

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO.: 8:20-cv-00394-MSS-SPF

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

KINETIC INVESTMENT GROUP, LLC et al.,

Defendants and Relief Defendants.

**DEFENDANT WILLIAMS' REPLY IN SUPPORT OF HIS
MOTION FOR SUMMARY JUDGMENT**¹

Defendant MICHAEL SCOTT WILLIAMS (“Defendant”) submits this reply in support of his Motion for Summary Judgment [D.E. 202] and states:

**Defendant’s Undisputed Material Facts
Remain Undisputed**

Notwithstanding Plaintiff’s denial of all but one of the 21 undisputed material facts identified by Defendant,² the evidence cited by Plaintiff in

¹ As a preliminary matter, in response to Defendant’s 17-page Motion, Plaintiff filed a 27-page Opposition [D.E. 219], exceeding by seven pages the 20-page limit mandated by the Local Rules and the Case Management and Scheduling Order. *See* Local Rule 3.01(b); D.E. 88 at II.G and II.H.1. Plaintiff was aware of the page limits and the procedure for requesting to exceed them — as evidenced by the two motions to file excess pages filed by it [D.E. 194; D.E. 223] — yet Plaintiff did *not* seek leave from the Court for a 35% increase in the page limit prior to filing its Opposition. Accordingly, Plaintiff’s Opposition should be stricken.

² For ease of reference, Defendant’s undisputed material facts shall hereinafter be referred to by the prefix “D’s” and the paragraph numbers assigned to them in Defendant’s Motion for Summary Judgment — *e.g.*, D’s No. 1, D’s No. 2, etc. [D.E. 202 at 3-7].

support of its denials³ does *not* establish there is a genuine dispute or issue for trial regarding any of those material facts, much less contradict any of them:⁴

D's No.1: Plaintiff admits D's No. 1.

D's No. 2: The evidence cited by Plaintiff does *not* address any of the allegations contained in or omitted from the Complaint and therefore is a legal *non sequitur*. As a result, D's No. 2 is *undisputed*.⁵

D. No. 3: The evidence cited by Plaintiff does *not* establish the funds transferred by Kinetic Funds I, LLC ("KF") to KCL Services, LLC d/b/a Lendacy ("Lendacy") belonged to KF, KFYield, or their investors. As a result, D's No. 3 is *undisputed*.⁶

D's Nos. 4 and 5: The evidence cited by Plaintiff does *not* establish Defendant: (1) advised Kinetic Investment Group, LLC ("KG"), KF, KFYield, or their investors as to the value of securities or the advisability of investing in, purchasing, or selling securities; or (2) engaged in the business of advising others as to the value of securities or the advisability of investing in, purchasing, or selling securities. As a result, D's No. 4 and 5 *undisputed*.⁷

D's Nos. 6, 7, and 8: The evidence cited by Plaintiff does *not* establish Defendant received any compensation: (1) advising KG, KF, KFYield, or

³ Plaintiff cites its own list of undisputed material fact as support for its denials of the undisputed material facts identified by Defendant, identifying them by the paragraph numbers assigned to them in its Motion for Summary Judgment ("MSJ"). [D.E. 200 at 2-20]. Many of Plaintiff's numbered paragraphs, however, contain *multiple* undisputed material facts, each denoted by a footnote citing to purported evidence in support of it. For clarity and ease of reference, Plaintiff's undisputed facts shall hereinafter be referred to by the prefix "P's" and the footnote numbers assigned to them — *e.g.*, P's No. 1, P's No. 2, etc.

⁴ Plaintiff's MSJ contains 55 numbered paragraphs comprising 134 footnoted undisputed material facts supported by 70 attachments comprising 58 exhibits (including several hundred pages of transcripts). [D.E. 200-2-20]. The sheer volume of Plaintiff's argument is daunting (presumably intentionally so to discourage further investigation of its assertions). If one can find the stamina to plow through this dense thicket of words and paper, however, and drill down on Plaintiff's exhibits — and compare them to Plaintiff's undisputed material facts — it quickly becomes apparent that there is no there there, and *none* of Plaintiff's so-called undisputed material facts are in fact supported by the evidence cited by Plaintiff, much less undisputed. [D.E. 221 at 1-22; D.E. 221-1].

⁵ See P's Nos. 60-64, 72-73, 90-91, 97-123, 133-135; Defendant's Response to Plaintiff's Motion for Summary Judgment [D.E. 221] at 8-10, 14-20, 22; D.E. 221-1.

⁶ See P's Nos. 60-64, 72-73, 90-91, 97-123; D.E. 221 at 8-10, 14-20; D.E. 221-1.

⁷ See P's Nos. 2-16, 27-34, 42, 44-56, 58-59, 65-66, 70-71, 75, 77-82, 90-93, 98-101; D.E. 221 at 1-3, 5-8, 10-12, 14; D.E. 221-1.

their investors as to the value of securities or the advisability of investing in, purchasing, or selling securities; (2) advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities; or (3) from KG, KF, KFYield, or their investors. As a result, D's Nos. 6, 7, and 8 are undisputed.⁸

D's Nos. 9, 10, 11, 12, 13, 14, and 15: The evidence cited by Plaintiff does not establish that Defendant made any untrue oral statements of material fact in connection with the offer, purchase, or sale of: (1) any security relating, directly or indirectly, to KG, KF, or KFYield or (2) any security; nor that Defendant omitted to state orally a material fact necessary in order to make any statements made — in the light of the circumstances under which they were made — not misleading in connection with the offer, purchase or sale of: (1) any security relating, directly or indirectly, to KG, KF, or KFYield or (2) any security; nor that Defendant omitted to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of: (1) any security relating, directly or indirectly, to KG, KF, or KFYield or (2) any security. As a result, D's Nos. 9, 10, 11, 12, 13, 14, and 15 are undisputed.⁹

⁸ See P's Nos. 2-16; D.E. 221 at 1-3; D.E. 221-1; D.E. 221-2 at ¶¶ 219-223. Exhibit 3 of Plaintiff's MSJ establishes only that: (1) KF was charged an expense ratio, but not by whom; and (2) KF's Class A member, defined as KP (not Defendant), would receive 20% of the net profits. [D.E. 200-6]. Exhibit 12 of the MSJ establishes only that: (1) KG "received" the 1% paid by KF and used the funds to pay third parties; and (2) the Class A member, identified as KG (not Defendant), received 20% the net profits [D.E. 200-15]. Exhibit 16 of the MSJ establishes only that KG (not Defendant) charged KF a 1% management fee, 25% of which was "shared [with] Eliseo." [D.E. 200-16]. And Exhibit 1 of Plaintiff's Opposition establishes only that KG (not Defendant) made its money from a 1% management fee and a 20% performance fee charged to KF. [D.E. 219-1]. *None* of Plaintiff's purported evidence contradict the (undisputed and material) fact that Defendant never received any compensation from KG, KF, KFYield, or their investors or for advising anyone as to the value of securities or the advisability of investing in, purchasing, or selling securities. [D.E. 200-1 at ¶¶ 19-33; 221-2 at ¶¶ 219-223].

⁹ See P's Nos. 47-89; D.E. 221 at 7-13; D.E. 221-1. None of the evidence cited by Plaintiff identifies a specific misrepresentation or omission together with *who* made it, to *whom* it was made, *when* it was made, and *where* and *how* it was made — all of which are required to plead and prove a securities claim. See *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1318 (11th Cir. 2019); *SEC v. Roanoke Tech. Corp.*, 2006 WL 3813755, at *3 (M.D. Fla. Dec. 26, 2006). At most, Plaintiff has presented evidence that a misrepresentation or omission was made generally "to investors" without any of the other requisite details. Further, Plaintiff has not provided any evidence that a specific misrepresentation or omission was made *orally* other than Exhibit 41 of its MSJ. According to Exhibit 41, however, the purported misrepresentations were made *in person* and therefore did not involve "interstate commerce or the mails" — and therefore cannot be the basis of a claim for violation of the securities laws. See

D's Nos. 16, 17, 18, 19, 20, and 21: The evidence cited by Plaintiff does *not* establish that KG made any untrue oral statements of material fact in connection with the offer, purchase, or sale of: (1) any security relating, directly or indirectly, to KG, KF, or KFYield or (2) any security; *nor* that KG omitted to state orally a material fact necessary in order to make any statements made — in the light of the circumstances under which they were made — not misleading in connection with the offer, purchase or sale of: (1) any security relating, directly or indirectly, to KG, KF, or KFYield or (2) any security; *nor* that KG omitted to state a material fact necessary in order to make any statements made orally, in the light of the circumstances under which they were made, not misleading in connection with the offer, purchase or sale of: (1) any security relating, directly or indirectly, to KG, KF, or KFYield or (2) any security. As a result, D's No. 16, 17, 18, 19, 20, and 21 are *undisputed*.¹⁰

**The Predicate Misappropriations Were Not
“in Connection with” a Securities Transaction**

Plaintiff admits that the alleged misappropriations were made *after* the investors had already made their investments. Undeterred, however, Plaintiff invokes *SEC v. Zanford*, 535 U.S. 813 (2002), which found misappropriations were “in connection with” securities transactions where it was alleged in the complaint that the defendant “engaged in a scheme to defraud” whereby he sold an investor’s securities for the purpose of converting the proceeds to his own use. 535 U.S. at 820-21.¹¹

Relying on *Zanford*, Plaintiff argues that Defendant’s alleged misappropriations occurred in connection with a securities transaction because, after

D.E. 202-50 at ¶¶ 6-9; 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 15 U.S.C. § 80b-6; 17 C.F.R. § 240.10b-5; 17 C.F.R. § 275.206(4)-8(a).

¹⁰ See *supra* n.9. In addition, none of the evidence cited by Plaintiff establishes that KG made any oral (or written) misrepresentations or omissions.

¹¹ The *Zanford* court contrasted the facts alleged in the complaint before it with the “case in which, after a lawful transaction had been consummated, a broker decided to steal the proceeds and did so” — which the Court deemed would *not* be in connection with a securities transaction. *Id.* at 820.

the investors invested in KF, Defendant used a combination of the investors' funds and margin to purchase securities so that Defendant could use the funds "left behind" to fund loans to himself and others.

Unlike in *Zanford*, however, Plaintiff has not alleged in the Complaint that Defendant purchased securities with margin for the purpose of using the unspent cash to make loans. The word margin nowhere appears in the Complaint. Nor does the Complaint contain any allegations that Defendant structured the purchase of securities for the purpose of making loans to himself or that he engaged in a scheme to structure securities purchases so that he could make loans. Rather, the Complaint presents these transactions — the selling of investments in KF, the purchase of securities, and the making of loans — as separate and *independent* events. As such, *Zanford* is applicable.¹²

Even if Plaintiff could now amend its Complaint to include these revised allegations (it cannot), the "evidence" cited by Plaintiff in support of its effort to satisfy the "in connection with" requirement does not establish that Defendant chose to purchase securities with margin so that he could fund loans to

¹² Plaintiff is bound by the allegations and claims it strategically chose to plead in its Complaint and cannot amend its Complaint at this late stage to evade summary judgment. See *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed.R.Civ.P. 15(a)."); *Manning v. St. Petersburg Kennel Club, Inc.*, 2015 WL 477364, at *5 (M.D. Fla. Feb. 5, 2015) (holding Plaintiff may not amend claim via opposition to summary judgment motion); *Petty v. United Plating, Inc.*, 2012 WL 2047532, *9 (N.D. Ala. May 31, 2012) ("[A] plaintiff cannot assert for the first time at the summary judgment stage a claim for relief that was not plead in his complaint.).

himself or that the purchase of securities on margin worked “hand-in-hand” with the diversion of “investor capital” to fund loans to Defendant or that Defendant even used any investor funds to fund any loans (he did not).¹³ Nor has Plaintiff presented any evidence of a single, specific security being bought or sold — with margin or otherwise — in connection with a loan (none was).

The Misappropriated Funds Were *Not* Misappropriated

Plaintiff’s claims are predicated on alleged misappropriations that occurred when Defendant routed “KFYield funds” to Lendacy and then borrowed those funds from Lendacy to use for his own purposes.

Defendant has presented evidence that: (1) none of the funds transferred to Lendacy belonged to KF, KFYield, or their investors; and (2) only funds belonging to Interactive Brokers, LLC (“IB”) were transferred to Lendacy.¹⁴

Plaintiff’s only response is to present the Declaration of Crystal Ivory, which states: (1) Lendacy received \$312,000 from IB; and (2) the majority of the funds delivered to Lendacy came from KF’s bank account.¹⁵

Ms. Ivory, however, has not been identified as an expert witness.¹⁶ Nor is she a fact witness. Ms. Ivory is a staff accountant employed by Plaintiff who

¹³ See P’s Nos. 70-71, 90-93, 97, 104-121; D.E. 221 at 10, 14-19; D.E. 221-1.

¹⁴ See D.E. 202-1 at ¶¶ 16-18; see also D.E. 221-2 at ¶¶ 138-143, 204-205, 209.

¹⁵ D.E. 219 at 8-9; D.E. 219-2; but see D.E. 221-2 at ¶¶ 97-159 (explaining how IB’s funds could be delivered to Lendacy from KF’s bank account without using any funds belonging to KF, KFYield, or their investors and without exposing KF, KFYield, or their investors to any increased costs or risks).

¹⁶ See D.E. 88 at 1 (December 7, 2020 deadline for Plaintiff to disclose experts).

has no first-hand knowledge of any of the underlying facts in this case.¹⁷ In addition, her Declaration is based on *unauthenticated* documents and *hearsay*.¹⁸ As a result, Ms. Ivory's Declaration **cannot** be presented in a form that would be admissible in evidence and should be stricken.¹⁹

Because Plaintiff has not presented any admissible evidence — or any argument based on admissible evidence — to rebut Defendant's evidence that no KF, KFYield, or investors funds were transferred to Lendacy, this fact is *undisputed*. Accordingly, Plaintiff cannot prove any "KFYield Funds" were routed to Lendacy, and summary judgment should be entered on Plaintiff's claims predicated on such alleged misappropriations.

Defendant Is Not an "Investment Adviser"

The evidence offered by Plaintiff does not establish there is a genuine dispute or issue for trial — much less contradict Defendant's evidence — that Defendant did not: (1) engage in the business of advising others as to the value of, investing in, purchasing, or selling securities;²⁰ or (2) receive any

¹⁷ See D.E. 219-2 at ¶ 2.

¹⁸ See D.E. 219 at ¶ 4.

¹⁹ See FED. R. CIV. P. 56(c)(2); *Day v. Sarasota Doctors Hosp., Inc.*, 2021 WL 288969, at *6 (M.D. Fla. Jan. 28, 2021) (“[U]nauthenticated documents generally cannot be considered on a motion for summary judgment Similar to unauthenticated evidence, hearsay statements typically cannot be considered on a motion for summary judgment.” (citation omitted))

²⁰ See D's Nos. 19-23; P's Nos. 2-16, 47-56, 58-59, 65-66, 70-71, 74-75, 77-82, 97-101; D.E. 221 at 1-3, 7-8, 10-12, 14; D.E. 221-1; D.E. 221-2 at ¶¶ 219-223. Exhibit 12 of Plaintiff's MSJ establishes only that Defendant wrote one document and helped prepare a second document (*neither* of which have been made part of the record in this case), not the contents of those documents. Exhibit 36 of the MSJ establishes only that Kelly Locke sent a KG marketing brochure to someone who was not an investor. Exhibit 46 of the MSJ establishes only that

compensation for do so.²¹

Defendant Cannot Aid and Abet *His Own* Misappropriations

Plaintiff overstates the holding in *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019), when it argues that scheme liability claims can be predicated on misrepresentations and omissions. *Lorenzo* only extended scheme liability to those who “disseminate” false statements. It did not hold that misstatements alone are sufficient to trigger scheme liability.

The issue in *Lorenzo* was whether an individual who was not subject to primary liability under Rule 10b-5(b) because he disseminated — but did not “make” — fraudulent statements could be held primarily liable under Rule 10b-5(a) and (c).²²

Defendant was identified as KG’s Managing Director in a KG report written in 2017, not whether the report was correct or what Defendant’s duties entailed or whether he advised investors or whether he was Managing Director any other time. *See* D.E.221 at 1-3.

²¹ *See supra* n.7; *see also* D’s Nos. 19-23; D.E. 221-2 at ¶¶ 219-223. Exhibit 2 of Plaintiff’s Opposition cannot be presented in a form that would be admissible in evidence. *See supra* at 8. Exhibit 4 of the Opposition establishes only that LF42 entered into a agreement with KG to provide unspecified “consulting” (securities are not mentioned), not that Defendant (or LF42) received any compensation under that agreement or otherwise. Exhibit 5 of the Opposition establishes only that Defendant received payments from El Morro and LF42, not that those payments were for providing securities-related advice. Exhibit 1 of Plaintiff’s MSJ establishes only that Defendant used LF42 to pay for living expenses, not that he received any compensation for providing securities advice. Exhibit 12 of the MSJ establishes only that Defendant received \$60,000 pursuant to an agreement with “Kinetic” to do unspecified consulting, not that the consulting or the \$60,000 related to providing securities advice.

²² In *Lorenzo*, an investment banker sent emails to potential investors that he knew contained false information about a company’s financial prospects. *Id.* at 1099-100. However, the investment banker was not the “maker” of those false statements because his boss had ultimate authority over the statements and whether and how to communicate them. *Id.* at 1100. The Supreme Court held that, although the investment banker could not be primarily liable under Rule 10b-5(b) because he did not “make” the false statements in the emails, he could be primarily liable under Rules 10b-5(a) and (c) because “dissemination of false or misleading

While *Lorenzo* contains language regarding the interrelatedness of Rule 10-b's subsections, "*Lorenzo* did not address whether a Defendant could be held primarily liable under all three subsections of Rule 10b-5 for a series of misstatements and omissions that are . . . partly actionable under Rule 10b-5(b)." *In re Teva Secs. Litig.*, 2021 WL 1197805, at *6 (D. Conn. Mar. 30, 2021).²³

Significantly, since the *Lorenzo* decision was published, *IBEW Local 5959 Pension & Money Purchase Pension Plans v. ADT Corp.*, 660 Fed. App'x 850 (11th Cir. 2016), remains good law — and the courts in this Circuit continue to cite it approvingly and rely on its guidance.²⁴

Even if Plaintiff's expansive interpretation of *Lorenzo* had been adopted by the Eleventh Circuit (it has not), Plaintiff has *not* presented any evidence that the alleged misrepresentations or omissions were made by *KG* such that Defendant could aid and abet *KG*'s securities violations.²⁵

statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5." *See id.* at 1100-01.

²³ *See SEC v. Rio Tinto PLC*, 2021 WL 818745, at *2 (S.D.N.Y. Mar. 3, 2021) (rejecting SEC's contention *Lorenzo* holds that misstatements can be the basis for liability under Rule 10b-5(a) and (c) and § 17(a)(1): "*Lorenzo* holds that those 'who disseminate false or misleading statements to potential investors with the intent to defraud' can be liable under these provisions, not that misstatements alone are sufficient to trigger scheme liability.")

²⁴ *See In re Tupperware Brands Corp. Secs. Litig.*, 2021 WL 247870, at *5 (M.D. Fla. Jan. 25, 2021) ("[A] misrepresentation claim . . . involves 'deceptive statements,' [whereas] scheme liability involves 'deceptive conduct.'"); *Halbert v. Credit Suisse AG*, 402 F. Supp.3d 288 at 1305-06 (N.D. Ala. 2019) "[M]isleading statements and omissions only create scheme liability in conjunction with 'conduct beyond those misrepresentations or omissions.'" (quoting *IBEW*, 660 F. App'x at 858).

²⁵ *See* P's Nos. 2-13, 42, 47-51, 58-66, 72-75, 85-89, 97-123, 133-135; D.E. 221 at 1-3, 6-20, 22; D.E. 221-1.

Defendant Did Not Make Any Oral Misrepresentations or Omissions

The Plaintiff's evidence does not establish there is a genuine dispute or issue for trial — much less contradict Defendant's evidence — that Defendant and KG did not make any oral misrepresentations or omissions.²⁶ Indeed, Plaintiff's only evidence that Defendant made an *oral* misrepresentation also establishes that that alleged misrepresentation did not involve “interstate commerce or the mails” and therefore is inactionable.²⁷ Plaintiff has not established that any other oral statement by Defendant or KG was false.²⁸

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2021, the foregoing document was filed with the Clerk of the Court using the CM/ECF system and served on all counsel of record.

By: /s/ Timothy W. Schulz

By: /s/ Jon A. Jacobson

²⁶ See D's Nos. 9-21; P's Nos. 2-10, 42, 47-51, 58-73, 77-83, 85-86, 89-97, 104-121,124-132; D.E.221 at 1-2, 6-23, 26-27, 29, 31-32; D.E. 221-1; *supra* n.9.

²⁷ See *supra* n.9.

²⁸ Compare, e.g., P's Nos. 58 with D.E. 221-2 at ¶¶ 134, 151; P's Nos. 65-66 with D.E. 221-1 at ¶¶ 131-133, 135, 151; and P's No.70 with D.E. 221-1 at ¶ 144.