

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

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

Plaintiff,

vs.

CASE NO. 51-2010-CA-2912-WS/G

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

Defendants.

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**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST  
DEFENDANTS JON J. HAMMILL AND JON J. HAMMILL, P.A.  
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, Office of the Attorney General, Department of Legal Affairs, State of Florida,  
by and through its undersigned attorneys, hereby files this Motion for Partial Summary Judgment  
Against Defendants Jon J. Hammill and Jon J. Hammill, P.A., and states as follows:

**Introduction**

Defendants Jon J. Hammill ("Hammill") and Jon J. Hammill, P.A. ("Hammill, P.A.") participated substantially in the illegal Ponzi scheme operated by Defendants Botfly, L.L.C. ("Botfly") and David R. Lewalski ("Lewalski") that solicited more than 500 investors to invest approximately \$29.9 million in Botfly. Defendants Hammill and Lewalski represented to investors that money received for investment in Botfly would be traded on the Foreign Exchange ("Forex") market for currency trading. However, Defendants failed to invest most of the money

received from investors and instead enriched themselves at the expense of investors. Defendants invested only a miniscule percentage of the money received for investment, and Defendants' abysmal Forex trading results failed to support the exorbitant rates of return promised by Defendants to investors. Defendants Hammill and Hammill, P.A. have violated the Florida Securities and Investor Protection Act ("FSIPA") by their participation in the scheme to defraud investors. Plaintiff hereby moves for a Partial Summary Judgment as to liability against Hammill and Hammill, P.A. based upon their violations of FSIPA.

### **Statement of Facts**

#### **A. The Fraudulent Scheme**

Beginning in 2005, the Botfly Ponzi scheme led by Defendant David R. Lewalski ("Lewalski") sought to purloin money from investors on the false premise that Botfly was a legitimate investment company that traded currency on the Forex market and earned significant profits. Lewalski is the principal member and President of Botfly. (WAC 6928 BOTFLY 1-2; BOA 7434 22; BOA 5586 1868; DB 3108 3-8, 16-23). Lewalski represented himself as an expert Forex trader. In reality, however, Botfly through Lewalski failed to invest most of the money received for investment and instead spent the money or diverted the money to Lewalski, Hammill, and Hammill, P.A. The small percentage of funds Botfly invested lost significant sums of money in the Forex market.

In 2008, Hammill began working for Botfly to assist Lewalski in recruiting persons to invest in Botfly and handle the preparation of monthly statements and promissory notes provided to investors. (Deposition of DG ("DG Dep."), 93, 97-98, 106; Affidavit of JD ("JD Aff."), ¶ 9 and Exhibit C). Thereafter, Hammill became a chief promoter of the Botfly investment program.

Lewalski and Hammill lured persons into investing in Botfly by promising to pay a rate

of return of as much as 10% per month on any investment in Botfly. (Affidavit of GLP (“GLP Aff.”), ¶¶ 7-8; JD Aff., ¶¶ 3-5).<sup>1</sup> Botfly attempted to substantiate its ability to pay such a high rate of return by touting the Forex trading acumen of its principal, David Lewalski. (JD Aff., ¶¶ 3-4). Hammill told one investor on March 20, 2009, that Botfly through Lewalski earned an average of 20% per month on its Forex trading and therefore could afford to pay investors a rate of return of 10% per month. (Deposition of JG (“JG Dep.”), 81). Eight months later, Hammill told this same investor that Botfly was earning an average of 35% per month on its Forex trading activity for the past twelve months. (JG Dep. 81). In reality, however, Lewalski proved to be a poor Forex trader.

Upon investing in Botfly, investors received from Botfly a promissory note. (GLP Aff., ¶10 and Exhibit D; JD Aff., ¶ 5 and Exhibits A, C). Botfly’s typical promissory note contained representations that investors would receive 10% interest per month on their investments. (GLP Aff., ¶11 and Exhibit D; JD Aff., ¶¶ 6, 9 and Exhibit A). This equates to an interest rate of 120% per year using simple interest and much more if the interest is compounded. Further, in the promissory note, Botfly through Lewalski and Hammill represented to investors that the principal amount of the investment was to be held by Botfly for “investment and margin purposes only.” (GLP Aff., ¶11 and Exhibit D; JD Aff., ¶ 6 and Exhibit A).

Botfly sent account statements to investors indicating that investors’ funds were accruing interest at the rate of as much as 10% per month. (GLP Aff., ¶ 13 and Exhibits F, H; JD Aff., ¶ 7 and Exhibit B). These investor account statements were sent by mail or email to investors until the summer of 2009, when Defendants began providing investors with statements via the internet website of [www.botflyllc.com](http://www.botflyllc.com). (Affidavit of FW (“FW Aff.”), ¶ 9 and Exhibit C; GLP Aff., ¶¶

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<sup>1</sup> For a period of time, Botfly promised to pay fifty percent of its profits to a select few investors of large amounts of money. (JD Aff., ¶¶ 8-11).

13, 15, Exhibits F, H). These investor account statements indicated that investors had been credited with a 10% rate of return, which was the typical rate of return promised by Botfly. (FW Aff., ¶ 9 and Exhibit C; GLP Aff., ¶¶ 13, 15, Exhibits F, H).

In order to increase the flow of money into Botfly, Defendants Lewalski and Hammill promised to pay referral fees of 10% of the new investment amount to almost anyone who would bring in a new investor. (GLP Aff., ¶ 21 and Exhibit H; JG Dep. 34-35; DG Dep. 60-61). These referral fees led to the rapid growth of Botfly from just a few investors in 2005 to a huge operation with more than 500 investors in early 2010. However, the rapid growth of Botfly was based on fraudulent representations and omissions.

The returns paid to early investors were not the result of legitimate Forex trading by Botfly or Lewalski. Instead, the supposed “returns” paid to investors were simply new investor funds being provided to existing investors. (Second Affidavit of William T. “Tim” Bivens, II (Second Bivens Aff.), ¶ 11d). Botfly paid investors approximately \$15,587,105.18 million of money received from other investors. (Second Bivens Aff., ¶ 11c). These Ponzi payments created the illusion that Botfly was a legitimate investment company earning high returns, which attracted more investors. Botfly did not pay investors with money derived from any legitimate investment activity.

Investors provided approximately \$29,926,178.34 to Botfly for investment. (Second Bivens Aff., ¶ 11b). Lewalski and Hammill received checks from investors and signed promissory notes for Botfly. (JD Aff., ¶¶ 5, 9 and Exhibits A, C; Affidavit of CM (“CM Aff.”), ¶¶ 8, 9 and Exhibit A). More than 500 persons and entities invested in Botfly. (Second Bivens Aff., ¶ 7). Defendants solicited and received money from individuals, corporations, and churches. Further, Defendants illicitly skimmed investor money for themselves or have spent the

money on their own personal purchases without investing the money. (Second Bivens Aff., ¶¶ 11e-11k).

**B. Representations to Investors**

1. Representations to Investor DG

When DG first heard about Botfly's investment program paying a 10% per month return on an investment through investments in foreign currency exchange, he thought it was too good to be true. (DG Dep. 8). Therefore, he traveled to Gainesville, Florida, to meet with David Lewalski to discuss the Botfly investment. (DG Dep. 8-9). In February or March 2009, Lewalski represented to investor DG at Lewalski's apartment in Gainesville, Florida, that Lewalski earned between 19-30% per month trading foreign currency. (DG Dep. 89-90). Lewalski specifically told DG that Lewalski traded the British pound and the Japanese yen. (DG Dep. 90). After meeting with Lewalski, DG spoke to Jon Hammill about the Botfly investment program. (DG Dep. 93-94). Soon thereafter, Hammill represented to DG by telephone that neither he nor Lewalski were registered to trade foreign currency and that it was not necessary for Lewalski or Hammill to be registered to trade foreign currency. (DG Dep. 95). Hammill also told DG that Lewalski had been investigated by the Division of Homeland Security and had been given "a clean bill of health." (DG Dep. 14-15). Investor DG relied upon Lewalski's representations when DG decided to invest in Botfly. (DG Dep. 96). Investor DG also relied upon Hammill's representations when DG decided to invest in Botfly. (Dep. 96).

2. Representations to Investor JG

Similarly, investor JG met with Jon Hammill on March 20, 2009, before investing in Botfly. (Deposition of JG ("JG Dep."), 79). Hammill promised JG that he would receive a guaranteed rate of return on his investment in Botfly of 10% per month. (JG Dep. 79). Hammill

then showed JG some charts on his computer in order to justify the promised rate of return. (JG Dep. 79-80). At this meeting, Hammill told JG that Botfly earned 20% per month on its investments in the foreign currency market trading the pound and the yen. (JG Dep. 81). Eight months later, Hammill stated to JG that Botfly had earned an average of 35% per month over the last twelve months in foreign currency trading. (JG Dep. 81). Hammill informed JG that Botfly performed its trading at Deutsche Bank. (JG Dep. 82). Investor JG would not have invested in Botfly if he had known it was a Ponzi scheme. (JG Dep. 25).

Investor JG received a promissory note from Botfly in exchange for investing the sum of \$410,000 in Botfly. (JG Dep. 27-28 and Exhibit 1). Hammill signed the promissory note provided to JG. (JG Dep. 85). The promissory note states that JG was to receive a return of 10% per month on JG's investment in Botfly. (JG Dep. 85 and Exhibit 1). Further, the promissory note states that JG's investment is to be used for investment and margin purposes only. (JG Dep. 85 and Exhibit 1). He also received account statements that indicated he was earning the return promised by Hammill on JG's investment in Botfly. (JG Dep. 82-83). Further, investor JG was credited money on his account statement for referring other investors to Botfly. (JG Dep. 34-35). Hammill told JG that the referral fee was 10% of the amount any new investor placed in Botfly. (JG Dep. 35). Based upon Botfly's promises of returns, JG planned to have \$2 million by the end of 2010 in his Botfly account. (JG Dep. 36).

### 3. Representations to Investor JD

Hammill told JD in 2008 that Lewalski had a software program for trading currency on the foreign exchange market. (JD Aff., ¶ 3). JD then traveled to Gainesville, Florida to meet with Lewalski to gather additional information about the Botfly investment program in June or July, 2008. (JD Aff., ¶ 4). At the meeting, Lewalski showed JD Lewalski's Forex trading

software and stated that he had modified the trading indicators on the software. (JD Aff., ¶ 4). Lewalski claimed that he traded the yen and the pound on the Forex market and promised JD that he would receive a return of 10% per month if JD invested in the Botfly investment program. (JD Aff., ¶ 4). Based upon the representations of Lewalski and Hammill including the promised 10% return per month and representations of conducting Forex trading, JD decided to invest \$20,000 in Botfly. (JD Aff., ¶ 5).

In approximately November, 2008, Lewalski told JD that if he increased his account balance to more than \$100,000, then Lewalski would give JD a special deal for investors that would provide him with a fifty percent share of the profits earned on his investment amount. (JD Aff., ¶ 8). In reliance upon Lewalski's representation, JD invested an additional \$71,000 on or about November 18, 2008. (JD Aff., ¶ 9). JD received a second promissory note dated December 1, 2008, and signed by Hammill. (JD Aff., ¶ 9). The second promissory note also stated that JD's money was to be held for "investment and margin purposes only." (JD Aff., ¶ 10).

Lewalski had informed JD that once his account exceeded \$100,000, JD's money would be traded separately from other investors' funds. (JD Aff., ¶ 12). Therefore, JD requested to view Lewalski's trading records for JD's account. (JD Aff., ¶ 13). Lewalski provided JD with three Deutsche Bank trading statements covering the periods of December 31, 2008 through February 1, 2009, April 6, 2009 through May 8, 2009, and May 6, 2009 through June 3, 2009. (JD Aff., ¶¶ 13-15 and Exhibits E-G). These statements indicated Lewalski had earned profits of \$41,815.71, \$37,258.66, and 52,578.49, respectively on JD's investment. (JD Aff., ¶¶ 13-15 and Exhibits E-G). One of these trading statements indicates that it is linked with an account number ending in 3108, which is a Botfly account number at Deutsche Bank. As discussed below,

Botfly failed to generate the type of profits in Forex trading that were represented on these trading records provided to investor JD. JD's review of these statements led JD to believe that Botfly was a legitimate investment company. (JD Aff., ¶ 16). JD invested a total of \$91,000 in Botfly. (JD Aff., ¶¶ 5, 9). Neither Hammill nor Lewalski informed JD of any risks associated with JD's investment in Botfly. (JD Aff., ¶ 17). In fact, they assured JD that his initial investment in Botfly would not be lost. (JD Aff., ¶ 17).

**C. Roles of Hammill and Hammill, P.A. in the Fraudulent Scheme**

Hammill began working for Botfly in 2008. (DG Dep., 93, 97-98, 106; Hammill's Response to First Request for Admissions). As early as December 1, 2008, Hammill signed a promissory note on behalf of Botfly for investor JD. (JD Aff., ¶ 9, Exhibit C). Hammill served as a primary contact for prospective investors who were interested in learning about the Botfly investment program. Hammill routinely touted the supposed Forex trading expertise of Lewalski when promoting the Botfly investment program to prospective investors. (JG Dep. 81; CM Aff., ¶¶ 4-5; JD Aff., ¶ 3). Hammill repeatedly promised prospective investors a return of 10% per month on any investments made in Botfly. (GLP Aff., ¶ 7; CW Aff., ¶ 4; CM Aff., ¶ 8; JG Dep. 79).

Hammill signed many Botfly promissory notes sold to investors. (JD Aff., ¶ 9, Exhibit C; CW Aff., ¶ 6, Exhibit A; CM Aff., ¶ 9, Exhibit A; FW Aff., ¶ 6, Exhibit A; GLP Aff., ¶ 10, Exhibit D; Affidavit of KK ("KK Aff."), ¶ 7, Exhibit A). The promissory notes signed by Hammill generally promised to pay investors in Botfly a rate of return of 10% per month. (CW Aff., ¶ 6, Exhibit A; CM Aff., ¶ 9, Exhibit A; FW Aff., ¶ 6, Exhibit A; GLP Aff., ¶ 10, Exhibit D; Affidavit of KK ("KK Aff."), ¶ 7, Exhibit A). The promissory notes signed by Hammill represented that Botfly investor funds would be used for "investment and margin purposes only."

(JD Aff., ¶ 9, Exhibit C; CW Aff., ¶ 6, Exhibit A; CM Aff., ¶ 9, Exhibit A; FW Aff., ¶ 6, Exhibit A; GLP Aff., ¶ 10, Exhibit D; Affidavit of KK (“KK Aff.”), ¶ 7, Exhibit A). Hammill failed to inform investor JD of any risks associated with his investment. (JD Aff., ¶ 17).

Further, Hammill served as the primary contact person at Botfly for existing investors with respect to their Botfly account statements. A typical account statement given to Botfly investors indicated, “If you have any questions with your statement or account, please contact your account executive: Jon Hammill.” (GLP Aff., ¶ 15, Exhibit H; FW Aff., ¶ 9, Exhibit C; JD Aff., ¶ 11, Exhibit D). Moreover, after new investor CW sent her investment to Botfly, she received an email from the address of [info@botflyllc.com](mailto:info@botflyllc.com) from Jon Hammill and David Lewalski on March 31, 2010. (Affidavit of CW (“CW Aff.”), ¶ 8 and Exhibit B). The email stated, “Thank you for becoming part of our Forex venture. We have had many successful years, and look forward to many more.” (CW Aff., ¶ 8 and Exhibit B). CW was instructed in the email to complete a direct deposit form and mail it “directly to Jon.” (CW Aff., ¶ 8 and Exhibit B). The email said, “If you need anything, please contact me first, as we need to keep Dave focused on trading and not distracted with emails and phone calls. This will help to ensure that he does his very best for us.” (CW Aff., ¶ 8 and Exhibit B). Investors GLP and FW also received similar emails from Jon Hammill and David Lewalski when GLP and FW became investors in Botfly. (GLP Aff., ¶ 9, Exhibit C; FW Aff., ¶ 8, Exhibit B).

For his work advancing the Ponzi scheme, Botfly rewarded Hammill handsomely. Hammill received from Botfly \$111,000 of investor funds. (Second Bivens Aff., ¶ 11e). Hammill owned and controlled Hammill, P.A. during the time Hammill worked for Botfly. (Hammill’s Response to First Request for Admissions). Hammill, P.A. received from Botfly approximately \$1.3 million of investor funds. (Second Bivens Aff., ¶ 8). Hammill, P.A. paid

directly to Hammill approximately \$728,000 of Botfly investor funds. (Second Bivens Aff., ¶ 11f). Hammill, P.A. failed to repay investors any of the Botfly investor money it received. (Second Bivens Aff., ¶ 8).

**D. Trading Activity**

1. Botfly

Botfly invested only approximately 4.7% of the money received from investors and fared poorly in its trading on the Forex market. Botfly transferred \$1,290,000.00 of investor funds from the Bank of America account numbers ending in 5586 and 5540 to the Deutsche Bank Forex trading accounts held by Botfly ending in 3108 and 3177. As of August 25, 2010, these Deutsche Bank accounts contained only \$384,374.04. Botfly lost the sum of \$905,625.96 in trading losses and fees. This represents a loss of at least 70% of the money invested by Botfly in Deutsche Bank Forex trading.

Furthermore, Botfly also had an account with IFX Markets. This account held in the name of Botfly was opened on October 13, 2005. Botfly deposited a total of \$65,000 in this account from its accounts at Wachovia ending in 6925 and Bank of America ending in 5586. Botfly withdrew a total of \$22,000 from IFX Markets. The balance in this account as of July 10, 2010, was a meager \$997.99.

Moreover, Botfly also maintained an account with PFG Best Financial Group (“PFG”), which was opened on July 3, 2008. This account was funded from the Bank of America Botfly account ending in 5586 in the amount of \$50,000 and by a \$10,055.13 transfer from Lewalski’s personal PFG account ending in 8187 on July 28, 2008. The remaining balance in this account was a mere \$9,929.53.

Of the total amount Botfly received from investors of approximately \$29,926,178.34,

only \$1,405,000 was invested by Botfly in trading accounts held in the name of Botfly. These investments lost approximately more than \$997,637.00 in value from trading losses and fees. Thus, Botfly lost approximately 71% of the money Botfly actually invested.

2. Lewalski

Lewalski also performed poorly in his own personal Forex trading accounts. Lewalski placed \$1,550,000.00 of Botfly investor funds in the Swiss Forex trading account called Dukascopy (Suisse) SA (“Dukascopy”) held by UBS AG in the name of David Lewalski. Lewalski withdrew \$300,000.00 from the Dukascopy account and placed this money in his personal account at Bank of America. Of the \$1,250,000.00 remaining in the Dukascopy account after the withdrawals, Lewalski lost \$530,288.94 of investor money through trading losses and various fees charged to the account. As of August 19, 2010, only the sum of \$719,711.06 remained in the Dukascopy account.

Lewalski’s trading woes continued. Lewalski transferred \$220,000.00 from his Bank of America account to his Deutsche Bank account held in his own name ending in 1771. As of August 25, 2010, Lewalski’s Deutsche Bank account contained only \$46,020.84. Lewalski lost the sum of \$173,979.16 in trading losses and fees. This represents a loss of at least 79% of the money invested by Lewalski in his personal Deutsche Bank Forex trading account.

Additionally, Lewalski lost money in two trading accounts held with Gain Capital Group, LLC (“Gain Capital”). Lewalski transferred \$7,500 from his Bank of America account to his Gain Capital account held in his own name ending in 3427. As of November, 30, 2007, the date the account was closed, Lewalski’s Gain Capital account contained only \$1,527.09. Lewalski transferred this amount into a second Gain Capital trading account ending in 3337, which was also funded with \$14,000 from Lewalski’s Bank of America account. Lewalski withdrew the

sum of \$2,475 from this account. As of May 30, 2008, only the sum of \$13.11 remained in this account. Lewalski lost approximately 88% of the money invested in the Gain Capital Forex trading accounts.

3. Hammill

Hammill fared worse than Botfly and Lewalski in his own Forex trading. Hammill transferred \$283,500 from his Bank of America account to Deutsche Bank account number ending in 2962 held in the name of Jon Hammill. As of August 25, 2010, Hammill's Deutsche Bank account contained only \$29,046.58. Hammill withdrew the sum of \$1,800 from this account. Hammill lost the sum of \$252,653.42 in trading losses and fees. This represents a loss of approximately 89% of the money invested by Hammill in his personal Deutsche Bank Forex trading account.

**D. Misappropriation of Investor Funds**

Botfly through Lewalski and Hammill solicited and received approximately \$29,926,178.34 from investors. (Second Bivens Aff., ¶ 11b). Instead of actually investing all of the money received, Lewalski used investor funds for his own personal use. Lewalski spent approximately more than \$3 million of investor funds on items such as high end automobiles, private jet services, lavish hotels, high end retailers, cosmetic and dental procedures, restaurants, motor bikes, high end bicycles, and cycling equipment. (Second Bivens Aff., ¶ 11g-j). Additionally, Lewalski received payments from Botfly of approximately \$912,509.23. (Second Bivens Aff., ¶ 11k).

Moreover, Hammill and Hammill, P.A. participated in the misappropriation of investor funds. Botfly diverted investor funds to Hammill and Hammill, P.A. Botfly paid approximately \$1.3 million of investor money to Hammill's company, Hammill, P.A. (Second Bivens Aff., ¶

11f). Hammill, P.A. paid approximately \$728,000 of investor funds to Hammill. (Second Bivens Aff., ¶ 11f). Further, Botfly gave Hammill \$111,000 of investor money. (Second Bivens Aff., ¶ 11e). The funds received by Hammill, P.A. were not paid back to investors. (Second Bivens Aff., ¶ 11f).

**E. Hammill’s Invocation of His Fifth Amendment Privilege Against Self-Incrimination**

During his deposition on June 10, 2010, Defendant Jon J. Hammill invoked his Fifth Amendment privilege against self-incrimination many times in response to questions regarding his involvement in the Botfly investment program. (Deposition of Jon J. Hammill, June 10, 2010). At a previous deposition of Hammill on April 16, 2010, Hammill indicated that he would invoke his Fifth Amendment privilege against self-incrimination as to any questions relating to Hammill’s involvement with Botfly. (Deposition of Jon J. Hammill, April 16, 2010). In addition, Plaintiff served Hammill with Plaintiff’s First Set of Interrogatories, First Request for Production of Documents, and First Request for Admissions on or about August 6, 2010. Hammill responded to most of these discovery requests by asserting his Fifth Amendment privilege against self-incrimination. (Defendant Jon J. Hammill’s Responses to Plaintiff’s First Set of Interrogatories, First Request for Production of Documents, and First Request for Admissions).

**F. Summary Judgment Evidence**

In this Motion for Partial Summary Judgment, Plaintiff relies upon the Depositions of DG and JG and the two Depositions of Jon Hammill taken in this action on June 10, 2010 and April 16, 2010. Plaintiff also relies upon the Affidavits of JD, CM, CW, GLP, FW, KK, the Affidavit of William T. “Tim” Bivens, II, the Second Affidavit of William T. “Tim” Bivens, II, the Affidavit of CWA, and the Supplemental Affidavit of CWA. Plaintiff also relies upon records

produced by Bank of America for accounts ending in numbers 5586, 5540, 7434, and 7098 in the name of Botfly, 6691 in the name of Lewalski, and 5458 and 2851 in the name of Hammill. Plaintiff relies upon records produced by Wachovia Bank for accounts ending in numbers 6928 in the name of Botfly, 2128 in the name of Hammill, and 5195 in the name of Jon J. Hammill, P.A.; Florida Citizens Bank for the account ending in number 4192 in the name of Botfly; VyStar Credit Union for the accounts ending in numbers 5861 and 1392 in the name of Botfly and account number 1388 in the name of Lewalski; Fifth Third Bank for the account ending in 2101 in the name of Botfly; Deutsche Bank for accounts ending in numbers 3108 and 3177 in the name of Botfly, 1771 in the name of Lewalski, and 2962 in the name of Hammill; Dukascopy (Suisse) SA records produced by Botfly; PFG Best Financial Group for accounts ending in numbers 5619 in the name of Botfly and 8187 in the name of Lewalski; Gain Capital for accounts in the name of Lewalski; and IFX Markets for the account ending in number 5800 in the name of Botfly. Plaintiff also relies upon Plaintiff's First Set of Interrogatories, First Request for Production of Documents, and First Request for Admissions served on Jon J. Hammill and Defendant Jon J. Hammill's Responses to Plaintiff's First Set of Interrogatories, First Request for Production of Documents, and First Request for Admissions.

#### **Standard for Summary Judgment**

Rule 1.510, Florida Rules of Civil Procedure, provides that a court shall enter a summary judgment when "the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to

support his motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist.” *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979); *see also Fisel v. Wynns*, 667 So. 2d 761, 764 (Fla. 1996) (stating “it is never enough ‘for the opposing party merely to assert that an issue does exist.’”) (quoting *Landers*, 370 So. 2d at 370).<sup>2</sup>

### Argument

#### **A. Plaintiff Is Entitled to a Summary Judgment on Its FSIPA Claim.**

FSIPA prohibits a person in connection with the sale of a security from operating a scheme to defraud, concealing material information from an investor, and making any fraudulent statement or representation to an investor. The purpose of FSIPA is to “protect the public from fraudulent and deceptive practices in the sale and marketing of securities.” *Mesher v. Combs*, 685 So. 2d 1391, 1392 (Fla. 4th DCA 1997) (citations omitted). The Supreme Court has advised, “The legislature enacted chapters 517... to protect the public from fraud and deceit in the investment of securities. The laws are especially concerned with inexperienced investors who may be duped by unscrupulous brokers. Because of the statutes’ public importance, the state should not be unduly restricted in its attempt to enforce them.” *State v. Beeler*, 530 So. 2d 932, 934 (Fla.1988).

Plaintiff is specifically authorized by FSIPA to obtain “injunctive relief, restitution, civil penalties, and any remedies provided for in this section” when it “has reason to believe that a person has engaged or is engaged in any act or practice constituting a violation of s. 517.275, s. 517.301, s. 517.311, or s. 517.312, or any rule or order issued under such sections.” Fla. Stat. § 517.191(5) (2009) (emphasis added). Further, section 517.191(5) authorizes the Attorney

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<sup>2</sup> When a motion for summary judgment is filed before the filing of an answer, then the movant must show that “defendant could not raise any genuine issues of material fact if the defendant were permitted to answer the complaint.” *Sandoro v. HSBC Bank, USA*, 55 So. 3d 730, 732 (Fla. 2d DCA 2011) (citations omitted).

General to bring an action against “*any other person in any way participating in such act or practice or engaging in such act or practice or doing any act in furtherance of such act or practice*, to obtain injunctive relief, restitution, civil penalties, and any remedies provided for in this section.” Fla. Stat. § 517.191(5) (emphasis added). Section 517.191 has been described as “broadly worded” and it has been recognized that chapter 517 “is to be given a liberal construction.” *Smith v. State*, 570 So. 2d 1315, 1318 (Fla. 2d DCA 1990). Section 517.301(1)(a), Florida Statutes, provides in part:

It is unlawful and a violation of the provisions of this chapter for a person:

(a) In connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any investment or security, including any security exempted under the provisions of s. 517.051 and including any security sold in a transaction exempted under the provisions of s. 517.061, directly or indirectly:

1. To employ any device, scheme, or artifice to defraud...

The undisputed facts demonstrate that the Botfly investment program is a scheme to defraud investors, and Defendants Hammill and Hammill, P.A. have violated FSIPA by participating in the Botfly scheme.

1. Hammill and Hammill, P.A. have violated FSIPA by participating in a Ponzi scheme to defraud investors.

Section 517.301(1)(a), Florida Statutes, declares that it is unlawful for any person to “employ any device, scheme, or artifice to defraud” in connection with the offer or sale “of any investment or security.” Defendant Lewalski as the President and member of Botfly led the Botfly investment program. (WAC 6928 BOTFLY 1-2; BOA 7434 22; BOA 5586 1868; DB 3108 3-8, 16-23; GLP Aff., ¶ 23 and Exhibit K). Defendants Lewalski and Hammill enticed investors to invest in Botfly by promising extravagant returns of 10% per month on their investment. (GLP Aff., ¶¶ 7-8; JD Aff., ¶¶ 3-5; JG Dep. 79). In return for investors’ money, Defendants Lewalski and Hammill provided investors with a Botfly promissory note typically

promising the investor a rate of return of 10% per month on the investment. (GLP Aff., ¶11 and Exhibit D; JD Aff., ¶¶ 6, 9 and Exhibit A). The promissory note constitutes a security under Florida law because it is a note, an evidence of indebtedness, and/or an investment contract. Fla. Stat. §§ 517.021(21)(a), (f), (q); *see also Bookhardt v. State*, 710 So.2d 700, 701 (Fla. 5th DCA 1998) (holding that the sale of unsecured promissory notes constitutes the sale of a security under Fla. Stat. § 517.021(18)). Lewalski and Hammill falsely represented to investors that money invested in Botfly would be traded on the Forex market, where Defendants allegedly earned high returns. (JD Aff., ¶¶ 3-4; JG Dep. 81). In reality, however, very little investor money was invested, and most of the money invested was lost in trading. (Second Bivens Aff., ¶ 11a-j). Thus, Hammill participated in a scheme to defraud investors in connection with the offer or sale of an investment or security.

Botfly possesses the prima facie elements of a Ponzi scheme. A Ponzi scheme “is one in which funds obtained from new investors are used to satisfy interest and principal obligations due on earlier investors’ notes (and usually to line the pockets of the scheme's perpetrators). Such a scheme requires an ever-larger circle of new investors to keep it afloat, and thus almost invariably ends in disaster.” *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 613 n. 3 (7<sup>th</sup> Cir. 1996); *see also In re Forex Fidelity Intern.*, 222 Fed. Appx. 810, 814 (11<sup>th</sup> Cir. 2007) (“[A] Ponzi scheme is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.”) (citations omitted). Here, Botfly used money from new investors to pay supposed returns to existing investors. (Second Bivens Aff., ¶ 11d).

Moreover, most of the investor funds received by Botfly were not even invested, which is further evidence that Defendants operated a Ponzi scheme. (Second Bivens Aff., ¶ 11a); *see*,

*e.g.*, *U.S. v. Treadwell*, 593 F.3d 990, 994 n. 3 (9<sup>th</sup> Cir. 2010) (stating that “it is the absence of evidence of any investment of investor funds that makes ‘Ponzi scheme’ an apt characterization of the defendants’ fraud”) (citations omitted). Botfly invested only approximately 4.7% of the money it received for investment in accounts held in the name of Botfly. Moreover, no income from any Forex trading from the Botfly Deutsche Bank accounts, the Lewalski Deutsche Bank accounts, or the Lewalski Dukascopy account was ever distributed back to an investor. (Second Bivens Aff., ¶¶ 9-11a).

In addition, Ponzi schemes typically promise high rates of return on investments. In one case involving a Ponzi scheme, the defendant “displayed a 27.4% return for 1997 and a 12.4% return for 1998.” *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 12 (S.D.N.Y. 2007). The Court concluded that “[s]uch representations are consistent with the existence of a Ponzi scheme.” *Id.* Here, Hammill and Lewalski promised extraordinarily high investment returns of 10% per month, which absent compounding interest, equates to a return of 120% per year. (GLP Aff., ¶¶ 7-8; JD Aff., ¶¶ 3-5; JG Dep. 79). Such a promised return is indicative of a Ponzi scheme.

Further, Ponzi schemes include investor funds being “skimmed off for personal use by the members of the scheme.” *U.S. v. Silvestri*, 409 F.3d 1311, 1317 (11<sup>th</sup> Cir. 2005). Here, Hammill, P.A. obtained approximately \$1.3 million of Botfly investor funds directly from Botfly and failed to return any of these funds to investors. (Second Bivens Aff., ¶ 8, 11f). Hammill personally profited from the scheme by obtaining \$111,000 of investor funds from Botfly. (Second Bivens Aff., ¶ 11e). Hammill also took approximately \$728,000 of investor funds from Hammill, P.A. (Second Bivens Aff., ¶ 11f). Hammill and Hammill, P.A. have violated FSIPA through their participation in a scheme to defraud, and a partial summary judgment should be entered in favor of Plaintiff and against Hammill and Hammill, P.A. *See, e.g., SEC v. Fraser*,

2009 WL 2450508, at \*9 (D. Ariz. Aug. 11, 2009) (holding scheme liability is a valid theory for the SEC to bring a civil enforcement action under Federal Rule 10(b)).

Section 517.191(5), Florida Statutes, authorizes the Attorney General to bring an action against “such person” violating Section 517.301 “and any other person in any way participating in such act or practice or engaging in such act or practice or doing any act in furtherance of such act or practice, to obtain injunctive relief, restitution, civil penalties, and any remedies provided for in this section.” Fla. Stat. § 517.191(5). Here, Hammill has participated substantially in the scheme to defraud and is therefore liable pursuant to Section 517.191(5), Florida Statutes. The evidence indicates Hammill participated in the Botfly scheme by:

- promoting the Botfly investment program to potential investors,
- selling Botfly promissory notes to investors,
- signing Botfly promissory notes provided to investors,
- receiving checks from investors for investment in Botfly,
- serving as an account executive for investors in Botfly,
- sending correspondence to investors on behalf of Botfly,
- touting the Forex trading ability of Lewalski,
- promising that investors’ money would be used for investment and margin purposes only,
- promising high rates of return to investors in Botfly, and
- promising the payment of referral fees to persons who referred new investors to Botfly.

Therefore, Hammill has participated in the scheme and committed acts in furtherance of the scheme in violation of Fla. Stat. § 517.191(5). Hammill, P.A. is also liable for participating in the scheme to defraud because it served as the vehicle for siphoning off approximately \$1.3 million of investor funds from Botfly to Hammill.

Moreover, “any agent of the purchaser or seller which has personally participated in the sale would be liable for violations of section 517.301, Florida Statutes, whether that agent is a corporation, partnership or natural person.” *Arthur Young & Co. v. Mariner Corp.*, 630 So. 2d 1199, 1205 (Fla. 4th DCA 1994). As demonstrated above, Hammill has personally participated in the sale of Botfly promissory notes to investors. Accordingly, Hammill is also liable as an agent of Botfly for his actions in selling securities to investors.

2. Hammill’s invocation of his Fifth Amendment privilege against self-incrimination creates an adverse inference against Hammill.

Hammill has repeatedly invoked his Fifth Amendment privilege against self-incrimination in this action when questioned about his involvement in the Botfly scheme. The Supreme Court of the United States has held that an adverse inference may be drawn against a defendant in a civil case who invokes his Fifth Amendment right against self-incrimination. *Mitchell v. United States*, 526 U.S. 314, 328 (1999). Florida courts have similarly held that an adverse inference may be drawn against a defendant in a civil case who invokes the Fifth Amendment. *See, e.g., In re E.R.*, 49 So. 3d 846, 857 (Fla. 2d DCA 2010) (holding the trial court may draw an adverse inference against parents who invoked the Fifth Amendment in a parental termination suit); *Vasquez v. State*, 777 So. 2d 1200, 1203 (Fla. 3d DCA 2001) (noting that “the trial court may draw an adverse inference against a party in a civil action who invokes his privilege against self-incrimination”). One court has stated, “A party may not trample upon the rights of others and then escape the consequences by invoking a constitutional privilege -- at least not in a civil setting.” *Atlas v. Atlas*, 708 So. 2d 296, 299 (Fla. 4th DCA 1998) (quoting *Fraser v. Security & Inv. Corp.*, 615 So. 2d 841, 842 (Fla. 4th DCA 1993)).

In this civil case, Hammill has remained silent when questioned about his role in the Botfly Ponzi scheme. For example, at his deposition, Hammill testified as follows:

Q. Okay. What is your role with Botfly L.L.C.?  
A. I invoke my Fifth Amendment rights on the grounds it may tend to incriminate me.  
Q. Have you ever invested in Botfly L.L.C.?  
A. I invoke my Fifth Amendment rights on the grounds that it may tend to incriminate me.  
Q. Have you ever been employed by Botfly L.L.C.?  
A. I invoke my Fifth Amendment rights on the grounds it may tend to incriminate me.  
Q. Have you ever had the authority to make payments on behalf of Botfly L.L.C.?  
A. I invoke my Fifth Amendment rights on the grounds it may tend to incriminate me.  
Q. Have you ever had the authority to withdraw money from financial institutions on behalf of Botfly L.L.C.?  
A. I invoke my Fifth Amendment rights on the grounds it may tend to incriminate me.  
Q. Have you received payments from Botfly L.L.C. as salary?  
A. I invoke my Fifth Amendment rights on the grounds it may tend to incriminate me.

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Q. Okay. What is your understanding of what Botfly L.L.C. did?  
A. I invoke my Fifth Amendment rights on the grounds that it may tend to incriminate me. (Hammill Deposition, June 10, 2010, 35-36, 42).

This Court should draw an adverse inference against Hammill for his silence in the face of specific questions relating to his involvement in Botfly. The specific questions are contained in the Deposition of Hammill on June 10, 2010, as well as the Request for Admissions and Interrogatories served on Hammill.

**B. This Court Should Award Restitution to Victims.**

Plaintiff requests that this Court order that Defendants Hammill and Hammill, P.A. make restitution to investor victims of the scheme. Plaintiff requests that this Court reserve jurisdiction to determine the appropriate amount of restitution that Hammill and Hammill, P.A., jointly and severally, should pay back to investor victims. Restitution is an authorized remedy for Hammill and Hammill, P.A.'s violation of FSIPA. Fla. Stat. § 517.191(5). The total amount

of money collected by Defendants from investors is approximately \$29,926,178.34. (Second Bivens Aff., ¶ 11b). Defendants made payments from the Botfly Ponzi scheme to investors in the amount of approximately \$15,587,105.18. (Second Bivens Aff., ¶ 11c). From December 1, 2008, the earliest known date when Hammill was working for Botfly, Defendants collected approximately \$27,415,393.11 from investors. (Second Bivens Aff., ¶ 11b). From December 1, 2008, Defendants made payments from the Botfly Ponzi scheme to investors in the amount of approximately \$14,927,632.08. (Second Bivens Aff., ¶ 11c). Therefore, the restitution amount to be paid by Defendant Hammill should be no less than the sum of \$12,487,761.03. Hammill, P.A. should be required to pay restitution to Botfly investor victims in the amount of \$1,394,717.00, the amount Hammill, P.A. received from Botfly, in a plan to be determined by the Court. (Second Bivens Aff., ¶ 11f). Accordingly, Plaintiff requests that this Court retain jurisdiction of this case to determine the appropriate amount of restitution to be paid by Hammill, determine a plan for payment of restitution to victims of Hammill and Hammill, P.A. from the assets collected by the Receiver and any assets which may be collected in the future, and continue to supervise the work of the Receiver in this case.

**C. This Court Should Enter a Permanent Injunction.**

Additionally, Plaintiff requests that this Court retain jurisdiction to enter a permanent injunction against Hammill and Hammill, P.A. Plaintiff seeks the entry of a permanent injunction against Hammill and Hammill, P.A. to prevent Hammill and Hammill, P.A. from soliciting money or goods from any person or company in the State of Florida. Plaintiff is specifically authorized to obtain injunctive relief for violations of FSIPA. Fla. Stat. § 517.191(5). “To obtain a permanent injunction, the petitioner must ‘establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief.’”

*Liberty Counsel v. Florida Bar Bd. Of Governors*, 12 So. 3d 183, 186 n. 7 (Fla. 2009) (quoting *K.W. Brown & Co. v. McCutchen*, 819 So. 2d 977, 979 (Fla. 4th DCA 2002)). In this case, Hammill and Hammill, P.A. have participated in a scheme to defraud hundreds of consumers out of millions of dollars. Accordingly, Hammill and Hammill, P.A. should be enjoined from causing future harm to others.

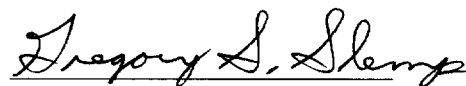
### **Conclusion**

The uncontroverted evidence demonstrates that Defendants Jon J. Hammill and Jon J. Hammill, P.A. have violated FSIPA. Hammill and Hammill, P.A. participated in the Botfly scheme to defraud and committed acts in furtherance of the scheme. There is no genuine issue of any material fact, and Plaintiff is entitled to a judgment as a matter of law. Defendants cannot show a genuine issue of any material fact in this case. Accordingly, Plaintiff requests that this Court enter a Partial Summary Judgment in favor of Plaintiff and against Defendants Jon J. Hammill and Jon J. Hammill, P.A. as to the liability of Defendants Jon J. Hammill and Jon J. Hammill, P.A. on Count I of the Amended Complaint. Plaintiff requests that the Court order Jon J. Hammill, P.A. to pay restitution to investor victims in the amount of \$1,394,717.00 in a plan to be determined by the Court. Additionally, Plaintiff requests that this Court retain jurisdiction of this matter to determine and award restitution to victims of Hammill in a plan to be determined by the Court. Further, Plaintiff requests that this Court reserve jurisdiction of this matter to determine the plan for distributing the assets of Hammill and Hammill, P.A. to the investor victims and to supervise the work of the Court appointed Receiver in this case.

WHEREFORE, Plaintiff, Office of the Attorney General, Department of Legal Affairs, State of Florida, prays this Court enter an Order granting its Motion for Partial Summary Judgment Against Defendants Jon J. Hammill and Jon J. Hammill, P.A., enter a Partial Summary

Judgment in favor of Plaintiff and against Defendants Jon J. Hammill and Jon J. Hammill, P.A. as to the liability of Defendants, ordering restitution to be paid by Jon J. Hammill to investor victims in an amount to be determined by the Court, ordering restitution to be paid by Jon J. Hammill, P.A. to investor victims in the amount of \$1,394,717.00, reserving jurisdiction to determine the amount of restitution to be paid by Jon J. Hammill, reserving jurisdiction to enter a permanent injunction against Jon J. Hammill and Jon J. Hammill, P.A., reserving jurisdiction to approve a plan to distribute the assets of Jon J. Hammill and Jon J. Hammill, P.A. to victims and supervise the work of the Receiver in this case, and for such other and further relief that this Court deems just and proper.

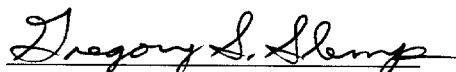
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#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jeffrey W. Warren and Karen Cox, Bush Ross, P.A., P.O. Box 3913, Tampa, FL 33601-3913; David R. Lewalski, Pinellas County Jail, Cell Location/Status: CEN-6C1-UN01-08-003, 14400 49<sup>th</sup> St. N., Clearwater, FL 33762; Steve D. Tran, 2285 First Avenue North, Suite A, Saint Petersburg, FL 33713; Jon J. Hammill, 6232 Fifth Avenue North, Saint Petersburg, FL 33710; and Gabriel Mazzeo via email at [gmazzeo11@gmail.com](mailto:gmazzeo11@gmail.com) on this 18<sup>th</sup> day of May, 2011.



Gregory S. Slemp