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United States District Court,  
M.D. Florida,  
Jacksonville Division.

WICKES LUMBER COMPANY, etc., Plaintiff,  
v.  
FYNSYN CAPITAL CORP., a New Jersey  
corporation; Riverside Group, Inc., a  
Florida corporation; Resolution Trust Corporation,  
as receiver for Lincoln  
Savings and Loan Association, F.A.; W. Lumber  
Investment Partnership, a New  
Jersey general partnership, by and through its  
general partners: Philip D.  
Kaltenbacher, an individual; Arveron Investments  
L.P., a New Jersey limited  
partnership, by and through Arthur M. Goldberg, its  
general partner; David  
Mandelbaum and Nathan Mandelbaum, a New  
Jersey general partnership, by and  
through its general partners, David Mandelbaum  
and Nathan Mandelbaum; Deye,  
L.P., a New Jersey limited partnership, by and  
through Emil Solimine, its  
general partner; and Mack Lumber Partners, L.P., a  
Delaware limited  
partnership, by and through Mack Trading Corp., a  
Delaware corporation, its  
general partner, Defendants.  
**No. 94-655-CIV-J-10.**

Feb. 8, 1995.

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Group, Inc.

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Resolution Trust Corp.

Nathan Douglas Goldman, McGuire, Woods,  
Battle & Boothe, Jacksonville, FL, Jeffrey M.  
Garrod, Eileen A. Lindsay, Orloff, Lowenbach,  
Stifelman & Siegel, Roseland, NJ, for W. Lumber  
Inv. Partnership, Philip D. Kaltenbacher, Arveron  
Investments, L.P., Arthur M. Goldberg, David  
Mandelbaum, Nathan Mandelbaum, Deye, L.P.,  
Emil Solimine, Mack Lumber Partners, L.P., Mack  
Trading Corp.

Nathan Douglas Goldman, Keith Douglas Munson,  
McGuire, Woods, Battle & Boothe, Jacksonville,  
FL, Jeffrey M. Garrod, Eileen A. Lindsay, Orloff,  
Lowenbach, Stifelman & Siegel, Roseland, NJ, for  
W. Lumber Inv. Partnership, Philip D.  
Kaltenbacher, Arveron Investments, L.P., Arthur M.  
Goldberg, David Mandelbaum, Nathan  
Mandelbaum, David Mandelbaum, Nathan  
Mandelbaum, Emil Solimine, Mack Lumber  
Partners, L.P., Mack Trading Corp., Fynsyn Capital  
Corp.

*ORDER*

HODGES, District Judge.

\*1 Defendant FynSyn Capital Corporation  
("FynSyn") and other Defendants have moved to  
dismiss (Docs. 38, 39 and 55) the amended  
complaint (now Second Amended Complaint) of  
Wickes Lumber Company ("Wickes") (Doc. 58), as

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well as the amended crossclaim of Defendant Riverside Group ("Riverside") (Doc. 65). The motions have been briefed at great length.

#### The Facts as Alleged

Wickes was created in a leveraged buyout in April, 1988, in which W. Lumber Investment Partnership (for purposes of this Order, "Investment Partners" will include both Defendant W. Lumber Investment Partnership and Defendant "WLIP Partners") acquired 25,001 shares of Wickes common stock and Fynsyn acquired 120 shares of Wickes preferred stock.

In 1989, FynSyn sold 10.333 shares of Wickes preferred stock represented by Certificate P-7 to AMCOR Funding Corporation ("AMCOR"), whose interest is now represented in this litigation by the Resolution Trust Corporation ("the RTC").

In July of 1993, FynSyn negotiated another sale of the 10.333 preferred shares represented by Certificate P-7 to Riverside, a Florida corporation created to hold Wickes' securities. [FN1] The 10.333 shares were sold for \$400,000 in cash and a promissory note for \$1,093,333 payable to FynSyn. As FynSyn was unable to locate Certificate P-7 at the time of this sale in 1993, it executed an Affidavit of Loss and Indemnity Agreement for the benefit of Wickes, after which Wickes issued Certificate P-11, as a replacement for Certificate P-7, and delivered it to Riverside. FynSyn and Investment Partners also executed a Stock Purchase Agreement/Pledge Agreement and Settlement Agreement between it and Riverside.

In February of 1994, Wickes received correspondence from AMCOR stating that AMCOR owned the 10.333 shares represented by Certificate P-7. Wickes thereafter filed this suit, requesting, *inter alia*, a declaratory judgment with respect to FynSyn, Riverside, and AMCOR as to the ownership of the 10.333 shares in question, and damages from FynSyn and Investment Partners under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j) and Rule 10b-5 (17 C.F.R. 240.10b-5). On July 12, 1994, this Court

granted Wickes' motion for a temporary restraining order ("the TRO") restraining FynSyn from negotiating, transferring, selling or exchanging the Promissory Note and Pledge Agreement it executed with Riverside. By stipulation, the TRO has since been extended on July 20 and 28, 1994, and is still in effect (Doc. 17).

#### The 10b-5 Claim of Wickes

Wickes brought this action in this Court pursuant to 15 U.S.C. § 78j, alleging that it was the victim of fraud by FynSyn and Investment Partners in the sale of securities (Count V, Second Amended Complaint, Doc. 58). However, private damage actions under Rule 10b-5 are "limited to purchasers and sellers of securities." *Blue Chip Stamps v. Manor Drug Stores*, 95 S.Ct. 1917, 1923 (1975), citing *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 463 (2d Cir.1952). Even viewing the facts in a light most favorable to the Plaintiff, this Court finds that Wickes was neither a buyer nor a seller, and therefore, Count V is due to be dismissed.

\*2 In 1993, Wickes reissued a certificate representing the original 10.333 shares sold to FynSyn in 1988; this reissuance was not a sale, but was merely a device to allow one of its shareholders (FynSyn) to sell the shares FynSyn had previously purchased from Wickes. Granted, Wickes incurred potential liability by reissuing the certificate--hence the Affidavit of Loss and Indemnity Agreement--but this liability does not make the transaction a sale, remediable under Rule 10b-5.

Wickes has cited cases which hold that a corporation "issuing" shares is a seller for the purposes of Rule 10b-5. However, each of these cases involve circumstances in which the shares are issued for consideration, as were the 10.333 shares issued by Wickes in 1988, but not the replacement certificate issued in 1993. For instance, Wickes cites *Rekant v. Dresser*, 425 F.2d 872, 877 (5th Cir.1970), [FN2] for the proposition that "[t]he rule in this Circuit and other Circuits is that a corporation issuing its own treasury shares is a seller of securities for purposes of Rule 10b-5." *Rekant* is distinguishable in two ways: first, the

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type of "issuance" involved in that case was of treasury shares owned by the company, not simply the issuance of a certificate representing shares previously issued; and second, the issuance in *Rekant* was for consideration. Treasury shares were issued to the company's president and several directors in exchange for properties owned by the president worth substantially less than the market value of the treasury shares issued. That type of "issuance" is clearly a "sale," and has no bearing on the present case.

There was no exchange here, despite Wickes' recent claims that the issuance of replacement Certificate P-11 was for consideration (*See* Plaintiff Wickes Lumber Company's Surreply in Opposition to the Motion to Dismiss of Defendant FynSyn Capital Corporation, Doc. 109, at p. 9). It is argued that the Affidavit of Loss and Indemnity Agreement supplied consideration for Certificate P-11, but, if so, any consideration was for Certificate P-11 itself, not the *shares* represented by the certificate. [FN3] Wickes did not sell its shares to FynSyn in 1993, and therefore, simply does not have standing to bring a Rule 10b-5 claim in this Court. Count V is therefore due to be dismissed.

#### The Pendent Claims of Wickes

In Count VI of its Second Amended Complaint, Wickes has also alleged a violation of the Florida Securities Act, Fla.Stat. § 517.301, by Defendants FynSyn and Investment Partners. However, as stated in *E.F. Hutton & Co., Inc. v. Rousseff*, 537 So.2d 978, 981 (Fla.1989), a private action under the Florida statute is also limited to the buyer or seller, as under Rule 10b-5. The Court has found that Wickes was neither a buyer nor a seller, for the reasons stated above, and therefore, this count, too, should be dismissed.

Wickes' other pendent state claims are not automatically dismissed because the federal basis for jurisdiction has been dismissed, as 28 U.S.C. § 1367 allows this Court discretion to keep or dismiss those claims. However, other considerations, discussed below, point toward the dismissal of the entire action.

#### Personal Jurisdiction and Venue

\*3 Interposed with the arguments over the substantive issues of the claims has been considerable debate over the issues of personal jurisdiction and the proper forum for this action. Personal jurisdiction, it appears, is not proper over FynSyn and the Investment Partners.

Wickes first argues that personal jurisdiction would be appropriate nationwide over the Defendants under 15 U.S.C. § 78aa (Section 27 of the Securities Exchange Act of 1934), which allows for nationwide service of process. However, as the federal securities claim of Wickes has been dismissed, § 78aa is inapposite. Personal jurisdiction over the state counts, therefore, must be premised on the Florida Long-Arm Statute (Fla.Stat. §§ 48.193(1) and (2)).

Wickes has alleged that "specific" personal jurisdiction (Fla.Stat. § 48.193(1)) over FynSyn and Investment Partners is proper because of the Affidavit of Loss and Indemnity Agreement negotiations between Defendants and Wickes, and Defendants' subsequent breach of that agreement, and that "general" personal jurisdiction (Fla.Stat. § 48.193(2)) is proper because of alleged "substantial and not isolated activity" by Defendants FynSyn and Investment Partners within Florida.

As to specific jurisdiction, the negotiations between Wickes, a Delaware corporation headquartered in Illinois, and Defendants FynSyn and Investment Partners, both New Jersey entities, took place outside of Florida. That Wickes' general counsel is located in Florida [FN4] and that the replacement certificate was sold to a Florida corporation [FN5] are irrelevant to the transaction at issue. The mere execution of the Affidavit of Loss and Indemnity Agreement between corporations from New Jersey and Illinois, contrary to the fatuous assertions of Wickes, does not bring FynSyn and Investment Partners under any of the bases for specific jurisdiction.

General jurisdiction is also inappropriate. It appears from the pleadings that while some or all of

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the individual partners of the Investment Partners have had business dealings in Florida, neither FynSyn or W. Lumber Investment Partnership have transacted business within the state. There is simply no evidence of "substantial" business activities which would make FynSyn and Investment Partners amenable to service in Florida.

#### The New Jersey State Court Action

The record before this Court reflects that the issues raised in this case are being litigated in the Superior Court of New Jersey ("the New Jersey action"). The New Jersey action was filed by FynSyn and the Investment Partners, and names not only Riverside and Wickes as Defendants, but also Bankers Trust Company, the broker for the 1993 sale. As Wickes' alleged basis for filing suit in this court was improper as noted above, and the New Jersey action has all of the material parties to this action, the New Jersey action is the proper forum for this action. The goals of judicial comity and economy will be advanced by the dismissal of this action.

#### Conclusion

\*4 The Rule 10b-5 claim of Wickes is due to be dismissed as Wickes was neither a buyer nor a seller of securities. Dismissal of the remaining claims then would fall within the purview of my discretion, under 28 U.S.C. § 1367. The considerations of personal jurisdiction and the pending New Jersey action, arguably sufficient to warrant dismissal even if taken alone, when combined with the considerations of 28 U.S.C. § 1367 clearly point to this action being dismissed in its entirety.

Accordingly, upon due consideration, the motion to dismiss is GRANTED, and the Clerk is directed to enter judgment dismissing the case without prejudice and close the file.

IT IS SO ORDERED.

DONE AND ORDERED.

FN1. Riverside currently holds

approximately one-third of Wickes' outstanding stock.

FN2. Decisions by the Fifth Circuit prior to September 30, 1981 are binding upon the Eleventh Circuit Court of Appeals and on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981).

FN3. This view is consistent with the affidavit of Douglas J. Woods, the President and Chief Operating Officer of Wickes, given under oath for the temporary restraining order, "Wickes received no consideration from FynSyn or otherwise for its issuance of replacement Certificate P-11 to FynSyn" (Doc. 10). The ownership of the shares, not the certificate, is the crux of this litigation.

FN4. Mere contacts between FynSyn and Wickes' counsel during the negotiations would not subject FynSyn to service in this state under § 48.193(1)(a) and (g), as argued by Wickes. Section 48.193(1)(a) deals with business or a business venture within the state, and (1)(g) deals with a contract breached within the state. The location of the counsel is not relevant to these sections because Wickes' counsel was merely acting as a conduit for the corporations and their agreement, all located elsewhere.

FN5. Wickes and Riverside have collapsed the two transactions--the execution of the Affidavit of Loss and Indemnity Agreement between Wickes and Defendants FynSyn and Investment Partners and the sale of Certificate P-11 by Defendants FynSyn and Investment Partners to Riverside--together, even though the transactions are discrete. The sale of the replacement certificate to Riverside has no bearing on whether FynSyn and Investment Partners were properly haled by Wickes into a court sitting in Florida.