Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	
	)	
Continental Capital Investment Services, Inc., and Continental Capital Securities, Inc.,	)	Bankruptcy Adv. Pro. No. 03-3370 SIPA Liquidation
	)	
Debtors.	)	
	)	Hon. Mary Ann Whipple
Securities Investor Protection Corporation,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Continental Capital Investment Services, Inc., et al.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION REGARDING MOTIONS FOR SUMMARY JUDGMENT

The matter before the court in this broker-dealer liquidation proceeding is the claim of John M. Counter ("Counter"). The specific issue raised by the parties' cross-motions for summary judgment is whether Counter has a customer claim protected under the Securities Investor Protection Act , 15 U.S.C. § 78aaa, *et seq.* ("SIPA"), and is, therefore, entitled to share in the distribution of "customer property" in

Debtors' liquidation proceeding and to advances on account of his claim from the Securities Investor Protection Corporation ("SIPC").

The court has jurisdiction over this liquidation proceeding under 15 U.S.C. § 78eee(b)(4). For the reasons that follow, the court will grant SIPC's motion for summary judgment and will deny Counter's motion for summary judgment.

PROCEDURAL BACKGROUND

On September 29, 2003, upon a Complaint and Application filed by SIPC against Continental Capital Investment Services, Inc., and Continental Capital Securities, Inc., (collectively, "CCSI" or "Debtors"), the United States District Court for the Northern District of Ohio entered an order finding that CCSI's customers are in need of the protections afforded under SIPA and appointing a trustee for Debtors' liquidation, thus commencing the liquidation proceedings of Debtors. Thomas A. Zaremba was appointed as the liquidation trustee ("Trustee"). The district court ordered that the case be removed to this court for further proceedings in accordance with § 78eee(b)(4).

Under SIPA, all customer claims against CCSI must be filed with the Trustee. 15 U.S.C. § 78fff-2(a)(2). Under this court's order entered on November 20, 2003, setting forth, among other things, procedures for the resolution of claims, if the Trustee determines that the claim is not allowed, in whole or in part, he is required to notify the claimant in writing of such determination. [Doc. # 36, p.6]. Thereafter, the claimant is required within thirty days to file with the court an opposition to the Trustee's claim determination. [*Id.* at 7].

Counter filed a claim with the Trustee for cash in the amount of $191,608.66. [SIPC Ex. A]. By letter dated December 29, 2005, the Trustee notified Counter that his claim was being denied. [Claimant's Ex. 4]. The Trustee concluded that "[Counter's] losses are the result of the loss in value of [his] investments and that such losses are not protected by SIPA." [*Id.* at 2]. Counter filed with the court a timely opposition to that determination. [Doc. # 300]. The claim is now before the court on cross-motions for summary judgment filed by SIPC and the Trustee [Doc. # 443], on the one hand, and claimant Counter, on the other hand [Doc. #444], as well as the parties' respective oppositions [Doc. ## 465 & 467] and replies [Doc. ## 474 & 475].

FACTUAL BACKGROUND[1]

Counter's investments at issue began on or about October 19, 1998, after receiving a personal injury settlement from a railroad company that employed him. He attended a series of meetings with William Davis in October 1998 at CCSI offices. Davis was a director and officer of CCSI. [Case No. 05-3147, Doc. # 1, Complaint ¶ 16 and Doc. # 21, Answer ¶ 16].[2] Davis recommended that Counter invest his settlement proceeds in "guaranteed, high interest, absolutely safe" bridge loans that were "secured by property, buildings, equipment and inventory." [Claimant's Ex. 1, Counter Aff. ¶ 4]. Davis assured him that these loans were for those with a "weak stomach" for the stock market and that when they matured, Counter could either obtain the principal and interest or "roll them over, 'no problem.'" [*Id.* at ¶ 5]. Counter was impressed not only with Davis' presentation but also with the promotional materials that were provided to him by Davis, and he began his investment with a cashier's check made payable to "Continental Capital" in the amount of $200,000. [*Id.* at ¶6-7]. At that time, Counter did not know to which companies he would be "loaning" money. [*Id.* at ¶ 7].

In conjunction with Counter's investment, he signed a Securities Account Agreement with WFS Clearing Service, which carried accounts of, and provided account statements to, Debtors' customers.[3] The agreement provides, in part, as follows:

> Communications may be sent to me [Counter] at the mailing address on file with you . . . . The information set forth on all documents sent to me by you will be deemed conclusive

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[1] Counter offers his own affidavit and attached documents in support of his motion for summary judgment. He does not refer to or authenticate any of the attached documents in his affidavit. In support of their motion for summary judgment, SIPC and the Trustee offer the affidavit of counsel for SIPC and the documents attached thereto. In his affidavit, SIPC's counsel states only that he is the Senior Associate General Counsel for Litigation for SIPC and that attached thereto are true and correct copies of ten documents from various sources. While a document may be authenticated by the testimony of a witness, it must be testimony of a witness *with knowledge* that the matter is what it is claimed to be. Fed. R. Evid. 901. Counsel's affidavit fails to set forth facts from which such knowledge can be found. Notwithstanding that documents generally must be authenticated by an affidavit in order to be considered by the court at the summary judgment stage, *E.g.*, *Carmona v. Toledo,* 215 F.3d 124, 131 (1st Cir. 2000)*; United States v. Billheimer*, 197 F. Supp. 2d 1051, 1058 n.7 (S.D. Ohio 2002), no objections have been raised with respect to any document offered by the parties and the court will therefore consider all of them.

[2] The court takes judicial notice of the contents of its case docket. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (6th Cir. 1979) (stating that judicial notice is particularly applicable to the court's own records of litigation closely related to the case before it).

[3] According to SIPC and the Trustee, Debtors were introducing firms and used WFS Clearing Services to perform the clearing services of a securities broker-dealer, including, among other things, the holding of customers' cash and/or securities, carrying of accounts and effecting transactions, and providing account statements to customers. Although this explanation is presented in a footnote of their brief, they offer no evidence of the relationship between Debtors and WFS Clearing Services. Nevertheless, Counter does not dispute this relationship and, in fact, acknowledges its existence in his opposition brief. [*See, e.g.,*Doc. # 467, p. 8 ("The first of Counter's WFS Account Statements show the $200,000.00 being placed in the CCSI account on October 20, 1998, and the entire $200,000.00 going out of the account over a period of three days. . . .")].

unless objected by me within 10 days of its being provided.

[SIPC Ex. I-C, unnumbered p. 2].

The first account statement received by Counter was for the period October 20, 1998, through October 31, 1998. [SIPC Ex. D]. That statement reflects Counter's deposit of the cashier's check in the amount of $200,000 on October 20, 1998. Under "Account Activity," the statement shows seven withdrawals over a period of three days, leaving him with a zero cash balance. The statement provides only the following information regarding the withdrawals:

10 21	WITHDRAWAL	CHK ISS #BR80311738	-30,000.00
10 22	WITHDRAWAL	CHK ISS #BR80311743	-25,000.00
10 23	WITHDRAWAL	CHK ISS #BR80311750	-50,000.00
10 23	WITHDRAWAL	CHK ISS #BR80311751	-55,000.00
10 23	WITHDRAWAL	CHK ISS #BR80311747	-25,000.00
10 23	WITHDRAWAL	CHK ISS #BR80311748	-5,000.00
10 23	WITHDRAWAL	CHK ISS #BR80311749	-10,000.00

[*Id.*]. Notwithstanding the withdrawals made from the cash account, under "Current Portfolio," described on page two of the statement as "[a] listing of the individual assets (grouped by category) in your portfolio at the end of the statement period," the statement reflects no assets in Counter's portfolio. [*Id.*]. The second page of the statement, entitled "Understanding Your Statement," also includes language that the "statement shall be deemed conclusive if not objected to within 10 days." *Id.* There is no dispute that Counter did not pose an objection to this statement within ten days. In fact, there is no evidence that Counter ever objected to the fact that the $200,000 was withdrawn from his account.

Six Letters of Authorization were utilized in October 1998 as authority to issue checks from Counter's account, each purportedly signed by both Counter and Davis.[4] [*See* Claimant's Ex. 8]. According to Counter, he *may* have signed one blank Letter of Authorization, but no more. These documents purport to provide Counter's authorization for the issuance of checks payable to the following entities and for the following transactions noted therein:

1. $5,000 payable to Howard & Dorothy Butterfield Trust (with the notation - "Purchase of 1000 shares of Eclipse common stock");

2. $10,000 payable to Al Simon (with the notation - "Purchase of 2,000 shares of Eclipse common stock");

3. $50,000 payable to Active Leisure, Inc. (with the notation - "Purchase of Preferred 3 stock");

[4] Each Letter of Authorization includes the number of Counter's account with CCSI and a direction to "Please use this letter as your authority to issue a check as follows." [Claimant's Ex. 8].

4. $25,000 payable to Continental Sports Management, LLC (with the notation - 15% - 9 month note - July '99");

5. $55,000 payable to Americus Communications (with the notation - "15% 2 year Note");

6. $25,000 payable to Richard Lock Trust (with the notation - "Purchase of New England Ribs, Inc., Note).

[*Id.*]. A Letter of Authorization for the seventh transaction noted in his initial account statement is not in evidence and, in any event, according to Counter, was never signed by him. Also according to Counter, he had no knowledge that these Letters of Authorization were used to issue checks from his account until they were produced to his counsel in 2003 as part of a separate proceeding before the Securities and Exchange Commission.

After the initial account statement was sent to Counter, he continued to receive account statements from WFS Clearing Services through December 1999 and, thereafter, from First Clearing Corporation at least through December 2002.[5] [SIPC Ex. A-3]. Each of these subsequent statements list under his portfolio 1,000 shares of Eclipse stock valued at zero with a notation that this "unpriced security" is not reflected in the portfolio value. [*Id.*]. No other investments are listed. Counter did not pose an objection to any of these account statements.

After Counter had tendered his $200,000 to CCSI, he received an informal typewritten statement setting forth the following information regarding the investment of his funds:

Investment Amount	Company	Yield-Maturity	Estimated Annual Return	Actual Return
30,000	ADM Document Systems	12% April 99	3,600	
25,000	New England Ribs, Inc.	15% Nov 99	3,750	
25,000	Continental Sports Management	15% July 99	3,750	
50,000	Active Leisure Preferred B Stock	12% -daily	6,000	
55,000	Americus Communications	15% Nov-00	8,250	
15,000	Eclipse, Inc.	Daily		
200,000			25,350	

[Claimant's Ex. 6].

Counter states that he was told his investment in Eclipse was "a loan or some other debt instrument like a bond" and that he did not learn that this investment was actually in the form of stock until August

[5] Although First Clearing Corporation performed clearing services beginning in early 2000, the account statements provided reflect the same account was being serviced throughout the entire period.

2000. [Claimant Ex. 1, Counter Aff. ¶ 12, 19]. Only then did he receive the stock certificates, one of which pre-dated his $200,000 investment by more than two weeks. [*Id.* at ¶ 19; *see* SIPC Ex. E].

Also, despite numerous requests, Counter did not receive copies of any of the promissory notes until February 2000. The notes he eventually received were signed by either Davis or William Faulkner, also an officer of CCIS,[6] or, in the case of the New England Ribs note, was unsigned. Also, according to Counter, the Notes he received in 2000 were not secured notes. [Claimant Ex. 1, Counter Aff. ¶ 11].

Between January 6, 2000, and December 3, 2001, Counter received various checks in connection with the above described investments, as partial payments of either principal or interest on the various notes. [*See* SIPC Exs. G, F]. The checks, which totaled $102,751.23, were drawn on accounts held in the names of Americus Communications, ADM Document Systems, Continental Capital Merchant Bank LLC, and Continental Capital Corporation. One of the checks Counter received, dated March 10, 2000, in the amount of $10,000, was drawn on an account in the name of Continental Capital Merchant Bank LLC, with the notation "For Refund of Shares" but was explained by Davis as being a partial payment of principal on Counter's investment in New England Ribs. [SIPC Ex. F, unnumbered p. 3].

Over a period of approximately three months, from August 3, 2000, through November 1, 2000, Counter communicated with CCSI in writing on seven different occasions. [*See* SIPC Ex. I, ¶ 13 and Ex. I-F]. Each of his written communications discusses some aspect of the investments at issue in this case:

August 3, 2000:	lists things needed after a meeting with "Patty," including a note for the New England Ribs investment that he had never received, a certificate for Eclipse stock; seeks to "reinstate: CSM at ($33,000) that includes principal and interest," to "reinstate: Americus Comm. at ($69,000) includes principal and interest," and progress on liquidation of ADM Documents;
August 14, 2000:	instructs that if a note on New England Ribs cannot be produced, he will take all principal and interest on this note; seeks information on the "Liquidation of ADM" and discusses the purchase of Active Leisure Shares;
August 16, 2000:	instructs that current amount of the New England Ribs note is to be rolled over;
Sept. 6, 2000:	states New England Ribs note still needs to be signed and seeks information on liquidation of ADM Document Systems as well as the purchase of Active Leisure stock;
Oct. 3, 2000:	seeks "reinstatement" of New England Ribs note

[6] *See* Adv. No. 05-3318, Doc. # 1, Complaint ¶ 18 and Doc. # 29, Answer ¶ 18.

Oct. 10, 2000:	states he has changed his mind and wants to "close out" the New England Ribs note and "take all principal and interest;"
Nov. 1, 2000:	requests payment of New England Ribs note and requests meeting with Davis to discuss "Active Leisure deal."

[SIPC Ex. I-F, unnumbered pp. 6, 9, 12-16].

Counter does not dispute that he did, in fact, "reinstate" or reinvest the principal and interest due on the Americus Communications and Continental Sports Management notes in new notes issued in 2000 and that the reinvestment transactions were conducted at a meeting between Counter and Davis at the CCSI offices. [*See* SIPC Ex. I-E, ¶¶ 77-78; Ex. H, p. 2; Ex. I, p.2; Claimant's Ex. 9, unnumbered pp. 12-13].

Counter never received all of the principal and interest owed on the notes at issue, despite months of requests for payment. He sought the advice of an attorney in June 2001 after receiving a fax transmission from the individual to whom he had repeatedly directed his communications requesting a signed New England Ribs note. The fax offered the same excuse as to why he had not yet received the signed note (the person that needed to sign was on vacation) as was offered the previous August, and, in fact, was the same fax, but with a new date, that he had received the previous August. (Claimant's Ex. 1, ¶ 23, SIPC Ex. F, unnumbered pp. 10, 17]. Thereafter, Counter commenced a series of legal actions.

On January 9, 2002, Counter filed a complaint in the United States District Court against Continental Capital Securities, Inc., and others connected with his investments. [SIPC Ex. I-E]. In that complaint, he alleges, among other things, that Davis made material misrepresentations regarding the risk associated with the notes at issue in this case ("Notes"), including that the Notes were secured by "'property, buildings, equipment, and inventory' in an amount greater than the amount loaned through Defendant Continental Capital Corporation and/or Continental Capital Securities to the five (5) companies issuing the Notes and Stock," [*Id.* at ¶¶ 58, 61, 66-67], that Davis led investors to believe that the Eclipse stock was actually a "'guarantied loan' with terms substantially similar to the Notes," [*Id.* at ¶¶ 4, 59], and that he relied to his detriment on these false representations when he invested his money in 1998 and when he reinvested the principal and interest due and owing from the Americus and Continental Sports Management notes in 2000, [*Id.* at ¶¶ 70-71, 77-78]. He alleged that each of the transactions at issue "was induced by a series of materially false and misleading representations and omissions." [*Id.* at ¶¶ 5-7]. Based on these false representations, Counter asserted claims of violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934, violations of Ohio Revised Code §§ 1707.42 and 1707.43, as well as common law fraud, negligent misrepresentation and breach of fiduciary duty. In addition, he asserted violations under the Securities Act

of 1933 and Ohio Revised Code § 1707.44(C)(1), based on allegations that the Notes were not registered or exempt from registration with either the Securities and Exchange Commission ("SEC") or the Ohio Division of Securities, and breach of contract claims.

Counter was precluded from pursing his complaint in federal district court based upon an arbitration clause contained in his Securities Account Agreement. Therefore, he pursued arbitration of his claims before a National Association of Securities Dealers ("NASD") Dispute Resolution panel, asserting the same claims, with the exception of the breach of contract claims, as those asserted in district court. [*See* SIPC Ex. J, p. 2, "Case Summary"]. In neither forum did he assert a conversion claim or specifically allege that the transactions at issue were unauthorized, nor did he assert any complaint relating to his investment in Active Leisure stock. Continental Capital Securities, Inc., Continental Capital Corporation, Davis, and others, were named as respondents in the arbitration proceeding. While the arbitration panel found Continental Capital Corporation, Davis and others liable to Counter for compensatory damages, it did not adjudicate any issues as to Continental Capital Securities, Inc., due to the automatic stay in effect after SIPC commenced proceedings against that entity in district court. [*Id.,* unnumbered pp. 2-3].

Counter also filed complaints with the SEC and the Ohio Division of Securities in 2002 with respect to the Americus and Continental Sports Management notes only. [SIPC Exs. I & J]. In both of those complaints, he alleged the same misrepresentations being made by Davis in 1998 as he alleged in his district court complaint. [*Id.*]. As in the district court complaint and arbitration proceeding, he did not allege that the transactions were unauthorized.

After the commencement of liquidation proceedings of CCSI, Counter filed a claim for cash and a supplement to his claim with the Trustee (collectively, "claim"), seeking the principal and interest owed on the Notes and the Eclipse stock, less payments received by him as set forth above, as well as, for the first time, recovery of his $50,000 investment in Active Leisure stock. [SIPC Ex. A; Claimant's Ex. 3]. In his claim, he sets forth the same representations made by Davis in October 1998 as alleged in each of the previous legal proceedings discussed above, including that he was told that his investment in Eclipse was in the form of a debt instrument, not stock. He also states that "Davis and CCSI invested $50,000 of Counter's money in a company called Active Leisure" and that "this investment was and is worthless." [SIPC Ex. A, Attachment to Customer Claim Form, p.2]. He explains in his claim that forged Letters of Authorization were used to distribute money from his securities account in furtherance of a Ponzi scheme and that he was unaware that these payments were being made. He claims customer status under SIPA based on the assertion that his funds were unlawfully converted.

LAW AND ANALYSIS

I. Summary Judgment Standard

This case is before the court upon the parties' cross-motions for summary judgment. Under Federal Rule of Civil Procedure 56, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a party will prevail on a motion for summary judgment when "[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). In order to prevail, the movant must prove all elements of the cause of action or defense. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). Once that burden is met, however, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249-51 (1986); *60 Ivy St. Corp. v. Alexander,* 822 F.2d 1432*,* 1435 (6th Cir. 1987). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-88 (1986).

In cases such as this, where the parties have filed cross-motions for summary judgment, the court must consider each motion on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not in itself establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Rule 56 does not automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

II. Overview of Arguments

In his motion for summary judgment, Counter claims customer status under SIPA based on his claim that Debtor engaged in unauthorized trading resulting in the misappropriation or conversion of his cash investment. In response, SIPC argues that Counter is not a "customer" under SIPA because he did not invest, or intend to invest, in "securities" as defined by SIPA. Also, in its motion, SIPC argues that Counter's actions since his initial cash deposit preclude a finding of unauthorized trading and that, in any event, he is estopped from arguing that the transactions at issue were not authorized due to his failure to object to those transactions in a timely manner. SIPC also argues that, in light of arguments made in the

NASD arbitration proceeding, judicial estoppel precludes Counter's claim that the transactions were unauthorized. Finally, SIPC argues that Counter's claim is, at bottom, a claim for fraud and market loss that is not protected under SIPA.

Because the undisputed facts demonstrate that the nature of Counter's claim is one for fraud and market loss and also demonstrate Counter's failure to timely object to the transactions at issue and, in effect, his ratification of the transactions, the court will grant SIPC's motion and will deny Counter's motion for summary judgment. The court need not address SIPC's separate arguments that the disputed investments do not constitute "securities" under SIPA or its judicial estoppel argument.

III. Summary Judgment Motions

SIPA was enacted after a wave of brokerage house failures in the late 1960s in order to protect the assets of investors that are held by securities broker-dealers who become insolvent. *Sec. Investor Prot. Corp. v. Pepperdine Univ. (In re Brentwood Sec., Inc.)*, 925 F.2d 325, 326 (9th Cir. 1991). As explained by the Supreme Court:

> Customers of failed firms found their cash and securities on deposit either dissipated or tied up in lengthy bankruptcy proceedings. In addition to its disastrous effects on customer assets and investor confidence, this situation also threatened a 'domino effect' involving otherwise solvent brokers that had substantial open transactions with firms that failed. Congress enacted the SIPA to arrest this process, restore investor confidence in the capital markets, and upgrade the financial responsibility requirements for registered brokers and dealers.

Sec. Investor Prot. Corp. v. Barbour, 421 U.S. 412, 415 (1975).

SIPA affords limited financial protection to "customers" of an insolvent securities broker-dealer by, among other things, giving said customers preference in the distribution of a separate fund of customer property over general creditors. *In re Bell & Beckwith,* 66 B.R. 703, 705 (N.D. Ohio 1986). In addition, SIPC, a federally chartered non-profit corporation created under SIPA, maintains a fund from which it will advance funds, within certain limits, to pay allowable customer claims where an insolvent brokerage firm's customer property is insufficient to satisfy customer net equity claims. *See In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 72-73 (2d Cir. 2004); 15 U.S.C. § 78fff-3(a). The statute permits SIPC to advance up to $500,000 for each customer claim, except that the amount advanced to satisfy a claim for cash, as distinct from a claim for securities, is limited to $100,000. 15 U.S.C. § 78fff-3(a). SIPC may also make advances up to the statutory limits pending a determination of the sufficiency of customer property to satisfy customer claims for net equity, with SIPC then subrogated to the customer claims paid to the extent of its advances. 15 U.S.C. § 78fff-3(a). Not all investor losses, however, qualify for SIPC protection. The fund administered by SIPC may not be used for payment of claims against the broker that do not fall within the narrow

statutory scope of a "customer claim," with "customer" a term of art defined by SIPA as follows:

> any person . . . who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer from or for the securities accounts of such person for safekeeping, with a view to sale, to cover consummated sales, pursuant to purchases, as collateral security, or for purposes of effecting transfer. The term "customer" includes any person who has a claim against the debtor arising out of sales or conversions of such securities, and any person who has deposited cash with the debtor for the purpose of purchasing securities. . . .

15 U.S.C. 78lll(2). Claimants not awarded customer status are relegated to sharing in the general estate with other general creditors of the firm. 15 U.S.C. § 78fff-2(c)(1).

Courts have uniformly applied the definition of customer narrowly in order to carry out the clear legislative intent to protect those who invest in securities. *See, e.g., Stafford v. Giddens (In re New Times Sec. Servs., Inc.)*, 463 F.3d 125, 127 (2d Cir. 2006); *Sec. Investor Prot. Corp. v. Wise* (*In re Stalvey & Assocs., Inc.*), 750 F.2d 464, 472 (5th Cir. 1985); *In re A.R. Baron,* 226 B.R. 790, 795 (Bankr. S.D.N.Y. 1995); *In re Kline*, *Maus & Shire, Inc.*, 301 B.R. 408, 418 (Bankr. S.D.N.Y. 2003)(collecting cases). Thus, "customers" include those who have entrusted securities to the brokerage in the ordinary course of its business and those who have deposited cash with the brokerage for the purpose of purchasing securities. *Focht v. Heebner (In re Old Naples Sec., Inc.*, 223 F.3d 1296, 1300 (11th Cir. 2000); *In re Brentwood Sec., Inc.*, 925 F.2d at 327. So long as such property is owed to the investor on the SIPA filing date, the investor has a "customer" claim. *Klein, Maus & Shire, Inc.*, 301 B.R. at 419. However, "SIPA does not protect customer claims based on fraud or breach of contract. The Act is designed to remedy situations where the loss arises directly from the insolvency of the broker-dealer." *In re Bell & Beckwith*, 124 B.R. 35, 36 (Bankr. N.D. Ohio 1990); *see also Stafford,* 463 F.3d at 127; *In re John Dawson & Assoc., Inc.*, 289 B.R. 654, 661 (Bankr. N.D. Ill. 2003); *Sec. Investor Prot. Corp. v. Oberweis Sec., Inc. (In re Oberweis Sec., Inc.)*, 135 B.R. 842, 846 (Bankr. N.D. Ill 1991) (claims based on fraud or breach of contract are not considered part of a customer's protected net equity claim since damage would have occurred even if debtor had not become insolvent).

Customer status is determined as of the filing date of a debtor's liquidation. *Stafford*, 463 F.3d at 127. "Claimants seeking 'customer' status under SIPA bear the burden of proving they fit within the statutory definition." *Ahammed v. Sec. Investor Prot. Corp. (In re Primeline Sec. Corp.*), 295 F.3d 1100, 1107 (10th Cir. 2002) (citing *Sec. Investor Prot. Corp. v. Wise (In re Stalvey & Assocs.)*, 750 F.2d 464, 472 (5th Cir.1985)); *see* 15 U.S.C. § 78fff-2(b) (requiring that the SIPC trustee "promptly discharge . . . all obligations of the debtor to a customer . . . insofar as such obligations are ascertainable from the books and

records of the debtor or are otherwise established to the satisfaction of the trustee").

In this case, it is undisputed that CCSI's records of Counter's account show a zero cash balance at the time this proceeding was commenced in 2003. Nevertheless, Counter bases his claim for cash on alleged unauthorized purchases in 1998 of the Notes and the Active Leisure and Eclipse stock from funds deposited in his account. Courts have recognized, and SIPC does not argue otherwise, that SIPA protection may extend to instances of unauthorized trading. *See, e.g., Klein, Maus & Shire, Inc.,* 301 B.R. at 419 ("The fact that the property is missing, perhaps due to unauthorized trading, does not affect 'customer' status."); *Sec. and Exchange Comm'n v. S.J. Salmon & Co., Inc.,* 375 F. Supp. 867, 871 (S.D.N.Y. 1974)*; John Dawson & Assoc.,* 289 B.R. at 662; *In re C.J. Wright & Co., Inc.*, 162 B.R. 597, 607-08 (Bankr. M.D. Fla.1993)(court distinguishes cases cited that denied customer status based on fraud or breach of contract from those based on unauthorized transactions). As one court explained in discussing the purposes of SIPA, "[l]egislative attention was focused on the small investor who suffered significant losses when a brokerage house collapsed, often because the house had in its last days misappropriated the investor's funds to its own use." *Sec. and Exchange Comm'n v. Packer, Wilbur & Co., Inc.*, 498 F.2d 978, 984 (2d Cir. 1974).

However, courts have found that evidence of a timely and contemporaneous objection is essential to a claim that a disputed transaction was unauthorized. *Klein, Maus & Shire, Inc.*, 301 B.R. at 419; *John Dawson & Assoc.*, 289 B.R. at 663. A timely objection gives the broker a chance to correct a disputed trade. In the absence of such an objection, customers can use unauthorized or mistaken trades as a means to play the market with impunity and complain only if a trade becomes a losing proposition. *Richardson Greenshields Sec., Inc. v. Lau*, 819 F. Supp. 1246, 1259-60 (S.D.N.Y.1993). Therefore, although SIPA contains no express objection requirement, courts have generally enforced provisions in broker-customer agreements requiring a written notice of objection within a ten-day period of time after the customer receives confirmation of a transaction. *See, e.g., In re Modern Settings, Inc. v. Prudential-Bache Sec., Inc.*, 936 F.2d 640, 646 (2d Cir. 1991) (citing cases); *In re John Dawson & Assoc., Inc.*, 271 B.R. 561, 566 (Bankr. N.D. Ill. 2001).

In this case, the Securities Account Agreement signed by Counter provides that the "information set forth on all documents sent to [Counter] . . . will be deemed conclusive unless objected by [Counter] within 10 days of its being provided." [SIPC Ex. I-C, unnumbered p. 2]. Also, account statements sent monthly to Counter provided that "this statement shall be deemed conclusive if not objected to within 10 days." [SIPC Ex. D, p. 2]. There is no dispute that Counter did not pose a timely objection to any of the transactions at issue. In fact, although the original transactions occurred in October 1998, there is no

evidence of an objection of any kind, let alone an objection based on a claim of unauthorized trading, until 2002, when he filed complaints in the United States District Court and with the SEC and the Ohio Division of Securities. Even then, Counter did not allege that he had not authorized the purchase of the four Notes. Rather, he alleged that the transactions "were induced" by Davis' fraudulent misrepresentations and that he relied on these representations when he invested his money in 1998 and when he reinvested the principal and interest due and owing from the Americus and Continental Sports Management notes in 2000. [SIPC Ex. I-E at ¶¶ 5-7, 70-71, 77-78]. And he raised no complaint at all regarding the purchase of the Active Leisure stock until he filed his claim with the Trustee in this proceeding, stating only that "this investment was and is worthless." [SIPC Ex. A, Attachment to Customer Claim Form, p. 2].

There is also no dispute that Counter received the account statement that clearly shows that he had deposited $200,000 into his customer account and that seven withdrawals totaling $200,000 occurred within three days after his deposit, leaving him with a cash balance of zero in his account. Counter did not object to the withdrawals.

Counter does not argue that he had no knowledge of the objection requirement. Rather, he states that he did not object to the information reported on the statements because the statements did not provide him with sufficient information to object. While it is true that the initial account statement provides information only as to the amount of the withdrawals and not as to the specific investments purchased, to the extent that Counter argues that he did not authorize withdrawals for the purchase of *any* investments on his behalf, his actions clearly demonstrate otherwise. Although the account statements do not list, with the exception of the 1,000 shares of Eclipse stock, the companies in which his money was invested, it is undisputed that Counter received an informal written statement from CCSI listing those companies. Not only did he not object to the withdrawals, he repeatedly requested copies of the Notes evidencing his investments. When he did receive such copies in the year 2000, he states that the Notes were not secured notes. Nonetheless, Counter chose to "roll over" his investment in two of the promissory notes, the Americus Communications and Continental Sports Management notes, thus, reinvesting in those companies.

Nevertheless, Counter argues that the requirement of a timely objection should not preclude him from claiming customer status because he is an unsophisticated investor. Courts have recognized instances warranting a flexible application of contract provisions requiring an objection within a specified time. In *Modern Settings, Inc.*, the court identified two such circumstances. The first is where there is a disparity in sophistication between a brokerage firm and its customer. *In re Modern Settings, Inc.*, 935 F.2d at 646 (citing *Karlen v. Ray E. Friedman & Co. Commodities*, 688 F.2d 1193, 1200 (8th Cir. 1982) ("When a

customer lacks the skill or experience to interpret confirmation slips, monthly statements or other such documents, courts have generally refused to find that they relieve a broker of liability for its misconduct."). The second is where the broker is estopped from invoking the written notice of objection clause if the broker's own assurances or deceptive acts forestall the customer's filing of the required written complaint. *Id.*

Even assuming that Counter is an unsophisticated investor,[7] no special skill or experience other than the ability to read was required to interpret his account statements. His initial statement clearly shows that $200,000 was deposited and $200,000 was thereafter withdrawn, leaving a cash balance of zero. Thereafter, his account statements clearly showed a cash balance of zero with a portfolio that included Eclipse stock. Although Counter relies on copies of allegedly forged Letters of Authorization used by Davis to direct the withdrawal of funds from Counter's account as proof that the transactions were not authorized by him, after receiving his account statement showing the withdrawals, his account statements put him on notice of those withdrawals and he did not object.

Counter's written communications with CCSI between August and November of 2000 also provide undisputed evidence of his knowledge of the transactions at issue and, at least, his acquiescence in those investments. In those communications, he requests the Eclipse stock certificate, discusses the progress of ADM Document Systems' liquidation and his desire to buy additional shares of Active Leisure stock with funds from the liquidation. The undisputed evidence is wholly inconsistent with Counter's claim that he never authorized or acquiesced in the transactions at issue.

Although it is true that three of the Letters of Authorization used by Davis to withdraw funds from Counter's account directed funds to be transferred to entities other than the company in which the investment was being made, each included a notation indicating the purpose of the transfer was to purchase either Eclipse stock or the New England Ribs note. There is no evidence indicating that the companies in which Counter's money was invested were non-existent companies. And Counter does not argue that the Notes and stock were never issued. He argues only that the Notes were not secured as represented by Davis and that he believed the Eclipse stock was a debt instrument until he learned otherwise in August 2000.

With respect to the Notes, the court concludes that Counter's claim that he was induced by Davis's misrepresentations to invest in the companies that are the subject of the disputed transactions is one for fraud that is not entitled to SIPA protection. *Cf. Stafford*, 463 F.3d at 130 (claim was not a customer claim under

[7] Counter states in conclusory fashion in his briefs that he is an unsophisticated investor but provides no evidence or affidavit testimony from which the court could so conclude.

SIPA where claimant was fraudulently induced to swap SIPA-protected investment for nonprotected transaction); *In re Bell & Beckwith*, 124 B.R. at 35-36 (claim that investors were persuaded to purchase shares of stock by being provided inaccurate insider information was a claim based on fraud and, thus, not a customer claim under SIPA); *In re Gov't Sec. Corp.*, 90 B.R. 539 (Bankr. S.D. Fla. 1988) (claim of fraud by broker who sold claimants securities due to non-disclosure of premium being charged and lies regarding purchase price is not a SIPA-protected claim); *In re MV Sec., Inc.*, 48 B.R. 156 (Bankr. S.D.N.Y. 1985) (where essence of claim was fraud or overreaching on the part of broker in inducing investor to purchase securities unsuitable to claimant's investment needs, claim is not SIPA-protected); *Sec. and Exchange Comm'n v. S.J. Salmon & Co., Inc.,* 375 F. Supp. 867 (S.D.N.Y. 1974) (claim that authorization was fraudulently induced is a fraud claim that must be pursued as a general creditor). These courts reason, and this court agrees, that SIPA does not protect such claims based on fraud since the claimant's loss is not the result of the insolvency of the broker or caused by the liquidation of the broker, which are the types of causes of loss that SIPA was enacted to remedy. *See, e.g., In re Bell & Beckwith*, 124 B.R. at 36; *In re Gov't Sec. Corp.*, 90 B.R. at 542.

With respect to the Eclipse stock, while CCSI may have initially purchased the stock without authorization since Counter originally believed he was investing in a debt instrument, Counter's failure to object to the purchase, notwithstanding the reporting of the stock in his account statements and, at least by mid-2000, his receipt of the stock certificates, defeats his claim that he never authorized or acquiesced in the purchase. *Cf. Sec. and Exchange Comm'n v. Howard Lawrence & Co., Inc.*, 1975 Bankr. LEXIS 15 (Feb. 14, 1975) (where claimant authorized purchase of stock in one company but another company's stock was purchased, court finds no authorization since he asked for his money back but was led to believe that he had to pay additional money to "pry loose" his original funds).

Finally, with respect to the Active Leisure stock, the undisputed evidence is that Counter not only never objected to the purchase of the stock but sought to purchase additional shares of the stock. In his customer claim filed with the Trustee, he argues only that the stock was and is worthless. SIPA does not protect customers from market losses. *Sec. and Exchange Comm'n v. Albert & Maguire*, 560 F.2d 569, 572 (3d Cir. 1977).

CONCLUSION

Based on the undisputed evidence, and for the reasons discussed above, the court finds, as a matter of law, that Counter cannot prevail on his claim of unauthorized trading due to his failure to timely object to, and his acquiescence in, the transactions. Counter's assertion of unauthorized trading is too recent in

its genesis to be a cognizable customer claim under SIPA. The court further finds, as a matter of law, that Counter's claim relating to the Notes is a fraud claim that must, if at all, be pursued as a general creditor, and his claim relating to the Active Leisure stock is a claim for market loss not protected by SIPC. As such, the court will grant SIPC's motion for summary judgment and will deny Counter's motion for summary judgment. A separate order in accordance with this memorandum of decision will be entered by the court.