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 as to Plaintiffs' Extra-Contractual IRA Claims" (the "Motion") filed on September 23, 2005. Upon due consideration of the proper summary judgment evidence, the written legal arguments submitted by the parties,[1] and the relevant legal authorities, the Court concludes that, for the reasons stated herein, the Motion for Partial Summary Judgment as to the Plaintiffs'

[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.

Extra-Contractual IRA Claims should be granted in part and denied in part.

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

[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.

need for greater space, it became a tenant in a building owned by CNB. Eventually, 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] Included in these executed documents was an IRA Adoption Agreement, an IRA Custodial Agreement and Disclosure Statement ("Custodial Agreement"), and a Customer Agreement between Sunpoint and the IRA Customer ("Customer Agreement").[5] The documentation of the account unambiguously established that the IRA accounts were self-directed — that is, CNB had no duty to render investment advice.[6]

CNB brings this Motion for Partial Summary Judgment as to Plaintiffs' Extra-Contractual IRA Claims, alleging that under Texas law certain actions which lie in

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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] *See* paragraph 6 of Plaintiffs' Response to CNB's Motion for Partial Summary Judgment as to Plaintiffs' Extra-Contractual IRA Claims.

[6] *Id.*

contract cannot be simultaneously pursued under a tort theory.[7] The Plaintiffs do not disagree with this proposition generally, but assert various reasons why the principle should not bar the prosecution of the tort claims asserted in this case. A proper understanding of CNB's Motion requires an examination of the Plaintiffs' Second Amended Original Complaint.[8]

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"). The Plaintiffs also claim in their responsive pleadings to the Motion to have adequately pled a cause of action for fraud, although that is not denominated as a specific "Cause of Action" in their complaint.[9] The Plaintiffs'

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[7] CNB also claims that the Plaintiffs' statutory causes of action under federal securities and racketeering laws should also be barred because they sound in contract. As discussed *infra*, the Court is not persuaded by this position.

[8] Docket #259, filed April 11, 2005.

[9] Even if the Plaintiffs have properly pled a cause of action for fraud, the issue of whether such a cause of action sounds only in contract is not before the court. This Motion for Partial Summary Judgment does not request summary judgment on Plaintiffs' spectral fraud claim. The Court acknowledges the Texas Supreme Court case of *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998), but notes that the holding of that case is limited to the issue of whether fraudulent *inducement* claims sound only in contract. *Yzaguirre v. KCS Resources, Inc.,* 47 S.W.3d 532, 543 (Tex. App.– Dallas 2000), *aff'd,* 53 S.W.3d 368 (Tex. 2001). Clearly they do not, but the facts of this case do not involve fraudulent inducement.

claims for breach of contract allege violations of the IRA Custodial Agreements, with damages not less than $25 million.[10] The negligent misrepresentation claims arise out of two sets of facts: paragraph 59 of the complaint alleges negligent misrepresentation arising from a letter (the "NASD Letter") sent by CNB to the National Association of Securities Dealers ("NASD"), while paragraph 60 of the complaint alleges negligent misrepresentation arising from account statements sent to the IRA Customers.[11] The negligence/gross negligence claims also arise out of two similar sets of facts: paragraph 65 deals with the NASD Letter, while paragraphs 63, 64, and 66 respectively deal with CNB's alleged responsibilities to safeguard IRA assets and assure the transmission of accurate account statements to customers.[12] Plaintiffs also allege that the requested award of $25 million is warranted due to CNB's negligence or gross negligence.

Discussion

Standards for Summary Judgment

CNB brings its Motion for Partial Summary Judgment as to the extra-contractual IRA 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

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[10] Second Amended Original Complaint, ¶¶ 114-118.

[11] Second Amended Original Complaint, ¶¶ 58-61.

[12] Second Amended Original Complaint, ¶¶ 62-68.

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. 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."].

Negligent Misrepresentation, Negligence, and Gross Negligence

The test to determine whether particular allegations of negligent misrepresentation, negligence, and gross negligence sound exclusively in contract or may be simultaneously pursued in tort is common to all three causes of action. The touchstone is the source of the duty that gives rise to the cause of action. The Texas Supreme Court has stated:

> If the defendant's conduct ... would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct ... would give rise to liability only because it breaches the parties' agreement, the plaintiff's

claim ordinarily sounds only in contract.

Sw. Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991).

In an ongoing process of trying to decipher this distinction, Texas courts have repeatedly referenced the same examples. See *Formosa Plastics Corp. USA v. Presidio Eng'rs. and Contractors, Inc.*, 960 S.W.2d 41, 45 (Tex. 1998) and cases cited therein. When a Yellow Pages publisher negligently failed to publish an advertisement as contracted, the action was restricted to breach of the contract. *DeLanney*, 809 S.W.2d 493 [noting that the publisher's only duty arose from the contract]. When a contractor hired to repair a water heater negligently caused a fire which destroyed the customer's house, the customer was permitted to sue both on the contract and in tort. *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1946) [noting the general duty to refrain from negligently harming another's property]. Finally, in a suit brought by a landowner regarding a utility's right to cut and trim trees within the boundaries of an easement, the utility was held liable only in contract because the contractual relationship between the parties explicitly modified any common law duty to refrain from damaging trees on another person's property. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 105 (Tex. 1999). In the present context, the Plaintiffs concede that "[t]he key to determining concurrent viability of Plaintiffs' claims lies in the existence of an independent duty attributable to each cause of action."[13] If such an independent duty

[13] Plaintiffs' Response to CNB's Motion for Partial Summary Judgment as to Plaintiffs' Extra-Contractual IRA Claims at 11.

exists, Plaintiffs may proceed on both theories, but if the duty is created by the contract, the action lies only on the contract.[14]

The allegations in paragraphs 60, 63, 64, and 66 of the Plaintiffs' Second Amended Original Complaint deal entirely with CNB's alleged duties: (1) to safeguard the IRA Customers' assets in its custody; and (2) to provide an accurate report of those assets to the customers. Absent any contractual agreement to protect assets or provide statements, CNB would have had no duty to perform those functions for the IRA customers.[15] There was no fraudulent inducement. There was no misrepresentation triggering the creation of the contract. There are no damages alleged which did not rise from the confines of the contract.[16] Hence, because CNB had no independent duty to

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[14] Plaintiffs allege in their Statement of Genuine Issues that "CNB had additional duties and responsibilities under Texas common law." Plaintiffs' Response to CNB's Motion for Partial Summary Judgment as to Plaintiffs' Extra-Contractual IRA Claims at 3. But the Plaintiffs never explicitly identify any duty other than those arising from the contract. Although they do assert that misrepresentations extraneous to the IRA relationship were made, in an attempt to open the door to the assessment of tort liability, those extraneous representations are never identified. While the Court recognizes the general duty not to mislead one who is known to be relying on a representation, such a duty will not cause this particular action to sound in tort. *See infra* note 15. If the Plaintiffs are purportedly relying on some other common law duty, they have wholly failed to identify it.

[15] Though they have not done so, perhaps Plaintiffs could point to an independent duty to refrain from making misrepresentations when one knows another will rely thereon. However, when comparing that duty to the contractual obligation allegedly breached, it seems clear the contract superceded any common law duty. In that context, this case closely resembles *DeWitt*, wherein the contract which created the utility easement expressly modified the utility's right to cut trees, so that despite the fact that cutting another party's trees is generally actionable, the action was proper only on the contract. *DeWitt*, 1 S.W.3d at 105.

[16] The Texas Supreme Court has stated:

> In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff's loss. When the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract.

protect the IRA assets nor to report on them absent the contract, recovery for breach of the allegations raised in those paragraphs is absolutely dependent upon proof of the existence of the contract. Thus, the allegations sound only in contract. *DeLanney*, 809 S.W.2d at 496 [noting that when a party must prove the contents of a contract and must rely on the duties created therein, the action is "in substance an action *on the contract*, even though it is denominated an action for negligent performance of a contract." (emphasis in original)]. The Plaintiffs' allegations in paragraphs 60, 63, 64, and 66 of the Second Amended Original Complaint cannot be pursued under a tort theory.

CNB argues that the same analysis applies to the allegations in paragraphs 59 and 65 of the Plaintiffs' Second Amended Original Complaint which deal with CNB's alleged misrepresentation contained in the NASD Letter.[17] This letter was not related to the IRA

Formosa Plastics, 960 S.W.2d at 45. The Plaintiffs cite this language in support of a fallacious inverse proposition: if the damage sought extends beyond the subject matter of the contract, then utilization of a tort theory is appropriate. Plaintiffs then assert that because the $25 million sought exceeds the amount of money related to the IRA accounts, the damages therefore extend beyond the scope of the contract and a tort theory is appropriate. However, the inverse of a true conditional statement is not always true, and the Plaintiffs' analysis is not supported by Texas law. When Texas cases make loose references to the concept that one may look to the scope of the damages sought to determine whether the action lies in contract or tort, the test is only *actually* applied when it otherwise supports the outcome dictated by the examination of the source of the duty, *see, e.g. Bass v. City of Dallas*, 34 S.W.3d 1, 9 (Tex. App.–Amarillo 2000, no pet.) [noting the economic nature of damages where defendant had no independent duty]; *Thompson v. Espey Huston & Assoc., Inc.*, 899 S.W.2d 415, 421 (Tex. App.–Austin 1995, no writ) [noting damages beyond subject matter of contract where defendant had an independent duty not to negligently damage property of the other party to a contract], or when it is applied to bar tort damages when only a contractual cause of action was found. *See, e.g., Jim Walter Homes v. Reed*, 711 S.W.2d 617 (Tex. 1986); *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742 (Tex. 1986). The Plaintiffs have not provided, nor has the Court independently located, any case law wherein the source of the duty was contractual but, because the plaintiffs simply *sought* damages beyond the scope of the contract, access to a tort theory of recovery was magically created.

[17] Paragraphs 59 and 65 could arguably be asserted by IRA Customers and non-IRA Customers alike. Such is not the case with the assertions in ¶¶ 60, 63, 64, and 66. Since summary judgment has also

accounts, but instead dealt with CNB's general banking relationship with Sunpoint, Lewis, and the Affiliates. As described by the Plaintiffs in their brief, "The inquiry by the NASD, and the subsequent response by CNB, had no relationship to, and would have been made irrespective of, whether CNB had a contractual relationship with the IRA Customers."[18] That is an accurate statement. It is therefore erroneous to suggest that such a cause of action cannot be pursued concurrently with Plaintiffs' breach of contract claims.

CNB also contends that the existence of a contract bars some statutory causes of action. In support of this proposition, CNB notes that the Texas Supreme Court has refused to allow a cause of action for violations of the Texas Deceptive Trade Practices Act ("DTPA") when such a cause of action actually sounds in contract. *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12 (Tex. 1996). The DTPA action in *Crawford* essentially involved a claim in which the defendants represented verbally that they would fulfill the contract, and then they failed to do so. *Id.* at 14. The court noted that finding a DTPA violation on such facts would convert every breach of contract action into a violation of the DTPA and that such would constitute an unwarranted expansion of the intended breadth of that statute. *Id.*

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been granted on the negligent misrepresentation claim asserted in ¶ 59 pursuant to a companion summary judgment motion filed by CNB, the court need not address that claim in the context of the present motion. Curiously, CNB elected to forego any request for summary judgment on the negligence claim asserted in ¶ 65 under its companion motion.

[18] Plaintiffs' Response to CNB's Motion for Partial Summary Judgment as to Plaintiffs' Extra-Contractual IRA Claims at 7.

However, while the Texas Supreme Court is obviously free to construe the breadth of a Texas consumer protection statute, the scope of that authority cannot be expanded to govern the breadth of federal securities and racketeering laws. Federal law defines the availability of federal causes of action and CNB offers no authority to suggest that the availability of these federal causes of action is in any way proscribed by the existence of a state law claim for breach of contract. Summary judgment, therefore, cannot be granted in favor of CNB on the securities fraud on these grounds.[19]

Conclusion

For the above-stated reasons, the Court concludes that the Plaintiffs' claims outlined in paragraphs 60, 63, 64, and 66 of the Second Amended Original Complaint cannot be pursued under a tort theory, but rather are inextricably tied to, and subsumed within, the Plaintiffs' breach of contract claims.[20] However, Plaintiffs' claims regarding the NASD letter outlined in paragraphs 59 and 65, along with their claims for securities fraud and RICO violations, survive this particular summary judgment motion because they are not dependent upon the existence of the IRA contract. Therefore, the Motion for

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[19] Since summary judgment has been granted to the Defendant, City National Bank, on the RICO claims asserted in paragraphs 81-96 of the Plaintiffs' Second Amended Complaint pursuant to a companion summary judgment motion filed by the Defendant, the court need not address those claims in the context of the present motion.

[20] The Plaintiffs state, "The Motion does not seek summary judgment on the extra-contractual claims related to the non-IRA customers." Plaintiffs' Response to CNB's Motion for Partial Summary Judgment as to Plaintiffs' Extra-Contractual IRA Claims at 2. Because paragraphs 60, 63, 64, and 66 do not allege any breached duties owing to non-IRA customers, summary judgment as to all of Plaintiffs' claims under these specific paragraphs is proper.

Partial Summary Judgment as to Plaintiffs' Extra-Contractual IRA Claims shall be granted in part and denied in part, such that:

(1) summary judgment is rendered in favor of Defendant, City National Bank, on Plaintiffs' claims asserted under paragraphs 60, 63, 64, and 66 of their Second Amended Complaint [under headings of "Negligent Misrepresentation" and "Negligence/Gross Negligence"];

(2) summary judgment is denied to the Defendant, City National Bank, with respect to Plaintiffs' claims asserted under paragraphs 59 and 65 of the Plaintiffs' Second Amended Complaint; and

(3) summary judgment is denied to the Defendant, City National Bank, with respect to Plaintiffs' claims for violations of federal securities laws asserted in paragraphs 108-113 of the Second Amended 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