preparing the Security Agreement was that of a scrivener, to memorialize the terms negotiated by Seller LeFevre and Buyer BCJJ during the conference call.

The Court notes that during the conference call of March 26, 2012, there was direct contact between William Turkish and Jason Turkish, for BCJJ, and Thomas LeFevre, as Seller, and Evan Berlin, counsel for Seller. It is undisputed that the Plaintiff's claim is based solely on a misrepresentation contained within the Security Agreement, which was prepared by Defendant Evan Berlin (Dkt. 196-3, p. 110). Plaintiff contends that the misrepresentation within the Security Agreement is the misrepresentation of Defendant Evan Berlin. Statements made in drafting of legal documents are not publicly attributable to one acting in a representative capacity, communicating the representations of a client. The offer Thomas LeFevre made to BCJJ was accepted by Jason Turkish at the conclusion of the conference call. Evan Berlin then prepared the documents and transmitted them to Jason Turkish for BCJJ prior to the closing. The context of the statement is a statement made in a representative capacity; the Security Agreement was a form document prepared for a client. This factual situation does involve the legal opinion of the attorney who prepared the opinion for the benefit of Plaintiff.

A. Duty to Disclose Based on Federal Securities Laws

A duty to disclose "arises from the relationship between parties," Dirks v. SEC, 463 U.S. 646, 658 (1983), and will exist if there is "a fiduciary or other similar relation of trust and confidence between them." Chiarella v. United States, 445 U.S. 222, 228 (1980).

The Court has determined that Defendants Evan Berlin did not have an attorney/client relationship with Plaintiff BCJJ. A lawyer or law firm cannot be held liable for misrepresentation under Section 10(b) absent a fiduciary or other confidential

relationship with the third party. See Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 496 (7th Cir. 1986).

In Ziemba v. Cascade International, Inc., supra, the Eleventh Circuit Court of Appeals affirmed the decision of the district court which dismissed a claim for primary liability under Section 10(b) against a law firm which played a significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases. The Eleventh Circuit further applied the principles of Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994), which abolished secondary liability for aiding and abetting liability under Section 10(b). In Ziemba, the Eleventh Circuit explained the "bright line" test to distinguish liability of a primary actor from that of a secondary actor, stating that for primary liability to attach, an individual must make a false or misleading statement, and the statement must be attributed to that individual at the time of public dissemination, so as not to undermine the element of reliance required for 10(b) liability. The critical issue is the investor's understanding of who made the misleading statement, and in what context the misleading statement was made. Id.

To the extent that Plaintiff contends that Defendant Evan Berlin acted as agent for Thomas LeFevre in preparing the Security Agreement and Collateral Assignment of Distributions and Profits memorializing the agreement of Thomas LeFevre and BCJJ, the fact that an attorney is an agent representing his client does not automatically make the attorney liable under agency law for alleged misrepresentations his client makes. "Lawyers do not vouch for the probity of their clients when they draft documents reflecting their clients' promises, statements or warranties." Schatz v. Rosenberg, 943 F.2d 485, 495 (4th Cir. 1991). The misrepresentation within the Security Agreement on which Plaintiff's claim in Count II is based is the misrepresentation of Thomas LeFevre, not Evan Berlin.

B. Evan Berlin as Agent for Berland Investments, LLC

On March 27, 2007, Evan Berlin, as Manager of Berland Investments, LLC, which held 1.75 Investment Units in Bayonne Investments, LLC, executed a consent and waiver of first refusal on behalf of Berland Investments LLC. This is the only record evidence of any act of Berland Investments, LLC as to the subject transaction. The Court does not perceive any connection between Evan Berlin's act of executing this consent and waiver, and Thomas LeFevre's agreement to grant BCJJ a security interest in LeFevre's Membership Units in TT, LLC and GLRS, LLC. Tom's S Corp was the sole Manager of Bayonne Investments, LLC on March 27, 2007. Since Berland Investments, LLC was not a Manager of Bayonne Investments LLC, Berland Investments, LLC was not authorized to act as the agent of Bayonne Investments, LLC on March 27, 2007.

C. Evan Berlin as Agent for TT, LLC

On March 27, 2007, Berland Investments, LLC was a Member of TT, LLC. However, Berland Investments, LLC was not a Manager of TT, LLC and was not required to consent to Thomas LeFevre's agreement to grant BCJJ, LLC a security interest in Thomas LeFevre's Investment Units in TT, LLC. Berland Investments, LLC made no representations to Plaintiff as agent for TT, LLC.

D. Evan Berlin as Agent for GLRS, LLC

On March 27, 2007, Defendant Evan Berlin held no membership interest in GLRS, LLC, and was not a Manager of GLRS, LLC. Evan Berlin was not authorized to act as agent for GLRS, LLC. Evan Berlin made no representations to Plaintiff as an agent for GLRS, LLC.

The Court has concluded that Evan Berlin, Berlin Law Firm, P.A. and Berland Investments, LLC made no alleged misrepresentations. The Court also notes that Plaintiff has not established reasonable reliance and loss causation. After consideration, the Court **grants** the Motions for Summary Judgment of Evan Berlin, Berlin Law Firm, P.A. and Berland Investments, LLC as to Count II, and **denies** the Motion for Summary Judgment of BCJJ as to Count II.

3. Count III - Ch. 517.301, Florida Statutes

Defendants Evan Berlin, Berlin Law Firm, P.A. and Berland Investments, LLC move for summary judgment as to Count III. Plaintiff BCJJ has cross-moved for summary judgment as to Count III.

Pursuant to Florida Statute § 517.301:

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 ... directly or indirectly:

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

2. To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstance under which they were made, not misleading; or

3. To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

The remedy for a violation of Section 517.301 is contained in Florida Statutes Section 517.211(2) and states:

> Any person purchasing or selling a security in violation of s. 517.301, and every ... agent of or for the purchaser or seller, if the ... agent has personally participated or aided in making the sale or purchase, is jointly and severally liable to the person ... purchasing the security from such person in an action for rescission if the plaintiff still owns the security, or for damages, if the plaintiff has sold the security.

In order to succeed in a securities fraud claim under this statute, Plaintiff must prove that a defendant made a misrepresentation or omission of a material fact, on which Plaintiff relied. The elements of a cause of action under § 517.301 are identical to those under the Federal Rule 10b-5, except that the scienter requirement under Florida law is satisfied by showing of mere negligence. Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1046 (11th Cir. 1987). See Grippo v. Perazzo, 357 F.3d 1218, 1222 -1223 (11th Cir. 2004). Plaintiff does not need to prove loss causation under Florida law, see E.F. Hutton & Co. v. Rousseff, 537 So.2d 978, 981 (Fla.1989) ("Proof of loss causation is not mentioned in sections 517.211 or 517.301, nor is it required under section 12(2), which is the comparable federal law, or under the common law cause of action from which the state and federal laws derived. Accordingly, we hold that proof of loss causation is not required in a civil securities proceeding under sections 517.211 and 517.301, Florida Statutes.").

The Court also notes that conduct sufficient to constitute solicitation for purposes of Ch. 517.211 liability is similar to that deemed sufficient by the Supreme Court in Pinter v. Dahl, 486 U.S. 622 (1988) to hold one liable as a "seller" under Sec. 12(2) of the Securities Act of 1933. See In re Sahlen & Assoc., Inc. Sec. Litig., 773 F.Supp. 342, 372 (S.D. Fla. 1991); E.F. Hutton & Co. v. Rousseff. 537 So.2d 978 (Fla. 1989).

In this case, the Seller was Thomas J. LeFevre as Trustee of Thomas J. LeFevre Living Trust dated October 8, 2001, and Tom's Friends, LLC, a Florida limited liability company, which held the seven Investment Units in Bayonne Investments, LLC that

Thomas LeFevre agreed to sell to Plaintiff BCJJ. (Dkt. 148-2).

Defendant Evan Berlin represented Thomas J. LeFevre and "LeFevre entities" in the transaction with BCJJ. In that sense, Defendant Evan Berlin acted as the agent of the Seller. However, in Pinter v. Dahl, the Supreme Court excluded from the definition of "seller" those performing traditional legal services as securities professionals. As the Court noted in Bailey v. Trenam, Simmons, Kemker, Scharf, Barkin, Frye and O'Neill, P.A., 938 F.Supp. 825, 828-829 (S.D. Fla. 1996):

> In Pinter, the Supreme Court reaffirmed the principal that liability as a "seller" under § 12(1) of the Securities Act, 15 U.S.C. § 771(1) is not restricted to those who actually pass title to the securities, but is expansive enough to encompass the entire selling process, including the seller/agent transaction. 486 U.S. at 643, 108 S.Ct. at 2076. The Court placed limits on this expansiveness by stating that liability only extends to persons who successfully solicit the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner. Id. at 647, 108 S.Ct. at 2078–79. The Court declined to impose liability merely on the basis of substantial participation in the transaction, fearing that such a basis would extend liability to participants only remotely related to the relevant aspects of the sales transaction, specifically mentioning "securities professionals such as accountants and lawyers whose involvement is only the performance of their professional services...." Id. at 651, 108 S.Ct. at 2081. The reasoning behind this decision was that "[t]he buyer does not, in any meaningful sense, purchase the security from such a person." "Nor do such persons solicit the purchase of securities as that term is understood in common parlance." Ryder International Corp. v. First American National Bank, 943 F.2d 1521, 1527 (11th Cir. 1991). This Court is convinced, as was Judge Hoeveler in Sahlen, that Defendant must be shown to have provided more than standard legal services to Freedom in order to impose liability as an agent under § 517.211. 733 F.Supp. at 372 n. 40

As the Court noted above, on March 27, 2007, Berland Investments, LLC was not authorized to act as agent for Bayonne Investments, LLC, TT, LLC and GLRS, LLC. Berland Investments, LLC made no representations to Buyer BCJJ, and did not solicit the sale.

After consideration, the Court **grants** the Motions for Summary Judgment of Evan Berlin, Berlin Law Firm, P.A. and Berland Investments, LLC and **denies** the Motion for Summary Judgment of Plaintiff BCJJ.

4. Count IV - Fraudulent Inducement - Evan Berlin and Berland Investments, LLC

Defendants Evan Berlin and Berland Investments, LLC move for summary judgment as to Count IV. Plaintiff BCJJ has cross-moved for summary judgment as to Count IV.

To prevail on a claim for fraudulent misrepresentation, a plaintiff must establish: 1) a false statement concerning a material fact; 2) the representor's knowledge that the representation is false; 3) an intention that the representation induce another to act on it; and 4) consequent injury by the party acting in reliance on the representation. Butler v. Yusem, 44 So.3d 102 (Fla. 2010).

Plaintiff's claim is based on a statement within the Security Agreement executed by Seller Thomas LeFevre. Evan Berlin's involvement is limited to providing the proposed Security Agreement to Plaintiff. The Court has found that Evan Berlin was present during the conference call in which Seller Thomas LeFevre and Buyer BCJJ negotiated the terms of the Security Agreement. Evan Berlin memorialized the terms agreed to by the parties, and transmitted the proposed Security Agreement and Collateral Assignment of Distributions and profits to BCJJ prior to the closing on March

27, 2007. Buyer BCJJ had the opportunity to read the Unit Upgrade Agreement, Security Agreement and Collateral Assignment of Distributions and Profits before and during the closing.

An attorney serves as agent for his client; the attorney's acts are the acts of the principal, the client. Andrew H. Boros, P.A. v. Arnold P. Carter, M.D., 537 So.2d 1134 (Fla. 3d DCA 1989). The alleged misrepresentation within the Security Agreement is the misrepresentation of Thomas LeFevre, who executed the Agreement, and not Evan Berlin.

Berland Investments, LLC did not make any representations to Plaintiff BCJJ. Berland Investments, LLC was not authorized to act as agent for Bayonne Investments, LLC , TT, LLC and GLRS, LLC on March 27, 2007, and was not required to execute a consent on behalf of TT, LLC or GLRS, LLC. Berland Investments, LLC is not a signatory to the Security Agreement and Collateral Distribution Agreement.

After consideration, the Court **grants** the Motions for Summary Judgment of Evan Berlin, and Berland Investments, LLC and **denies** the Motion for Summary Judgment of Plaintiff BCJJ.

5. Count V - Negligent Misrepresentation - Evan Berlin and Berland Investments, LLC

Defendants Evan Berlin and Berland Investments, LLC move for summary judgment as to Count V. Plaintiff BCJJ has cross-moved for summary judgment as to Count V.

To prevail on a claim for negligent misrepresentation, a plaintiff must show: 1) there was a misrepresentation of material fact; 2) the representer either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity,

or should have known the representation was false; 3) the representer intended to induce another to act on the misrepresentation; and 4) the injury resulted to a party acting in justifiable reliance upon the misrepresentation. Baggett v. Electricians Local 915 Credit Union, 620 So.2d 784, 786 (Fla. 2d DCA 1993). To succeed in a claim for negligent misrepresentation, the plaintiff must show the defendant owed it a duty of care. ZP No. 54 Ltd. P'ship v. Fidelity and Deposit Co. of Md., 917 So.2d 368, 374 (Fla. 5th DCA 2005). Under Florida law, a person is responsible for investigating information for himself and not relying on representations of an opposing party if a reasonable person in the position of the recipient would be expected to investigate. Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So.2d 334 (Fla. 1997).

The Court notes that the subject transaction was an arms-length negotiated transaction between sophisticated parties. A reasonable person in the position of BCJJ would be expected to investigate the factual allegations of the Security Agreement. The Court has determined that Evan Berlin did not represent BCJJ as to the subject transaction. Evan Berlin did not owe a duty of care to BCJJ. The Court concludes that Plaintiff's claim for negligent misrepresentation fails as a matter of law.

The Court has found that Berland Investments, LLC made no representations to BCJJ, LLC. Berland Investments, LLC was not authorized to act as the agent of Bayonne Investments, LLC on March 27, 2007; Tom's S Corp was the manager of Bayonne Investments, LLC at that time. Berland Investments, LLC was not authorized to act as an agent of TT, LLC or of GLRS, LLC on March 27, 2007; TT, LLC and GLRS, LLC are manager-managed limited liability companies, and Berland Investments, LLC was not a manager of either.

After consideration, the Court **grants** the Motions for Summary Judgment of Evan Berlin and Berland Investments, LLC, and **denies** the Motion for Summary Judgment of BCJJ, LLC.

6. Count VI - Aiding and Abetting Fraud - Berlin Law Firm, P.A.

Defendant Berlin Law Firm, P.A. moves for summary judgment as to Count VI. Plaintiff BCJJ has cross-moved for summary judgment as to Count VI.

The elements of the tort of aiding and abetting fraud include: 1) the existence of an underlying fraud; 2) defendant had knowledge of the fraud; and 3) defendant provided substantial assistance to advance the commission of the fraud. ZP No. 54 Ltd. Partnership v. Fidelity and Deposit Co. of Maryland, 917 So.2d 368 (Fla. 5th DCA 2005).

Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff. Lerner v. Fleet Bank, N.A., 493 F.3d 273 (2d Cir. 2006); Hines v. FiServ, Inc., 2010 WL 1249838 (M.D. Fla. 2010).

In the Second Amended Complaint, BCJJ alleges that Berlin Law Firm had actual knowledge of the fraud (Dkt. 148, pars. 91-93, 101) based on Evan Berlin's knowledge and his role in carrying out the fraud, and provided substantial assistance to advance the commission of the fraud when it "drafted and placed its imprimatur on the documents necessary to implement BCJJ's investment in Bayonne Investments, LLC, including the false representations and warranties of LeFevre and LeFevre Trust, and hosted the closing on the transaction in its Sarasota office." (Dkt. 148, pp. 32-33). William Turkish and Jason Turkish testified that the first time the consents were discussed with Evan Berlin was in April, 2008, one year after the closing.

The Court notes that Berland Investments, LLC was a Member of TT, LLC, but a pledge of Thomas LeFevre's interest in his Investment Units in TT, LLC required the signatures of the Managers. Evan Berlin's signature on a consent was therefore not

required. Evan Berlin and Berland Investments, LLC were not Members of GLRS, LLC; Evan Berlin's signature on a consent was not required as to GLRS, LLC. Evan Berlin testified that he learned the required consents were not obtained in April, 2008, when BCJJ informed him of this fact. Berland Investment, LLC's membership in TT, LLC does not support an inference that Evan Berlin had actual knowledge of the fraud.

In drafting the Security Agreement and Collateral Assignment of Distributions and Profits, Evan Berlin for Berlin Law Firm, P.A. memorialized the terms Seller and Buyer agreed upon, but did not vouch for statements within the documents which were to be executed by Thomas LeFevre. Preparing closing documents and hosting a closing are actions within the scope of traditional legal services. There is no evidence that William Turkish was prevented from reading the documents, or that the documents did not accurately reflect the terms agreed upon between the parties.

Evan Berlin has denied actual knowledge that the required consents were not obtained at the relevant time. Plaintiff BCJJ has provided no evidence that Evan Berlin had actual knowledge of the alleged fraud. Berlin Law Firm, P.A. did not have an attorney/client relationship with BCJJ. Berlin Law Firm, P.A. did not have a fiduciary relationship with BCJJ, and did not have a duty to take any action on behalf of BCJJ. The Court therefore concludes that Berlin Law Firm, P.A. did not provide substantial assistance to the alleged fraud by drafting documents which memorialized the terms agreed upon after negotiation by Seller and Buyer, and by hosting the closing.

After consideration, the Court **grants** the Motion for Summary Judgment of Berlin Law Firm, P.A., and **denies** the Motion for Summary Judgment of Plaintiff BCJJ.

7. Count X - Legal Malpractice - Evan Berlin and Berlin Law Firm, P.A.

Defendants Evan Berlin and Berlin Law Firm, P.A. move for summary judgment

as to Count X. Plaintiff BCJJ has cross-moved for summary judgment as to Count X.

To prevail on a legal malpractice claim, a plaintiff must establish: a) the attorney's employment; 2) the attorney's neglect of a reasonable duty; and 3) the attorney's negligence as a proximate cause of loss to the client. See Law Office of David J. Stern, P.A. v. Security Nat. Servicing Corp., 969 So.2d 962, 966 (Fla. 2007). A plaintiff must allege that a relationship existed between the parties with respect to the acts or omissions upon which the malpractice claim is based, and that the alleged acts of malpractice must be within the scope of the attorney's employment. Malliard v. Dowdell, 528 So.2d 512 (Fla. 3d DCA 1988).

An attorney's liability for negligence in the performance of his professional duties is limited to clients with whom the attorney shares privity of contract. See Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, 61 So.2d 1378, 1379 (Fla. 1993). Florida recognizes a limited exception to the privity requirement in the area of will drafting which applies to those third parties able to demonstrate the apparent intent of the client in engaging the services of the lawyer was to benefit that third party. Id at 1380.

Under Florida law, legal malpractice claims are generally not assignable. "Florida law views legal malpractice as a personal tort which cannot be assigned because of 'the personal nature of legal services which involve highly confidential relationships,'" Cowan Liebowitz & Latman, P.C. v. Kaplan, 902 So.2d 755 (Fla. 2005), only permitting assignment in limited circumstances, such as in cases involving an independent auditor hired to give an opinion on a client's financial statements with impartiality which contemplates reliance upon the audit by interests other than the entity upon which the audit is performed, or where an attorney prepares private placement memoranda, knowing that third parties would rely on the representations within them. Id, at 758-759.

The Court notes that in the Second Amended Complaint, Plaintiff does not allege directly that Evan Berlin and Berlin Law Firm, P.A. represented Plaintiff. Plaintiff alleges that BCJJ was the intended beneficiary of the documents prepared by Evan Berlin/Berlin Law Firm, P.A., or was an assignee of the attorney/client relationship between Evan Berlin/Berlin Law Firm, P.A. and Thomas LeFevre.

The Court has determined that Evan Berlin and Berlin Law Firm, P.A. represented Thomas LeFevre and did not represent BCJJ as to the subject transaction. There was no privity of contract between Plaintiff BCJJ, LLC and Defendants Berlin and Berlin Law Firm, P.A.. An attorney who represents one party to a transaction or matter cannot be held liable to the other party for negligence. Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977).

This case does not involve will-drafting, or a claim based on misrepresentations within a private placement memorandum which was prepared with the knowledge that third parties would reply on the representations within it. The subject transaction was an arms length transaction between sophisticated parties.

The Court also notes that:

> As a general rule, the assignee of a nonnegotiable instrument takes with it all the rights of an assignor, and subject to all the equities and defenses of the debtor connected with or growing out of the obligation that the obligor had against the assignor at the time of the assignment.

State v. Family Bank of Hallandale, 667 So.2d 257, 259 (Fla. 1st DCA 1995). A general assignment does not implicitly assign the attorney-client relationship between the assignor and his attorney. Law Office of David J. Stern P.A. v. Security Nat. Servicing Corp., 969 So.2d 962, 968 (Fla. 2007). BCJJ cannot establish standing to assert its malpractice claim by virtue of the assignment of a nonnegotiable instrument in the

subject transaction.

After consideration, the Motion for Summary Judgment of Defendants Evan Berlin and Berlin Law Firm, P.A. is **granted** as to Count X, and Plaintiff's Motion for Summary Judgment is **denied** as to Count X.

8. Count XI - Ch. 501.201, Florida Statutes
Florida Deceptive and Unfair Practices Act

Defendants Evan Berlin, Berlin Law Firm, P.A. and Berland Investments, LLC move for summary judgment as to Count XI. Plaintiff BCJJ has cross-moved for summary judgment as to Count XI.

Ch. 501.204, Florida Statutes, declares any unfair or deceptive acts or practices in the conduct of any trade or business to be unlawful.

In the Second Amended Complaint, Plaintiff alleges that a violation of any "law, statute, rule, or ordinance which proscribes unfair, deceptive or unconscionable acts or practices" is a per se violation of FDUTPA. Plaintiff further alleges that the Interstate Full Disclosure Act ("ILSA") proscribes certain unfair and deceptive trade practices, such that a violation of ILSA is a violation of FDUTPA. Plaintiff alleges that Defendants Evan Berlin, Berlin Law Firm, P.A. and Berland Investments, LLC violated FDUTPA as alleged in Count I.

The Court has granted the Motions for Summary Judgment of Evan Berlin, Berlin Law Firm, P.A. and Berland Investments, LLC as to Count I, and denied Plaintiff's Motion for Summary Judgment as to Count I. Therefore, the Court **grants** the Motions for Summary Judgment of Evan Berlin, Berlin Law Firm, P.A. and Berland Investments,

LLC as to Count X, and **denies** Plaintiff's Motion for Summary Judgment as to Count X. Accordingly, it is

ORDERED that Defendants' Motions for Summary Judgment (Dkts. 256, 281) are **granted** as set forth above, and Plaintiff's Motion for Summary Judgment (Dkt. 263) is **denied**. The Clerk of Court shall enter a final judgment in favor of Evan Berlin and against BCJJ, LLC as to Counts I, II, III, IV, V, X and XI. The Clerk of Court shall enter a final judgment in favor of Berlin Law Firm, P.A. and against BCJJ, LLC as to Counts I, II, III, VI, X and XI. The Clerk of Court shall enter a final judgment in favor fo Berland Investments, LLC and against BCJJ, LLC as to Counts I, II, III, IV, V, and XI.

DONE and ORDERED in Chambers, in Tampa, Florida on this 27th day of July, 2012.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record