SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

VAN SCOYOC ASSOCIATES, INC.	)	
	)	
Plaintiff,	)	Civil Action No. 99ca006989
	)	
v.	)	Calendar #9
	)	
ERNST & YOUNG, LLP	)	Judge Stephanie Duncan-Peters
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ERNST & YOUNG, LLP'S MOTION FOR SUMMARY JUDGMENT

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Dated: September 4, 2001

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Defendant Ernst & Young, LLP ("E&Y") respectfully submits this memorandum in support of its motion for summary judgment. As we show below, E&Y is entitled to summary judgment on plaintiff's remaining claims:

- as to Count V (negligent misrepresentation), dismissal in its entirety, or, in the alternative, judgment on all damages arising from the departure of Phillip Moseley from Van Scoyoc Associates ("VSA"), which constitute the vast majority of the damages claimed; and
- as to Count II (fiduciary duty), dismissal in its entirety, or, in the alternative, judgment on all damages arising from the departure of Phillip Moseley from VSA.

PRELIMINARY STATEMENT

On October 13, 2000, this Court granted in part and denied in part E&Y's first motion for summary judgment. At that time, the Court dismissed the breach of fiduciary duty claim, holding that E&Y had served only as an auditor for VSA and that, under settled case law, "an auditing relationship alone will not give rise to fiduciary duties." 10/13/00 Order at 3-4. The Court also held that plaintiff's fraud claim survived summary judgment because there were "genuine questions of material fact which must be determined by a finder of fact." *Id*. at 3.[1]

After both parties sought reconsideration, the Court modified its earlier ruling. In an order issued on July 17, 2001, the Court concluded that the fraud claim should be dismissed because "the Plaintiff cannot establish the required element of intent." 7/17/01 Order at 7. The Court agreed, however, to permit plaintiff to amend its complaint by July 31, 2001, to add a new claim for negligent misrepresentation.

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[1] The Court dismissed the remaining claims — for breach of contract, misuse of confidential information, tortious interference with contractual relations, and tortious interference with advantageous business relations. 10/13/00 Order at 4-5. Those claims are no longer at issue.

The Court then reinstated the claim of breach of fiduciary duties. The Court reiterated that an auditor-client relationship, without more, does not give rise to a fiduciary duty. 7/17/01 Order at 12. The Court observed, however, that there is at least *some* evidence that E&Y was more than just VSA's auditor. In particular, the Court quoted from the affidavit of H. Stewart Van Scoyoc, which he submitted after the close of discovery, in opposition to summary judgment. In that affidavit, Van Scoyoc swore that, as he understood things,

> E&Y was to provide both C&A and VSA with the professional accounting expertise necessary for us to make sure that the acquisition made financial sense to the parties and to assist us in structuring the deal in the best way possible to accomplish our goal of a C&A/VSA public offering.

Affidavit of H. Stewart Van Scoyoc ("Van Scoyoc Aff.") ¶ 9. In light of that assertion — together with what the Court took to be a "conce[ssion]" in E&Y's motion papers (7/17/01 Order at 13 n.6) — the Court concluded that there was a genuine issue of material fact "regarding what representations were made to the Plaintiff by the Defendant about the nature of their relationship as well as the nature of the services the Defendant was providing and for whose benefit they were being provided." *Id.* at 13.

Plaintiff has now filed its amended complaint, seeking recovery on the two remaining theories: negligent misrepresentation and breach of fiduciary duty. Summary judgment should now be granted on both claims in their entirety. Plaintiff's claim of negligent misrepresentation is fatally flawed because VSA has failed to adduce sufficient evidence that E&Y owed a *duty* to VSA to disclose its solicitation of Moseley. And, plaintiff's fiduciary duty claim also must be dismissed, because plaintiff has not presented sufficient evidence that E&Y had a fiduciary relationship with VSA.

Alternatively, the Court should grant partial summary judgment, dismissing from the case

all damages — under both remaining claims — arising from the departure of Phillip Moseley from VSA. As the Court learned during the course of the pre-trial conference in Chambers, the overwhelming majority of plaintiff's damages are based on the departure of Phillip Moseley from VSA. In fact, the amended complaint seeks some *$4 million* because Moseley left VSA to go work for E&Y. As we show below, however, plaintiff is not entitled to recover these damages under either of the two remaining causes of action. Accordingly, in the event the Court declines to dismiss plaintiff's case in its entirety, this crucial category of damages should, once and for all, be taken off the table.

ARGUMENT

Summary judgment is appropriate when the moving party shows that the record contains no evidence that creates material issues of fact. *D'Ambrosio* v. *Colonnade Council of Unit Owners*, 717 A.2d 356, 358 (D.C. 1998), *citing Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986); see also D.C. Super. Ct. R. 56(c). And where, as here, the non-moving party bears the burden of proof at trial, it cannot survive summary judgment unless it can show this Court that it has amassed *enough* evidence on *each* and every element of its claims to actually *carry* its burden of proof at trial. As the United States Supreme Court has explained, plaintiffs must set forth "*significant probative* evidence tending to support the complaint." *Anderson* v. *Liberty Lobby*, *Inc.*, 477 U.S. 242, 249 (1986) (emphasis added, internal quotations omitted).[2] Where the nonmoving party is unable to establish the existence

[2] The text of District of Columbia Superior Court Rule 56, which governs summary judgment, is identical in all material respects to Federal Rule of Civil Procedure 56. See D.C. Super. Ct. R. 56, *comment* ("Identical to Federal Rule of Civil Procedure 56 except for the provision in paragraphs (a) and (b) of Rule 56 that the time period for filing the motion shall be set by Court order."). For that reason, D.C. case law on summary judgment follows federal case law. *See*, *e.g.*, *Claytor* v. *Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1381 (D.C. 1995) (setting out standards for granting summary judgment and citing *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), and *Celotex*).

"of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment must be granted. *Celotex*, 477 U.S. at 322 (1986).

Moreover, to survive summary judgment, the plaintiff must adduce not only a sufficient *quantity* of evidence, but also the requisite *quality* of evidence. In particular, "*[m]ere conclusory allegations on the part of the non-moving party are insufficient to stave off the entry of summary judgment*." *D'Ambrosio*, 717 A.2d at 358 (emphasis in original) (citation omitted). See also *Claytor* v. *Owens-Corning Fiber Corp.*, 662 A.2d 1374, 1384 (D.C. 1995) ("It is the duty of the court * * * to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.")

Finally, although plaintiffs typically invoke the old chestnut that summary judgment should be invoked only sparingly, that simply is not the law. "Summary judgment procedure is a valuable tool. It is not disfavored. It facilitates just, speedy and inexpensive determination of every action." *Cloverleaf Standardbred Owners Ass'n, Inc.* v. *National Bank of Washington*, 512 A.2d 299, 299 (D.C. 1986), *quoting Celotex,* 477 U.S. 317.

As we next show, summary judgment is entirely warranted in this case — to dismiss both claims for want of sufficient proof, and, in the alternative, to strip from the case any claim for damages on account of the departure of Phillip Moseley from VSA.

I. SUMMARY JUDGMENT SHOULD BE ENTERED ON VSA's NEGLIGENT MISREPRESENTATION CLAIM BECAUSE E&Y OWED NO DUTY OF DISCLOSURE TO VSA

A. A Negligent Misrepresentation Claim Requires Proof, From an Expert, that the Defendant Violated a Professional Duty, and Such Proof Must Be Based on Practices "In Fact Generally Followed" Throughout the Profession

To avoid summary judgment on its negligent misrepresentation claim, VSA must establish

that E&Y violated a duty owed to VSA. *Redmond* v. *State Farm Ins. Co.*, 728 A.2d 1202, 1207 (D.C. 1999). According to VSA, E&Y owed it two duties: (1) "to have a system in place to communicate to the partners and employees of E&Y performing professional services for Cassidy and VSA that other partners or employees of E&Y * * * were soliciting Moseley" and (2) to disclose the Moseley solicitation to VSA and Cassidy. Am. Cplt. ¶¶ 54, 58. Whether these duties exist at all depends on the practices and ethics of the accounting profession, and knowledge of such practices and ethics lies outside the knowledge of lay jurors. To establish the existence of these duties, VSA must therefore rely on expert testimony. *See*, *e.g.*, *Nat. Tel. Coop. Assoc. v. Exxon Mobil Corp.*, 244 F.3d 153, 157 (D.C. Cir. 2001). Indeed, VSA concedes this point. See Exhibit 7.

But simply having an expert is not enough. In this case, VSA's proposed expert testimony (by Dan Guy) is fatally flawed because, as Guy himself acknowledged, he could not point to *any* evidence that E&Y deviated from actual practices that are, in fact, followed by accountants or which are generally recognized in the industry. Absent such grounding in actual industry practice, the expert's testimony is legally insufficient; and absent legally sufficient expert testimony, no jury can reasonably conclude that E&Y owed the alleged duties to VSA. See *Meek* v. *Shepard*, 484 A.2d 579, 582 (D.C. 1984) ("Without sufficient proof of the standard of care, [plaintiff's] case should never have gone to the jury.").[3]

Because malpractice litigation is a forum for applying accepted standards, not creating new ones, an expert must begin by establishing that the standard at issue exists and is recognized by

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[3] The Court has previously denied E&Y's motion to preclude Guy's testimony. In this summary judgment motion, E&Y therefore takes as a given that Guy's testimony is admissible, but contends that it is insufficient, as a matter of law, to support a verdict against E&Y. *See*, *e.g.*, *Travers* v. *District of Columbia*, 672 A.2d 566, 568-69 (D.C. 1996) (expert testimony admitted but held to be insufficient to establish a standard of care).

industry members. Thus, as courts emphasize again and again, the expert "must clearly relate that standard to the *practices in fact generally followed by [similarly situated parties] or to some standard recognized by such parties*." *Nat. Tel. Coop. Assoc.,* 244 F.3d at 157 (brackets in original, emphasis added) (quoting *District of Columbia* v. *Arnold & Porter*, 756 A.2d 427, 433 (2000); also citing *Messina v. District of Columbia*, 663 A.2d 535, 538 (D.C. 1995)). This requirement holds true in all types of negligence actions. See, *e.g.*, *Nat. Tel. Coop. Assoc.*, 244 F.3d at 157 (expert testimony in environmental remediation case insufficient to establish standard of care because it did not show what "was *in fact* the prevailing practice or a national standard" in the industry); *Phillips* v. *District of Columbia*, 714 A.2d 768, 773 (D.C. 1998) (plaintiff's expert did not establish standard of care for prison management because expert did not identify practices actually followed); *Travers* v. *District of Columbia*, 672 A.2d 566, 568 (D.C. 1996) (rejecting expert testimony in medical malpractice case where expert did not show "evidence that *a particular course of treatment is followed* nationally") (emphasis added).

The expert's identification of an existing practice also must be specific and concrete. Courts have found expert testimony lacking where it failed to state whether other playgrounds maintain a ground cushion of "ten to twelve inches," *Messina*, 663 A.2d at 539 (playground safety practices); whether other prisons "have oxygen and emergency equipment available," *Toy v. District of Columbia*, 549 A.2d 1, 7-8 (D.C. 1988) (practices relating to care of prisoners); and what percentage of prisons "have metal detectors," *District of Columbia v. Carmichael*, 577 A.2d 312, 315 (D.C. 1990) (prison security practices).

And when a plaintiff fails to provide specific evidence of an existing industry practice, courts do not hesitate to grant summary judgment or reverse jury verdicts. In *Carmichael*, for example,

plaintiff's expert testified, based on his own experience, discussions with prison staff, and materials he had read, that it was negligent for officials at the Lorton federal prison to fail to use metal detectors to screen for contraband. In setting aside the plaintiff's jury verdict, the Court of Appeals explained that:

> Critically absent from [the expert's] testimony was any statement, for example, that a certain percentage of comparable facilities did have metal detectors, and that those metal detectors were customarily in service over certain periods of time. Without such evidence the jury had no basis for comparing Lorton with any other institution, and hence no basis for finding that Lorton's failure to have functioning metal detectors in place amounted to a deviation from a demonstrated standard of care.

577 A.2d at 315. See also *Nat. Tel. Coop. Assoc.,* 244 F.3d at 156-158 (reversing jury verdict for plaintiff); *Woldeamanuel* v. *Georgetown Univ. Hosp.*, 703 A.2d 1243, 1245 (D.C. 1997) (same); *Messina*, 663 A.2d at 538-540 (affirming judgment for defendant as a matter of law); *Travers*, 672 A.2d at 57 (affirming judgment as a matter of law for defendant). To sustain its burden of proof of negligent misrepresentation, VSA is thus required to show, through expert testimony, that it is the actual practice of the accounting profession to screen for the possibility that the firm is soliciting an employee of an audit client and to disclose such solicitation if it exists. As we next show, however, VSA has adduced no such evidence in this case.

B. Guy's Opinion Does Not Provide the Required Evidence of an Industry Practice "In Fact Generally Followed" by Public Accounting Firms

To establish the standard of care applicable to E&Y, VSA relies exclusively on the expert opinion of Dan Guy. Guy, in turn, bases his opinion exclusively on the term "conflicts of interest," which he wrenches out of context from Rule 102 of the Code of Professional Conduct of the American Institute of Certified Public Accountants. That rule, entitled "Integrity and Objectivity," states in full:

> *In the performance of any professional service*, [an accountant] shall maintain

> objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

(Emphasis added.) According to Guy, the Rule 102 prohibition against "conflicts of interest" extends to the hiring of employees of a client, and effectively prohibits such hires without client consent. This interpretation of Rule 102 is the sole basis of Guy's opinion that E&Y violated duties owed to VSA.

But that is just not enough. As the case law makes clear, Guy must show that public accounting firms have actually adopted the specific practices he advocates: policies prohibiting solicitation of employees from audit clients without client consent, and internal systems to identify when client employees are being recruited. Yet Guy candidly acknowledged that he is completely unable to show that public accounting firms "in fact generally" have adopted these practices. *Arnold & Porter*, 756 A.2d at 433. Indeed, Guy cannot point to even a *single example* of an accounting firm that has done so.

- Guy expressly concedes that he does not base his opinion on an existing industry practice or custom. Guy Tr. 191-194. He also is unable to identify a single accounting firm that has a system of the kind he testifies E&Y had a duty to maintain. Guy Tr. 52, 112, 191-192.

- Guy does not know of a single instance in which an accountant was found in violation of Rule 102 (or any professional standard) for recruiting or hiring an employee of an audit client. Guy Tr. 52, 112.

- Despite the extensive and detailed bodies of law, accounting authorities and scholarly literature that exist in the accounting profession, Guy cannot cite a single case, authority, or statement of any kind that supports his opinion. Guy Tr. 47-49, 106-108. Indeed, Guy concedes that the only arguably relevant pronouncement or authority contradicts his opinion. Guy Tr. 92-93, 100. Securities and Exchange Commission Regulation S-X (17 C.F.R. § 210.2-01(b)) (now at 17 C.F.R. § 210.2-01(c)(2)(iv)) *specifically permits the hiring by an accounting firm of an employee of an audit client as long as the employee is not involved in the audit of his or her employer.* Nothing in the rule requires any pre-hiring disclosure to the client by the accounting firm.

As this summary shows, there is no evidence – literally none – that Guy's opinion rests on a "practice in fact generally followed" by accounting firms. *Messina*, 663 A.2d at 539. At most, Guy *proposes* that accounting firms *should* institute systems to identify and disclose Moseley-type employment discussions as conflicts of interest. But proposing that accounting firms *should* adopt such systems is of course the very antithesis of proof that the alleged industry standard is actually "followed nationally." *Travers*, 672 A.2d at 568, 569. In short, no reasonable juror could conclude that E&Y's alleged duty to disclose its discussions with Moseley "had been promulgated, or was generally known, before" this case arose, "or that [E&Y] should have been aware of its existence." Summary judgment is therefore warranted. *See, e.g., Travers*, 672 A.2d at 568.

It is, by the way, hardly surprising that Guy can offer no evidence at all — much less evidence of the required industry-wide consensus — supporting his novel application of Rule 102. Indeed, SEC Regulation S-X confirms the point, by making clear that hiring an employee of an audit client is perfectly permissible for an auditor, so long as the employee does not assume responsibility for the audit of his former employer. Even Guy's own, recent academic writings do not describe the duty that he would now impose on E&Y. See *The CPA's Guide to Professional Ethics* (co-authored by Guy and published in December 2000). No doubt this is why Guy does not offer evidence of accepted industry prohibitions against conduct that is even analogous to E&Y's hiring of Moseley.

But, even if VSA were correct that Rule 102 should govern the hiring of client employees, and even if a jury could find Guy's systems for identifying conflicts of interest to be more reasonable than the actual E&Y practice, that would be beside the point. The only legally relevant inquiry remains whether E&Y's practices run afoul of what the accounting profession as a whole *actually does*. As the Court of Appeals explained in *Carmichael*, "[w]hile one might think it reasonable for a maximum

security facility to have metal detectors, such a belief, reasonable or not, is no substitute for a specific, articulable (and articulated) standard of care." 577 A.2d at 315.

Requiring evidence of an existing, widely-acknowledged standard before allowing a jury to impose negligence liability on E&Y is not only required by District of Columbia law, it is also both sensible and fair. The purpose of rules of conduct is to enable professionals to determine, before they act, whether a specific course of conduct may or may not be appropriate in a given set of circumstances. Here the most exhaustive review of industry practices by E&Y would not have put it on notice of a duty to disclose its discussions with Moseley to VSA. Guy's innovative use of Rule 102 cannot substitute for the requirement that he base his opinion on "practices in fact generally followed" by accounting firms. Summary judgment on VSA's negligent misrepresentation claim is therefore warranted.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PARTIAL SUMMARY JUDGMENT ON THE NEGLIGENT MISREPRESENTATION CLAIM AND DISMISS ALL DAMAGES RESULTING FROM MOSELEY'S DEPARTURE FROM VSA

In the event the Court declines to dismiss the negligent misrepresentation claim outright, it should still grant partial summary judgment in E&Y's favor. The vast majority of the purported damages on plaintiff's negligent misrepresentation claim are based on the "decrease in the fair market value" of VSA caused by Moseley's departure from the firm. Am. Cplt. ¶ 62.[4] According to the complaint, VSA suffered the loss of revenue because of Moseley's departure from VSA in "an

[4] VSA also requests damages for expenses associated with pursuing the acquisition by C&A, in terms of out-of-pocket expenses and employee time, that VSA claims it could have saved had E&Y disclosed its discussions with Moseley. See Am. Cplt. ¶ 63. These claimed damages total approximately $75,000. See Van Scoyoc Aff. ¶¶ 20-21. It further requests damages for contracts that it claims it released early because it had no one to staff the matter once Moseley left. Pretrial Statement at 5-6.

amount no less than $4,000,00." *Ibid.* For two independent reasons, this category of damages – by far the largest in the case – is unavailable.

A. Damages Occasioned By The Loss of Moseley's Services Are, As A Matter of Law, Not Available On A Claim For Negligent Misrepresentation

It is well settled that a plaintiff that sues on a claim of negligent misrepresentation cannot recover so-called "benefit of the bargain" damages. All that a plaintiff may recover on such a tort is its *pecuniary* losses — here, the hard, out-of-pocket costs, occasioned by Moseley's departure (such as the costs of VSA's investment banker in connection with the acquisition). VSA may not recover the money it *expected* to earn had the circumstances been as E&Y allegedly represented them to be — *i.e.*, that E&Y was not soliciting Moseley and Moseley therefore stayed on to earn revenue for the firm.

Section 552 of the Restatement (Second) of Torts defines the elements of a claim for negligent misrepresentation in the District of Columbia . See *Remeikis* v. *Boss & Phelps, Inc.*, 419 A.2d 986, 990 (D.C. 1980) (citing Section 552 to describe negligent misrepresentation); *Osbourne* v. *Capital City Mortgage* Corp., 727 A.2d 322, 324 (D.C. 1999) (in concluding that plaintiffs had not made the requisite showing of damages, citing Section 552). Section 552B expressly limits the available damages recoverable for negligent misrepresentation to "pecuniary losses" that is, "loss suffered * * * as a consequence of plaintiff's reliance upon the misrepresentation." Restatement (Second) of Torts § 552B. In circumscribing the damages recoverable for negligent misrepresentation, the Restatement distinguishes between fraud claims — where the defendant has acted knowingly — and negligence claims — where the defendant has not: "The considerations of policy that have led the courts to compensate the plaintiff for the loss of his bargain in order to make the deception of a deliberate defrauder unprofitable for him, do not apply when the defendant had honest intentions but merely

failed to exercise reasonable care in what he says or does." Rest. § 552B, *comment b*; see also *Trytko* v. *Hubbell Inc.*, 28 F.3d 715, 722 n.3 (7th Cir. 1994) (quoting Restatement). The Restatement further emphasizes that "there is as a general rule no liability for merely negligent conduct that interferes with or frustrates * * * an *expectancy* of pecuniary advantage." Rest. § 552B, *comment b* (emphasis added).

Although DC courts have not expressly addressed the question whether Section 552B bars recovery of "benefit of the bargain" damages, every court in the thirteen states to have considered the issue has concluded that it does. "[R]ecovery under claim of misrepresentation is limited to indemnity for actual pecuniary loss, and do[es] not include the greater profit that could have been made but for the false representation." *Lama Holding Co.* v. *Smith Barney, Inc.*, 627 N.Y.S.2d 33, 34 (1st Dep't 1995) (New York law). See also *Elliott* v. *Aspen Brokers, Ltd.*, 811 F. Supp. 586, 591 (D. Colo. 1993) (Colorado law); *Cunha* v. *Ward Foods, Inc.*, 804 F.2d 1418, 1424 (9th Cir. 1986) (Hawaii law); *Continental Leavitt Communications, Ltd.* v. *Painewebber, Inc.*, 1994 WL 710745, at *9 (N.D. Ill. Dec. 20, 1994) (Illinois law); *Trytko*, 28 F.3d at 716, 722-724, 726 (Indiana law); *Danca* v. *Taunton Savings Bank*, 429 N.E.2d 1129, 1134 (Mass. 1982) (Massachusetts law); *Law Offices of Lawrence J. Stockler* v. *Rose*, 436 N.W.2d 70, 86 (Mich. App. 1989) (Michigan law); *Frame* v. *Boatman's Bank*, 824 S.W.2d 491, 496 (Mo. App. 1992) (Missouri law); *Burke* v. *Harman*, 574 N.W.2d 156, 175-76 (Neb. App. 1998) (Nebraska law); *First Interstate Bank of Gallup* v. *Foutz*, 764 P.2d 1307, 1309 (N.M. 1988) (New Mexico law); *Torres* v. *Borzelleca*, 641 F. Supp. 542, 545 (E.D. Pa. 1986) (Pennsylvania law); *Federal Land Bank Ass'n* v. *Sloane*, 825 S.W.2d 439, 443 (Tex. 1991) (Texas law); *Janda* v. *Brier Realty*, 984 P.2d 412 (Wash. App. 1998) (Washington law).

But "benefit-of-the-bargain" damages are *exactly* what VSA seeks to collect on its newly pleaded claim of negligent misrepresentation. Plaintiff wants E&Y to pay it the sum of money it *expected* to earn had E&Y's purported implied representation — "We're not soliciting your employee Moseley" — been true. VSA is not content merely to recoup its "pecuniary" losses. Unhappily for plaintiff, however, that is all the law permits on this cause of action. VSA therefore is not entitled, on its claim for negligent misrepresentation, to recover damages arising from the departure of Phillip Moseley from VSA.

B. Plaintiff Has Failed To Adduce Sufficient Evidence That E&Y's Conduct Proximately Caused Moseley's Departure, And For that Additional Reason This Category Of Damages Should Be Dismissed

Even if benefit-of-the-bargain damages were otherwise available on a claim for negligent misrepresentation, there is a second reason why VSA cannot recover money occasioned by the loss of Moseley's services. To prevail on its claim, VSA must demonstrate that E&Y's alleged wrongdoing proximately caused VSA's injuries. See *Messina* v. *District of Columbia*, 663 A.2d 535, 537 (D.C. 1995) ("The plaintiff in a negligence action bears the burden of proof on * * * [the] causal relationship between th[e] deviation [from duty] and the plaintiff's injury."). To recover damages arising from Moseley's departure, VSA must therefore prove that E&Y's negligence — here, its failure to disclose that it was soliciting Moseley — proximately caused Moseley to leave the firm.

How does VSA propose to meet that causation burden? Apparently with a chain of logic that would make even Mrs. Palsgraf blush. It goes something like this: If E&Y had disclosed its solicitation of Moseley, then Cassidy & Associates ("C&A") would have instructed E&Y to cure its alleged conflict of interest, preferably by ceasing its solicitation of Moseley; if C&A had so instructed E&Y, E&Y would have acceded to that request and immediately stopped trying to recruit Moseley;

if E&Y had stopped recruiting Moseley, Moseley would have stayed at VSA; and finally, if Moseley had stayed at VSA, he would have remained there for at least three years, thereby boosting VSA's market value by some $4,000,000. Exhibit 6 at 1-2.

That's some theory. But it's one thing to *assert* a chain of events like this, and quite another to prove, as the case law requires, "a reasonably close causal connection between the conduct and the resulting injury." *Holmes* v. *Amerex Rent-A-Car*, 710 A.2d 846, 850 (D.C. 1998). VSA's causation theory, far from showing a "close causal connection" between the alleged wrongdoing and the purported injury, is instead a loose and speculative chain of events with more than one "weakest link." Indeed, although VSA must carry its burden under the case law on *every one* of these links in order to establish causation, VSA cannot point to sufficient evidence to meet its burden of proof on *any* of them (let alone all of them). The Court simply should not send this exercise in speculation to the jury.

1. <u>The first break in the chain: There is insufficient evidence to establish that, had C&A known of the solicitation of Moseley, it would have asked E&Y to stop the solicitation.</u>

The starting point of plaintiff's causation theory is that, had E&Y disclosed its solicitation of Moseley prior to commencing its audit of VSA, someone (either VSA or C&A) would have asked E&Y to cure its alleged conflict of interest by discontinuing the recruitment of Moseley. Am. Cplt. ¶ 62; Exhibit 6 at 1-2.

This theory, however, stands in stark contrast to the sworn statements of Stewart Van Scoyoc, the President of VSA. In his affidavit submitted in opposition to E&Y's first motion for summary judgment, Van Scoyoc stated that, had he known about the discussions between E&Y and Moseley, he would have *terminated the acquisition — not* demanded an end to the solicitation of Moseley. "I would not have let E&Y perform the audit in connection with the acquisition and otherwise review

VSA's records." Van Scoyoc Aff. ¶ 15. See also *id*. at ¶¶ 14-19. As Mr. Van Scoyoc summarized the matter — in a pleading obviously drafted by his lawyers in order to avoid summary judgment the first time — had he known that E&Y was negotiating with Moseley, "I would have terminated the acquisition discussions" with C&A so as to avoid the costs of pursuing the acquisition. *Id*. at ¶¶ 20-21. Significantly, Mr. Van Scoyoc *never* said that he would have instructed E&Y to stop its discussions with Moseley.

To be sure, Gerald Cassidy, the former chairman of C&A, says that had *he* known of the solicitation of Moseley, he would have tried to persuade E&Y to end it, rather than demanding that E&Y stop performing audit procedures at VSA. Affidavit of Gerald Cassidy ("Cassidy Aff.") ¶¶ 11-12. Whether Cassidy's statement is sufficiently weighty to create a triable issue of fact in light of Van Scoyoc's testimony is doubtful – but as we next show, there is absolutely *no* evidence to support the remaining links in VSA's causation chain.

2. <u>The second break in the chain: There is *no* evidence that E&Y would have acceded to a request (had one been made) to cease its discussions with Moseley.</u>

While there is at least some evidence (although not sufficient evidence) that C&A might have asked E&Y to stop soliciting Moseley, there is not one shred of evidence — literally none at all — that E&Y would have agreed to do so. Not one person from E&Y has testified that the defendant would have stopped talking with Moseley if either C&A or VSA had told E&Y that it believed E&Y had a conflict of interest. Nor can VSA point to a single document, such as an E&Y policy, indicating that E&Y would have acceded to a request to stop the Moseley solicitation. Indeed, VSA's First Amended Complaint, which it has just now filed after almost two years of litigation, *does not even*

plead that E&Y would have stopped soliciting Moseley had it been asked to do so. See generally Am. Cplt. ¶ 59.

The most plaintiff can offer are affidavit statements that assert that C&A would have *liked* E&Y to stop the solicitation, rather than resign as auditor. For example, Mr. Cassidy states that he "would have tried to avoid replacing E&Y as the auditor because I believe it may have caused C&A harm to have had a different auditor perform the work at VSA given the timing of our efforts to 'go public.'" Cassidy Aff. ¶ 12. See also Declaration of Todd L. Parchman ("Parchman Dec.") ¶ 5 (E&Y's withdrawal of auditor would have caused damage to VSA and C&A).[5] But there is no evidence – none – that E&Y would have agreed to this request and abandoned its recruitment of Moseley (instead of, for example, abandoning the audit).

Nor is there any evidence of some rule, regulation, or industry practice that would have *required* E&Y to accede to a request (had one been made) to stop soliciting Moseley. Certainly Mr. Guy, plaintiff's expert, failed to identify any. Neither has any other witness pointed to such a requirement. And to our knowledge, there simply isn't any authority, formal or informal, that would have required E&Y, had it been asked, to stop recruiting Moseley. To the contrary, the *only* pertinent authority — SEC Regulation S-X – affirmatively *permits* auditors to hire the employees of their audit clients, so long as they insulate those employees from working on the audit of their former employer. In short, the choice would have been entirely E&Y's to make.

The short of the matter is this: Plaintiff's assertion that E&Y would have agreed to stop soliciting Moseley is utter speculation. It rests on absolutely no evidence in the record. Indeed, VSA

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[5] It is undisputed that there is *no* requirement that C&A's accounting firm perform the audit of VSA. Kelley Tr. at 29. The audit could just as easily have been performed by another firm, and the choice of another firm would not have not had any significance in terms of public perception, nor would it have had any impact on the transaction. *Id*. at 33, 35.

is not even correct when it assumes (and "assume" is the operative word) that E&Y would have had only two choices — either quit soliciting Moseley or walk away from the audit. E&Y could just as easily have disagreed with the very premise that it had a conflict to begin with; thus, had C&A given it a choice ("Quit soliciting Moseley or quit the audit"), E&Y might well have told C&A that it could *both* do the audit *and* solicit Moseley.[6]

In the end, however, it does not matter which of these options (or even some other option) E&Y would have chosen if asked. What matters is that *none* of these choices has any evidentiary support in the record. The chain of causation breaks right here — and the jury should not be given the chance to mend it using speculation or conjecture.

3. <u>The third break in the chain: The evidence is undisputed that Moseley would have left VSA even if he had not accepted a position with E&Y.</u>

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The next link in VSA's causation chain asserts that, had E&Y acceded to a request to stop soliciting Moseley, Moseley would have stayed at VSA. But the evidence does not support that inference — if anything, it shows exactly the opposite.

Moseley testified — without contradiction — that he was unhappy at VSA and that he had decided to leave VSA by the end of 1998, even before he ever spoke with E&Y. Moseley Tr. 33, 43. In fact, Moseley told Van Scoyoc that he was thinking of leaving (*id*. at 72-74), and Van Scoyoc himself acknowledged that he knew Moseley was looking for other employment, or was at least

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[6] Even VSA's expert concedes that there is no professional rule or guidance stating that an accounting firm has a conflict in a situation like the one at issue here. Guy Tr. 108. See also Kelley Tr. 59, 115-16, 124-25 (nothing in the code of ethics that precluded E&Y's solicitation of Moseley). VSA's expert also admits that Securities and Exchange Commission regulations state that E&Y's independence would not be impaired by the hiring of an employee of a client. Guy Tr. 95, 100. And the E&Y partner in charge of recruiting and hiring Moseley has stated that, even today, he does not think that the hiring of Moseley "raised any kind of ethical issues for Ernst & Young." Bobrow Tr. 199.

considering other offers. Van Scoyoc Tr. 129. Kevin Kelly, a vice president of VSA, confirmed that Moseley had told him that he was thinking of leaving VSA. Kelly Tr. 48-49. And even the potential financial benefits of the Cassidy acquisition did not make a difference to Moseley. As he testified, Moseley considered the apparent terms of the C&A deal and nonetheless chose to accept the position with E&Y. Moseley Tr. 107-09. Moreover, those benefits, consisting primarily of the receipt of publicly traded stock, disappeared once the public offering of C&A's stock was postponed because of market conditions. Peskoff Tr. 21-22.

In short, even if it were E&Y's burden to prove that Moseley *would not have stayed* at VSA anyway, it would have carried that burden on this record. But of course, the burden under *Celotex* and *D'Ambrosio* is exactly the opposite: VSA must adduce sufficient evidence to show that Moseley *would have stayed* had E&Y stopped soliciting him. There is absolutely no evidence to support that link in the chain.

4. <u>The fourth break in the chain: VSA has no evidence that Moseley would have remained employed at VSA for three years</u>.

VSA's damages theory requires plaintiff to prove not only that Moseley would have stayed at VSA, but also that Moseley would have remained at VSA for the three years for which plaintiff seeks damages. VSA measures its purported damages in this case by the loss of revenue that Moseley was projected to generate for VSA over the next three years. Exhibit 6 at 1-2. Alternatively (but building on the same assumption), VSA bases its damages on the valuation of C&A when that company was acquired in 1999, and again incorporates the assumption that Moseley would have stayed at VSA for three years. *Ibid.*

But there is absolutely no evidence that Moseley would have remained at VSA for three years, from the fall of 1998 through 2001. For one thing, as described above, Moseley was unhappy at VSA

and had decided to leave by the end of *1998* (indeed, he did so). Moreover, Moseley was an at-will employee; he was free to terminate his employment at any time for any reason (and, for that matter, VSA was free to terminate Moseley). Exhibit 2; Van Scoyoc Tr. 159. And, at the time of the events central to this action, Moseley had worked at VSA for less than two years. A hypothesis that an at-will employee, dissatisfied with his position, would have remained with his employer for a period of time substantially longer than he had already been with that employer is not evidence. It's speculation — and speculation that flies in the face of all available evidence.

* * * * *

In sum, VSA's "proof" of causation is really nothing more than a series of unsubstantiated hunches about what it thinks E&Y and Moseley might have done had E&Y disclosed its discussions with Moseley. But VSA cannot proceed to trial simply by claiming that E&Y *may* have heeded Cassidy's request to stop soliciting Moseley, and that Moseley then *might* not have left VSA, and that Moseley *might* then have stayed on for three more years. "[T]he obligation to draw reasonable inferences in favor of the opposing party does not mean that the Court must assume facts that are unsubstantiated or that the Court must fill in blanks where no evidence exists." *In re Hodges*, 756 A.2d 389, 393 (D.C. 2000). And applying this principle, courts have refused to award damages based on the solicitation of employees where the "proof" of loss of revenue is entirely speculative. *See*, *e.g.*, *Rhodes* v. *Rhodes Indus., Inc.*, 595 N.E.2d 441, 448-49 (Ohio. App. 1991) (evidence showing loss of revenue due to departure or former owner of business held insufficient to sustain award of lost profits); *John Jay Esthetic Salon, Inc.* v. *Woods*, 435 So.2d 1051, 1053-54 (La. App. 1983) (employer's request for lost profits resulting from departing employee, based on projected revenue and expected increase in business, denied as too speculative); *Augut, Inc.* v. *Aegis, Inc.*, 631 N.E.2d

995, 999 (Mass. 1994) (in denying request for damages for a period of twenty-seven months following employees' departure, concluding that "six months fairly represents the outside period for which damages should be awarded"); see also *Williams* v. *CWI, Inc.*, 777 F. Supp. 1006, 1009 (D.D.C. 1991) (refusing to award damages for lost income because it would be "too speculative" to guess what plaintiffs would have earned had defendant not made misrepresentations). Indeed, as we have noted, even if E&Y bore the burden of proof to prove the *absence* of causation here, it likely could carry that burden on this record. But the burden under *Celotex* and *D'Ambrosio*, we repeat, is on plaintiff to adduce sufficient evidence — not speculation — to prevail on this element at trial. Plaintiff has not even come close.

For this additional reason, this Court should hold that plaintiff's single largest component of damages — the losses occasioned by Moseley's departure — are unavailable in this claim for negligent misrepresentation.

III. THE COURT SHOULD DISMISS THE BREACH OF FIDUCIARY DUTY CLAIM IN ITS ENTIRETY, OR, AT THE VERY LEAST, IT SHOULD DISMISS THAT PORTION OF THE CLAIM THAT SEEKS DAMAGES OCCASIONED BY MOSELEY'S DEPARTURE

A. E&Y Did Not Have a Fiduciary Relationship with VSA, and Therefore this Claim Should Be Dismissed in its Entirety

A fiduciary is one who acts in a representative capacity, owing the "highest fidelity" to the person whose interests he is "charged with protecting and advancing." *Urban Invs., Inc.* v. *Branham*, 464 A.2d 93, 96 (D.C. 1983). In its order granting in part and denying in part E&Y's first motion for summary judgment, the court dismissed Count II (alleging breach of fiduciary duty), relying on well-established precedent holding that an auditor does not owe a fiduciary duty to its client. 10/13/00 Order at 3-4. The Court later reinstated that count based on a statement made by Mr. Van Scoyoc in

his affidavit submitted in opposition to summary judgment. In it, Van Scoyoc asserted that, in his opinion, E&Y performed *more* than just auditing services for VSA. 7/17/01 Order at 11-12.[7]

As we show below, that single statement by Mr. Van Scoyoc is the *only* evidence, in the entire record (that is, if an affidavit crafted by lawyers in opposition to summary judgment counts as "evidence"), that E&Y was anything more than just an auditor for VSA. Arrayed against literally an avalanche of contrary proof, Mr. Van Scoyoc's affidavit could not carry VSA's burden of proof in any event. But as we also show, even if Van Scoyoc's assertion were the *only* evidence in the case – even if it did *not* squarely contradict all the other proof in the case – it still would not establish a fiduciary duty.

One point should be noted at the outset. Whatever else they may dispute in this case, the parties agree that E&Y was *at least* an auditor in this case. And that is a crucial fact, for it is fundamentally inconsistent with the role of an auditor to have a fiduciary relationship with one's client. A fiduciary owes the "highest fidelity" to the person he represents. *Urban Invs.*, 464 A.2d at 96. The fiduciary is "charged with protecting and advancing" the interests of that person. *Ibid*; see also *Myers* v. *Finkle*, 950 F.2d 165, 168 (4th Cir. 1991) (a fiduciary duty "arises when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence") (internal quotations omitted). Conversely, "the independent auditor assumes a *public* relationship with the client. * * *

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[7] The Court also stated that "Defendant has conceded that it may have provided 'consulting' services" to VSA. 7/17/01 Order at 13 n.6 (citing E&Y's Reply Brief in Support of Motion for Summary Judgment at 9). In fact, however, the relevant passage in E&Y's reply brief indicated merely that *the plaintiff* had asserted that "at most E&Y provided audit and consulting services" (*ibid*. (citing VSA Statement of Genuine Issues of Material Fact)); and E&Y went on to show that, even under the plaintiff's theory of the case, no fiduciary relationship arose. For its part, however, E&Y did not "concede" that it had provided anything other than auditing services.

This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 818 (1984).

Courts therefore are extremely reluctant to impose fiduciary duties on auditors, as this Court observed when it initially granted summary judgment on this claim. 10/13/00 Order at 3-4. In *Resolution Trust Co.* v. *KPMG Peat Marwick*, for example, 844 F. Supp. 431 (N.D. Ill. 1994), the court concluded that "accountants do not owe a fiduciary duty to their clients when performing services as an auditor; rather the nature of an independent auditor is that it will perform the services objectively and impartially." *Id*. at 436 ("[I]n general [it] is not the case" that "the function of an independent auditor * * * overlap[s] into areas in which it would hold a fiduciary relationship to the client.") See also *Franklin Supply Co.* v. *Tolman*, 454 F.2d 1059, 1065 (9th Cir. 1971) (finding that an auditor is not a fiduciary because its duty is to act "independently, objectively, and impartially"); *FDIC* v. *Schoenberger*, 781 F. Supp.1155, 1157 (E.D. La. 1992).

That being so, this Court should expect *more*, not less, proof from VSA before permitting an inference of fiduciary duty to go to the jury. Where is that evidence? As we next show, there isn't any. Count II alleging breach of fiduciary duty should therefore be dismissed in its entirety.

1. The Overwhelming Weight Of The Evidence In This Case Shows That E&Y Served *Only* As VSA's Auditor, And Thus Plaintiff Has Not Borne Its Burden Under *Celotex* and *D'Ambrosio* To Prove The Existence Of A Fiduciary Relationship Between E&Y And VSA

To defeat summary judgment, VSA must set forth "sufficient evidence favoring" its claim "for a jury to return a verdict for [VSA]." *Malone* v. *Saxony Coop. Apartments, Inc.*, 763 A.2d 725, 728 (D.C. 2000) (internal quotations and citation omitted). Where the evidence is "overwhelmingly in

favor of one position," it "warrant[s] the grant of summary judgment." *Jack Baker, Inc.* v. *Office Space Development Corp.*, 664 A.2d 1236, 1241 (D.C. 1995).

Here, the evidence overwhelmingly shows that E&Y served *only* as the auditor of VSA's financial statements. The following list provides only *some* of the documents and testimony showing that E&Y's role was *limited to* that of an auditor:

- Term Sheet. This document, outlining the proposed acquisition of VSA by Cassidy, states that "VSA acknowledges that Ernst & Young will perform *an audit* of its financial statement for 1997, and agrees to cooperate with the *audit* and to execute such representation letters and other documents as are reasonably required in the *audit* process." Exhibit 5 at VSC000342 (emphasis added).

- Draft Engagement Letter of E&Y by C&A dated September 9, 1998. This document states that "This will confirm our engagement to audit and report on the financial statements of Van Scoyoc Associates, Inc. as of December 31, 1997 and for the year then ended." Exhibit 8 at EY000581.

- John Hendrick, C&A's Chief Financial Officer, testified that the draft engagement letter outlined *all* of E&Y's responsibilities with regard to VSA. Hendrick Tr. 39-40.

- Every piece of paper documenting E&Y's work (which totals hundreds of pages) at VSA reflects that E&Y was auditing VSA's financial statements. *See*, *e.g.*, Exhibit 9 at EY000586; Exhibit 10 at EY000542.

- 10/28/98 letter to Laskawy from Van Scoyoc. In a letter to E&Y's chairman drafted soon after Moseley's departure, Van Scoyoc stated that: "VSA agreed to permit [C&A's] auditors to perform due diligence on VSA. Ernst & Young (E&Y) was, and is, the accounting firm engaged by [C&A] to perform this function." Exhibit 11 at VSC000014.

- Van Scoyoc *himself* testified that E&Y served as VSA's auditors: "[M]y grievance with E&Y is that they were *auditing* my books while they were trying to hire Moseley." Van Scoyoc Tr. 75. See also *id*. at 120, 125, 213-14 (referring to E&Y as an auditor).

- Cassidy also stated that C&A retained E&Y to audit VSA and to assist VSA in putting its financial records together. Cassidy Aff. ¶ 5.

- Richard Goldstein, VSA's regular accountant, worked with the E&Y auditors while they did their work on VSA's financial statements. Goldstein Tr. 35-37. He testified

that E&Y was brought in to perform an audit (Tr. 29) and that, with regard to E&Y's role at VSA: "I don't know if there was any other advisory responsibilities. The only thing I was aware of was the audit responsibility." *Id*. at 52.

- Randall Palmer, an E&Y auditor who was responsible for the VSA engagement, testified that E&Y's role was to perform a one-year audit of VSA. Palmer Tr. 21. "I would characterize our relationship with Van Scoyoc as purely performing an audit of their financial statements." *Id*. at 113-114.

- Jonathan Peskoff, an investment banker for C&A in connection with the proposed acquisition of VSA, testified that E&Y was hired by C&A to audit VSA's financial statements. Peskoff Tr. 38.

- Todd Parchman, an investment banker for VSA, also defined E&Y's role as that of an auditor. Parchman Dec. ¶¶ 3-6.

- Janet Buckley, VSA's Vice President for Administration, described E&Y's role as performing an audit, and as "help[ing] [VSA] get through this, the *accounting* part of it" Buckley Tr. 43 (emphasis added). See also *id*. at 39 (describing E&Y's "audit"), 40 (E&Y performed "due diligence"), 80 (describing E&Y as performing an audit).

The following is the list of documents and testimony obtained in discovery showing that E&Y's role was *greater than* that of an auditor:

- Nothing.

Not one document produced in the course of discovery in this litigation — of which there are hundreds — indicates that E&Y performed anything other than auditing services for VSA. And not one witness testified during his or her deposition that E&Y's role went beyond that of VSA's auditor. Indeed, VSA's own expert admitted that he could not find any evidence in the record that E&Y performed consulting services on behalf of VSA. Guy Tr. 154-55 (Guy assumed that E&Y performed consulting services but had no basis in the record for making that assumption).

So where does that leave us? Simply and solely with a single passage in Van Scoyoc's post-discovery affidavit. Here is what Mr. Van Scoyoc had to say:

> It was my understanding that E&Y was to provide both C&A and VSA with the professional accounting expertise necessary for us to make sure that the acquisition made financial sense to the parties and to assist us in structuring the deal in the best way possible to accomplish our ultimate goal of a C&A/VSA public offering. E&Y was to make whatever changes were necessary to VSA's financial records to further the post-acquisition public offering. It was to perform due diligence to uncover any reason why the parties may not want to go forward with the acquisition. It was also to provide C&A and VSA with the level of expertise on public offerings that we thought was not fully available from our regular accountants.

Van Scoyoc Aff. ¶ 9. That's it – one single paragraph, submitted after the close of discovery, that states an "understanding," nowhere reflected in *any* document, or *any* deposition, or *any* exhibit.

Not surprisingly, the law shields defendants from being hauled before a jury on "proof" like this. *See*, *e.g.*, *R&A, Inc.* v. *Kozy Korner, Inc.*, 672 A.2d 1062, 1072 (D.C. 1996) (granting summary judgment and concluding that the affidavit submitted by the nonmoving party's "adds no support to the[] conclusory allegations."); *Paul* v. *Howard University*, 754 A.2d 297, 305 (D.C. 2000) (granting summary judgment in favor of defendant where plaintiff submitted affidavit intended to create an issue of material fact). For one thing, a court may disregard an affidavit that contradicts the affiant's prior deposition testimony "when the affidavit constitutes an attempt to create a sham issue of material fact." *Hancock* v. *Bureau of Nat'l Affairs*, 645 A.2d 588, 591 (D.C. 1994). Van Scoyoc's affidavit, in which he, for the first time, suddenly recalled that E&Y may have played some sort of advisory role to VSA, is squarely at odds with his deposition testimony, in which he described E&Y only as an auditor. Van Scoyoc Tr. 75, 120, 125, 213-14 (referring to E&Y as VSA's auditor). Moreover, even taking the affidavit at face value, it is simply too conclusory to establish that VSA's relationship with E&Y "transcend[ed] the ordinary business transaction." *High* v. *McLean Fin. Corp.*, 659 F. Supp. 1561, 1568 (D.D.C. 1987) (defining a fiduciary relationship). The affidavit does not identify a single document indicating that E&Y provided consulting, not just auditing, services

to VSA. It does not identify a single person at E&Y who advised VSA on whether the "acquisition made financial sense to the parties" or assisted VSA "in structuring the deal in the best way possible." And it does not identify a single piece of advice that E&Y ever gave to VSA. Accordingly, the affidavit's allegations are simply too "conclusory" to defeat a motion for summary judgment (see *D'Ambrosio* 717 A.2d at 358) and certainly do not constitute "sufficient evidence favoring the nonmoving party to allow a jury to return a verdict for that party." *Malone*, 763 A.2d at 728. See also D.C. Super. Ct. R. 56(e) ("the adverse party's response * * * must set forth *specific facts* showing that there is a genuine issue for trial") (emphasis added).

2. <u>Even If Van Scoyoc's Affidavit Did *Not* Contravene A Sea Of Contrary Proof, It Does Not Establish A Fiduciary Relationship</u>

Even if Van Scoyoc's affidavit were the only piece of evidence in this case regarding E&Y's role, and even if it were competent, probative evidence on this issue, the affidavit would still be insufficient, as a matter of law, to prove a fiduciary relationship between VSA and E&Y. A fiduciary relationship "transcends an ordinary business transaction and requires each party to act with the interests of the other in mind" (*High*, 659 F. Supp. at 1568), and the existence of a fiduciary relationship can be determined as a matter of law. See *Steele* v. *Isikoff*, 130 F. Supp. 2d 23 (D.D.C. 2000) (granting defendant's motion to dismiss plaintiff's claim of breach of fiduciary duty). See also *TCF Mortgage Co.* v. *Gelber Holding Co.*, 1991 WL 127587, at *5 (N.D. Ill. July 3, 1991); *McGee* v. *Vermont Fed. Bank*, 726 A.2d 42, 44 (Vt. 1999). Van Scoyoc's affidavit simply does not describe the kind of circumstances necessary to create a fiduciary relationship.

1. E&Y did not have the quality and quantity of interactions with VSA necessary to create a fiduciary duty on the part of E&Y. Prior to its audit of VSA's financial statements, VSA had no relationship with E&Y. Goldstein Tr. 29. E&Y auditors spent only four days in VSA's offices.

Goldstein Tr. 37; Buckley Tr. 42. And senior personnel at VSA, including Kevin Kelly, were unaware even that E&Y was performing any services for VSA. Kelly Tr. 55.

In *Steele* v. *Isikoff*, *supra*, the court dismissed a claim for breach of fiduciary duty because of the limited nature of the interactions between the plaintiff and defendant. Plaintiff, a source for a magazine article, alleged that she had several face-to-face or telephone conversations with the defendant reporter over the course of several days. 130 F. Supp. 2d at 26-27. Recognizing that "[t]he existence of a fiduciary relationship would depend on whether the parties, through the past history of the relationship and their conduct, had extended the relationship beyond the limits of the contractual obligations," the court concluded that the plaintiff's "relationship with [defendant] was simply too superficial to give rise to a fiduciary duty." *Id*. at 37 (internal quotations omitted). Here, E&Y's interactions with VSA also were "too superficial to give rise to a fiduciary duty."

2. The provision of advice, in and of itself, is insufficient to create a fiduciary relationship. *Production Credit Ass'n* v. *Croft*, 423 N.W.2d 544, 548 (Wis. 1988) ("A fiduciary relationship does not arise merely because advice and counsel is offered upon which a customer places trust and confidence.").

3. E&Y was retained by C&A, which was engaged in arm's length negotiations with VSA. See *Fitzgerald* v. *Shannon & Luchs Co.*, 600 F. Supp. 106, 108 (D.D.C. 1984) (finding no fiduciary duty where relationship was "arms length").

4. VSA had its own law firm, its own investment banker, and its own external accountant all advising VSA on the transaction. Van Scoyoc Tr. 112, 199; Guy Tr. 152; Hendrick Tr. 46-47. Under those circumstances, it is simply implausible to suggest that VSA formed a fiduciary with *C&A's* auditors. See *In re Apex Automobile Warehouse, L.P.*, 2000 WL 220497, at

*10 (N.D. Ill. Feb. 18, 2000) (presence of other advisors belied plaintiffs' assertion that accounting firm had fiduciary duties).

In sum, even if Van Scoyoc's affidavit were competent evidence, and even if it did not contravene the overwhelming evidence to the contrary, it still would fall well short of the kind of proof necessary to establish a fiduciary relationship between E&Y and VSA. For all of these reasons, Count II alleging breach of fiduciary duty should be dismissed.

B. At a Minimum, the Damages Attributable to Moseley's Departure Should Be Dismissed for the Same Proximate Cause Reasons Stated in Connection with VSA's Claim for Negligent Misrepresentation

On its claim for breach of fiduciary duty — as with its claim for negligent misrepresentation — plaintiff seeks damages arising from the departure of Phillip Moseley. Am. Cplt. ¶ 42. For the same reasons given in Point II.B, the Court should dismiss this portion of the fiduciary duty claim, even if it declines to dismiss that claim in its entirety. As with the claim for negligent misrepresentation, to prevail on a claim for breach of fiduciary duty, a plaintiff must establish that its losses were proximately caused by the defendant's conduct. See *Aronoff* v. *Lenkin Co.*, 618 A.2d 669, 687 (D.C. 1992) (causation is an element of a breach of fiduciary duty claim). But as we showed in Part II.B, VSA cannot establish that any breach of fiduciary duty proximately caused Moseley to leave VSA. Accordingly, if the Court does not dismiss Count II in its entirety, it should, at a minimum, dismiss plaintiff's claim for damages arising from Moseley's departure.

CONCLUSION

For the foregoing reasons, summary judgment should be granted in E&Y's favor (i) as to Count V, dismissing the claim in its entirety, or, in the alternative, dismissing all damages arising

from Phillip Moseley's departure from VSA; and (ii) dismissing Count II in its entirety, or, in the alternative, dismissing all damages arising from Phillip Moseley's departure from VSA.

Oral Hearing Requested

Dated: September 4, 2001

Respectfully submitted,

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