

**In the United States District Court
For the Northern District of Indiana
Fort Wayne Division**

BOYD MACHINE &)	
REPAIR COMPANY, INC., et al.,)	
)	
Plaintiffs,)	CASE NO. 1: 03-CV-057
)	
vs.)	
)	
IRVIN FREEDMAN, et al.,)	
)	
Defendants.)	

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR
FIRST MOTION FOR SUMMARY JUDGMENT**

Come now the defendants (“Freedman”), by counsel, pursuant to Local Rule 56.1, and furnish the court with undisputed facts that entitle them to summary judgment – judgment that either ends this case or compels arbitration.

STATEMENT OF MATERIAL FACTS

The plaintiffs (“Boyd”) alleged that they purchased from Freedman securities for a total price of \$3,139,127.00.¹ In the original complaint Boyd asserted that they signed demand notes and Freedman issued Boyd stock.² Boyd also alleged that he received demand notes and shares of stock in return for their

¹ **Amended Complaint, par.22.**

² **Original Complaint, par.22.**

investments.³ After Freedman filed his first motion to dismiss, Boyd changed his story. The amended complaint alleges that Boyd received all of this stock in 2001 for an investment he made on May 28, 1998.⁴ The undisputed evidence is to the contrary.

On May 28, 1998 L & L Asset Management Company (hereafter “L & L”) signed an investment agreement.⁵ A plaintiff, Matthew Boyd, drafted it. Their agreement called for L & L to pay \$250,000.00, although only \$175,000.00 was paid. For an additional \$100,000.00 L & L had the option to convert this investment into an equity position with another company. Under the present complaint Boyd has not sought return of the \$175,000.00. The original investment was free from fraud. In fact, all investments were free from fraud.

On February 28, 2000 L & L and BMR Business Company loaned Freedman \$150,000.00.⁶ The promissory note called for Freedman to repay \$10,000.00 every two weeks and repay in full within 120 days. Boyd alleged in his original complaint that Freedman did not repay.⁷ For obvious reasons there is no mention of this in the amended complaint.

³ Id., par.29.

⁴ Amended Complaint, par.25.

⁵ Exhibit 1

⁶ Exhibit 2

⁷ Complaint, par.30.

Boyd has filed a complaint in Florida, a complaint in Indiana, and an amended complaint in Indiana that does not disclose when Freedman purportedly made false statements to Boyd. Boyd has not identified any specific time, and has not identified any steps he took to discover any purported fraud. What is for certain is that Boyd began investing with Freedman on May 28, 1998, and from the outset could not repay Boyd under the terms of their agreement. By 1999 Boyd had invested \$500,000 in J.J. Siriss Asset Management Company and on August 10, 1999 Freedman sent a letter to him stating that the company could not repay.⁸ Yet Boyd took no steps to discover any purported fraud. Because Freedman never lied to Boyd. At the very least Boyd knew or should have known he had one year to file a lawsuit.

Boyd has no admissible evidence to prove that they timely filed their lawsuit in Indiana. More than one year elapsed between when Boyd knew or should have known that any “alleged” fraud was afoot.

On or about July 12, 2002 Boyd filed a complaint against Freedman in Pinellas County, Florida, Cause No. 02-5490-CI-13.⁹ Therein Boyd verified that Freedman sold unregistered securities and was not a registered dealer, all in the State of Florida. Boyd complained about violations of the Florida Securities and

⁸ This pushes back any limitations period even further. See Exhibits 2 & 3.

⁹ Exhibit 4 (summons); Exhibit 5 (verified complaint); Exhibit 6 (voluntary dismissal).

Investor Protection Act, not any Indiana or federal securities laws.¹⁰

Boyd alleged that Freedman owes him \$3,139,127.00 and attached promissory notes (many of which Freedman never signed) to support this amount.¹¹ According to the signed promissory notes attached to the complaint: Boyd loaned J.J. Siriss Asset Management Company a total of \$500,000.00.¹² Friss Asset Management Company a total of \$975,000.00.¹³ Fiberloc Corp. a total of \$40,000.00.¹⁴ Famco Holding Company, Inc. a total of \$40,000.00.¹⁵ And to Freedman personally a total of \$1,046,795.00.¹⁶ The signed promissory notes total \$2,601,795. The amended complaint seeks \$3,139,127.00.

Freedman last signed a demand note on June 30, 2000.¹⁷ On July 13, 2001 Boyd received shares of stock and attached them as Exhibit B to their original and amended complaints. Everything that Boyd paid Freedman prior to July 13, 2001 was the consideration paid for what Boyd attached as Exhibit B to the

¹⁰ **Exhibit 5, pars.6-10, 20-23, 32-36, 46-49, 59-62, 72-75, 85-88, 116, 120, & 128.**

¹¹ **Amended Complaint, pars.22-28.**

¹² **Exhibit 7.**

¹³ **Exhibit 8.**

¹⁴ **Exhibit 9.**

¹⁵ **Exhibit 10.**

¹⁶ **Exhibit 11.**

¹⁷ **Exhibit 10.**

amended complaint.¹⁸ Boyd told Freedman how he wanted the shares divided.¹⁹ The plaintiffs' acceptance of the shares completely satisfied the promissory notes and other transfers.²⁰ (It is enough that the amended complaint admits that should Freedman repay \$3,139,127.00, Boyd wants rescission and will return the shares.²¹ Such requested relief infers that Boyd paid \$3,139,127.00 for the shares in the first place.) Boyd received value of at least \$3,139,127.00 when they received the Famco shares.

A few words about Famco Holding Company. The managing corporation met on February 12, 2001, which included Larry Boyd (a plaintiff and board member). At the meeting everyone (including Boyd) approved of the Operating Agreement for Famco Holding Company, LLC.²² Boyd accepted 1,500,000 units of Famco. Larry Boyd did not resign as a board member until May 15, 2002.²³

As reported to the Court in response to its inquiry concerning disclosure of citizenship, the members of the LLC are as follows:

18 **Exhibit 12.**

19 **Exhibit 13.**

20 **Republic Funding Corp. v. Juarez, 563 So.2d 145, 146 (Fla.App. 1990); Mominee v. King, 629 N.E.2d 1280 (Ind.App. 1994).**

21 **Amended Complaint, pars.42, 48 & 56.**

22 **Exhibit 14 (agenda); Exhibit 15 (minutes of meeting); Exhibit 16 (LLC Operating Agreement).**

23 **Exhibit 17.**

Alpine Capital Trust, Judith Barrick, Chan Teck Chan, Continental Investment Trust, Peter Davis, James and Anna Marie Dunn, Patrick Edmonson, Famco Holding Company, Inc., Steven Freedman, Randi Freedman, Friss Asset Management Company, Gibbs Family Trust, Symee Greenfield, Himalayan Investment Trust, Kenny Trust, Kelly Kigar, Ronald Kinder, Gerald and Tybe Klein, Jeffrey Klein, Charles Morando, Inez Morando, Richard Morando, Irwin J. Newman, Nordic Capital Trust, Fred R. Pollak, Kenneth Pollack, Lou and Trudy Smida, J. Layne Smith, Alan Stevens, Viking Capital Trust, Kimberly Wick, Marilyn Wick, and John Witmer.

Five of the above are plaintiffs in this case.

In pertinent part the Operating Agreement states as follows: To avoid the uncertainty and potential for litigation, the members agreed not to rely on any purported or unwritten expectations.²⁴ If Boyd had any reason to believe he was lied to, he had a duty to immediately inform all other members and attempt to change the Operating Agreement.²⁵ Failure to do so resulted in a waiver.²⁶ Boyd knew that their membership in the LLC did not involve registered securities.²⁷ No member can force the redemption of shares.²⁸ Although that is what Boyd seeks in this lawsuit.

Boyd agreed not to file any lawsuit against Freedman except to obtain

²⁴ **Exhibit 16, p.3, § 3.3.**

²⁵ **Exhibit 16, p.4, § 3.3.**

²⁶ **Id.**

²⁷ **Id., p.6, § 5.2(c); p.16, § 12.1; p.28, § 23.7.**

²⁸ **Id., p.7, § 5.5.**

urgent injunctive relief or to enforce arbitration.²⁹ The Operating Agreement contains extensive dispute resolution provisions, including a requirement that Boyd voice his complaints to the full membership and cooperate in the appointment of a mediator.³⁰ Should this prove unsuccessful, Boyd agreed to submit any “claim, controversy or dispute to the American Arbitration Association for binding arbitration” in Broward County, Florida.³¹ Even if Boyd could escape arbitration, they agreed to the venue of the “Federal or state court located in Broward County, Florida.”³²

Boyd attached Exhibit B to their complaint and amended complaint but copied only the front side of their shares. They left off the back side, a copy of which is attached as Exhibit 18 (identical on all shares).

In prior briefing, Boyd sought confirmation of Exhibits 14, 15 and 16. The affidavit of Irv Freedman is attached as Exhibit 19 which should alleviate any concerns.

Boyd has no admissible evidence to prove (1) that Freedman made any false statement or omission, (2) of material fact, (3) with scienter, (4) in connection with the purchase or sale of securities, (5) upon which Freedman justifiably relied,

²⁹ **Id., p.5, § 5.1(g).**

³⁰ **Id., p.26, § 22.1.**

³¹ **Id., p.26, § 22.2. See Pacificare v. Book, 123 S.Ct. 1531 (2003); FDIC v. Ernst & Young, 2003 WL 1883445 (N.D.Ill. April 15, 2003).**

³² **Exhibit 16, p.27, § 23.1. See Stephan v. Goldinger, 325 F.3d 874 (7th Cir. 2003) (contract venue provision valid, even if fraud alleged).**

(6) that any false statement proximately caused their damages, (7) prove that they would not have invested had Freedman not lied about something, and (8) that what Freedman said caused Boyd to lose money.

ARGUMENT

Before diving into the complex web of securities fraud, perhaps an analogy might help shed some light on how to think about this case. Suppose that Freedman was in the business of selling jewelry. In 1998 he sold Boyd a diamond ring for \$3,000,000.00. In 2001 Boyd decided to exchange the diamond ring for a diamond bracelet of Freedman's with a price tag of \$3,000,000.00. As part of the exchange they signed an agreement to not rely on anything ever said before, and to arbitrate any disputes.

Whether or not the diamond ring was real or fake is no longer an issue for the courts. No matter what the ring was really worth, Boyd received \$3,000,000.00 (or better) when he traded for the bracelet. If Boyd had reason to believe the ring was worthless, he cannot be heard to complain for signing a contract waiving any action involving prior statements. Boyd cannot ask a court to permit him to return the bracelet because the ring may have no value. In the end, any dispute among the parties goes to arbitration.

I. Freedman did not commit securities fraud

Boyd assert that Freedman ran afoul of the Securities Exchange Act of 1934, § 10(b), and the Security and Exchange Commission’s Rule 10b-5.³³ Congress enacted these laws shortly after the market crash of 1929 “to insure honest securities markets and thereby promote investor confidence.”³⁴ But these rules “must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b).”³⁵ “The federal securities laws should not be mistaken for insurance against risky investments.”³⁶ They “do not guarantee sound business practices and do not protect investors against reverses.”³⁷ Simply put, “not every instance of financial unfairness constitutes fraudulent activity under § 10(b).”³⁸ In response to strike suits fishing for discovery and predatory settlements,³⁹ Congress enacted “procedural protections to

³³ 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Boyd also asserts that the defendants ran afoul of RICO, but that assumes an underlying unlawful activity. If the securities fraud counts do not survive summary judgment or an order to arbitrate, any RICO counts fall like the next dominos.

³⁴ U.S. v. O’Hagan, 521 U.S. 642, 658, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997).

³⁵ SEC v. Zandford, 535 U.S. 813, 820, 122 S.Ct. 1899, 1903, 153 L.Ed.2d 1 (2002).

³⁶ Searls v. Glasser, 64 F.3d 1061, 1069 (7th Cir. 1995).

³⁷ DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990).

³⁸ Chiarella v. U.S., 445 U.S. 222, 232, 100 S.Ct. 1108, 1116-17, 63 L.Ed.2d 348 (1980).

³⁹ See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975).

discourage frivolous litigation”,⁴⁰ namely The Private Securities Litigation Reform Act of 1995 (hereafter “PSLRA”).⁴¹

PSLRA requires Boyd to:

“specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which the belief it formed.”⁴²

PSLRA also requires Boyd to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”⁴³

The Supreme Court has held that scienter, “a mental state embracing intent to deceive, manipulate or defraud,” is an essential element of any § 10(b)(5) or Rule 10b-5 claim.⁴⁴ On this issue the Seventh Circuit has not addressed the precise pleading standard to apply under PSLRA. Other courts are divided. The Ninth Circuit standard is considered the most stringent.⁴⁵ The Second Circuit the most lenient.⁴⁶ The Sixth Circuit requires reckless behavior.⁴⁷ The Eleventh

40 H.R.Conf.Rep.No. 104-369, at 32 (1995), U.S. Code Cong. & Admin. News at 730, 731.

41 15 U.S.C. § 78.

42 15 U.S.C. § 78u-4(b)(1).

43 Id., § 78u-4(b)(2).

44 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

45 Janas v. McCracken, 183 F.3d 970, 974 (9th Cir. 1999) (“strong evidence of deliberately reckless or conscious misconduct”).

46 Rothman v. Gregor, 220 F.3d 81, 90 (2nd Cir. 2000).

47 Mansbach v. Prescott, 598 F.2d 1017, 1025 (6th Cir. 1979).

Circuit requires “severe recklessness”, noting that motive and opportunity alone could not sustain a complaint for fraud.⁴⁸ Prior to PSLRA the Seventh Circuit required an “intent to defraud” or “recklessness”.⁴⁹ After PSLRA the Court mentioned this standard in *dicta*.⁵⁰

The heightened pleading requirements in PSLRA increased the plaintiffs’ duty to conduct pre-suit investigation and hoped to prevent “fraud by hindsight”.⁵¹ Yet in this case it appears that Boyd filed one complaint in Florida and now two in Indiana without much investigation. Indeed, the Florida complaint contained more detail than the later one filed in Indiana, which, to digress for a moment, gives rise to the inference that allegations made in Florida yet omitted in Indiana were not true after all. The promissory notes themselves certainly are not securities.⁵²

Under § 10(b) and Rule 10b-5, the plaintiff must establish that:

“(1) the defendant made a false statement or omission (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities (5) upon

48 **Bryant v. Avado Brands, Inc.**, 187 F.3d 1271, 1287 (11th Cir. 1999).

49 **Sundstrand Corp. v. Sun Chem. Corp.**, 553 F.2d 1033, 1043-45 (7th Cir. 1977).

50 **Caremark v. Coram**, 113 F.3d 645, 650 n.7 (7th Cir. 1997). See **Helwig v. Vencor**, 251 F.3d 540, 550 (6th Cir. 2001), for an excellent discussion of the Congressional record concerning PSLRA.

51 **Denny v. Barber**, 576 F.2d 465, 470 (2nd Cir. 1978); **Searls v. Glasser**, 64 F.3d 1061 (7th Cir. 1995) (showing that statements of predictions, forecasts, puffery or optimistic rhetoric are not actionable as securities fraud).

52 **American Bank & Trust v. Wallace**, 702 F.2d 93 (6th Cir. 1983); **Manning v. Smith Barney, Harris Upham & Co.**, 822 F.Supp. 1081 and 828 F.Supp. 256 (S.D.N.Y. 1993).

which the plaintiff justifiably relied (6) and that the false statement proximately caused the plaintiff's damages."⁵³

In addition the plaintiff must show "transaction causation" and "loss causation".⁵⁴

In English these mean Boyd has to prove that they would not have invested had Freedman not lied about something; and that what Freedman said caused Boyd to lose money.⁵⁵ Boyd cannot prove any of this, much less each element.

Even if Boyd can prove fraud concerning any of his allegations, any statements by Freedman were rendered moot when Boyd agreed to the Famco Operating Agreement.⁵⁶

⁵³ Caremark v. Coram, 113 F.3d 645, 648 (7th Cir. 1997); Healthcare Compare Corp. v. Healthcare, 75 F.3d 276 (7th Cir. 1996) (dismissing case for failing to sufficiently allege fraud).

⁵⁴ Id.

⁵⁵ Stransky v. Cummins Engine, 51 F.3d 1329, 1331 (7th Cir. 1995) (applying same standard in Rule 10b-5 claim); Stamatio v. Hurco, 885 F.Supp. 1180, and 892 F.Supp. 214 (S.D.Ind. 1995) (dismissing even a proposed amended complaint for failing to sufficiently plead fraud); Akerman v. Bankworchester, 751 F.Supp. 11, 12 (D.Mass. 1990) (conclusions pertained more to mismanagement than misrepresentation); Luce v. Edelstein, 802 F.2d 49, 57 (2nd Cir. 1986) ("Allegations that relate to mismanagement cannot survive a Rule 12(b)(6) motion even if made with more particularity.").

⁵⁶ See Rissman v. Rissman, 213 F.3d 381 (7th Cir. 2000) (shareholder agreement stating that no party relied on any prior oral statement prevented any claim of fraud); Carr v. Cigna, 95 F.3d 544, 547 (7th Cir. 1996) (documents warning investors about risk precluded fraud allegations based on other statements; "Without such a principle, sellers would have no protection against plausible liars and gullible jurors").

II. Complaint Untimely

Boyd alleges that he has made demand on the notes.⁵⁷ Given that Boyd had the right to make such demands as early as the note signed on July 9, 1998,⁵⁸ Freedman (and the Court) are left to wonder when Boyd made such a demand, and in order to have a timely lawsuit under the securities laws, why he apparently waited until June or July, 2002 to ask for anything.⁵⁹

If Boyd is correct that the promissory note is a security, at the latest any limitations period began to run at the end of June, 2000. Thus the amended complaint shows that Boyd has waited too long to file any allegation concerning the federal securities laws.⁶⁰

⁵⁷ Amended Complaint, par.37.

⁵⁸ Exhibit 7.

⁵⁹ See Amended Complaint, par.37.

⁶⁰ Lampf v. Gilbertson, 501 U.S. 350, 364, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321 (1991) (securities fraud involves a one year limitations period after the plaintiff knew or should have known of any problem, and a three year statute of repose); Trogenza v. Great American, 12 F.3d 717, 718, 722 (7th Cir. 1993) (“discovery” is imputed to the plaintiff when he is put on “inquiry notice”; that is, when he becomes “aware of facts that would have led a reasonable person to investigate whether he might have a claim” under 10(b)(5)); Fujisawa v. Kapoor, 115 F.3d 1332 (7th Cir. 1997) (plaintiff’s discovery of suspicious circumstances begins the limitations period); Kauthar v. Sternberg, 149 F.3d 659 (7th Cir. 1998) (involving an opinion by this Court), citing Whirlpool v. GN Holdings, 67 F.3d 605 (7th Cir. 1995) (a plaintiff that states facts showing the suit is barred by the statute of limitations pleads itself out of court).

III. Boyd Agreed to Arbitration

The Federal Arbitration Act's (FAA) establishes a "federal policy favoring arbitration" whereby "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁶¹ This places "arbitration agreements upon the same footing as other contracts."⁶² The same rule applies to cases involving securities fraud.⁶³ If the court does not award Freedman summary judgment, then it should in the alternative order Boyd to proceed to arbitration.⁶⁴ Even if Boyd can escape arbitration, they agreed to the venue of the "Federal or state court located in Broward County, Florida."⁶⁵

Boyd should have shown the Court what he has known all along: that this case does not involve securities fraud but a possible breach of an Operating Agreement subject to binding arbitration or the jurisdiction of the Florida courts.⁶⁶ In contrast to this Court's opinion in Lincoln National Life Insurance Company v.

⁶¹ Moses H. Cone Mem. Hosp. v. Mercury, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

⁶² Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S.Ct. 1647, 1651, 114 L.Ed.2d 26 (1991).

⁶³ Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).

⁶⁴ 9 U.S.C. § 3; Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985) (lower courts should "rigorously enforce agreements to arbitrate."

⁶⁵ Defendant's First Motion to Dismiss, Exhibit 16, p.27, § 23.1. See Stephan v. Goldinger, 325 F.3d 874 (7th Cir. 2003) (contract venue provision valid, even if fraud alleged).

⁶⁶ Hirata Corp. v. Oxford, 193 F.R.D. 589, 592 (S.D.Ind. 2000) (plaintiffs cannot deliberately omit references to documents upon which their claims are based).

Donaldson, 9 F.Supp.2d 994 (N.D.Ind. 1998), the Operating Agreement in this case is as central to Boyd's case as having attached a complete copy of the share certificates (Exhibit 18) in the first place.

Conclusion

Many investors accepted shares in Famco Holding Company, LLC knowing that an Operating Agreement governed their relationship. The Court should not permit a few of the many to ignore it. By filing lawsuits in Florida and now Indiana Boyd has damaged Famco, interrupted its business, and publicly accused Irv Freedman of criminal behavior at a time when Famco wants profits, not problems. Boyd should wait for a return on their investment, or work to resolve any dispute with the membership, a mediator, or an arbitrator.

WHEREFORE the court should find that these facts are not in dispute and summarily end this matter.

Respectfully submitted,

Curtis E. Shirley

CERTIFICATE OF SERVICE

The undersigned certifies that he has served the foregoing paper on the following attorney by United States first class mail postage prepaid this February 4, 2004:

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