STATE OF OHIO	) IN THE COURT OF COMMON PLEAS
	) SS.
COUNTY OF CUYAHOGA	) Civil Case No. 490449
	)
	) **JOURNAL ENTRY AND OPINION**
CFM PARTNERSHIP, et al.,	)
Plaintiffs,	)
Vs.	)
KEYBANK, N.A.,	)
Defendant.	)

Kathleen Ann Sutula, J:

IT IS SO ORDERED:

Defendant, KeyBank National Association (hereinafter "Key") moves this Court to grant summary judgment in its favor as to the totality of the Plaintiffs' claims as well as Key's counterclaim. Likewise, the Plaintiffs move the Court to grant summary judgment in their favor on Counts II and VII of their Complaint, as well as judgment on Key's counterclaim.

In their complaint against Key, the Plaintiffs seek relief for 1)negligence; 2)breach of contract); 3)negligent misrepresentation; 4) breach of fiduciary duty; 5)aiding and abetting; 6) civil conspiracy; 7)conversion; and 8)unauthorized wire transfers in contravention of Ohio Revised Code Section 1304.59. In its Answer, Key responded with a counterclaim against the Plaintiffs for indemnification. Having reviewed reams of pages in the various briefs filed by the parties, the Court construes the

facts of the case in the light most favorable to the non-moving party and sets forth the facts, for purposes of summary judgment, as follows.

Third-party Defendant Cashel Management Company ("Cashel") was an Ohio corporation whose president, Third-Party Defendant Thomas Durkin, acted as an investment counsel for the Plaintiffs. (Key's Evidentiary Appendix, Ex. J). As investment counsel Cashel acted as the Plaintiffs' agent, and Cashel never had custody of any funds. *Id.* Rather, Key would retain custody pursuant to a custody agreement signed between itself and the individual Plaintiffs. (Key's Evidentiary Appendix, Ex. K).

The custody agreement entered into between the parties permitted Key "[t]o make such…investments as Owner [i.e., Plaintiffs] or any person appointed by Owner may direct in writing for the account and risk of Owner. Custodian shall not be liable for any…loss sustained in connection with sales or investments made in good faith compliance with such direction." (E.g., *Id.*, Custody Agreement between Karl Kuhn & Key, ¶A(2); see also ¶A(3)).

In order, therefore, for Key to comply with the terms of the custody agreements, the Plaintiffs signed "Investment Counsel Authorization Instructions," informing Key that Cashel would serve as the Plaintiffs' investment counsel for their accounts. (Key's Evidentiary Appendix, Ex. J). The authorizations provide that Key was "to act in accordance with instructions which…Investment Counsel [i.e., Cashel] may give you with respect to…investments or cash." *Id.*

Furthermore, Key was under

> no duty or obligation to inquire into or seek to ascertain the reason for direction [it] may [have] receive[d] from the

> Investment Counsel…or to advise Owners or anyone on the Owners' behalf of any such direction which [Key] may [have] receive[d] from the Investment Counsel regarding any…transaction…which [Key] may receive before complying with such direction. *Id.*

Finally, the authorizations informed Key that

> [a]ny past action by the Investment Counsel in any way relating to [the] Custody Agreement…is hereby ratified, approved, and confirmed…as if it had been originally done…and authorized by Owners…[Key] shall have no liability for the acts of the Investment Counsel…and shall incur no liability for any action taken…pursuant to their directions…The undersigned, as Owners, shall indemnify you and hold you harmless against any and all actions… *Id.*

Against the backdrop of these various agreements and authorizations, Cashel began investing the Plaintiffs' money in RxRemedy ("Rx"), a Connecticut based company that published a health care related magazine. Cashel would direct Key, with written instructions, to transfer various sums of money from the Plaintiffs' accounts to Rx. At the end of the month, Cashel would then deposit checks from Rx in the Plaintiffs' account. The next business day Cashel would then instruct Key to wire more of the Plaintiffs' finances to Rx, and the cycle would repeat itself at the end of the month.

The Plaintiffs, although they were aware of their investments in Rx because of the monthly statements Key prepared and sent in accordance with the custody agreements, never voiced their concerns to Key. Eventually, near the end of 2000, a number of Rx checks that were to be deposited in the Plaintiffs' custodial accounts did not clear. Following an investigation conducted by the United States Attorney's Office

and the Federal Bureau of Investigation into Cashel's and Rx's conduct, multiple charges of fraud were brought against Tom Durkin and several others, and prison sentences ultimately were imposed. Key, as well as other custodial banks utilized by Cashel customers, never had criminal charges filed against them.

The Plaintiffs now have filed suit against Key to recoup the losses they suffered from this series of events.

I. Summary Judgment Standard

When ruling on motions for summary judgment, Rule 56 (C) of the Ohio Rules of Civil Procedure guides the Court. Rule 56(C) permits the Court to grant summary judgment when (1) there are no genuine issues of material fact; (2) reasonable minds can come to only one conclusion, and the conclusion adversely affects the non-moving party; and (3) the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 365 N.E.2d 46; see also Civ.R. 56(C); *Holliman v. All State Ins. Co.* (1998), 86 Ohio St.3d 414, 715 N.E.2d 532; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881.

Since summary judgment is such a drastic measure, cutting off a party's right to present its case at trial, courts should grant summary judgment motions sparingly. *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 120, 413 N.E.2d 1187; see also *Viock v. Stowe-Woodward Co.* (Erie 1983), 13 Ohio App.3d 7, 14-15, 467 N.E.2d 1378. By the same token, however, courts can, and should, grant summary judgment motions when the case has been fully developed by discovery and the record demonstrates that, construing all the facts and inferences in the non-movant's favor, the non-moving party would not be entitled to judgment as a matter of law. *Dupler*, 64 Ohio St.2d at 120.

In order for the Court to grant summary judgment, the moving party has the burden of demonstrating through the evidence detailed in Civ.R. 56(C) that the opposing party cannot establish any elements of its claims.[1] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If the movant fulfills its burden, the burden will then shift to the non-moving party to produce evidence to establish the elements of its claims. *Id.*, 75 Ohio St.3d at 282. If the non-movant fails to satisfy its burden, a court's granting of summary judgment is not only proper- it is mandated. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

II. Plaintiffs' Breach of Contract Claims

In their motion for partial summary judgment, the Plaintiffs seek judgment as a matter of law on Count II of their Complaint. Similarly, Key has moved the Court for summary judgment on the Plaintiffs' breach of contract claims.

When interpreting a contract, when the contract's terms are clear and unambiguous on the face of the contract, a court may grant summary judgment since interpreting the contract is a matter of law rather than an issue of fact. See *Long Beach Assn., Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576, 697 N.E.2d 208; *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271; *Stark v. Leonard Fuchs Irrevocable Gift Trust* (Cuyahoga 2001), 145 Ohio App.3d 699, 704, 764 N.E.2d 446.

In order to prevail on its breach of contract claim, the Plaintiffs must show that a contract existed, the Plaintiffs performed, Key breached it, and the Plaintiffs suffered damages or a loss. *Garofalo v. Chicago Title Ins. Co.* (Cuyahoga 1995), 104 Ohio

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[1] The evidence to be used includes the pleadings, depositions, interrogatory answers, admissions, affidavits, transcripts of evidence, and written fact stipulations. Civ.R. 56(C).

App.3d 95, 108. Here, there is no dispute that there was a contract between the parties, and the main issue for the court to determine is whether or not Key breached the custody agreements.

In order to reach a conclusion on this issue, it is necessary to examine the three agreements detailed previously- the Plaintiffs' naming Cashel as their investment counsel; the custody agreements between the Plaintiffs and Key; and the Investment Counsel Authorizations. When all three are read in conjunction with each other the plain language of the contracts leads to only one conclusion.

Section A of the various custody agreements imposes several affirmative duties upon Key. Primarily, these duties were to follow the written instructions of either the Plaintiffs' or any person appointed by them, which were Cashel and Durkin. Key, unfortunately to the detriment of the Plaintiffs' and numerous other persons not a party to this action, followed the custody agreements to a "tee." Furthermore, in adhering to the terms of the authorizations, Key was under no duty or obligation to question or inquire into the directions submitted by Cashel.

The various documents in question are consistent in that they gave Cashel almost totally unfettered discretion in managing the Plaintiffs' investments. Cashel obviously abused its authority, but this abuse was known to the Plaintiffs' through the monthly statements delivered by Key. Under the terms of the custody agreements, the Plaintiffs, could have directed Key to stop making deposits or wire transfers, or the Plaintiffs could have revoked the authorization. Doing so would have been within the terms of the various agreements and would have had the effect of forcing Key to act in accordance with those agreements. Without any notification or instructions from the Plaintiffs

themselves, however, Key could only continue receiving and following instructions from Cashel.[2]

III. Plaintiffs' Tort Claims

A. The Uniform Fiduciary Act

In addition to the breach of contract claim, the Plaintiffs also claim that Key committed several torts. Initially, Key defends these various torts by relying upon the Uniform Fiduciary Act ("UFA"). This act "provides a defense for those who knowingly deal in good faith with an authorized fiduciary."[3] *Master Chemical Corp. v. Inkrott* (1990), 55 Ohio St.3d 23.

The history of the UFA reveals that it was developed in order to lessen the penalties wrought upon banks when they might fail to exercise the highest degree of vigilance in uncovering irregularities. *Id.*, 55 Ohio St.3d at 26. A bank, therefore, is not liable when it has actual knowledge of a fiduciary relationship and knows that the fiduciary had the authority to conduct the transactions that may be in dispute. *Id.*, 55 Ohio St.3d at 27.

Application of the UFA requires the Plaintiffs to demonstrate that 1) Key had actual knowledge of Cashel's actions and 2) Key had knowledge of sufficient facts that its actions were tantamount to bad faith.

In the case before the Court, Key knew that Cashel was the duly designated investment manager for the Plaintiffs, and according to the various agreements, Cashel

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[2] The Court is aware that Key could not contract to absolve itself from exercising good faith and ordinary care. In this case, there is no genuine issue of material fact, and the contract is clear, that the agreements do not actually absolve Key of these duties. Furthermore, there is no evidence that Key failed to act in good faith in relation to the instructions it received from Cashel and the inaction taken by the Plaintiffs.

[3] A fiduciary also includes agents, like Cashel, who primarily act for the benefit of others. See *Haluka v. Baker* (Wayne 1941), 66 Ohio App. 308.

had authority to invest the funds in the Plaintiffs' accounts. The Plaintiffs fail, however, to meet their evidentiary burden as there is a lack of evidence indicating Key had actual knowledge of Cashel's acts and that any conduct on Key's behalf amounted to bad faith. As discussed in Section II, *supra*, Key merely performed in accordance with the custody agreements and authorizations.

The Plaintiffs rely heavily on the Ohio Supreme Court's decision in *Inkrott* in their efforts to avoid summary judgment. The issues and facts of *Inkrott* are inapposite to those before this Court. First, the issue in *Inkrott* that the Supreme Court decided was for the wrongful payment of checks deposited. None of the Plaintiffs' claims in their Complaint allege this action. Moreover, in *Inkrott*, the plaintiff's fiduciary took checks made payable to one entity but would alter the amounts and deposit them into an account he had established under an assumed name. The defendant bank's payment of those checks altered the legal obligations that it was to operate under.

In the case before the Court, however, Cashel directed Key to deposit checks into the Plaintiffs' accounts, and then authorized Key to wire transfers to Rx. The basic premise of these actions was kosher pursuant to the various agreements signed by the parties. Without any knowledge of the scam Cashel and Durkin were perpetrating, Key is immune from liability under the UFA as the Plaintiffs have not produced any evidence to create any genuine issues of material fact.

B. Plaintiffs' claim of negligent misrepresentation

Assuming *arguendo* that the UFA does not shield Key from liability, the Court will address the various torts alleged by the Plaintiffs.[4] First among these is a claim for negligent misrepresentation.

With respect to negligent misrepresentation, the Ohio Supreme Court has held that a person who gives false information is subject to liability for damages if there is justifiable reliance on the information, provided that the person supplying the information fails to use reasonable care or competence in acquiring or communicating that information. *Haddon View Invest. Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154. False information and reliance are the two prerequisites for such a claim. *Zuber v. Ohio Ins. Dept.* (1986), 34 Ohio App.3d 42, 45. Furthermore, "[r]eliance is justified if the representation does not appear unreasonable on its face and if, under the circumstances, there is no apparent reason to doubt the veracity of the representation." *Lepera v. Fuson* (Hamilton 1992), 83 Ohio App.3d 17, 26.

In applying the law, the Court finds that the Plaintiffs fail to establish a prima facie case. First, Key did not provide any false information. Key provided the Plaintiffs with their bank account statements. There is no evidence that the statements were inaccurate. The fact that Key may use a "confusing statement format," does not mean that the information on it was false or misleading. (Plaintiffs' Brief in Opposition, p.46).

Secondly, even if the statements were false, the Plaintiffs were aware that there may have been some shady dealings by Cashel, as evidenced by their own depositions, but they never requested Key to investigate or to cease following Cashel's directions.

[4] Count I of the Plaintiffs' Complaint, an allegation of negligence, fails as a matter of law because Key only had the duties imposed on it by contract. As there is no breach of contract, there is no breach of duty. Without a breach of duty, it necessarily follows that the Plaintiffs' negligence claim must be dismissed.

On account of the Plaintiffs' suspicions, and the fact that they did ask Thomas Durkin about his activities, the Plaintiffs cannot claim now that they justifiably relied on the bank statements issued by Key.

C. Plaintiffs' claim of breach of fiduciary duty

In Count IV of their Complaint, the Plaintiffs also allege that Key breached a fiduciary duty. Ohio courts have consistently held that a "fiduciary duty is one in which a 'special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.'" *Cairns v. Ohio Savings Bank* (Cuyahoga 1996), 109 Ohio App.3d 644, 649, quoting *Stone v. Davis* (1981), 66 Ohio St.2d 74, 78.

In this case, the agreements are explicit that Key merely held the Plaintiffs' funds in a custodial account and would only act at the direction of Cashel. This relationship between Key and the Plaintiffs did not rise to the level of a fiduciary relationship. As a result, there was no relationship for Key to breach.

D. Plaintiffs' claim for aiding and abetting

The Plaintiffs also bring forth a claim for aiding and abetting. No matter how the facts are construed, the claim is not proper as "Ohio does not recognize a claim for aiding and abetting common law fraud." *Collins v. National City Bank* (Montgomery 2003), 2003-Ohio-6893. The Court agrees with the rationale of the *Collins* court that "[o]ne who engages in any way in fraudulent behavior is liable for fraud itself, not as an aider and abetter to fraud." *Id.*, 2003-Ohio-6893 at ¶32. The Plaintiffs' claim, therefore, fails as a matter of law.

E. Plaintiffs' claim of civil conspiracy

Another tort claim alleged by the Plaintiffs is one for civil conspiracy. Just as in Section IV(D), *supra*, the Plaintiffs' claim fails as a matter of law. While Ohio law does recognize claims for civil conspiracy, such as tortiously interfering with a contractual relationship, see e.g., *Wagoner v. Leach Co.* (Montgomery 1999), 1999 WL 961166, such is not the claim in the case before the Court. In fact, in order to state a claim for civil conspiracy, the underlying cause of action must sound in tort. *Wagoner*, 1999 WL 961166; *Schell v. Kaiser-Frazer Sales Corp.* (Montgomery 1971), 28 Ohio App.2d 16.

In the present case there is no underlying tort as the Plaintiffs do not allege fraud on the part of Key, nor is there any claim that Key conspired to breach the contract. In the absence of an underlying cause of action, the Plaintiffs' civil conspiracy claim cannot stand on its own.

F. Plaintiffs' claims for conversion and unauthorized wire transfers

Finally, the Plaintiffs' bring claims of conversion and unauthorized wire transfers, pursuant to O.R.C. §1304.51 *et seq.*[5] An application of Section 1304.59 would require Key to refund the Plaintiffs if Key accepted payment orders that were unauthorized. As has been pointed out repeatedly, Cashel was the authorized agent of the Plaintiffs, and Key was under a contractual obligation to honor the written directions submitted by Cashel. A literal reading, therefore, of Section 1304.59 clearly demonstrates that Key cannot be held liable under this statute.

An examination of the code's official comment buttresses the Court's interpretation of the statute. The comment reads that "…the bank takes the risk of loss

[5] A review of the relevant code sections reveals a paucity of case law in interpreting this section. Though the Court is typically loathe to review official comments in interpreting statutes as such documents are not law, in the absence of case law, the Court has examined the official comments to the pertinent code sections.

with respect to an unauthorized payment order because the bank is not entitled to payment…" O.R.C. §1304.59, 1991 Official Comment, 1. In this instance, the transfers were authorized by Cashel. Also telling to the Court is that the comment reflects an intent that the customer, in this case the Plaintiffs, "has a duty to exercise ordinary care…and to advise the bank of the relevant facts within a reasonable time not exceeding 90 days…" *Id.*, 1991 Official Comment, 2. Once again, the Plaintiffs, despite being suspicious of Cashel's and Tom Durkin's activities, never inquired of Key as to their accounts.

In addition to the above, O.R.C. §1304.57 fails to provide the Plaintiffs with any relief. The Plaintiffs could avail themselves of this section if the parties had agreed to a security procedure, and Key then failed to verify the payment orders pursuant to that procedure. O.R.C. §1304.57(B).[6] The record, however, is void of any kind of security procedure as there was no agreement entered into between the Plaintiffs and Key relating to this. It is axiomatic that an agreement requires both parties to come to a meeting of the minds, so any procedures Key may have routinely used with the Plaintiffs and any other customers, does not amount to a security procedure in the absence of an agreement. *See* O.R.C. §1304.57, 1991 Official Comment.

In the absence of any Ohio law to the contrary, the Plaintiffs have not demonstrated a prima facie case under the Ohio Wire Trasfer Act.

IV. Key's Counterclaim

The Court now turns its attention to Key's counterclaim, seeking indemnification for the losses Key has suffered in relation to this action. Once again, the plain language

[6] This assumes that Cashel was not an agent of the Plaintiffs, an argument that belies logic given the agreements the Plaintiffs signed with Cashel and the subsequent investment counsel authorizations.

of the investment counsel authorizations instructs the Court's ruling. In those documents, the Plaintiffs expressly agreed to indemnify and hold harmless Key "for the acts of the Investment Counsel." Key's Evidentiary Appendix, (Ex. L).

The facts are undisputed that it was Cashel that was engaged in this scam with Rx. It was Tom Durkin and other Cashel agents who instructed Key to make the deposits and subsequently make the authorized wire transfers.

In addition, the Plaintiffs' cannot say at this point that the indemnification clause is unenforceable. The clause is written in the same size and font and it is found on the same page as the rest of the authorization. There should have been no surprise to the Plaintiffs' of the clause's existence, and if there is, such surprise must be a result of the Plaintiffs' negligence in reviewing and signing the agreement. Furthermore, the evidence is such that all the parties to the document were of similar sophistication, the Plaintiffs were not novice investors, and Key was not in a superior position to that of the Plaintiffs. Given the express terms of the clause, and the fact that the clause is enforceable, Key is entitled to judgment as a matter of law on its counterclaim.[7]

V. Conclusion

The Court is aware that this case before it is just one of a handful that have been filed, both in state and federal court, concerning the actions perpetrated by Cashel and Tom Durkin. While numerous investors have lost a small fortune, in its ruling the Court must limit its scope strictly to the facts and circumstances placed before it.

Given the agreements entered into between the Plaintiffs and Cashel, in conjunction with the Plaintiffs and Key, along with the Plaintiffs' failure to relieve Key

[7] Given the Court's ruling on Key's counterclaim, a damages hearing shall be conducted in order to determine the amount of damages suffered by Key.

of their contractual duty to accept without question Cashel's instructions (or to modify Key's obligations by requesting them to inquire into Cashel's fraudulent acts), the facts of this particular case do not lend themselves to finding Key liable on any of the Plaintiffs' claims.

It is, therefore, ORDERED, ADJUDGED, and DECREED:

After construing the facts in the light most favorable to the non-moving party, there are no genuine issues of material facts. Reasonable minds, therefore, can reach only one conclusion in this matter. Key's Motion for Summary Judgment is well taken. The Court grants Key's Motion for Summary Judgment for good cause shown and denies the Plaintiffs' Motion for Partial Summary Judgment.

DATE: April ____, 2004

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KATHLEEN ANN SUTULA, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via regular U.S. mail on this _____ day of April, 2004, to the following:

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