The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: July 11 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	
	)	SIPA Liquidation
Continental Capital Investment	)	No. 03-3370
Services, Inc., and Continental	)	
Capital Securities, Inc.,	)	Adv. Pro. No. 04-3354
	)	
Debtors.	)	Hon. Mary Ann Whipple
	)	
Thomas S. Zaremba, Trustee,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Berthel Fisher & Company,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION FOR DECLARATORY JUDGMENT AND RELATED RELIEF

Plaintiff Thomas S. Zaremba ("Plaintiff"), as trustee for the liquidation of Continental Capital Investment Services, Inc. ("CCIS"), and Continental Capital Securities, Inc. ("CCS"), has filed Plaintiff's

Motion for Declaratory Judgment and Related Relief. The motion seeks a declaration that Berthel Fisher & Company ("Defendant") is contractually obligated to deposit certain funds into escrow irrespective of the validity or extent of certain claims that Defendant asserts against CCIS. At the hearing on the motion, Plaintiff clarified that the motion also seeks an order requiring Defendant to make such escrow deposit. Substantively, the motion raises a straightforward issue of contractual interpretation. After reviewing the motion, supporting affidavit, and reply brief and Defendant's response and supporting affidavit, and after hearing the arguments of counsel, the court will deny Plaintiff's motion.

The court has jurisdiction over this adversary proceeding under 15 U.S.C. § 78eee(b)(2)(A) and (4), 28 U.S.C. § 1334(b) and (e), and the order entered by the United States District Court for the Northern District of Ohio on October 1, 2003, in the action styled *Securities Investor Protection Corp. v. Continental Capital Investment Services, Inc., and Continental Capital Securities, Inc.*, No. 3:03CV7496. This is a core proceeding that this court may hear and determine under 28 U.S.C. § 157(b)(1) and (b)(2)(A), (E), (F), (H) and (O).

UNDISPUTED MATERIAL FACTS

On January 21, 2003, Defendant entered into a Stock Purchase Agreement with Continental Capital Corporation ("CCC"), whereby Defendant agreed to purchase CCC's stock in CCIS and Continental Capital Insurance Services, Inc. ("CCINS"). (Complaint for Turnover, Accounting and Recovery of Preferential and Fraudulent Transfers ¶ 13 [hereinafter cited as Complaint]; Answer and Affirmative Defenses of Defendant Berthel Fisher & Company ¶ 13 [hereinafter cited as Answer].) On or about March 28, 2003, Defendant entered into an Amended and Restated Stock and Asset Purchase Agreement with CCC and CCIS, whereby Defendant agreed to purchase CCC's stock in CCINS and to purchase from CCIS certain of its assets and to assume certain of its liabilities. (Complaint ¶ 15, Ex. B; Answer ¶ 15.) This agreement was amended on April 16, 2003, April 30, 2003, and May 22, 2003 (collectively the "Purchase Agreement"), and by a Closing Agreement dated May 30, 2003. (Complaint ¶ 15; Answer ¶ 15.)

Under Section 3.2 of the Purchase Agreement, the initial consideration for the purchase was shares of stock in Defendant and the assumption of certain of CCIS's liabilities. (Complaint Ex. B p. 3.)[1] Under Sections 3.3 and 3.4 of the Purchase Agreement, certain additional consideration, called "Deferred Consideration," and "Contingent Consideration," respectively, would be payable at certain points in time and under certain circumstances. (Complaint Ex. B pp. 3-5.) Under Section 5.2 of the Purchase Agreement, Defendant was also obligated to make to CCIS certain quarterly payments calculated on commissions earned by former CCIS brokers in consideration of consulting services to be provided by Continental. Defendant had the right under Section 5.4 of the Purchase Agreement to suspend commission payments if it gave notice of a claim pursuant to Article 14, captioned Liability Limitations and Indemnity, and to offset them against any claim. (*Id.* p. 6.)

On or about May 29, 2003, Defendant consummated the purchase of the CCIS assets and assumed the CCIS liabilities. (Complaint ¶¶ 17-18; Answer ¶¶ 17-18.) The parties abandoned those provisions of the Purchase Agreement providing for Defendant to purchase CCC's stock in CCINS. (Complaint ¶ 15; Answer ¶ 15.) Under Section 3 of the Closing Agreement, the initial consideration (stock in Defendant) was deposited into escrow at closing (Pl.'s Mot. for Decl. J. and Related Relief ¶ 12; Def.'s Mem. in Opp'n to Trustee's Mot. for Decl. Relief and Related Relief ¶ 9), and the Deferred Consideration and the Contingent Consideration ("Supplemental Consideration") was to be added to the escrow if and when it came due:

> Deferred Consideration. Any cash or Berthel Common Stock required to be paid or delivered by Berthel to CCINV[2] in respect of Deferred Consideration as set forth in Section 3.3 of the Purchase Agreement, as amended, shall (unless subject to the provisions of Section 5) be delivered to the Depositary Agent (as defined in the Escrow Agreement) and shall upon such delivery become part of the Escrow Fund.

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[1] Exhibit B to the Complaint is a composite exhibit of the various agreements and is not numbered seriatim. The page reference numbers the court is using were derived counting the cover page of Exhibit B as page one; this is how the pages are numbered when viewing the document electronically.

[2] All of the initials get confusing. Debtor Continental Capital Investment Services, Inc., abbreviated for theoretical ease of reference in this memorandum and more generally in these proceedings as CCIS, was abbreviated by the parties for reference in the Purchase Agreement and Closing Agreement as CCINV.

> Contingent Consideration. Any cash, Berthel Common Stock or warrants for Berthel Common Stock to be paid or delivered by Berthel to CCINV in respect of Contingent Consideration as set forth in Section 3.4 of the Purchase Agreement, as amended, shall (unless subject to the provisions of Section 5) be delivered to the Depositary Agent and shall upon such delivery become part of the Escrow Fund.

(Complaint Ex. B p. 79 [Closing Agreement § 3.b.,c.]) Section 5 of the Closing Agreement provides that, if CCIS failed to deliver to Defendant the commissions for previous transactions due to CCIS brokers who went to work for Defendant, Defendant could pay the brokers and "offset the amounts paid as provided in Section 6." (Complaint Ex. B p. 79.) Section 6, in turn, reads as follows:

> SETOFF. If when [*sic*] Berthel owes to CCINV, CCINS, Continental or the Depositary Agent any payments or deliveries as provided in this Closing Agreement or the Purchase Agreement, as amended, (including, without limitation, the payments and deliveries set forth in Section 3 of this Closing Agreement, amounts owed to Continental for the use of the Bryan, Ohio facility and amounts owed to CCINS as provided in Section 2 of this Closing Agreement) Berthel may retain such payments or deliveries and may setoff such payments and deliveries against any amount owed to Berthel by CCINV or Continental, including, without limitation, (a) losses, damages, costs and expenses (as stated in Section 14.2 of the Purchase Agreement, as amended) that Berthel has incurred (or within a period of six months reasonably expects to incur), (b) the principal and accrued interest due on a promissory note issued to BERTHEL by CONTINENTAL in the principal amount of $50,000, (c) the principal and accrued interest due on a promissory note issued by CCINV to BERTHEL in the principal amount of $250,000 and (d) commissions elected to be paid by Berthel as set forth in Section 5 of this Closing Agreement. From time to time, upon the request of CCINV, CCINS or Continental, but not more frequently than monthly, Berthel shall provide to CCINV, CCINS and Continental a statement showing (i) the payments or deliveries due from Berthel to CCINV, CCINS or Continental that have been setoff as provided in this Section and (ii) the losses, damages, costs and expenses that Berthel expects to incur within six months of such statement against which Berthel expects to offset payments and deliveries.

(*Id.* p. 80.)

The parties also executed an Escrow Agreement dated May 30, 2003, which contained provisions similar to Section 3.b. and c. of the Closing Agreement quoted above:

> <u>Deferred Consideration.</u> Any shares of Berthel Common Stock or cash payments required to be delivered or paid by Berthel after the date of this Agreement and prior to the Expiration Date in respect of Deferred Consideration as set forth in Section 3.3 of the

Purchase Agreement shall (unless subject to the provisions of the Closing Agreement providing for the setoff of such amounts in certain circumstances) be delivered or paid to the Depositary Agent and shall upon such delivery or payment become part of the Escrow Fund.

Contingent Consideration. Any warrants for Berthel Common Stock ("Berthel Warrants") (and any shares of Berthel Common Stock to be issued upon exercise of Berthel Warrants) to be delivered by Berthel after the date of this Agreement and prior to the Expiration Date in respect of Contingent Consideration as set forth in Section 3.4 of the Purchase Agreement shall (unless subject to the provisions of the Closing Agreement providing for the setoff of such amounts in certain circumstances) be delivered to the Depositary Agent and shall upon such delivery become part of the Escrow Fund.

(Complaint ¶ 19, Ex. D § 1.c., d.; Answer ¶ 19.) Section 2.a. of the Escrow Agreement, upon which Plaintiff relies in connection with the motion before the court, provides:

> The Escrow Fund shall be available to compensate Berthel and its officers, directors, employees or agents, for any and all payments and disbursements made or reasonably expected to be made by Berthel, its officers, directors, employees or agents (including attorneys' fees and other expenses of litigation, and amounts paid in settlement), directly or indirectly, for, as a result of or on account of, losses ("Losses") for which indemnification is recoverable pursuant to Section 14.2 of the Purchase Agreement by Berthel or any of its officers, directors, employees[,] owners, agents or Affiliates.

Under Section 8 of the Escrow Agreement, claims against the Escrow Fund for Losses are subject to mandatory arbitration.

Defendant has never paid or delivered any of the Supplemental Consideration to the Depositary Agent under the Escrow Agreement.

PROCEDURAL BACKGROUND

On August 25, 2003, the Securities Investor Protection Corporation filed a Complaint and Application in the United States District Court for the Northern District of Ohio, seeking to commence the liquidation of CCIS and CCS pursuant to the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa-78lll. On October 1, 2003, the District Court entered an order commencing the liquidation proceeding and referring it to this court.

On September 21, 2004, Plaintiff filed the complaint initiating this adversary proceeding. Count One of the complaint seeks the turnover of the Supplemental Consideration or, in the alternative, the delivery thereof to the Depositary Agent pending a final determination of the parties' respective rights. Count Two seeks the avoidance of a certain alleged transfer as a preference. Counts Three and Four seek the avoidance, under the Bankruptcy Code and Ohio law, respectively, of a certain alleged transfer as a fraudulent conveyance. On November 18, 2004, Defendant filed an answer, responding to the averments of the complaint and asserting certain affirmative defenses, including that (a) it holds setoff rights against any amounts due to CCIS, (b) Plaintiff must assume the Purchase Agreement as an executory contract before Defendant need perform its obligations thereunder, (c) CCIS has breached the Purchase Agreement, (d) certain unspecified exceptions to preference avoidance found in 11 U.S.C. § 547(c) are applicable, and (e) Defendant constitutes a good faith transferee within the meaning of 11 U.S.C. § 548(c).

On December 27, 2004, Plaintiff filed the motion presently before the court. The motion was accompanied by an affidavit of a certified public accountant to the effect that the conditions precedent to Defendant's obligation to remit the Supplemental Consideration have been satisfied. Plaintiff contends that, under Sections 2.a. and 8 of the Escrow Agreement, Defendant must remit the Supplemental Consideration to the Depositary Agent for addition to the Escrow Fund irrespective of whether Defendant holds setoff rights against CCIS.

Despite Plaintiff's insistence that he his not seeking summary judgment, the court will treat the motion as a motion for partial summary judgment under the standards of Rule 56 of the Federal Rules of Civil Procedure, which applies in this adversary proceeding through Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"). Declaratory judgment is a remedy created by 28 U.S.C. § 2201. Rule 7001 of the Bankruptcy Rules requires an action for declaratory judgment to be commenced as an adversary proceeding. Rule 57 of the Federal Rules of Civil Procedure specifies that the "procedure for obtaining a declaratory judgment shall be in accordance with these rules...." Curiously, Rule 57 is one of the few rules not incorporated into the Bankruptcy Rules. Notwithstanding the absence of Rule 57 from the Bankruptcy Rules, there must still be a procedural avenue for awarding a declaratory judgment, be it through default judgment proceedings, summary judgment proceedings or trial. Other courts have

determined that summary judgment is suitable for declaratory judgment actions. *Iams Co. v. Falduti*, 974 F.Supp. 1263, 1269 (E. D. Mo. 1997); *State Farm Mutual Automobile Ins. Co. v. Morga (In re Morga)*, 31 B.R. 356, 358 (Bankr. N. M. 1983). Thus, the motion in effect seeks partial summary judgment on the alternate relief sought by Count One of the complaint initiating this adversary proceeding:

> Pursuant to 11 U.S.C. § 542, the Trustee is entitled to the immediate payment and turnover by Berthel Fisher of any and all Supplemental Consideration. In the alternative, Berthel Fisher should be required to comply with the express requirements of the SPA and immediately deposit all Supplemental Consideration into escrow with F & M Bank.

(Complaint ¶ 36; *id.* at p.10.)

On March 30, 2005, Defendant filed a memorandum in opposition to Plaintiff's motion, which asserts that the various agreements between the parties expressly authorize Defendant to retain the Supplemental Consideration pending a resolution of its setoff rights. The response was accompanied by an affidavit of Defendant's Chief Financial Officer, essentially acknowledging that, but for Defendant's setoff rights, certain portions of the Supplemental Consideration would be due and payable to the Depositary Agent. The amounts allegedly owed to Defendant that it claims may be offset include (1) commissions that Defendant claims it paid to CCIS brokers that Defendant employed, (2) legal fees comprising Losses within the meaning of Section 14.2 of the Purchase Agreement, (3) interest on that portion of the legal fees that has been reduced to a promissory note, and principal and interest due on a separate, $50,000 note, and (4) other expenses "associated with certain Losses." (Aff. of Ronald O. Brendengen ¶ 6.d.) Defendant asserts that additional amounts may be owed to it by virtue of pending litigation brought against CCIS and Defendant by former customers, officers, and directors of CCIS, but that Defendant cannot yet quantify such amounts.

LAW AND ANALYSIS

Section 553 of the Bankruptcy Code provides that, except insofar as the automatic stay of "*ipso facto*" clauses are concerned, "this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case." 11 U.S.C. § 553(a). There are certain exceptions to that general rule, *id.* § 553(a)(1)-(3), but Plaintiff does not rely on any such

exceptions in seeking the delivery of the Supplemental Consideration to the Depositary Agent irrespective of Defendant's setoff rights. Rather, Plaintiff asserts that Defendant is contractually prohibited from asserting setoff rights unless and until it has delivered the Supplemental Consideration to the Escrow Fund.[3]

The Purchase Agreement, the Closing Agreement and the Escrow Agreement each contain a choice of law provision specifying that the rights and obligations of the parties shall be governed by the laws of the State of Iowa applicable to contracts made and to be performed in that state. (Complaint Ex. B p. 41[Purchase Agreement § 15.10.]; p. 83 [Closing Agreement § 9.d.];Complaint Ex. D p. 10 [Escrow Agreement §12. e.]) Under Iowa law, where the language of a contract is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids, and it must be enforced as written. *See Montgomery Properties Corp. v. Economy Forms Corp.*, 305 N.W.2d 470, 476 (Iowa 1981)*; Mopper v. Circle Key Life Ins. Co.,* 172 N.W.2d 118, 124 (Iowa 1969) (noting that it is the duty of the courts to give effect to the language of the contract in accordance with its plain and ordinary meaning, and not make a new contract for the parties). The court concludes that the contract provisions in issue governing and the interplay between Defendant's setoff rights and its obligation to deposit the Supplemental Consideration in the Escrow Fund are plain and unambiguous.

Section 6 of the Closing Agreement applies when Defendant "owes to CCINV, CCINS, Continental *or the Depositary Agent* any payments or deliveries as provided in this Closing Agreement or the Purchase Agreement" (emphasis added) and "any amount" is owed to Defendant by CCIS or Continental. In the event of such mutual debts, Defendant is expressly authorized to "retain such payments or deliveries and may setoff such payments and deliveries against *any amount* owed to Berthel by CCINV or Continental" (emphasis added). Plaintiff contends that Defendant is barred from asserting its claims until after remitting the Supplemental Consideration to the Depositary Agent, but Section 6 clearly authorizes Defendant to "retain" "payments or deliveries" owed to the Depositary Agent, as well as sums owed to

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[3] Plaintiff disputes in his reply certain of Defendant's claimed setoffs. But no evidence is provided to support the arguments contesting claimed setoff amounts and entitlements. That issue is not before the court on Plaintiff's motion and the court is not deciding whether any of Defendant's claimed setoffs are valid.

CCIS, CCINS, or CCC.[4] Under subsections Section 3.b. and 3.c. of the Closing Agreement, the Supplemental Consideration "shall (unless subject to the provisions of Section 5) be paid or delivered to the *Depositary Agent*...." (emphasis added). Under these provisions, Defendant is entitled to retain and setoff the Supplemental Consideration without first delivering it to the Depositary Agent to become part of the Escrow Fund.

Plaintiff argues that Section 2.a. of the Escrow Agreement requires payment into escrow before asserting setoff rights. While that provision does make the Escrow Fund "available" to compensate Defendant for Losses for which indemnification is recoverable under Section 14.2 of the Purchase Agreement and portions of Defendant's claims appear to fall within that category, Section 2.a. by no means *requires* Defendant to seek such Losses only from the Escrow Fund. That is one alternative available to Defendant, but it is not the only remedy. If Defendant elected the option of seeking recovery from the Escrow Fund (by way of an officer's certificate), the arbitration provision in Section 8 of the Escrow Agreement would then come into play. But the requirement of arbitration if Defendant chooses to assert a claim against the Escrow Fund does not impose a requirement that Defendant elect that course of action, particularly in light of the unequivocal language of Section 6 of the Closing Agreement. Indeed, Section 6 explicitly provides that Defendant may withhold payments or deliveries to the Depositary Agent on account of, among other things, "Losses, damages, costs and expenses (as stated in Section 14.2 of the Purchase Agreement, as amended)." Thus, Sections 2.a. and 8 of the Escrow Agreement do not preclude the remedy of setoff with respect to Section 14.2 Losses. In addition, Section 1 of the Escrow Agreement itself recognizes the setoff rights, by requiring the delivery or payment of Supplemental Consideration to the Depositary Agent "unless subject to the provisions of the Closing Agreement providing for the setoff of such amounts in certain circumstances."

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[4] Section 6 of the Closing Agreement does require Defendant to provide statements as to amounts that have been offset or are anticipated to be subject to setoff against the assets to be paid or delivered by Defendant, but that requirement only applies "upon the request of CCINV, CCINS or Continental," and Plaintiff has offered no evidence that any such request was made. Indeed, Defendant asserts that it has provided such statements, and Plaintiff has offered no evidence to the contrary. In any event, the language of Section 6 does not make the delivery of such statements a condition precedent to the exercise of setoff rights.

Plaintiff seeks a determination that the agreements between the parties require the payment and delivery of the Supplemental Consideration to the Depositary Agent under the Escrow Agreement before asserting any setoff rights with respect thereto. The pertinent sections of those agreements provide exactly the opposite, expressly authorizing Defendant to "retain" any assets otherwise payable or deliverable to the Depositary Agent if there are amounts due from CCIS to Defendant. Whether any such amounts are actually owed to Defendant is the ultimate issue presented by Count One of the complaint. Section 1 of the Escrow Agreement and Section 6 of the Closing Agreement clearly permit Defendant to retain the Supplemental Consideration pending a resolution of that ultimate issue. There is no genuine issue of fact material to Plaintiff's motion and, under those undisputed material facts, Plaintiff is not entitled to the judgment it seeks as a matter of law. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c).

THEREFORE, for the foregoing reasons,

IT IS ORDERED that Plaintiff's motion for declaratory and other relief [Doc. #18] is denied.