits by taking advantage of favorable exchange rates. *Id.* In fact, Sunstate is alleged to have been a simple pyramid scheme. Early investors were allegedly paid “profits” drawn from the capital contributed by later investors. R. 7. Meanwhile, Sunstate’s officers are alleged to have skimmed off the top, using investors’ money to make personal purchases and paying exorbitant kickbacks to its salesmen.

At least some of the money invested with Sunstate was in fact alleged to have been used to trade in foreign currency, even though the “profits” generated were fictitious. *Id.* To effectuate these trades, Sunstate allegedly deposited its investors’ contributions in pooled accounts operated by at least two “clearing agents,” who executed foreign currency trades at the direction of Sunstate’s officers. R. 4-5.

One of the clearing brokers hired by Sunstate to execute foreign currency transactions was the defendant-appellee, CMC Group, PLC. CMC, as the Complaint accurately summarizes, is a corporation that provides its clients with access to foreign currency markets, offering various financial products for sale and also acting as a clearing broker for small introductory firms that wish to sell

¹ Citations to R.___ refer to the Record on Appeal, of which there is only one volume. Citations to Supp. R.___ refer to the Supplemental Record. Citations to Br.___ refer to the appellants’ brief.

foreign currency products but lack direct access to the tools necessary to effectuate such transactions.

The plaintiffs allege that they were induced by Sunstate and its representatives to invest in foreign currencies based on purportedly false promises that the investments would yield significant profits. According to the initial complaint, Sunstate attracted investors through a “network” of brokers, who were secretly rewarded for their efforts by “unusual and extraordinary” commissions. R. 7. As a result of the brokers’ solicitations, the complaint alleges (on “information and belief”) that Sunstate raised approximately \$54 million in investments. *Id.*

According to the complaint, Sunstate used up to 20% of its clients’ investments to pay “kick-backs” to its brokers. Sunstate’s officers also used client funds to purchase “a number of personal assets.” *Id.* In 2001, this misconduct resulted in civil enforcement actions by the Securities and Exchange Commission and the Commodities Futures Trading Commission, which charged Sunstate with violating federal securities laws. *Id.* In 2002, Sunstate’s Chief Investment Officer was convicted of conspiracy to defraud, wire fraud, and mail fraud in connection with the Sunstate scheme. He was sentenced to a five-year prison term and ordered to pay over \$15 million in restitution. R. 7-8

The complaint does not allege that CMC had direct involvement in the fraud Sunstate allegedly perpetrated against the plaintiffs. Rather, CMC is alleged to

have facilitated the fraud by clearing trades at Sunstate's direction and "ignor[ing]" or "recklessly disregard[ing]" (R. 8) what the complaint alleges were "numerous and obvious" "red flags" (R. 10) that should have alerted CMC to the nature of Sunstate's business.

These "red flags" were discoverable, the complaint alleges, primarily because two CMC representatives visited Sunstate's offices for an "on-site inspection" that "lasted for two to three days." R. 11. During this inspection, the complaint alleges, CMC's representatives were told that Sunstate used a "broker network" to attract investors. The complaint alleges that CMC's employees "were 'impressed' with the broker network." *Id.* During this same visit, CMC's representatives allegedly asked what they "could do to increase business on the option side." *Id.* Sunstate responded that it would increase its options trading if CMC offered it "better option pricing." *Id.* CMC allegedly agreed to lower its rates in exchange for more business.

Finally, during the "on-site" visit, Sunstate allegedly told CMC's representatives "that investor funds were pooled" and that "investment 'activity' was 'exploding.'" *Id.* To handle its increased business, Sunstate allegedly "requested that CMC provide recommendations or some additional back-up for the back-office work." *Id.* CMC is not alleged to have made any such recommendations. Instead, it provided Sunstate with a "state of the art" "computer

system” that Sunstate later used “as a means to induce investors to place funds with Sunstate and add[] a cloak of credibility.” R. 12. Sunstate also apparently requested that CMC “create additional accounts so it could track the progress of each individual trader.” R. 11.

In 2003, after the SEC and CFTC had concluded their enforcement actions, the plaintiffs commenced the present lawsuit against Sunstate and a number of its officers, as well as two of Sunstate’s clearing brokers, including CMC. The complaint alleged violations of the Florida Securities and Investor Protection Act, FLA. STAT. §§ 517.011 *et seq.* The complaint was amended soon after filing, and Sunstate was eliminated as a defendant.

The amended complaint was dismissed in March 2004 for failure to state a claim. Specifically, the court held that the complaint violated “hornbook law” by failing to “track the statute” and “allege the elements of fraud with particularity.” Supp. R. 38. “Moreover,” the court held, the complaint suffered from a lack of “detail” as to “the conduct by each of the defendants that is the violation of the statute.” Supp. R. 38. The trial court granted leave to amend. A second amended complaint was filed in April 2004, containing no material changes other than the assertion that the complaint was being filed on behalf of a purported class and the addition of a third FSIPA claim. That complaint was dismissed in March 2005, and leave to replead was granted again. In April 2005, the plaintiffs filed their

Third Amended Complaint, which is the subject of this appeal. That Complaint was substantially similar to the three prior complaints, except that it added two “common law” claims against the clearing brokers for aiding and abetting Sunstate’s fraud and breach of fiduciary duty. The Complaint did not allege any new facts, nor did it allege that either of Sunstate’s clearing brokers had any direct involvement with the fraud.

The Third Amended Complaint, too, was dismissed for failure to state a claim. This appeal followed.

SUMMARY OF ARGUMENT

The plaintiffs have alleged five claims against CMC. Four of those claims assert that CMC should be held liable for acts alleged to have been committed by Sunstate. These claims – two framed as common law “aiding and abetting” claims, and two framed as violations of the Florida Securities and Investor Protection Act, FLA. STAT. §§ 517.011 *et seq.* (“FSIPA”) – all fail because the Complaint does not allege any facts that, if proven, would be sufficient to subject CMC to liability for the acts of a third party. The two common law claims fail because the plaintiffs have not alleged that CMC knew of Sunstate’s fraud or “substantially assisted” in the commission of that fraud. The two FSIPA claims fail as well, because the plaintiffs have not alleged, as the statute requires, that CMC was Sunstate’s “agent,” or that CMC “personally participated or aided” in Sunstate’s allegedly

fraudulent sales to the plaintiffs. Finally, the plaintiffs' fifth claim – that CMC itself is liable for selling securities without registering as a broker dealer – fails because the foreign currency contracts alleged to have been sold by CMC to Sunstate were not “securities,” as defined by the statute itself, and because they were sold to Sunstate, not the plaintiffs in this case.

STANDARD OF REVIEW

The trial court's order dismissing the Complaint for failure to state a cause of action is reviewed *de novo*. *Rentas v. DaimlerChrysler Corp.*, 936 So. 2d 747, 749 (Fla. 4th DCA 2006). In assessing the sufficiency of the Complaint, the court must “accept all the allegations in the complaint as true,” *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004), but “mere legal conclusions inserted in a complaint are insufficient to state a cause of action unless substantiated by allegations of ultimate fact.” *Doyle v. Flex*, 210 So. 2d 493, 494 (Fla. 4th DCA 1968).

ARGUMENT

I. THE COMMON LAW CLAIMS WERE PROPERLY DISMISSED.

The plaintiffs have asserted two common law claims against CMC, both stemming from Sunstate's alleged misrepresentations to the plaintiffs. Count I (R. 18-19) alleges that CMC is liable for aiding and abetting common law fraud, and Count II (R. 19-20) alleges that CMC is liable for aiding and abetting breach of fiduciary duty.

Both of these claims were properly dismissed. To succeed on these claims, the plaintiffs were required to allege not only that Sunstate committed fraud or breached a fiduciary duty, but also that CMC (1) had actual knowledge of Sunstate's alleged misconduct; and (2) participated in or "substantially assisted" that alleged misconduct. *See, e.g., ZP No. 54 Ltd. P'ship v. Fid. & Deposit Co.*, 917 So. 2d 368, 372 (Fla. 5th DCA 2005) (listing elements for aiding and abetting fraud claim); *Sec. Investor Protection Corp. v. Capital City Bank (In re Meridian Asset Mgmt., Inc.)*, 296 B.R. 243, 263 (Bankr. N.D. Fla. 2003) (listing elements for aiding and abetting breach of fiduciary duty claim). The plaintiffs have alleged no facts, however, that could demonstrate that CMC even suspected, let alone knew about or participated in Sunstate's actions.

A. Plaintiffs Fail To Allege That CMC Knew Of Sunstate's Fraudulent Behavior.

Nowhere in the Complaint do the plaintiffs allege facts demonstrating that CMC knew of Sunstate's alleged misconduct. There are no allegations that Sunstate ever advised CMC of its scheme, that CMC ever agreed to participate in or assist in the scheme, or that CMC ever actually discovered that Sunstate was committing fraud or breaching any duty to its investors. Instead, the plaintiffs make only the conclusory statement that Sunstate engaged in numerous business practices that CMC should have recognized as "obvious" "red flags." R. 10. Thus,

plaintiffs conclude, CMC either “knew or should have known” of the nature of Sunstate’s operation. R. 19.

This conclusion is insufficient on the law and wrong on the facts. Specifically, plaintiffs are wrong when they assert that aiding-and-abetting liability can attach to a defendant who was merely reckless – who “should have known” about a third party’s tort. Rather, Florida law is clear that only a defendant who has *actual knowledge* of a tort may be held secondarily liable for the actions of another. In any case, even if plaintiffs were right about the standard, they still could not prevail. Despite their inflammatory characterizations, the plaintiffs have alleged no “red flags” that should have made Sunstate’s misconduct “obvious” to CMC. Based on the facts alleged in the Complaint, CMC could not have reasonably been expected to guess that Sunstate was engaged in any improper behavior.

1. The Standard For Aiding-And-Abetting Liability In Florida Is Actual Knowledge, Which The Plaintiffs Do Not Allege.

For over 75 years, Florida law has been clear that a defendant can be held liable for “aiding and abetting” the tort of a third party only if he has *actual knowledge* that the tort has been committed. The Florida Supreme Court first expressed this standard (to our knowledge) in a 1929 fraud case called *Fort Meyers Development Corp. v. J.W. McWilliams Co.*, 122 So. 264, 268 (Fla. 1929) (en banc) (“The rule generally respecting liability of aiders and abettors of fraudulent

promoters of corporations, is that, if *with knowledge of the fraud* they concur with the promoter in carrying out his fraudulent scheme, they are liable to the corporation for what it has lost as a result of the fraud.”) (emphasis added). Since then, the requirement of actual knowledge has been consistently applied throughout the state. As recently as 2005, for example, the Fifth DCA stated unequivocally that the elements of a claim for aiding and abetting a fraud are “1. There existed an underlying fraud; 2. *The defendant had knowledge of the fraud*; [and] 3. The defendant provided substantial assistance to advance the commission of the fraud.” *ZP No. 54 Ltd. P’ship*, 917 So. 2d at 372 (emphasis added). See also, e.g., *Nerbonne, N.V. v. Lake Bryan Int’l Props.*, 689 So. 2d 322, 325 (Fla. 5th DCA 1997) (“those who *knowingly* participate as an aider and abettor are liable” to the victim of a fraud) (emphasis added); *In re Meridian Asset Mgmt.*, 296 B.R. at 263 (“There are four elements for a claim of aiding and abetting a breach of fiduciary duty: ‘(1) a fiduciary duty on the part of the primary wrongdoer; (2) a breach of this fiduciary duty; (3) *knowledge of the breach by the alleged aider and abettor*; and (4) the aider and abettor’s substantial assistance or encouragement of the wrongdoing.’”) (quoting *Arwood v. Dunn (In re Caribbean K Line, Ltd.)*, 288 B.R. 908, 919 (S.D. Fla. 2002) (emphasis added)).

Florida is not out of the mainstream in this regard. The clear majority of jurisdictions that recognize torts for aiding and abetting fraud or breach of

fiduciary duty require a plaintiff to prove that the defendant actually knew of the primary wrongdoer's misconduct. *See* RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (third party tort liability available only if the accused aider “knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other”). Indeed, federal courts have long applied the “actual knowledge” requirement to cases just like this one – involving aiding-and-abetting claims brought against clearing brokers. *See, e.g., Ross v. Bolton*, 904 F.2d 819, 824 (2d Cir. 1990) (“[D]espite allegations of [the clearing broker's] reckless disregard of the facts – and even assuming for present purposes that the requisite standard of recklessness has been adequately pleaded – absent a fiduciary duty owing from [the clearing broker] to [the plaintiff] there is no aiding and abetting liability.”); *Connolly v. Havens*, 763 F. Supp. 6, 11 (S.D.N.Y. 1991) (“The complaint alleges at most recklessness on the part of [the clearing broker], and not actual knowledge, and thus plaintiffs have failed to plead scienter adequately.”); *Stander v. Fin. Clearing & Servs. Corp.*, 730 F. Supp. 1282, 1286 (S.D.N.Y. 1990) (“Plaintiff must allege that the clearing broker had knowledge of the primary broker's fraudulent activity and gave substantial, knowing assistance to that illegal activity [in order to state a claim].”); *Antinoph v. Laverell Reynolds Sec., Inc.*, No. Civ. A. 88-3664, 1989 U.S. Dist. LEXIS 10541, at *11 (E.D. Pa. Sept. 5, 1989) (unpublished), *aff'd sub nom. Antinoph v. Broadcort Capital Corp.*, 911 F.2d 719

(3d Cir. 1990) (clearing broker may not be held liable for aiding and abetting unless plaintiffs aver and prove “(1) that an independent wrong exist; (2) that the aider or abetter knew of the wrongs existing; and (3) that substantial assistance be given in effecting that wrong.”) (quoting *Landy v. F.D.I.C.*, 486 F.2d 139, 162-63 (3d Cir. 1973)).

The plaintiffs have not claimed that CMC actually knew about Sunstate’s alleged fraud, nor could they. Instead, they assert in their appellate brief that they may sustain a claim for aiding and abetting simply by alleging that the defendants “recklessly” disregarded certain “red flags” that “should have” led them to discover Sunstate’s misconduct. But this is not the law. Ignoring all the recent Florida authority directly on point (and the wealth of authority from other jurisdictions dealing specifically with clearing brokers), the plaintiffs base their entire argument on one sentence of dictum from a 1990 federal trial court opinion purporting to apply Florida law in a diversity case. *See Tew v. Chase Manhattan Bank, N.A.*, 728 F. Supp. 1551, 1568 (S.D. Fla. 1990). Simply put, that opinion was wrong. The *Tew* court did state that a plaintiff could sustain a claim for aiding and abetting fraud by alleging that the defendant had been reckless in failing to discover the fraud. But that conclusion was not only dictum (the court found that the plaintiff had “alleged sufficient facts that a reasonable jury could find actual knowledge or recklessness”), it was also based on an obvious misreading of a 1963

Florida case, which held that recklessness was sufficient to sustain a *direct* fraud claim – not a claim for aiding an abetting. *See id.* at 1568-69 (citing *Dawkins v. Florida Indus'l Comm'n.*, 155 So. 2d 153 (Fla. 2d DCA 1963)). In any event, even if Florida law was somehow unsettled or ambiguous in 1990, when *Tew* was decided, the Florida courts have spoken definitively and unanimously since then (*see ZP No. 54*, 917 So. 2d at 372; *Nerbonne*, 689 So. 2d at 325), as have multiple federal district courts applying Florida law (*see In re Caribbean K Line*, 288 B.R. at 919; *Amerifirst Bank v. Bomar*, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991)).

2. There Is Not Even A Sufficient Allegation Of Recklessness.

Even if the proper standard *were* “recklessness,” as the plaintiffs assert, the Complaint would *still* fail to allege facts sufficient to support the aiding and abetting claims. The claim of recklessness is based on the plaintiffs’ assertion that CMC ignored certain “red flags” that should have led them to suspect that Sunstate was engaged in improper behavior. But these “red flags,” which the plaintiffs list on pages 13 and 14 of their appellate brief, were nothing of the sort. For example, the list begins with the plaintiffs’ allegation that Sunstate was “one of” CMC’s “most profitable customers,” generating more than \$2 million in fees for its two clearing brokers. But the plaintiffs fail to explain, nor can they, why Sunstate’s mere profitability should have led CMC to conclude that Sunstate was defrauding its investors. Next, the plaintiffs allege that CMC made a “two to three day” due

diligence visit to Sunstate's headquarters, during which CMC learned that Sunstate raised capital through a network of brokers. But using sales representatives to attract investors is neither surprising nor unusual; it is certainly not a "red flag" that should have led CMC to believe that Sunstate was a fraudulent enterprise. (The fact that CMC's representatives were allegedly "impressed" by the scope of the broker network does not alter this fact.) Next, the plaintiffs claim that CMC knew that Sunstate was pooling its investors' funds in common accounts. But pooling investor funds is not illegal. Operating a commodity pool is permitted under Florida and federal law, so long as the operator is registered as a commodity pool operator and complies with various reporting requirements. *See* 7 U.S.C. § 6n. Sunstate's alleged misconduct in this respect was operating an *unregistered* commodity pool. *See* CFTC Press Release No. 4508-01 (01-8329-Civ) (Apr. 19, 2001), available at <http://www.cftc.gov/opa/enf01/opa4508-01.htm> (last visited Feb. 2, 2007) ("SunState fraudulently operated a commodity pool *in that SunState was not registered with the Commission as a commodity pool operator.*") (emphasis added). The Complaint, of course, does not allege that CMC knew that Sunstate had failed to comply with state and federal reporting requirements. Finally, the plaintiffs claim that the alleged refusal of Sunstate's deposits by two other clearing firms should have led CMC to suspect that Sunstate was defrauding its customers. But the Complaint does not allege that CMC even *knew* about

Sunstate's alleged dealings with other clearing firms, let alone that these clearing firms had any more legitimate reason to suspect Sunstate of fraud than CMC did.

B. There Is No Allegation That CMC Provided “Substantial Assistance” To Sunstate.

Even if the Complaint had alleged that CMC had actual knowledge of Sunstate's fraud, the aiding and abetting claims would still be insufficient because the Complaint fails to allege that CMC “substantially assisted” in Sunstate's misconduct. There are no allegations that CMC had any involvement, direct or indirect, in Sunstate's solicitations of investors, its purportedly fraudulent representations about its trading strategies or earnings, or its alleged theft of investors' money. Rather, the Complaint simply alleges that CMC provided ordinary “clearing” services such as processing trades, managing accounts, generating periodic statements, and performing other back-room, ministerial functions.

As the plaintiffs recognize in their brief (at Br. 18-19), it is well established that an aiding-and-abetting claim cannot be sustained merely on the strength of an allegation that a defendant performed ordinary clearing services for an introducing broker. *See, e.g., Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 29 (2d Cir. 2000) (“The simple providing of normal clearing services to a primary broker who is acting in violation of the law does not make out a case of aiding and abetting against the clearing broker.”) (quoting *Stander*, 730 F. Supp. at 1286). *See also*

Carlson v. Bear, Stearns & Co., 906 F.2d 315, 316, 318 (7th Cir. 1990) (refusing to extend “aid or participation” liability under Illinois Securities Act to clearing brokers); *McDaniel v. Bear Stearns & Co.*, 196 F. Supp. 2d 343, 352 (S.D.N.Y. 2002) (“It is well-settled that, when a clearing firm acts merely as a clearing agent, it owes no fiduciary duty to the customers of its introducing broker and cannot be held liable for the acts of an introducing firm.”); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001) (“A clearing broker does not provide ‘substantial assistance’ to or ‘participate’ in a fraud when it merely clears trades.”); *Warren v. Tacher*, 114 F. Supp. 2d 600, 603 (W.D. Ky. 2000) (“Clearing firms are generally not responsible to customers for the actions of an introducing broker and do not owe fiduciary duties to the customer, and courts have confirmed pre-hearing dismissals on these grounds.”).

“Moreover, courts have refused to hold clearing firms liable for the practices of introducing brokers even where the clearing firm continued to provide[] clearing services after it knew or should have known of the introducing broker’s fraudulent scheme.” *McDaniel*, 196 F. Supp. 2d at 352-53 (citing, e.g., *Ross*, 639 F. Supp. at 327 (dismissing claim against a clearing broker for aiding and abetting the fraud of an introducing broker where “the complaint does not specify what assistance [the clearing broker] rendered other than to continue to clear transactions when it ‘knew or should have known’ that” the introductory firm was

engaging in fraud); *In re Blech Sec. Litig.*, 961 F. Supp. 569, 584 (S.D.N.Y. 1997) (“Even assuming that [the clearing firm] had knowledge of the [introductory firm’s] scheme, primary liability [under federal securities laws] cannot attach when the fraudulent conduct that is alleged is no more [than] the performance of routine clearing functions.”)).

Recognizing that the performance of ordinary clearing functions is simply not actionable, the plaintiffs characterize their Complaint as alleging that CMC’s actions “went ‘above and beyond’ normal clearing functions.” Br. 19. When a clearing broker “becomes actively and directly involved in the introductory broker’s actions,” the plaintiffs argue, courts “routinely” impose third-party liability. Br. 18. In support of this claim of “routine” liability, the plaintiffs have apparently scoured the case law to find four out-of-state trial court decisions (including one from 1983 and two from the late 1970s) in which plaintiffs have been allowed to proceed with claims against clearing brokers. We have no quarrel with these cases. But every one of them involved allegations that the clearing broker exercised *control* over the introducing broker, or otherwise *directly* participated in the fraud.²

² In *McDaniel*, for example, the complaint specifically alleged that the clearing broker “asserted control over [the introducing broker’s] trading operations.” *McDaniel*, 196 F. Supp. 2d at 355. Employees of the clearing broker were alleged to have worked out of the introducing broker’s offices, controlled trading, executed trades against customer orders, and loaned money to the introducing broker. *Id.*

In stark contrast, the Complaint in this case is a textbook summary of the common tasks performed by clearing brokers for their clients. The plaintiffs allege, for example, that CMC “act[ed] as clearing agent for transactions they knew or should have known were illegal.” Br. 16 (citing R. 4-5). As we have explained, of course, such behavior does not, as a matter of law, constitute “substantial assistance” sufficient to subject a clearing broker to aiding-and-abetting liability. *See McDaniel*, 196 F. Supp. 2d at 352; *Ross*, 639 F. Supp. at 327. Nor is it unusual for a clearing broker to provide clients with computer access (Br. 17, citing R. 12), to act as a counterparty (Br. 16, citing R. 4-5), or to permit the truthful use of its name in customer solicitations (*id.*). As the Second Circuit recently explained,

Clearing responsibilities include: receiving or delivering funds from or to the customer; maintaining records that reflect the transaction; and safeguarding the funds in the customer’s account. *** Additional clearing services include the extension of credit for the purchase of

The plaintiffs in *Margaret Hall Foundation, Inc. v. Atlantic Financial Management, Inc.*, 572 F. Supp. 1475, 1480-81 (D. Mass. 1983), alleged that the clearing broker *itself* fraudulently promoted an inappropriate stock and also maintained a “very close relationship” with the introducing broker, including sharing office space. *Faturik v. Woodmere Securities, Inc.*, 442 F. Supp. 943, 945 (S.D.N.Y. 1977) also involved allegations of a “continuing close working relationship” between the clearing and introducing brokers, who operated out of offices on the same floor of the same building. In addition, the *Faturik* plaintiffs, like those in *Cannizzaro v. Bache, Halsey Stuart Shields, Inc.*, 81 F.R.D. 719 (S.D.N.Y. 1979), alleged that the clearing brokers directly participated in fraudulent “churning” of customer accounts.

securities on margin. *** In addition to performing clearing functions, on occasion, the clearing firm executes transactions, thereby limiting the role of the introducing broker to simply soliciting investor sales. The clearing firm also provides name recognition for the introducing firm ***.

Levitt v. Bear Stearns & Co., 340 F.3d 94, 98 (2d Cir. 2003) (internal quotation marks and citations omitted). *See also Graham v. S.E.C.*, 222 F.3d 994, 998 n.9 (D.C. Cir. 2000) (“A clearing broker performs ‘back office services such as clearing stock, handling customer funds, holding customer securities, dealing with transfer agents, and matching of trades with the exchanges and market makers’ for firms that do not have the capacity to perform these functions.”).

After putting aside these allegations of simple, run-of-the-mill clearing functions, the only allegations left are that CMC (1) “[a]ssist[ed] in the recruitment of currency traders for Sunstate”; (2) “[p]rovid[ed] positive references and referrals to prospective customers of Sunstate”; and (3) offered “favorable” rates to Sunstate in return for an increase in trading. Br. 16-17 (citing R. 4-5, 11). These bare allegations fall far short of alleging activity sufficiently “above and beyond” ordinary clearing functions to constitute “substantial assistance” in Sunstate’s fraud. There is no allegation, for example, that any of the “traders” purportedly “recruited” with CMC’s assistance were even *hired* by Sunstate, let alone that these traders facilitated Sunstate’s fraud. (Indeed, the Complaint alleges that Sunstate’s “broker network” was in place well before CMC was hired.) Likewise,

despite the naked allegation that CMC “provided positive references” for Sunstate, the plaintiffs do not allege that they or any other similarly-situated investor was actually referred to Sunstate by CMC. As for the plaintiffs’ argument that CMC somehow assisted in Sunstate’s fraud by offering to discount its fees in return for Sunstate’s promise to increase trading volume, negotiating a reduced fee structure for a profitable client has nothing to do with participating in the client’s fraudulent activities.

Finally, the plaintiffs argue (at Br. 15) that “whether conduct amounts to ‘substantial assistance’ is a question of fact which is not properly decided on a motion to dismiss.” (citing *Tew*, 728 F. Supp. at 1569). Suffice it to say, this is a gross misstatement of the law, and a mischaracterization of the one authority the plaintiffs cite. Aiding and abetting claims are routinely dismissed on the pleadings when the plaintiffs’ allegations, even if proven, would be insufficient to sustain their claim. *See, e.g., Filler v. Hanvit Bank*, 339 F. Supp. 2d 553, 555 (S.D.N.Y. 2004) (granting defendants’ motions to dismiss plaintiff’s complaint containing aiding and abetting allegations); *Baranski v. Serhant*, 603 F. Supp. 232, 234-35 (N.D. Ill. 1985) (granting defendant’s motion to dismiss plaintiffs’ third amended complaint containing aiding and abetting allegations). The *Tew* court was considering a summary judgment motion and held, on the basis of the facts before it, that there was a jury question on the “substantial assistance” prong of the

plaintiff's aiding and abetting claim. It did not purport to hold that no claim for aiding and abetting could ever be decided on summary judgment – and certainly said nothing about the propriety of deciding such a claim on a motion to dismiss.

II. ALL THREE OF THE STATUTORY CLAIMS FAIL.

The Complaint's remaining three claims are all asserted under the Florida Securities and Investor Protection Act, FLA. STAT. §§ 517.011 *et seq* ("FSIPA"). Counts III and V both allege under FLA. STAT. § 517.211 that CMC is jointly liable, as Sunstate's "agent," for Sunstate's alleged statutory violations. (Count III (R. 21-22) alleges sales of unregistered securities in violation of FLA. STAT. § 517.07, and Count V (R. 26) alleges fraudulent misrepresentations and omissions about securities, in violation of FLA. STAT. § 517.301.) Count IV (R. 24) alleges that CMC itself is liable under the statute for selling securities to the plaintiffs without registering as a broker-dealer. None of these claims hold water. The two "secondary liability" claims cannot survive because the plaintiffs have failed to allege that CMC was Sunstate's "agent" or that CMC "personally participated in Sunstate's improper sales. The "primary liability" claim fails as well, because there is no allegation that CMC sold anything to the plaintiffs, let alone a "security," as that term is defined by the FSIPA.

A. The Two “Secondary Liability” Claims Fail Because There Is No Allegation That CMC Had Anything To Do With Sunstate’s Fraudulent Sales.

1. CMC Was Not Sunstate’s “Agent.”

Counts III and V both assert that CMC can be held liable for statutory violations allegedly committed, not by CMC itself, but by Sunstate. To sustain either of these claims, the plaintiffs first must allege that CMC was a “director, officer, partner, or agent of or for” Sunstate, in connection with sales made to the plaintiffs. FLA. STAT. § 517.211. Aware of this requirement, the plaintiffs have alleged that CMC was a “common law agent” of Sunstate, because it executed trades at Sunstate’s direction. *See* R. 22, Br. 30. We do not dispute that the Complaint alleges that CMC acted as Sunstate’s agent when, on Sunstate’s behalf, it bought and sold foreign currency on the international market. But that is irrelevant to the plaintiffs’ claim that CMC may be held liable for Sunstate’s improper sales of investment contracts *to the plaintiffs*. The Complaint does not allege (nor can it) that CMC ever acted as Sunstate’s “agent” in any dealings with the plaintiffs. And *those* transactions – Sunstate’s solicitations to the plaintiffs and acceptance of the plaintiffs’ investments – are the transactions that are now alleged to have violated Florida’s securities laws. There is no allegation in the Complaint that the trades executed by CMC on the open market were in any way improper.

The very case plaintiffs cite (at Br. 30) for the proposition that CMC was an “agent” of Sunstate – *Arthur Young & Co. v. Mariner Corp.*, 630 So. 2d 1199 (Fla. 4th DCA 1994) – held that in order to be considered an “agent” under § 517.211 of the FSIPA, a defendant must be alleged to have helped induce the improper sale of securities *to the plaintiff*. *See id.* at 1203 (“[T]he context of the use of the word agent [in § 517.211] is to make liable all those representatives and direct participants in the sale of the security who commit fraud *as a means of inducing the purchaser to buy.*”) (emphasis added). Accordingly, the *Arthur Young* court concluded that the defendant was an “agent” for purposes of the statute when it agreed to “prepare a selling memorandum, contact potential buyers, assist in the negotiation of the sale, and ‘represent [the primary violator’s] interests.’” *Id.* at 1204. In short, the court concluded, the agent was “acting as any broker acts in a sale.” *Id.* The contrast with CMC’s alleged activities is stark: The *Arthur Young* defendant was alleged to have been personally and directly involved in sales to the plaintiff, “contact[ing] potential buyers” and helping to “negotiat[e] the sale.” Here, the plaintiffs concede that CMC did not even know who Sunstate’s customers were.

Other Florida authority, not to mention common sense, is in accord: An “agent” may be held liable for the FSIPA violations of a third party when it interposes itself between the alleged violator and the alleged victim. *See, e.g., E.F.*

Hutton & Co. v. Rousseff, 537 So. 2d 978, 980-81 (Fla. 1989) (approving “agency” liability under § 517.211 for corporation that acted as “exclusive sales agent” for the seller); *In re Sahlen & Assocs., Inc., Sec. Litig.*, 773 F. Supp. 342, 372 (S.D. Fla. 1991) (“[A] plaintiff may recover under § 517.211 from either (1) his seller, who he is in privity with, as well as (2) any *** agent of such a seller who has solicited the sale of the securities on his own behalf or on behalf of the seller.”).

There is no allegation that CMC had anything to do with any sales that Sunstate made to the plaintiffs. Accordingly, CMC was not Sunstate’s “agent” for purposes of the statute and cannot be held liable for Sunstate’s alleged violations.

2. CMC Did Not “Personally Participate Or Aid” In Sunstate’s Fraud.

In any event, even if CMC had been Sunstate’s agent, these claims would still be insufficient to survive a motion to dismiss. In order to make out a secondary liability claim under § 517.211, a plaintiff must allege not only that the defendant was a representative of the seller, but also that the defendant “personally participated or aided in making the sale.” The complaint does not allege that CMC had any involvement, “personal” or otherwise, in Sunstate’s allegedly fraudulent sales to the plaintiffs. CMC is not alleged to have even known who the plaintiffs were, let alone had any contact with them. There is certainly no allegation of CMC’s “personal” involvement in Sunstate’s sales. Instead, the plaintiffs’ theory is that CMC indirectly “aided” in sales to the plaintiff by performing the back-

room functions discussed above. On the plaintiffs' theory, such activity constitutes "aid" under the statute, because without CMC's assistance, Sunstate would have been unable to carry out its purportedly fraudulent scheme.

But Florida law is clear that such allegations, even if proven, are insufficient to satisfy the "personal[] participat[ion] or aid[]" prong of the statute.³ For well over 60 years, the Florida securities laws have been understood by courts in and out of the state to require that a plaintiff prove, as the plain wording of the statute indicates, that the defendant "personally" engaged in behavior that "induc[ed] the purchaser to invest." *Ruden v. Medalie*, 294 So. 2d 403, 406 (Fla. 3d DCA 1974) (quoting *Nichols v. Yandre*, 9 So. 2d 157, 160 (Fla. 1942) (en banc)). *See also Andrews v. Fitzgerald*, 823 F. Supp. 356, 380 (M.D.N.C. 1993) ("In order to be liable under [§ 517.301], one must have personally engaged in some act or acts that induced a purchaser to invest.") (emphasis in original); *Binder v. Gordian Sec., Inc.*, 742 F. Supp. 663, 669 (N.D. Ga. 1990) ("Thus, in order to be liable under Fla. Stat. 517.301(1)(a), a director or officer must personally engage in some act or acts that induce a purchaser to invest.").

The plaintiffs do not allege this required inducement by CMC. Rather, they allege in wholly conclusory fashion only that:

³ And suffice it to say, contrary to the plaintiffs' unsupported characterization, CMC has not "conceded" (Br. 42) that it "materially aided Sunstate" in any violations of the FSIPA.

CMC materially aided Sunstate in the violations of law alleged herein by providing assistance to Sunstate including among other things, acting as clearing agent for transactions they knew or should have known were illegal, assisting in the recruitment of currency traders for Sunstate, providing positive references and referrals to prospective customers of Sunstate[], allowing Sunstate to do business with CMC without producing the usual documentation, acting as counterparty for Sunstate currency transactions and allowing Sunstate to use CMC's name in its customer solicitations as evidence of its credibility as a currency exchange advisor.

R. 4-5.

As we discussed above, these allegations are insufficient to make out a claim of common law aiding and abetting; they are certainly insufficient to overcome the statutory hurdle of “personal” involvement in activity that “induced” the plaintiffs to invest. To begin, the allegation that CMC “provid[ed] positive references and referrals to prospective customers” is inadequate. The plaintiffs do not allege anywhere in the Complaint that these alleged references or referrals in fact caused them or anyone else to invest with Sunstate, nor do they particularize any of the details of these alleged referrals. Likewise, plaintiffs’ allegation that Sunstate advised prospective customers that it would be clearing trades through CMC (even if true) is irrelevant. Florida courts have held in similar contexts that the use of a third party’s name in connection with an allegedly illegal securities transaction does not create third party liability. *See Baraban v. Manatee Nat’l Bank*, 212 So. 2d 341, 343 (Fla. 2d DCA 1968) (“Nor does the willingness of a bank to become

the depository of funds amount to a personal participation or an aid in making a sale. *** The permission of the Bank, whether express or tacit, to the use of its name was not the taking of an active part in influencing the appellant to purchase.”) (quoting *Sorenson v. Elrod*, 286 F.2d 72, 74 (5th Cir. 1960), and *Nichols*, 9 So. 2d at 160).

Finally, plaintiffs’ bald allegations concerning Sunstate’s alleged business relationship with CMC – that CMC supposedly “knew” or “should have known” that Sunstate’s transactions were “illegal,” that CMC alleged “recruited” traders for Sunstate, and that CMC allegedly “allow[ed] Sunstate to do business with CMC without producing the usual documentation” – also fail. As the Eleventh Circuit held just last summer, even a director or officer of an entity charged with violating Florida’s securities laws cannot be held liable for those violations unless the plaintiff alleges and proves “some personal activity and involvement in the sale.” *Dillon v. Axxsys Int’l, Inc.*, 185 Fed. Appx. 823, 828 (11th Cir. 2006) (per curiam) (unpublished). The *Dillon* case is especially instructive, because like CMC, the *Dillon* defendant was alleged to have engaged in broad activities that allowed the alleged primary violator to continue in business. *See id.* at 827 (the defendant “handled all the business aspects of the corporation, she opened the corporation’s checking account, set up the company payroll, signed corporate checks, [and] loaned money to the corporation”). The defendant was even alleged to have been

present in a meeting at which the purportedly fraudulent sale had taken place. But, the court held, without proof that the defendant took some personal, specific step to induce the allegedly improper sale, the FSIPA did not permit her to be held liable for the corporation's violation. As the district court in *Dillon* explained,

[I]n assessing exposure to the remedies of Section 517.211(2), no amount of involvement with the business of the seller will overcome the absence of personal participation or aid in the making of the sale. Section 517.211(2) both visits liability on a complete stranger to the corporation who "makes the sale" and, quite consistently, exonerates even a director or officer if neither personally participating nor aiding in the sale. In short, the remedies of Section 517.211 depend upon buying and selling a security and not merely running a business, however energetically.

Dillon v. Axxsys Int'l, Inc., 385 F. Supp. 2d 1307, 1313 (M.D. Fla. 2005).

The plaintiffs urge this Court to ignore this holding that there must be some personal act of inducement, and every other similar decision from the last 60 years. These multiple courts, the plaintiffs assert, were wrong to read the statutory requirement of "personal[] participat[ion] or aid in making the sale" as necessitating some sort of *direct involvement* in a *specific* improper sale. Instead, the plaintiffs *concede* that CMC did not "induce" any sales (*see* Br. 48 (the "precise issue" in this case is "whether a party who *** does not induce an illegal sale *** can be held secondarily liable")), but believe that a "plain reading" of the statute permits liability for any person who performs any sort of background

activity that “aids” an alleged primary violator in its business operations. Br. 32-34. The plaintiffs provide not a single piece of authority for this radical proposition, other than extensive citation to a book written by one of their lawyers – a book that does not even specifically discuss Florida’s statute.

Plaintiffs’ “plain reading” argument is wrong on its face. The statutory language is very clear: A defendant may not be held liable for the securities violation of a third party unless the defendant “has personally participated or aided in making the sale.” Whether the defendant is accused of “participating” or merely “aiding” in the violation, the statute requires “personal” involvement that is specifically related to “the sale” of which a plaintiff complains. This reading of the statute has been unchallenged in Florida since 1942. Defendants who are not alleged to have had any involvement in the “inducement” of an improper sale cannot be held liable under § 517.211.⁴

⁴ Other than their lawyer’s book, the only authority offered on this point in the plaintiffs’ brief is citation to three non-Florida decisions interpreting securities statutes from Texas, Washington, and Indiana. Of course, none of these cases even purport to interpret Florida’s statute, nor have the statutes in question been interpreted by their state high courts as requiring allegations of “inducement.” Most importantly, the statutes discussed in these three cases differ substantially from Florida’s. The Texas statute, for example, imposes liability on any person who “directly or indirectly” aids in a fraudulent transaction. TEX. REV. CIV. STAT. ANN. art. 581-33(F)(2). The Washington and Indiana statutes both impose liability on those who “materially aid” a violation, even without “personal” participation or actual knowledge. WASH. REV. CODE § 21.20.430(3); IND. CODE ANN. § 23-2-1-19(d).

Plaintiffs claim, of course, that they are not actually urging a change in Florida law; they are merely addressing a question that has not yet been answered by any Florida court. But the *Nichols* court, as well as every other court that has subsequently applied the statute, purported to construe the *entire* statutory phrase – “personally participated or aided in making the sale” – and held that this phrase (not some subset thereof) required proof of personal inducement in an actual sale. *See Nichols*, 9 So. 2d at 160.

Ultimately, plaintiffs have failed to allege facts that contradict what the complaint itself concedes: that “[t]he reason that each and every member of the Plaintiffs’ Class made investments with Sunstate was that *Sunstate* promised them a return on their investment.” R. 20 (emphasis added).

B. The “Primary” Liability Claim Fails As Well.

The plaintiffs’ final claim (Count IV, R. 24-25) is one for selling securities without registering with the Florida Department of Banking, in violation of FLA. STAT. § 517.12. This claim asserts that when CMC acted as counterparty in transactions conducted by Sunstate, it was actually selling securities directly to the plaintiffs themselves, because Sunstate was using the plaintiffs’ money to make the purchases.

There are two fatal problems with this claim: (1) CMC is not alleged to have sold anything to any of the plaintiffs, and (2) the plaintiffs have not alleged that they purchased any item that meets the statutory definition of a “security.”

1. CMC Did Not “Sell” Anything To The Plaintiffs.

In order to bring a private suit under the FSIPA, a plaintiff must allege that he “purchase[d]” securities offered for “sale” by the defendant. *See* FLA. STAT. § 517.211. But there is no allegation in the Complaint that CMC sold anything to the plaintiffs. The plaintiffs do not allege that they ever purchased any security from CMC. Instead, they allege only that they purchased “investment contracts” directly from Sunstate. *See* R. 15, 20-21. Likewise, the Complaint does not allege that the plaintiffs ever paid money or any other consideration to CMC. To the contrary, the plaintiffs concede that their money was at all times paid to and invested only with Sunstate. *See, e.g.,* R. 2, 15, 20. Moreover, plaintiffs do not allege that CMC sold anything to them. Rather, they concede that CMC dealt *only* with Sunstate. *See, e.g.,* R. 10, 20-21.

On appeal, the plaintiffs attempt to explain away these deficiencies by advancing a convoluted theory under which all the money they invested with Sunstate was actually held by an “unincorporated association” under Florida law. Because such associations cannot hold title to property, the plaintiffs argue, the money was actually held by the plaintiffs themselves as “tenants in common.” Br.

45. Therefore, even though CMC believed it was dealing with Sunstate when it executed currency transactions, it was actually selling securities directly to the plaintiffs.

This fanciful theory finds no support in the law. There is no allegation in the Complaint that any of the plaintiffs ever had any contact with one another. They are not alleged to have ever met for a common purpose, held meetings, or even learned one another's names. They therefore never formed an "unincorporated association" under Florida law. *See, e.g., Peoples Gas Sys., Inc. v. Acme Gas Corp.*, 689 So. 2d 292, 298 (Fla. 3d DCA 1997) (unincorporated associations are "[g]enerally 'created and formed by the voluntary action of a number of individuals in associating themselves together under a common name for the accomplishment of some lawful purpose.'") (quoting 3A Fla. Jur. 2d Ass'n's & Clubs § 2 (1994); *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1222 (5th Cir. 1969)). The plaintiffs are unrelated individuals who invested money with a Florida corporation. If CMC made sales to anyone, it was to that corporation.

2. The Complaint Does Not Allege That The Plaintiffs Purchased "Securities," As Defined In The Statute.

In any case, CMC is not alleged to have sold or even offered for sale anything that even remotely resembles a security under Florida law. Rather, plaintiffs allege only that CMC executed "foreign currency trades, foreign currency futures trades, or other foreign exchange contracts" with Sunstate. R. 22.

Simply put, foreign currency trades and foreign currency contracts, which are not traded on any national securities exchange (see R. 16), are not “securities” under either Florida or federal law. The FSIPA, under which the plaintiffs have brought their claims, defines 23 separate categories of products as securities. See FLA. STAT. § 517.021(21). Foreign currency is conspicuously absent from this exhaustive statutory definition. Similarly, federal law considers foreign currency instruments “securities” only when they are “entered into on a national securities exchange.” 15 U.S.C. §§ 77b(a)(1), 78c(a)(10).

Recognizing this deficiency, plaintiffs argue that the foreign currency trades executed by CMC were “technically” sales of shares in a “commodity pool,” or perhaps “investment contracts.” Br. 27. This argument is without merit. It is certainly possible that *Sunstate*, by promising the plaintiffs a specific return on their investment, and by pooling multiple clients’ resources in a common trading account, converted their currency trades into such instruments. But CMC is not alleged to have made any such promises to the plaintiffs, nor are they alleged to have operated a commodity pool. CMC is simply alleged to have executed foreign currency trades, occasionally acting as counterparty in particular transactions. Such transactions are not sales of securities under Florida law.⁵

⁵ As for plaintiffs’ suggestion that “the Forex contract itself” is an investment contract “under the federal and Florida statutes” (Br. 28), that is simply not true. The federal cases plaintiffs cite do not so hold. *S.E.C. v. McCarthy*, 322 F.3d 650

Beyond the Florida statutes, the traditional test used to determine if a financial instrument is a security is in accord. Under the *Howey* test, plaintiffs must allege facts demonstrating that they (1) invested money with the defendant, (2) in a common enterprise, and (3) were led to expect profits from the defendants' efforts. See *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). Not only do plaintiffs concede that they did not invest their money with CMC (*see* R. 20), but they also did not expect to profit from CMC's efforts. See *id.* ("The reason that each and every member of the Plaintiffs' Class made investments with Sunstate was that *Sunstate* promised them a return on their investment."); *Id.*, ("Sunstate made all the investment decisions on the common fund pursuant to a limited power of attorney, executed by each member of Plaintiffs' Class, giving Sunstate unlimited discretionary trading authority during the Class Period."). Thus, under the *Howey* test, plaintiffs claim also fails as a matter of law. See, e.g., *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 159, 163-64 (S.D.N.Y. 2001) (holding that foreign exchange

(9th Cir. 2003) involved foreign currency options traded on a national exchange, and *SEC v. Forex Asset Management LLC*, 242 F.3d 325 (5th Cir. 2001) does not even discuss the type of trading the defendant engaged in. The plaintiff does not cite any authority for its assertion that "Florida law" considers foreign currency contracts "securities," and the various state cases plaintiffs cite involve state securities laws that differ materially from Florida's. Arizona's, for example, explicitly includes "foreign currency contracts" on its list of regulated commodities. See ARIZ. REV. STAT. § 44-1801(3).

transactions were not “securities” under the *Howey* test because “the structure of the transactions indicate that any gain likely would result in large part from market movements, not from capital appreciation due to Lehman’s efforts.”).

CONCLUSION

This Court should affirm the trial court’s order and dismiss the Complaint in its entirety.

Dated: West Palm Beach, Florida
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 5, 2007, a copy of the foregoing was served by U.S. Mail, postage prepaid, on all parties on the attached Service List.

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Pursuant to Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure,
this brief was prepared using Times New Roman 14-point font.

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