IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID G. SONDERS	:	CIVIL ACTION
v.	:	
PNC BANK, N.A.	:	NO. 01-3083

MEMORANDUM OF DECISION

THOMAS J. RUETER
United States Magistrate Judge

June 3, 2003

Former Congressman Edward M. Mezvinsky pled guilty to numerous counts of federal crimes relating to an investment fraud scheme, and was sentenced to a term of imprisonment. Plaintiff David G. Sonders is one of Mr. Mezvinsky's victims. The plaintiff seeks to recover his lost investment from defendant PNC Bank, N.A. ("PNC"), the bank in which Mr. Mezvinsky deposited the moneys invested by plaintiff, and from which he subsequently misappropriated the funds. Presently before the court is PNC's motion for summary judgment (Doc. No. 24), plaintiff's opposition thereto (Doc. No. 26), and PNC's reply brief (Doc. No. 27). For the reasons set forth below, this court grants PNC's motion for summary judgment.

I. BACKGROUND

Plaintiff seeks to recover from PNC moneys invested with Mr. Mezvinsky on a theory of bad faith. The following facts are undisputed. Plaintiff made two deposits of $250,000 each (the "Funds") into a PNC account titled: "Edward M. Mezvinsky, Esquire Trust Account," which was PNC account no. 86-1234-0387 (the "Account"). (Pl.'s Mem. of Law Supp. Summ. J. (hereinafter "Pl.'s Mem.") at 2; Def.'s Mem. of Law Supp. Summ. J. (hereinafter "Def.'s Mem.") at 5-6.) The deposits were made in June and July, 1999, in the midst of what was later

discovered to be a series of fraudulent schemes perpetrated by Mr. Mezvinsky.[1] Soon after the deposits, Mr. Mezvinsky converted the $500,000 to his own use. Id.

Plaintiff alleges the following additional facts. On January 16, 1998, Wesley Sine, an attorney, went to the Willow Grove branch of PNC[2] and met with Melveena L. White, who identified herself as the Operations Manager of the branch. Mr. Sine told Ms. White that his signature was to be required before any withdrawals were made from the Account, and Mr. Sine executed a signature card. Mr. Sine gave Ms. White a copy of an Escrow Agreement between himself and Mr. Mezvinsky to place in PNC's file along with the signature card. Mr. Sine directed a wire transfer of $1 million into the Account while at the branch. Mr. Sine also gave to Ms. White a copy of a letter signed by Mr. Mezvinsky, authorizing Mr. Sine to "transfer up to $1,000,000.00 under the single signature of Dr. Wesley F. Sine, J.D. on February 16, 1998" from the Account. Mr. Sine never requested nor received statements on the Account. Mr. Sine acknowledged that Mr. Mezvinsky was the owner of the Account and that all statements were directed to Mr. Mezvinsky. At least as of January 27, 2000, Ms. White no longer worked for PNC. In February, 2000, PNC representatives informed Mr. Sine that it had no record of the

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[1] Mr. Mezvinsky represented to plaintiff that he was owed $58 million in proceeds from a business transaction in the Ivory Coast in Africa, and that these funds were deposited in a bank in Spain, but that he could not withdraw the proceeds unless he showed $500,000 on deposit in an American bank to prove that he could pay the Ivory Coast's "Economic Recovery Tax." Plaintiff was anticipating a return of over 100% in a short period of time. (Def.'s Mem. at 1-2.)

[2] Plaintiff contends that Messrs. Mezvinsky and Sine met with Ms. White at the Fort Washington branch of PNC. (Pl.'s Mem. at 2.) This discrepancy in the recitation of facts is irrelevant.

signature card he claimed to have executed or the Escrow Agreement Mr. Sine claimed to have given to Ms. White. (Pl.'s Mem. Ex. B (Sine's Affid.).)

Plaintiff claims that PNC should have been aware of Mr. Mezvinsky's misdeeds and taken steps to investigate and stop the fraudulent activity. In Count I of the Complaint, plaintiff contends that PNC acted in bad faith when it (1) permitted Mr. Mezvinsky, on his signature alone, to transfer and withdraw plaintiff's monies from the Account, and (2) failed to investigate Mr. Mezvinsky's activities in light of the dual signature requirement and certain suspicious transactions. (Complaint ¶49.) Plaintiff also contends that PNC "had reason to question all the activity on the Account." Id. at ¶52. The Honorable James McGirr Kelly denied PNC's motion to dismiss Count I of the Complaint in which PNC alleged that plaintiff failed to present a claim under the Uniform Fiduciaries Act (the "UFA"), 7 Pa. Cons. Stat. Ann. §§ 6351-6404 (West 1995). Judge Kelly held as follows:

> The UFA protects a bank in PNC's position for payments made to a fiduciary in good faith. Id. § 6361. A bank only acts in bad faith where it has actual knowledge of a fiduciary's misapplication of funds. Id. § 6381. Following review of the Complaint in this matter, the Court is convinced that Sonders has sufficiently alleged that PNC released these funds to Mezvinsky in bad faith, that is, under circumstances where PNC should have known that the funds were misapplied. See id. Specifically, Sonders has alleged that PNC failed to follow the signature requirements of the account and failed to react to or perhaps even report suspicions transactions to the federal government pursuant to 31 U.S.C. § 5313 (1994).

Sonders v. PNC Bank, N.A., Memorandum Order, No. 01-CV-3083 (E.D. Pa. Oct. 16, 2001) (Doc. No. 7). Count II of the Complaint alleged a claim of negligence. Judge Kelly dismissed Count II of the Complaint finding that the "UFA bars claims based upon negligence." Id.

In its motion for summary judgment, PNC argues that plaintiff's remaining claim fails as a matter of law. (Def.'s Mem. at 2-3, 10-18.) PNC urges that plaintiff cannot state a claim under the UFA because it did not act in bad faith and the statute provides a defense, not an affirmative cause of action. However, under any theory, PNC contends that plaintiff has failed to establish a causal link between PNC's failure to abide by the two signature requirement alleged by Mr. Sine's affidavit and plaintiff's loss, since plaintiff did not know of Mr. Sine and Mr. Sine did not know of plaintiff until after Mr. Mezvinsky withdrew plaintiff's money from the Account. Consequently, PNC argues that plaintiff could not have relied upon or been protected by the dual signature requirement. Id.[3]

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[3] PNC argues that summary judgment also must be entered in its favor because the Adverse Claims Statute, 7 Pa. Cons. Stat. Ann. § 606, bars plaintiff's instant claim of bad faith. The Adverse Claims Statute provides:

> (a) An institution shall not be required, in the absence of a court order or indemnity required by this section, to recognize any claim to, or any claim of authority to exercise control over, a deposit account . . . made by a person or persons other than:
>
> (I) the customer in whose name the account or property is held by the institution . . ..

7 Pa. Cons. Stat. Ann. § 606(a)(I). PNC contends that this section establishes that "a bank is entitled to rely on the title of the account – in other words, the 'customer in whose name the account is held' – if there is a dispute over who has proper authority to conduct transactions on the account. Absent a court order or bond, the bank cannot be subject to claims that a party whose name does not appear in the title of the account has any authority over it." (Def.'s Mem. at 17.) PNC argues that since the Account was titled solely in the name of "Edward M. Mezvinksy, Esquire Trust Account," and neither Messrs. Sine nor Sonders attempted to comply with Section 606 as a means of obtaining control over the Account, it was entitled to abide by the instructions of Mr. Mezvinsky with respect to the Account. Id.

Plaintiff, however, is not attempting to exercise control over the Account as contemplated by the Adverse Claims Statute. Rather, plaintiff contends that PNC acted in bad faith with respect to Mr. Mezvinsky's misdeeds regarding the Account. Plaintiff's claim is

II. SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admission 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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court has held that Rule 56(c) requires "the threshold inquiry of determining whether there is a 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 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 248. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id.

The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 325 (1986). To defeat summary judgment, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party cannot rest on the pleadings, but rather must go beyond the pleadings and present "specific facts showing that there is a genuine issue for

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addressed by the UFA, not the Adverse Claims Statute. PNC surely cannot be heard to argue that if it acted in bad faith under the UFA, it is nonetheless immune from liability by the Adverse Claims Statute because it followed Mr. Mezvinsky's instructions. The Adverse Claims Statute does not bar plaintiff's bad faith claim.

trial." Fed. R. Civ. P. 56(e). The non-moving party also has the burden of producing evidence to establish, prima facie, each element of his claim. Celotex, 477 U.S. at 322-23. "If the evidence [offered by the non-moving party] is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50. On the other hand, "if reasonable minds can differ as to the import of the proffered evidence that speaks to an issue of material fact," summary judgment should not be granted. Burkert v. Equitable Life Assurance Society of the United States, No. 99-CV-1, 2001 WL 283156, at *3 (E.D. Pa. Mar. 20, 2001), aff'd, 287 F.3d 293 (3d Cir. 2002). In considering a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party, and all inferences must be drawn in that party's favor. Celotex, 477 U.S. at 322.

III. DISCUSSION

In his remaining claim, plaintiff asserts that PNC acted in bad faith when it permitted Mr. Mezvinsky to withdraw and transfer Funds from the Account on his signature alone. Plaintiff also contends that PNC should have investigated the Account in light of the large number of high dollar amounts withdrawn from the Account during June, July and August, 1999. Plaintiff argues that these facts should have caused PNC to suspect that Mr. Mezvinsky was breaching his fiduciary duties with respect to the moneys in the Account and to take steps to stop the activity. By failing to investigate the Account and to stop Mr. Mezvinsky's misconduct, plaintiff maintains that PNC acted in bad faith and is therefore liable to plaintiff for the moneys lost.

1. Uniform Fiduciaries Act

A. Uniform Fiduciaries Act – Generally.

Pennsylvania has adopted the Uniform Fiduciaries Act. 7 Pa. Cons. Stat. Ann. § 6351, et seq. (West 1995). Relevant provisions of Pennsylvania's UFA include:

> § 6361. Application of payments made to fiduciaries
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> A person who, in good faith, pays or transfers to a fiduciary any money or other property, which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary, and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.
>
> § 6372. Transfer of negotiable instruments by fiduciary
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> If any negotiable instrument, payable or indorsed to a fiduciary as such, is indorsed by the fiduciary, or if any negotiable instrument, payable or indorsed to his principal, is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.
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> § 6382. Check drawn by and payable to fiduciary
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> If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary whether in payment of a personal debt of the fiduciary, or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

7 Pa. Cons. Stat. Ann. §§ 6351, 6361, 6372, 6382.

The purpose and intent of the UFA is undisputed. "The very purpose of the Uniform Fiduciaries Act was to facilitate banking transactions by relieving a depository, acting honestly, of the duty of inquiry as to the right of its depositors, even though fiduciaries, to check out their accounts." Davis v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 12 A.2d 66, 69 (Pa. 1940). Stated another way, the UFA was designed to facilitate banking transactions by relieving depositories of the responsibility of seeing that authorized fiduciaries use entrusted funds for proper purposes. Lehigh Presbytery v. Merchants Bancorp, Inc., 600 A.2d 593, 595 (Pa. Super. Ct. 1991). By limiting a depositary's duty to that of good faith, the intent of the UFA

> is to facilitate banking transactions by relieving a depositary of the responsibility of seeing that an authorized fiduciary will use entrusted funds for proper purposes. . . . To apply a theory which would hold a payor liable for a minuscule and irrelevant departure from the prescribed procedure, where he has acted honestly in releasing money to a known authorized fiduciary, without knowledge of the latter's intent to subsequently embezzle those funds, would clearly not contribute to the smooth flow of commerce sought to be achieved by the UFA. Indeed, in the absence of contrary knowledge on the depositary's part, it is entitled, if not bound, to presume that a fiduciary will properly apply funds released to him. . . . We are not faced here with a case where the bank has expressly undertaken the responsibility of insuring the fidelity of the fiduciary in the discharge of the latter's responsibility. Moreover, such a contract would be highly unusual since in most instances the bank is not in the position to fulfill such an undertaking. Nor is there any justification for equating every breach of contract with an absence of good faith.

Robinson Protective Alarm Co. v. Bolger & Picker, et al., 516 A.2d 299, 304-05 (Pa. 1986) (citing cases).

B. Cause of Action Under the UFA.

Plaintiff does not specifically identify his bad faith claim as an affirmative cause of action under the UFA. PNC interprets plaintiff's claim in that manner and contends that the

UFA creates a defense when a bank acts in good faith in relationship with a fiduciary, but does not create an affirmative cause of action.

The Supreme Court of Pennsylvania addressed the UFA in Robinson Protective Alarm Co. v. Bolger & Picker, et al., 516 A.2d 299 (Pa. 1986). Interpreting section 6361 of the UFA, 7 Pa. Cons. Stat. Ann. § 6361, the Pennsylvania Supreme Court stated that "[f]rom the very language of this provision it is clear that, if a person acting in 'good faith' pays money to a fiduciary authorized to receive it, the payor bears no liability for a subsequent misapplication of those funds by the fiduciary." 516 A.2d at 303. PNC is correct in maintaining that the UFA shields a bank from liability when it acts in good faith with respect to a fiduciary relationship. As stated above, the Pennsylvania Supreme Court noted that the intent of this section of the UFA in limiting a depositary's duty to that of good faith, "is to facilitate banking transactions by relieving a depositary of the responsibility of seeing that an authorized fiduciary will use entrusted funds for proper purposes." Id. at 304 (citing cases).

However, the UFA shield is not absolute, and the Act allows liability when a bank acts in "bad faith." The UFA defines "good faith" as follows: "A thing is done in 'good faith,' within the meaning of this act, when it is done honestly, whether it is done negligently or not." 7 Pa. Cons. Stat. Ann. § 6351(2). The Pennsylvania Supreme Court interpreted this provision as follows:

> Under this standard, negligence will not negate "good faith." Even a failure to inquire under suspicious circumstances will not negate "good faith," unless the failure to do so is due to deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction. Conversely, if a bank has knowledge that a fiduciary intends to appropriate trust funds to his own use, and that to release funds to him will aid a breach of trust, then the bank will be held to have acted in "bad faith."

Robinson, 516 A.2d at 304 (citations omitted).[4] "[T]he UFA does not permit a bank to ignore an irregularity where it is of a nature to place one on notice of improper conduct by the fiduciary." Id. at 303.

The plaintiff in Manfredi v. Dauphin Deposit Bank, 697 A.2d 1025 (Pa. Super. Ct. 1997) asserted claims under both the Uniform Commercial Code ("UCC") and the UFA against a bank she alleged acted in bad faith when it permitted her father, on his endorsement alone, to deposit into a checking account a settlement check made payable to both her father and mother as guardians for plaintiff. The father then used the money to pay personal expenses. Id. at 1028. The plaintiff claimed that the bank was liable under Section 6372 of the UFA, see infra p.7, and that the UFA's good faith defense under Section 6361 did not shield the bank from liability. Based on the facts in that case, the Superior Court of Pennsylvania reversed the lower court's entry of summary judgment in favor of the defendant bank on both the UCC and the UFA claims. The appellate court agreed that the plaintiff could not maintain her cause of action under the UCC, but that summary judgment should not have been entered against the plaintiff because the bank "was liable under Section 6372" of the UFA. Manfredi, 697 A.2d at 1029.

The Pennsylvania Supreme Court has not specifically addressed whether an affirmative cause of action is created under the UFA. However, the Superior Court in Manfredi suggested that one was created, at least under Section 6372. In absence of persuasive evidence to the contrary, this court is required to accept this pronouncement by the Superior Court as an

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[4] The plaintiff in Robinson brought a contract action against the bank seeking indemnity and contribution after an attorney misappropriated proceeds of an escrow account. 516 A.2d at 301-02. The bank asserted the shield in the UFA as a defense. Id. at 302. The court in that case was not called upon to decide whether the plaintiff could have asserted a bad faith claim under the UFA.

indication of how the Pennsylvania Supreme Court would rule on the issue. See West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940). There is no evidence that the state Supreme Court would overrule Manfredi. Indeed, there are several federal court decisions that suggest that the UFA does create a cause of action.

Our district court, in Schwartz v. Pierucci, 60 B.R. 397 (E.D. Pa. 1986) (Kelly, J.J.M.), considering a statute of limitations issue, acknowledged without negative comment that the claims remaining against the savings and loan defendant alleged that the defendant had violated Pennsylvania's UFA. Id. at 399. The court further stated that "[u]nder the UFA, a bank is liable if, for example, it has notice that the fiduciary intends to misappropriate funds and fails to prevent the act." Id. at 400 (citing Downey v. Duquesne City Bank, 22 A.2d 124 (Pa. Super. Ct. 1941)). Additionally, in In re Lauer (Nagle v. Lauer), 98 F.3d 378 (8th Cir. 1996), the Eighth Circuit Court of Appeals outlined the elements of a claim under the UFA: "The elements of a cause of action under that statute [UFA] are: (1) the defendant dealt with one who was a fiduciary; (2) the fiduciary breached his fiduciary duty; and (3) the defendant had either actual knowledge of the breach or knew sufficient facts to amount to bad faith." Id. at 386.[5]

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[5] See also Attorneys Title Guar. Fund v. Goodman, 179 F. Supp. 2d 1268, 1272-73 (D. Utah 2001) (plaintiff alleged, inter alia, that bank employees violated Utah's UFA. The court granted the bank's motion for summary judgment holding that, on the facts in that case, the bank had not violated the UFA.); Penalosa Coop. Exch. v. A.S. Polonyi Co., 745 F. Supp. 580, 588 (W.D. Mo. 1990) (court denied defendant's motion to dismiss finding that plaintiff had stated a cause of action under the UFA); E.F. Hutton Mortgage Corp. v. Equitable Bank, N.A., 678 F. Supp. 567, 581, 582 (D. Md. 1988) (plaintiff pled that defendant violated Maryland's UFA; court explained the circumstances under which the plaintiff would be able to recover damages under the UFA). But see Appley v. West, 832 F.2d 1021, 1031 (7th Cir. 1987) (The "UFA did not create the cause of action. Rather, the UFA is a defense to such an action ....". The court observed that the UFA "relieves the bank of liability for negligence, but allows a cause of action when the bank has actual knowledge of the fiduciary's misappropriation of the principal's funds or when the bank has knowledge of sufficient facts that its action in paying the checks amounts

The Pennsylvania Superior Court's Manfredi decision and the federal court cases considering the UFA, support the conclusion that a plaintiff may state a claim for bad faith under the UFA. However, whether a plaintiff specifically references the UFA in stating a bad faith claim, or the UFA is merely asserted as a defense, does not alter the question before the court. In deciding the instant motion for summary judgment, the question is whether the plaintiff has come forward with evidence of PNC's bad faith to defeat PNC's motion for summary judgment, as under the UFA, absent contrary knowledge, PNC is entitled to presume that the fiduciary will act appropriately. See Robinson, 516 A.2d at 304-05 ("[I]n the absence of contrary knowledge on the depositary's part, it is entitled, if not bound, to presume that a fiduciary will properly apply funds released to him.").

C. Liability Under the UFA.

The law in Pennsylvania on the merits of plaintiff's claim is well settled. In order for plaintiff to recover, he must show that PNC acted in bad faith, that is the misconduct of Mr. Mezvinsky was actually known to PNC or was so compelling and obvious that PNC should have made an inquiry and not remained passive.

Case law in Pennsylvania has explained this standard. In Davis v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 12 A.2d 66 (Pa. 1940), beneficiaries of a trust sought to impose on a bank, which was the depository of the trust funds, liability for embezzlement committed by the trustee. Id. at 67. The Supreme Court of Pennsylvania considered the definition of the words "bad faith" for the purposes of liability under the UFA. Id. at 68. The court noted that the UFA defined that a thing is done in "good faith" under the UFA

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to bad faith.").

"when it is in fact done honestly, whether it is done negligently or not." Id. at 68 (quoting 20 Pa. Cons. Stat. Ann. § 3311(1)(a) (UFA of May 31, 1923)). The court reasoned that "[s]ince 'bad' is the antonym of 'good', it follows that a thing is done in bad faith, within the meaning of the act, only when it is done dishonestly and not merely negligently." Id. The court elucidated:

> At what point does negligence cease and bad faith begin? The distinction between them is that bad faith, or dishonesty, is unlike negligence, wilful. The mere failure to make inquiry, even though there are suspicious circumstances, does not constitute bad faith, unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction,– that is to say, where there is an intentional closing of the eyes or stopping of the ears.

Id. at 69 (citation omitted). The Supreme Court of Pennsylvania again addressed "bad faith" under the UFA in Robinson Protective Alarm Co. v. Bolger & Picker, 516 A.2d 299 (Pa. 1986). The Supreme Court of Pennsylvania stated:

> [I]t is agreed that the UFA does not permit a bank to ignore an irregularity where it is of a nature to place one on notice of improper conduct by the fiduciary.
> . . .
> Under this standard, negligence will not negate "good faith." Even a failure to inquire under suspicious circumstances will not negate "good faith," unless the failure to do so is due to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction.

Id. at 304, 305 (citing Davis, 12 A.2d at 66).

Courts from other jurisdictions that have adopted the UFA have enunciated a similar standard. In New Jersey Title Ins. Co. v. Caputo, 748 A.2d 507 (N.J. 2000), the court stated as follows:

> We hold that bad faith denotes a reckless disregard or purposeful obliviousness of the known facts suggesting impropriety by the fiduciary. It is not established by negligent or careless conduct or by vague suspicion. Likewise, actual knowledge and complicity in the fiduciary's misdeeds is not required. However, where facts suggesting fiduciary misconduct are compelling and obvious, it is bad faith to

> remain passive and not inquire further because such inaction amounts to a deliberate desire to evade knowledge. ... Because of the nature of this standard, each case will necessarily be fact sensitive. ... The test for good or bad faith is a subjective one to be determined by the trier of fact unless only one inference from the evidence is possible.

Id. at 514. Similarly, the court in Broadview Lumber Co., Inc. v. Southwest Mo. Bank of Carthage, 118 F.3d 1246, 1251 (8th Cir. 1997) held that "bad faith" can be found when the person "disregards circumstances that are suggestive of a breach and are sufficiently obvious such that it is in bad faith to remain passive." (citation omitted). See also Attorneys Title Guar. Fund v. Goodman, 179 F. Supp. 2d 1268, 1278 (D. Utah 2001) (Information must be "so cogent and obvious as to trigger a further investigation." "To require the Bank to inquire of the circumstances of every [ ] transaction where 'suspicious circumstances' may exist would bring the wheels of commerce to a halt."); Nations Title Ins. of New York v. Bertram, 746 N.E.2d 1145, 1151 (Ohio Ct. App. 2000) (In determining whether a bank acted with bad faith under the UFA, "[t]he facts and circumstances must be so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction.").

D. Applying the Law to the Facts.

Considering all of the evidence and all reasonable inferences therefrom in the light most favorable to plaintiff, there is no genuine issue of material fact and PNC is entitled to judgment as a matter of law.

Since PNC is the movant, the court must view the following facts, and all reasonable inferences to be drawn therefrom, in the light most favorable to plaintiff: (1) plaintiff made two deposits of $250,000 into the Account in June and July, 1999; (2) Mr. Sine met with

Melveena White, the Operations Manager for the Willow Grove PNC branch, and executed a signature card making him a required co-signor of the Account; (3) Mr. Sine gave Ms. White a copy of the Escrow Agreement between himself and Mr. Mezvinsky; (4) Mr. Mezvinsky was the owner of the Account and Mr. Sine never requested nor received statements for the Account from defendant; (5) Mr. Mezvinsky withdrew the Funds on his sole signature; (6) Mr. Mezvinsky made numerous large dollar amount withdrawals from the Account in June, July, and August, 1999; (7) without PNC's knowledge, Mr. Mezvinsky converted the Funds to his own use in breach of his fiduciary duties; (8) PNC has no record of the signature card executed by Mr. Sine nor the Escrow Agreement; and (9) PNC did not investigate Mr. Mezvinsky's activities.

Plaintiff presented no facts showing PNC had actual knowledge that Mr. Mezvinsky intended to breach his fiduciary duties. Rather, plaintiff contends that the numerous withdrawals made by Mr. Mezvinsky during June, July, and August, 1999 and the fact that the withdrawals were made on Mr. Mezvinsky's sole signature, were suspicious circumstances which PNC should have investigated and, if it had conducted an investigation, PNC would have uncovered Mr. Mezvinsky's breach of fiduciary duties and prevented, or minimized, the loss suffered by plaintiff. (Pl.'s Mem. at 2-3.)

The facts in this case are not so compelling and obvious as to render PNC's failure to investigate "bad faith" under the UFA. Drawing all reasonable inferences in favor of plaintiff, the non-movant, the facts, at best, suggest that (1) PNC misplaced Mr. Sine's signature card and Escrow Agreement, and (2) PNC failed to communicate the co-signature requirement to its employees. The Account was titled in Mr. Mezvinsky's name alone, and he was the individual making the withdrawals. Plaintiff never asked that he receive copies of Account

statements. Moreover, the numerous large dollar amount withdrawals by Mr. Mezvinsky in June, July and August, 1999, do not indicate that PNC acted in bad faith for the purposes of the UFA. Plaintiff has offered no evidence as to the Account activity from a time prior to these withdrawals. The volume of activity from June, July and August, 1999, may be consistent with the historical volume of activity on the Account.[6] The facts do not show that PNC acted with "deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction." Robinson, 516 A.2d at 304.

This court has examined the facts in cases where courts considered banks' summary judgment motions on claims under the UFA. In the cases where summary judgment was denied, there were compelling and obvious signs of bad faith by the fiduciaries which the banks failed to investigate. The facts in these cases are distinguishable from the relatively benign facts in the instant matter.

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[6] In Davis v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 12 A.2d 66 (Pa. 1940), as evidence of bad faith, the plaintiff pointed to the number (eighteen over two years) and amount of transfers by the trustee from the trust into his personal account. The court found that this evidence was insufficient to establish bad faith on the part of the defendant stating that plaintiff

> loses sight of the fact that defendant presumably knew nothing about the assets of the trust, or what other bank accounts the trustee might be maintaining, or what proportion of the entire estate was represented by the $18,400 transferred from the trust account to the personal account. As far as defendant was informed the $18,400 might have constituted only a small part of the trust funds, and might have been owing to the trustee because of commissions due to him over a long period of years or of advancements made by him for the purpose of investments. The very purpose of the Uniform Fiduciaries Act was to facilitate banking transactions by relieving the depository, acting honestly, of the duty of inquiry as to the right of its depositors, even though fiduciaries, to check out their accounts.

Id. at 69.

In New Jersey Title Ins. Co. v. Caputo, 748 A.2d 507 (N.J. 2000), the plaintiff claimed that the bank acted in bad faith and the court denied the bank's motion for summary judgment. The court found the following facts were sufficient for a jury to find that the bank acted in bad faith:

> Without belaboring the point, it is for a jury to determine whether the Bank recklessly disregarded or was purposely oblivious to facts suggesting impropriety by [defendant] Caputo. Included among the jury's considerations will be the facts surrounding almost daily withdrawals to himself from Caputo's trust account, amounting to $291,000, each of which was approved by Kane [Branch Manager] or Martin [Assistant Branch Manager]; the facts that Kane and Martin understood these withdrawals to be extraordinary; their concomitant knowledge of Caputo's regular dealings at a gambling casino; their willingness to close Caputo's business account, which held low or negative balances, while allowing the trust account, which held substantial client funds, to remain open; the fact that the Bank allowed Caputo to withdraw $25,000 from his trust account the day after the business account was closed and the Bank's failure to report Caputo to the I.R.S. contrary to its established policies.

Id. at 514.

In Home Savings Bank of America, FSB v. Amoros, 661 N.Y.S.2d 635, 233 A.D.2d 35 (N.Y. App. Div. 1997), the New York Supreme Court reversed the lower court's granting of the defendant bank's motion for summary judgment.[7] In this case, plaintiff retained the defendant law firm to represent its interests in connection with home mortgage closings. 233 A.D.2d at 37. The law firm maintained a mortgage trust account at the defendant bank. It was not unusual for the bank to honor checks drawn by the law firm on insufficient funds because the plaintiff often waited until immediately before a closing to deposit the needed funds. Id. However, during October, 1994, the law firm drew from the account forty-six checks, totaling

[7] The court did not mention the UFA in its discussion of this case. However, New York has adopted the UFA and the court addressed standards consistent with the standards applied under the UFA.

$831,163, against insufficient funds. The funds to cover these checks were not simply uncollected as had happened in the past, but were nonexistent. The account continued to run a deficit balance through November, 1994, and on December 11, 1994, the bank returned eleven checks totaling $766,102 for insufficient funds. At that time, the bank also demanded that the account be audited. Id. The bank paid one additional check on December 27, 1994 against insufficient funds. The audit revealed that an attorney from the law firm had embezzled more than $900,000 from the account, deposited the funds into another account at the bank, and then withdrew the funds from that account to pay personal obligations. Id. at 38. The court denied the bank's motion for summary judgment stating as follows:

> There is, at the very least, a factual issue as to whether the chronic and extremely serious insufficiency of funds in the mortgage trust account in early October 1994, combined with the contemporaneous and roughly commensurate sapping of that account into other . . . accounts [at the bank] plainly being utilized by the account fiduciary . . . for nontrust purposes, was sufficient to place [the bank] on notice of the misappropriation.
> . . .
> Furthermore, under the circumstances of this case, in which not one but 11 checks in very substantial amounts were dishonored in a context of long pending account insufficiency, we think this evidence suffices to raise a triable issue as to whether the bank fulfilled its common law obligation to acknowledge, as reasonable prudence would require, clear signs of fiduciary misappropriation from trust accounts maintained at its branches, and upon such acknowledgment to conduct a reasonable inquiry.

Id. at 40-41, 42.

In McCartney v. Richfield Bank & Trust Co., 2001 WL 436154 (Minn. Ct. App. May 1, 2001), the trial court granted the bank's motion for summary judgment, and the appellate court reversed. The plaintiffs, victims of their attorney's misappropriation of funds, brought an action against the bank which paid the attorney's checks drawn against the attorney's trust

account, claiming the bank was liable under the UFA. Id. at *1. The facts showed that from 1993 to 1996, there were more than twenty-five overdrafts against the trust account. Id. The record also revealed that the bank had a "computerized system that would automatically generate a 'suspect kiting report' whenever the ratios of deposits to check writing reached a certain level." Id. at *2. The bank's policy was to review the report and, if necessary, review the account, contact other banks, and dishonor checks. Id. Although the bank wrote to the attorney twice in 1994 advising him that the overdrafts must stop, the bank continued to honor checks drawn on insufficient funds, and never contacted any of the other banks when a "suspect-kiting entry would appear on his account reports." Id.

The Minnesota Court of Appeals stated that "[u]nder the circumstances of this case, the number of overdrafts may establish a duty of inquiry, even without evidence that the bank actually knew [the attorney] was stealing funds." Id. at *4. The court noted that "knowledge of check kiting and overdrafts could constitute bad faith and the cases do not suggest that the bank needs to know more." Id. Because there were "material fact questions as to whether the bank had actual knowledge or was acting in bad faith with respect to the lawyers [sic] breach of his fiduciary obligation to appellants," the court reversed the trial court's grant of summary judgment to the bank. Id. See also Lehigh Presbytery v. Merchants Bancorp, Inc., 600 A.2d 593, 596 (Pa. Super. Ct. 1991) (conflict between restrictive indorsement on the checks (each check was indorsed for deposit only to the credit of the corporation) and the account number on the deposit slips (employee of plaintiff wrote the proper account title, "Lehigh Presbytery," on the deposit slips, but inserted her own account number), was so irregular as to give rise to a duty on the part of the bank to refuse to deposit the checks without further inquiry).

By way of contrast, in cases where the bank's motion for summary judgment was granted, there were no compelling and obvious signs of fraud by the fiduciary. In Nations Title Ins. of New York v. Bertram, 746 N.E.2d 1145 (Ohio Ct. App. 2000), the appeals court affirmed the trial court's grant of summary judgment in favor of the bank. In that case, Secured Equity Title and Appraisal Corporation ("Secured Equity") performed various services for the plaintiff including providing title insurance and closing loans. Id. at 1146-47. William Bertram, Secured Equity's sole shareholder, opened an escrow account at Farmers State Bank of New Madison, Ohio (the "bank"). Bertram also had served as an attorney for the bank for twenty-five years and was a friend to the bank's president. Id. From December, 1994 though May, 1996, Bertram diverted funds from the trust account to invest in the stock market. During this time, Bertram requested that the president allow him overdraft protection on the escrow account stating that lenders often did not deposit mortgage proceeds until right before a closing. Id. at 1147.

In Nations Title, the plaintiff claimed that the following factors proved that there was a genuine issue as to whether the bank acted in good faith: (1) wire transfers from the escrow account to investment brokerage firms listing either Bertram or Secured Equity as the beneficiary, not a third party; (2) the escrow account had declining average daily balances even though business was growing; (3) Bertram's request for overdraft protection even though an escrow account is a "wash account;" (4) with minimal investigation, the bank would have discovered that the stated reason for needing overdraft protection was false; and (5) the bank violated its own policies when it allowed an escrow account to have overdraft protection. Id. at 1152. During the time in question, the escrow account was very active, 4,000 to 5,000 checks were written from the account each month, $10 million was deposited into the account each

week, and there was a large volume of wire transfers of funds to and from the account. Id. at 1147.

In affirming the grant of summary judgment in favor of the bank, the Ohio Court of Appeals noted that none of the twenty withdrawals from the escrow account to investment brokerage firms were unusual, when compared to other withdrawals from the escrow account, in dollar amount or volume. Id. at 1153. As to the declining balance in the account, the bank pointed out in April 1994 the account's balance never fell below $1,500,000, and in April 1995 the balance was approximately $828,000. Id. at 1154. The bank's president testified that he had known that the daily balances fluctuated all the time. Id. The court concluded that the declining daily balances in the account did not create a genuine issue of whether the bank acted in bad faith. "Placing a burden on banks to monitor the daily account balances of their numerous fiduciary accounts" would not promote the purpose of the UFA to facilitate banking transactions. Id.

The Nations Title court also rejected the plaintiff's argument that with minimal investigation the bank would have discovered that the stated reason for needing overdraft protection was false. The bank allowed overdraft protection on two other escrow accounts maintained at the bank, and also noted that on two occasions Secured Equity utilized the overdraft protection for proper purposes when lenders' checks had not been immediately deposited. Id. at 1154. The court explained that "[t]he wheels of commerce would be brought to a halt if a bank were required to inquire about a fiduciary's actions every time there was suspicious circumstances with an escrow account. Such a requirement would thwart the purpose of the UFA." Id. at 1155.

In Nations Title, the plaintiff also uncovered evidence that showed that the bank officers failed to follow the bank's loan policies in granting the request for overdraft protection by, inter alia, considering financial statements that were unsigned and not keeping minutes from committee meetings. Id. The Ohio Court of Appeals rejected plaintiff's argument that these violations created a genuine issue as to whether the bank acted in bad faith and stated:

> While [the bank's] failure to follow its loan policies could have constituted negligence, mere negligence is insufficient to amount to bad faith.
> . . .
> While the circumstances surrounding the escrow account might have been suspicious and [the bank's] actions could have constituted negligence, they were not so cogent or obvious that [the bank's] failure to investigate Bertram's actions was a deliberate evasion of knowledge because [the bank] feared that it would learn of his wrongdoing. We must remember that "the [UFA] was not designed so the loss resulting from the acts of a faithless fiduciary shall fall on 'one who was a mere conduit to transmit the fund[s].'"

Id. at 1155, 1156 (citation omitted). See also Heffner v. Cahaba Bank and Trust Co., 523 So.2d 113, 115 (Ala. 1988) (grant of summary judgment to bank affirmed; the court concluded that neither "the amount and number of transactions carried out on an account containing fiduciary funds, nor the mere names of payees on checks drawn on that account, are sufficient to create bad faith liability based on the bank's action in paying such checks").

Comparison of the facts in these cases to the instant matter supports this court's conclusion that PNC is entitled to summary judgment. Again, considering the evidence and all reasonable inferences drawn therefrom in the light most favorable to plaintiff, the nonmovant, this court finds that there were no suspicious circumstances so compelling and obvious as to require PNC to investigate whether Mr. Mezvinsky was breaching his fiduciary duties. While PNC's failure to require the second signature may have been negligence, it does not rise to the

level of bad faith. Similarly, PNC's misplacement of the signature card and Escrow Agreement amounts to no more than negligence, not bad faith.

Even if all of these events, including the frequency and amount of withdrawals from the Account, were considered to be "suspicious circumstances," a finding of bad faith still could not be made.[8] The law is clear that a bank's failure to investigate suspicious circumstances is not bad faith unless the bank acted with a "deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction." Robinson, 516 A.2d at 304. Plaintiff presented no evidence to show that PNC failed to act with the intent to evade knowledge of Mr. Mezvinsky's misconduct. Absent such evidence, requiring a financial institution to question and scrutinize each of the trust accounts in its portfolio would thwart the goal of the UFA to promote and facilitate the free flow of commerce. The statute places the burden on the beneficiary to scrutinize with whom it chooses to enter a fiduciary relationship, not

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[8] Plaintiff contends that PNC had knowledge of the transfers and withdrawals from the Account because federal law requires PNC to file Currency Transaction Reports ("CTRs") and Suspicious Activity Reports ("SARs") with respect to certain types of transactions. (Pl.'s Mem. at 6-8.) Plaintiff specifically asserts that there were seventeen withdrawals that qualified as Suspicious Activity during June and July, 1999, and ten transfers subject to the CTR requirement during the same time period. Id. at 7. Plaintiff argues that whether PNC filed these reports as required or not, "the federal regulations charge PNC . . . with the duty to monitor and investigate and, therefore, PNC . . . is charged with knowledge as a matter of law of all the numerous suspicious transactions conducted by Mezvinsky." Id. at 8. PNC counters that only one withdrawal required the filing of a CTR and that the CTR was filed. (Def.'s Reply Mem. at 8, and Ex. B.) PNC also noted that SARs are confidential and the disclosure of any information concerning SARs is punishable by criminal sanctions. Id. at 6 n.3 (citing federal regulations). Whether or not PNC actually filed CTRs or SARs does not impact this court's decision. In concluding that PNC was entitled to summary judgment, this court assumed that PNC was aware of the frequency and amount of withdrawals and transfers from the Account. However, under all of the circumstances, these transactions were not such compelling and obvious evidence of misconduct that failure to investigate further amounted to bad faith on the part of PNC.

to make the fiduciary's financial institution a guarantor of any losses to the beneficiary because of misconduct of the fiduciary.[9]

IV. CONCLUSION

For all the above reasons, PNC's motion for summary judgment is granted. Judgment will be entered in favor of PNC, and against the plaintiff. An appropriate order follows.

BY THE COURT:

_____

THOMAS J. RUETER
United States Magistrate Judge

[9] PNC also argues that plaintiff cannot succeed on his claim because of the absence of causation. (Def.'s Mem. at 12-13; Def.'s Reply Mem. at 3.) Specifically, PNC argues that for plaintiff to succeed, he must show that "PNC's alleged failure to obtain Sine's signature before permitting withdrawals from the Account by Mezvinsky caused the loss of [plaintiff's] funds." (Def.'s Mem. at 12.) PNC claims that plaintiff cannot prove causation because (1) plaintiff agreed that Mezvinsky would be the sole signer on the Account; (2) plaintiff did not know Mr. Sine existed; and (3) Mr. Sine did not know plaintiff existed. (Def.'s Reply Mem. at 3.) Consequently, PNC contends that plaintiff could not have relied upon the dual signature requirement. With respect to a bad faith claim under the UFA, the issue is not what the beneficiary knew, but what the financial institution knew. If the depository has certain knowledge of the fiduciary's conduct, and turns a blind eye, liability will be found. See Manfredi, 697 A.2d at 1029 ("The only question . . . is whether there were facts known to [the bank] that its action in the matter amounted to bad faith."). Plaintiff's claim relies not only on the dual signature requirement, but also upon the frequency and amount of withdrawals and transfers from the Account. Therefore, in any event, the court cannot grant summary judgment solely on the basis of PNC's causation argument.