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04/17/2006

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE:	§	
	§	Adversary No. 99-6073
SUNPOINT SECURITIES, INC.	§	
	§	A Liquidation Proceeding Under
	§	the Securities Investor Protection Act
Debtor	§	(15 U.S.C. §78aaa, et seq.)

SECURITIES INVESTOR	§	
PROTECTION CORPORATION and	§	
ROBERT G. RICHARDSON, Trustee	§	
of the Estate of Sunpoint Securities, Inc.	§	
	§	
Plaintiffs	§	Adversary No. 01-6079
	§	
v.	§	
	§	
CITY NATIONAL BANK	§	
	§	
Defendant	§	

MEMORANDUM OF DECISION

Now before the Court in the above-referenced adversary proceeding is "Defendant City National Bank's Motion for Partial Summary Judgment on Plaintiffs' Fiduciary Duty Claims" (the "Motion") filed on September 23, 2005. Upon due consideration of the proper summary judgment evidence, the written legal arguments[1] submitted by the parties, and the relevant legal authorities, the Court concludes that, for the reasons stated herein, the Defendant's Motion for Partial Summary Judgment on Plaintiffs' Fiduciary

[1] Including the Motion, the response in opposition filed jointly by the plaintiffs Robert G. Richardson, Trustee for the liquidation of Sunpoint Securities, Inc. (the "Trustee") and the Securities Investor Protection Corp. ("SIPC") (collectively, the "Plaintiffs"), the reply of City National Bank, N.A. ("CNB"), and the sur-reply filed by the Plaintiffs.

Duty Claims should be granted.

Factual Background

This adversary proceeding is brought by the Trustee and SIPC against CNB as a result of its former relationship with Sunpoint Securities Inc. ("Sunpoint"), a securities brokerage firm formerly based in Longview, Texas, which was forced into liquidation in November 1999, pursuant to the provisions of the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, et seq. The entry of a protective decree against Sunpoint, and its subsequent liquidation, was triggered by a misappropriation of customer funds by the CEO, director, and controlling shareholder of Sunpoint, Van R. Lewis, Jr. a/k/a Van R. Lewis, III ("Lewis"), and certain of his subordinates, in an amount exceeding $25 million.

The banking relationship between CNB and Sunpoint, Lewis, and/or various entities controlled by Lewis (the "Affiliates")[2] began around 1995. CNB loaned significant sums of money to Sunpoint, Lewis and the Affiliates. Some of those loans were secured. Others were not. As Sunpoint grew, and then in June 1997, achieved the status of a "self-clearing broker" (which would place customer funds relating to the purchase and sale of securities directly under Sunpoint's custody and control), so did its financial activity. CNB was clearly a beneficiary of that growth. To satisfy Sunpoint's need for greater space, it became a tenant in a building owned by CNB. Eventually,

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[2] The Affiliates include: Sunpoint Aviation, Inc.; Sunpoint Insurance, Inc., a/k/a Sunpoint Insurance Agency, Inc.; Sunpoint Air Transport, Inc.; Sunpoint Institute of Aeronautics, Inc.; Judith Ann Guess, Inc. d/b/a New Territory; Van Lewis, Inc. a/k/a Van Lewis III, Inc.; Financial Firms Exchange, Inc.; and Moonshadow, L.L.P.

CNB's business relationship with Sunpoint and the Affiliates was one of the bank's largest in terms of revenue, deposits, and lending.

In addition to these services, CNB also acted as IRA custodian for over a thousand Sunpoint customers (the "IRA Customers") beginning in June 1996.[3] To establish an IRA, a Sunpoint customer would meet with his broker at Sunpoint to execute various IRA documents. Those documents would eventually be forwarded to CNB for the establishment of the account.[4] The documentation of the account unambiguously established that the IRA accounts were self-directed — that is, CNB had no duty to render investment advice.[5] CNB was never instructed to execute any trades on behalf of any IRA customers, as any such trades were executed almost exclusively through Sunpoint.[6] CNB did not give investment advice to the IRA customers or to Sunpoint. CNB did not serve as an advisor to the IRA Customers, nor did it induce IRA Customers to make particular investments.[7] CNB had no contractual obligation to investigate or review any asset in any of the IRAs.[8]

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[3] *See* App. at 736, 778. (In support of the Response, Plaintiffs have submitted an Appendix containing their summary judgment evidence. As the pages of that appendix have been separately numbered, cites to the Plaintiffs' evidence will be in the form of "App. at ___.")

[4] *See* Blassingame Dep., pp. 84-88.

[5] *Id*. at p. 50.

[6] Gibbon Aff., at ¶ 6.

[7] *Id*. at ¶ 13.

[8] *Id*.

Sunpoint furnished copies of its own monthly customer statements to CNB, which CNB used to log reportable distributions.[9] CNB did not provide any input for the Sunpoint customer statements,[10] nor review them for accuracy.[11] CNB was unaware of any inaccuracy in Sunpoint's customer statements.[12] In or around May 1998, consistent with the terms of the custodial agreement, CNB designated Sunpoint as the replacement IRA custodian, and ceased to serve as IRA custodian for the IRA customers.[13]

The complaint of the Trustee and SIPC against CNB is comprehensive in nature and scope. The Plaintiffs seek to recover the entire $25 million of lost customer funds in actual damages, treble damages of $75 million, plus an assessment of additional exemplary damages, interest and attorneys' fees under various theories of alleged liability including negligence, gross negligence, negligent misrepresentation, breach of fiduciary duty, breach of contract, securities fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). CNB brings this Motion for Partial Summary Judgment on Plaintiffs' Fiduciary Duty Claims, alleging that CNB did not owe any

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[9] *Id.* at ¶ 7.

[10] Blassingame Dep., p. 115; Gibbon Aff., ¶ 7.

[11] App. at 742-44.

[12] Gibbon Aff., ¶10.

[13] App. at 778.

fiduciary duties to the IRA Customers as a matter of law.[14]

Discussion

Standards for Summary Judgment

CNB brings its Motion for Partial Summary Judgment as to the Plaintiffs' fiduciary duty claims pursuant to Federal Rule of Bankruptcy Procedure 7056. That rule incorporates Federal Rule of Civil Procedure 56 which provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). "The inquiry to be performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S.

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[14] CNB also claims that the Plaintiffs' fiduciary duty claims sound in contract and should merge with Plaintiffs' breach of contract claims, but the Court finds this position unpersuasive, noting that it is entirely possible that a defendant could precisely perform the duties explicitly noted in a contract (precluding a breach of contract claim), but breach fiduciary duties owing to a plaintiff (giving rise to an independent breach of fiduciary duty claim).

242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. Only once the moving party has met this burden does the non-moving party assume the burden of showing that a genuine issue of material fact exists. *Gillory v. PPG Indus., Inc.*, 434 F.3d 303, 309 (5th Cir. 2005) (*citing Catrett*, 477 U.S. at 321-25, 106 S.Ct. at 2548). As more particularly described by Judge William Wayne Justice in *Marshall Indep. Sch. Dist. v. U.S. Gypsum Co.*, 790 F. Supp. 1291 (E.D. Tex. 1992):

> Even where the non-moving party has the burden of persuasion on an issue, the summary judgment movant still has the initial burden of showing the absence of a genuine issue of material fact. It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove its case. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider either any evidence submitted by the non-moving party or whether the moving party has met its ultimate burden of persuasion that summary judgment should be granted in its favor.

Id. at 1299-1300.

The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial must be borne by the non-moving party, as in the present case, the party moving for summary judgment may satisfy the burden of production under Rule 56 by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. See 10A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §2727 at pp. 471-72 (1998). *See also, Brewer v. Quaker State Oil Ref. Corp*., 72 F.3d 326, 329-30 (3d Cir. 1995); *Cannon v. Cherry Hill Toyota, Inc*., 161 F. Supp.2d 362, 366 (D.N.J. 2001).

Once the motion is supported by a *prima facie* showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings, but rather must demonstrate in specific responsive pleadings the existence of specific facts constituting a genuine issue of material fact for which a trial is necessary. *Anderson,* 477 U.S. at 248-49, 106 S.Ct. at 2510 (*citing* FED. R. CIV. P. 56(e)). The substantive law will identify which facts are material. *Id.*

Thus, if a non-movant fails to set forth specific facts that present a triable issue, its claims should not survive summary judgment. *Giles v. Gen. Elec. Co.,* 245 F.3d 474, 494

(5th Cir. 2001). As the Supreme Court has stated,

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U.S. at 322-23, 106 S.Ct. at 2552. Thus, "in the absence of the necessary minimal showing by the plaintiff that the defendant may be liable under the claims alleged, the defendant should not be required to undergo the considerable expense of preparing for and participating in a trial." *Robinson v. Cutchin*, 140 F.Supp.2d 488, 491 (D. Md. 2001) (*citing Catrett*, 477 U.S. at 323-24, 106 S.Ct. at 2548 *and Anderson*, 477 U.S. at 256-57, 106 S.Ct. at 2505); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1076 (5th Cir. 1994) ["A plaintiff should not be required to wait indefinitely for a trial when the defendant has a meritless defense that can be resolved on motion for summary judgment. Nor should a defendant be required to bear the unnecessary costs of delay and trial to defend against a claim that has no merit. Neither party should be required to bear the costs of trying all of the issues in a case when some can and should be resolved on summary judgment."].

To determine whether summary judgment is appropriate, the record presented is reviewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). However, if the evidence demonstrating the need for trial "is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2511. Thus, a non-movant must show more than a "mere disagreement" between the parties, *Calpetco 1981 v. Marshall Explor. Inc.*, 989 F.2d 1408, 1413 (5th Cir. 1993), or that there is merely "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. However, "[t]he issue of material fact which must be present in order to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 248-49, 106 S.Ct. at 2510. Accordingly, the process has been described by the Supreme Court as one which mandates the entry of summary judgment where the evidence is such that it would require a directed verdict for the moving party. "In essence, . . the inquiry. . . is. . : whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id*. at 251-52, 106 S.Ct. at 2512; *see also Harken Explor. Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466 (5th Cir. 2001) ["There is a genuine

issue as to a material fact if the evidence is such that a reasonable jury could return a verdict for the non-movant."].

Breach of Fiduciary Duty

To establish a breach of fiduciary duty under Texas law, a plaintiff must prove the existence of a fiduciary duty, a breach of that duty, and damages caused by that breach. *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App. – Houston [1st Dist.] 2003, no pet.). If a plaintiff cannot show that the defendant owed a fiduciary duty, that plaintiff cannot recover. *Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski*, *L.L.P.*, 178 S.W.3d 40, 43 (Tex. App. – Houston [1st Dist.] 2005, no pet.).

Fiduciary relationships can arise in two ways. Some formal relationships, such as attorney/client, principal/agent, trustee/trust beneficiary, partner, and joint venturer give rise to fiduciary duties as a matter of law. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591 (Tex. 1992). Informal fiduciary, or confidential, relationships may also arise from a moral, social, domestic or purely personal relationship of trust and confidence, as determined on a case-by-case basis. *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865, 878 (Tex. App. – Houston [14th Dist.] 2001, pet. denied). While the existence of a confidential relationship is usually a question of fact, it may be decided as a matter of law when there is no evidence supporting the existence of such a relationship. *Crim Truck*, 823 S.W.2d at 595.

Formal Fiduciary Relationship

Whether the relationship between CNB as IRA custodian and the IRA Customers was a type of relationship that gave rise to fiduciary duties as a matter of law is rather problematic. As a general proposition, the relationship between a bank and its customer is not the kind of relationship that gives rise to fiduciary duties as a matter of law. *Fleming v. Texas Coastal Bank of Pasadena*, 67 S.W.3d 459, 461 (Tex. App. – Houston [14th Dist.] 2002, pet denied). The Plaintiffs concede this point, but contend that the actual relationship between these parties either was a trustee/beneficiary relationship, or was so similar to one, that fiduciary duties arose as a matter of law.

In different contexts, courts have at times indirectly referenced an IRA custodian as a trustee or a self-directed IRA as a trust, but none of those decisions have directly analyzed whether such labels are accurate descriptions of a legal relationship between the parties. *See First State Bank of Monahans, Texas v. Holt (In re McDaniel)*, 41 B.R. 132 (Bankr. W.D. Tex. 1984) [holding that an IRA custodian may not offset IRA funds against debts owed by a bankruptcy debtor because the IRA custodian holds the IRA funds in trust]; *In re Dunn*, 5 B.R. 156, 158 (Bankr. N.D. Tex. 1980) [holding same]; *Lee v. Gutierrez*, 876 S.W.2d 382, 385 (Tex. App. – Austin 1994, writ denied) [holding that IRA customers were not entitled to priority over other creditors of an insolvent bank, *despite* language in the opinion calling an IRA account a trust]; *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835 (Tex. 2005) [referring to a custodian for a self-directed IRA as

a trustee in the context of a breach of fiduciary duty case, with no indication that the custodian ever challenged the existence of a fiduciary relationship].[15] Much of the confusion in these cases appears to arise from language in the Internal Revenue Code defining an IRA account as a trust. *See* 26 U.S.C. §408. However, that very declaration limits its application to the context of determining tax consequences, stating, "For the purposes of this section, the term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual..." 26 U.S.C. §408(a). Furthermore, a later paragraph entitled "Custodial accounts" states, "For purposes of this section, a custodial account shall be treated as a trust if the assets of such account are held by a bank ..., and if the custodial account would, *except for the fact that it is not a trust*, constitute an individual retirement account described in subsection (a)." 26 U.S.C. §408(h) (italics added). Thus, the Internal Revenue Code acknowledges that custodial accounts often fall short of the requirements to create a trust. More importantly, the Internal Revenue Code does not define the elements of a valid trust. That is a matter of state law. The Internal Revenue Code only establishes that certain non-trust custodial IRA accounts may be treated as trusts for the purposes of determining federal tax

[15] It appears that the issue of whether the trust company was a trustee was conceded in this case. *See* Petitioner's Brief on Merits at 34, *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835 (Tex. 2005) *available at* 2004 WL 513764. A party conceding a point in a particular case does not create any precedent on the issue in subsequent cases and Plaintiffs' counsel would be well-advised not to cite such cases as if it did.

consequences.[16] Thus, any case relying on §408 of the Internal Revenue Code to define whether a particular IRA account actually constitutes a valid trust under state law is unpersuasive.

To establish a trust of personal property under Texas law, there must be an intention to create a trust. TEX. PROP. CODE ANN. §112.002 (Vernon 1995). There must also be "a) a transfer of the trust property; b) to a trustee; c) who is neither settlor; d) nor beneficiary; e) if the transferor expresses at the time or before the transfer his or her intent to create a trust." *Ayers v. Mitchell*, 167 S.W.3d 924, 928 (Tex. App.– Texarkana 2005, no pet.) (*citing* TEX. PROP. CODE ANN. §112.004(1) (Vernon 1995)). A transfer of the trust property must "divest the trustor of all dominion and control over the trust *res*." *Id.* at 929.

The features of the IRA Customers' accounts in this instance are inconsistent with these requirements. There is no evidence of any intent to create a trust, and the IRA Customers, as the alleged trustors, continued to maintain dominion and control over the alleged trust res.[17] Therefore CNB's position as custodian of the IRA Customers' accounts does not render CNB a trustee nor transform the accounts into trust accounts

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[16] Even if the Internal Revenue Code language were subject to broader applications, treating an IRA custodial account as a trust does not necessarily mean every characteristic of trusts generally, including imposition of fiduciary duties, should be imputed to non-trust IRA custodial accounts.

[17] This finding is consistent with courts both outside and within Texas. *See In re Houck*, 181 B.R. 187, 191 n. 9 (Bankr. E.D. Pa. 1995) ["IRAs lack a trustee and delivery of title to the trustee.... There is no trustee and there is no separation of title and beneficial interest: the depositor holds title to and is the beneficiary of the account."]; *Lee,* 876 S.W.2d at 385 [noting that IRAs are unlike typical trusts because the settlor "has the sole authority to determine how the trust corpus is invested."].

under Texas law.

Although an IRA custodian is not a trustee, it is still possible that the relationship between an IRA custodian and IRA customers could be a type of relationship from which fiduciary duties arise as a matter of law. However, the parties have not identified, nor has the Court independently located, any case (other than those previously distinguished) which has imposed such duties as a matter of law, and it does not appear that such protection is generally needed.[18]

The case of *Lee v. Gutierrez*, 876 S.W.2d 382 (Tex. App.–Austin 1994, writ denied) is helpful in this context. In that case, IRA customers of an insolvent bank asserted that their claims were entitled to priority treatment over those asserted by the general depositors of the bank. The issue was complicated by the fact that the assets held in the custodial IRA accounts consisted either of passbook savings accounts or certificates of deposit in the insolvent bank. In direct contravention to its reference to account as a "trust," the Austin court of appeals refused to give priority to IRA customers over the general customers of a failed bank by distinguishing two supposed

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[18] This result should not be surprising in light of the purposes for which fiduciary duties are imposed. In the case of a principal/agent, trustee/beneficiary, or director/corporaton, there is a risk that through either mismanagement or theft, the fiduciary (holding title to and control over assets of the other party) will lose or steal assets. *See generally* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991). A beneficiary, faced with a poorly performing res, is unable to distinguish mismanagement from theft. *Id.* So a fiduciary duty arises to allow the beneficiary to shift the burden of explaining the loss and demonstrating the fairness of the transaction. On the other hand, an IRA custodian has no responsibility for the performance of a self-directed IRA, and if performance is poor, the beneficiary can look either to his own mismanagement or the custodian's theft. There is no need for a fiduciary duty in this context.

responsibilities of IRA custodians: to protect the IRA account itself and to protect the value of the assets held in the account.[19] By analogizing the existence of an IRA account to a safe deposit box, the court noted:

> If a person leases a safe deposit box at a bank and places $1000 in cash in the safe deposit box, the bank has the responsibility to insure that the safe deposit box is secure in order to protect its contents. However, the person who rents the safe deposit box decides what to store in the safe deposit box, and cannot blame the bank if the *value* of the money or other item stored in the safe deposit box declines.

Lee, 876 S.W.2d at 386. While the court of appeals properly notes the existence of the bank's responsibility to protect the account, it refuses to label that responsibility as a fiduciary one. Indeed, as the Austin court found, there is no compelling reason to differentiate that protection responsibility from the general responsibility owed by any bank to all of its customers — a responsibility that is decidedly contractual rather than fiduciary in nature. *Manuf. Hanover Trust Co. v. Kingston Inv. Corp.*, 819 S.W.2d 607, 610 (Tex. App.–Houston [1st Dist.] 1991, no writ). Thus, there is no compelling nor persuasive rationale to justify the inclusion of a relationship between an IRA custodian and an IRA customer within the limited scope of relationships which give rise to fiduciary duties as a matter of law.[20]

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[19] CNB's agreements with the IRA Customers clearly denied any responsibility to advise the customers on the wisdom of their investment decisions.

[20] The Fifth Circuit has noted that "[u]nder Texas law, a fiduciary relationship will not be lightly created, as it imposes extraordinary duties" and requires the fiduciary to "put the interests of the

Informal Fiduciary Relationships

In the absence of a formal fiduciary relationship recognized as a matter of law, courts applying Texas law have occasionally imposed fiduciary duties based on the confidential nature of the relationship between particular parties. *United Teacher's Assoc. Ins. Co. v. MacKeen & Bailey, Inc.*, 99 F.3d 645 (5th Cir. 1996). However, the designation of such a heightened relationship is rarely triggered. *See ARA Automotive Group v. Central Garage, Inc.*, 124 F.3d 720, 723 (5th Cir. 1997) ["Under Texas law, a fiduciary duty will not be lightly created since it imposes extraordinary duties and requires the fiduciary to put the interests of the beneficiary ahead of its own if the need arises." (internal quotations omitted)]. Thus, "[s]ince [1992], few Texas cases have found fiduciary relationships outside of legal relationships that carry fiduciary duties as a matter of law." *Id*. at 726.

In deciding whether a course of dealing or relationship gives rise to fiduciary duties, "[i]f the extent, nature, and duration of the relationship is such that one party has become accustomed to being guided by the judgment or advice of the other, or is justified in placing confidence in the belief that such party would act in its interest, then a confidential relationship exists." *United Teacher's Assoc. Ins. Co. v. MacKeen & Bailey,*

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beneficiary ahead of its own if the need arises." *Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc.*, 55 F.3d 181, 188 (5th Cir. 1997). The Court notes that to apply fiduciary duties in this context would undoubtedly have a chilling effect on the willingness of banks and other institutions to serve as IRA custodians. A custodian bank would have to increase its fees to offset the risk that it will be held liable ------ not because it failed to perform according to the IRA contract but because it failed to place the interests of its IRA customers above its own interests.

Inc., 847 F.Supp. 521, 529 (W.D. Tex. 1994), *rev'd on other grounds*, 99 F.3d 645 (5th Cir. 1996). However, even the development of trust between two associates over a long period of time is insufficient to transform arms-length bargaining into a fiduciary relationship, *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962), nor does the actual use of the term "partnership" between a manufacturer and its dealers necessarily create a fiduciary relationship. *Floors Unlimited, Inc. v. Fieldcrest Cannon, Inc.*, 55 F.3d 181, 188 (5th Cir. 1995).

While the existence of such an informal fiduciary relationship is a question of fact, the Plaintiffs cannot rest on a bald assertion that this is a question of fact which precludes summary judgment in this context. CNB has presented to the court proper summary judgment evidence noting:

> The Sunpoint IRAs were "self-directed," meaning that the customer, rather than the custodian, made the investment decisions. The IRA customer directed and executed his IRA investments through his Sunpoint broker. CNB was not asked by Sunpoint IRA customers to execute any investments. CNB did not give investment advice to the IRA customers or Sunpoint. CNB did not serve as an advisor to customers of Sunpoint with respect to their investment decisions.[21]

In fact, the summary judgment evidence demonstrates that the IRA Customers did not choose CNB as their IRA custodian. In fact, they did not even meet nor deal directly in

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[21] See Motion at p. 6 and the evidentiary references cited therein.

any manner with CNB representatives in the establishment of their custodial IRA accounts. To suggest that such a limited relationship, with little, if any, contacts, was sufficient to establish any degree of reliance upon CNB by the IRA Customers, much less sufficient to justify confidence in the belief that CNB would place the customers' interests above its own, simply defies belief.

In the face of such proper summary judgment evidence, the Plaintiffs bear the burden to raise specific, genuine issues of material fact which would raise a *bona fide* dispute and necessitate a trial on the issue.[22] Alleging conduct by CNB in their statement of genuine issues which, while perhaps morally questionable,[23] has absolutely no bearing

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[22] Fed. R. Civ. P. 56(e), as incorporated into bankruptcy adversary proceedings by Fed. R. Bankr. P. 7056, states, in relevant part, that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Local District Court Rule CV-56(c), as made applicable in this proceeding by Loc. R. Bankr. P. 7056, further provides:

> In resolving the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion, as supported by proper summary judgment evidence. The court will not scour the record in an attempt to determine whether the record contains an un-designated genuine issue of material fact for trial before entering summary judgment.

[23] The question here is clearly one of duty, and Plaintiffs' Statement of Genuine Issues speaks very little to the source of any duty. Instead, Plaintiffs devote 15 pages of text to raise all the opportunities CNB had to stop Lewis' theft. As is the case with the bystanding swimmer who watches another drown in the ubiquitous first-year torts class hypothetical, opportunity to prevent an unfortunate circumstance is not the touchstone of the analysis. Morally questionable behavior, if it existed at all in

on the relationship or course of dealing between CNB and the IRA customers, is wholly insufficient to meet the Plaintiffs' burden to show there is a genuine issue of material fact on this issue. A review of the "Statement of Genuine Issues" filed in response to this Motion reveals that the Plaintiffs have alleged nothing which would controvert CNB's summary judgment evidence of the nature of the relationship between CNB and the IRA Customers.[24] Hence, as a matter of law, the Court concludes that the relationship between CNB and the IRA Customers did not give rise to a confidential relationship or the fiduciary duties attendant thereto. *ARA Automotive Group*, 124 F.3d at 723 ["The existence of a fiduciary relationship, outside of formal relationships that automatically give rise to fiduciary duties, is usually a fact-intensive inquiry. However, when the evidence offered is no evidence of a fiduciary relationship, the issue can be determined as a matter of law." (citing *Crim Truck*, 823 S.W.2d at 594.)].

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this context, does not establish liability in the absence of a duty.

[24] The issues raised by the Plaintiffs in their Statement of Genuine Issues involve: (1) CNB's relationship with Sunpoint, Lewis and the Affiliates and the manipulation of Sunpoint CDs; (2) Lewis' attempted bribe of a CNB officer; (3) false bank confirmations that led to Sunpoint's net capital violations; (4) money deposited into Sunpoint on December 30 and 31, 1997 in an attempt to cure Sunpoint's net capital violation; (5) liquidation of Sunpoint CDs by CNB; and (6) CNB's concerns about the accuracy of the IRA account values. See boldfaced headings in Plaintiffs' Statement of Genuine Issues, found on pages 2-13 of their Response to Defendant's Motion for Partial Summary Judgment on Plaintiffs' Fiduciary Duty Claims. Obviously, none of these issues pertain to the relationship between CNB and the IRA Customers.

Conclusion

For the above-stated reasons, the Defendant's Motion for Partial Summary Judgment on Plaintiffs' Fiduciary Duty Claims is granted, such that summary judgment is rendered in favor of City National Bank on Plaintiffs' claims under paragraph H ["Breach of Fiduciary Duty Owed to Sunpoint IRA Customers"] of the Plaintiffs' Second Amended Original Complaint. An appropriate order will be entered consistent with this opinion.

Signed on 4/17/2006

THE HONORABLE BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE