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 CROSS-MOTIONS FOR SUMMARY JUDGMENT

The matter before the court in this broker-dealer liquidation proceeding is the claim of Nicholas and Sylvia Lopez (collectively "Claimants"). The specific issue raised by the parties' cross-motions for summary judgment is whether Claimants have a customer claim protected under the Securities Investor Protection Act , 15 U.S.C. § 78aaa, *et seq.* ("SIPA"), and are, therefore, entitled to share in the distribution of "customer property" in Debtors' liquidation proceeding and to advances on account of their claim from the Securities Investor Protection Corporation ("SIPC").

The court has jurisdiction over this proceeding under 15 U.S.C. § 78eee(b)(4). For the reasons that follow, the court will grant the motion for summary judgment filed by SIPC and the liquidating trustee and will deny Claimants' 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, "Debtors"), the United States District Court for the Northern District of Ohio entered an order finding that Debtors' 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 S. Zaremba was appointed as the liquidation trustee ("Trustee"). The district court ordered that the case be removed to bankruptcy court for further proceedings in accordance with § 78eee(b)(4).

Under SIPA, all customer claims against Debtors must be filed with the Trustee. 15 U.S.C. § 78fff-2(a)(2). This court entered an order on November 20, 2003, directing the Trustee to provide notice to Debtors' customers and other creditors on or before December 5, 2003, of the procedure for filing claims in this case and notice in accordance with the provisions of 15 U.S.C. § 78fff-s(a)(3) that no claim will be allowed unless filed and received within six months from the date of the notice, that is, by June 5, 2004. [Doc. # 35 (Amended Notice), 36, p. 2 (Nov. 20 order); *see also* Doc. # 65, p. 2 (Status Report indicating that the required notice was mailed by December 5, 2003)]. The November 20, 2003, order also set forth, among other things, procedures for the resolution of claims. [Doc. # 36, p.6-7]. If the Trustee determines that a 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 objection to the Trustee's determination. [*Id.* at 7].

Claimants filed with the Trustee a timely claim, including attached documentation, for cash in the amount of $233,250. In response to a request from the Trustee, Claimants provided additional information concerning their claim by letter dated June 7, 2004, with attached exhibits. [*Id.* at C232-0084 through C232-0232]. By letter dated April 4, 2006, the Trustee notified Claimants that their claim was being denied. [SIPC Ex. C]. The Trustee concluded that their investments in "ADM, IVES, Eclipse, Americus, and Centrum were legitimate investment transactions" and that although Claimants claimed that some of the investments were unauthorized, they "received, and accepted, interest payments based on these investments." [*Id.* at 1-2]. The Trustee further concluded that their "loss resulted from the performance of these investments" and that "such losses are not compensable under SIPA." [*Id.* at 2]. Claimants filed with

the court a timely objection to that determination. [Doc. # 347]. The claim is now before the court on cross-motions for summary judgment filed by SIPC and the Trustee [Doc. # 722], on the one hand, and Claimants, on the other hand [Doc. # 721], as well as the parties' respective oppositions [Doc. ## 729 & 730], replies [Doc. ## 746 & 744], and sur-replies [Doc. #753 & 759].

FACTUAL BACKGROUND

The following facts, unless otherwise stated, are undisputed. All of the transactions that form the basis of Claimants' claim were the result of investment directives sent by William Davis to United Missouri Bank of Kansas City, N.A., ("UMB"), which is the trustee of the Employees' Profit Sharing Plan and Trust of Toledo Clinic, Inc., ("the Plan") pursuant to the Plan's Master Trust Agreement. [Claimants' Ex. A-1 & Ex. I, ¶ 1]. Davis was a director and officer of both Continental Capital Securities, Inc.,[1] ("CCS"), a securities broker-dealer and a debtor in this case, and Continental Capital Corporation ("CCC"), which is not a debtor in this case. [Case No. 05-3147, Doc. # 1, Complaint ¶ 16 and Doc. # 21, Answer ¶ 16].[2] Claimant Nicholas M. Lopez ("Lopez") is a physician who is or was employed by Toledo Clinic, Inc. and who is a participant in the Plan. Claimant Sylvia Lopez is his wife.

I. The Continental Capital Entities

CCS is a Michigan corporation that first filed for authority to do business in Ohio in 1984 under the name Continental Capital Corporation, charter/registration number 633097. [*See* Doc. # 746, SIPC Reply, Ex. C, unnumbered pp. 1, 18, 21, 31, 36-37]. In March 1991, the company changed its name from Continental Capital Corporation to Continental Capital Securities, Inc., and registered as such in Ohio. [*See id.* at unnumbered pp. 36-37]. The Continental Capital Corporation that exists today and that was operating throughout the 1990's is a separate Ohio corporation, incorporated in January 1991 under charter number 786999. [*Id.* at unnumbered pp. 1, 4-9]. A related but separately incorporated entity is Continental Capital Advisors, Inc., which is also not a debtor in this case. [*Id.* at 1; Claimants' Ex. J, Davis Depo. p. 25].

II. The Transactions in Issue

Under the Master Trust Agreement, UMB maintained a separate individual account for the benefit of Lopez, account number 34-0497-33-8. [Claimants' Ex. A-1, ¶ 4.6 & Ex. I, ¶ 1]. Only funds contributed

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[1] According to Davis, CCS was later renamed Continental Capital Investment Services ("CCIS"). [Claimant's Ex. J, p. 65]. Davis was also a director and officer of CCIS. [Case No. 05-3147, Doc. # 1, Complaint ¶ 16 and Doc. # 21, Answer ¶ 16].

[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).

by or on behalf of Lopez were in this account. To the extent that individual accounts are maintained, the Plan permits the individual participant to direct the investment of funds in the account. [*See* Claimants' Ex. A-1, ¶4.6(c) & Ex. I, ¶ 1; SIPC Ex. A, Thiedke Aff. ¶ 5 at p. C232-0049]. The Plan requires that directions from the participant for investments be in writing, signed by the participant and sent to UMB. [Claimants' Ex. A-1, ¶ 4.6(d) & Ex. J, Davis Depo., pp. 68-69]. In order for Davis or any of the entities with which he was affiliated to act as Lopez's investment advisor for his pension plan, UMB required an authorization letter from Lopez naming his investment advisor. [Claimants' Ex. J, Davis Depo., p. 68]. Although such a letter is not in evidence before the court, UMB paid "management fees" to non-debtor Continental Capital Advisors, Inc. from Lopez's individual pension plan account. [*See id.* at pp. C232-0059 and 0198].

Investment directives were prepared by Davis or his staff and were sent to UMB, and funds were obtained from Lopez's individual account under the Plan to purchase various securities. Eight directives,[3] each purportedly signed by Lopez, were sent to UMB directing it to carry out the disputed transactions. According to Lopez, he did not authorize these transactions and his signature was forged on each of the eight directives. [Claimants' Ex. B, Lopez Supplemetal Aff., ¶ 1]. The specific directives Lopez claims to have been forged are as follows:

Directives regarding investments in Centrum Industries, Inc. ("Centrum"):

1. Directive dated October 15, 1993, to purchase 5 units in Centrum, each unit consisting of a $10,000 promissory note and a warrant for the purchase of Centrum common stock. UMB is directed to mail to CCC a check in the amount of $50,000 "payable to the issuer." [Claimants' Ex. C, unnumbered p. 1].

2. Directive dated September 5, 1994, to purchase 1.01 units in Centrum for $11,000, each unit consisting of a $10,000 promissory note with warrants for the purchase of Centrum's common stock. UMB is directed to mail a check in the amount of $11,000 to CCC. [Claimants' Ex. C, unnumbered p. 2].

3. Directive dated March 30, 1996, to purchase 2 units in Centrum, each unit consisting of 12,000 shares of common stock at $1.50 per share, for a total price of $36,000. UMB is directed to make the check payable to Centrum and mail it to CCC. [Claimants' Ex. C, unnumbered p. 3].

Directives regarding investments in Eclipse Inc. ("Eclipse"):

4. Undated directive to purchase 1,000 shares of Eclipse stock at $5.00 per share. UMB is directed to make the check payable to "Virginia Mack" and to send it to CCS.[4] In addition to directing the purchase of Eclipse stock, the directive also directs a $10,000 investment in Aim Constellation Fund,

[3] Although Claimants include nine investment directives as an exhibit to their motion for summary judgment, they acknowledge that one of the directives to purchase 2 units (or 24,000 shares of common stock) in Centrum is duplicative. [*See* SIPC Ex. A at C232-0006].

[4] Although undated, the top of the page indicates that the directive was faxed on June 30, 1996.

an investment that is not at issue. [Claimants' Ex. C, unnumbered p. 5].

5. Directive dated March 22, 1994, to purchase 1/2 unit of Eclipse, consisting of a $6,250 subordinated debenture and 1,250 shares of class B common stock, at a total price of $12,500. UMB is directed to make the check payable to Eclipse and send it to CCC. [Claimants' Ex. C, unnumbered p. 6].

6. Directive dated April 30, 1992, to purchase 2 units of Eclipse at $25,000 each, for a total of $50,000. No further direction is provided. [Claimants' Ex. C, unnumbered p. 7].

7. Directive (with an illegible date) to purchase 2 units of Eclipse, each consisting of one $12,500 subordinated debenture and 2,500 shares of class B common stock.[5] UMB is directed to make the check payable to Eclipse and send it to CCS. [Claimants' Ex. C, unnumbered p. 8].

8. Directive dated March 18, 1997, to purchase 3000 shares of Eclipse stock at $5.00 per share for a total of $15,000. In addition, UMB is directed to purchase 30 shares of Active Leisure, Inc. ("Active Leisure") stock at $1,400 per share for a total of $42,000. The directive states, "Please forward the checks for both purchase[s] directly to [CCS]." A handwritten notation next to the directive to purchase the Active Leisure stock states "Refused to sign." [Claimants' Ex. C, unnumbered p. 9].

Each of the above directives provides, as does the Master Trust Agreement, that UMB is to retain the securities it acquired. [*See* Claimants' Ex. A-1, ¶ 1 & Ex. C]. Directives numbered one through three, five and seven, along with other additional directives, were included as attachments to Claimants' original SIPA claim filed on February 3, 2004. [*See* SIPC Ex. A-4 & A-6]. Directives numbered four, six and eight, along with the other directives listed above, were submitted only with Claimants' June 7, 2004, letter supplementing documentation of their claim. [*Compare id. with* SIPC Ex. A, pp. C232-0223 through 0230].

The securities purchased by UMB with funds from Lopez's individual account were issued in the name of UMB as trustee of the Master Trust Agreement for the benefit of Lopez. [*See* SIPC Ex. A, pp. C232-0089 through 0163]. With respect to directives numbered one through seven above, it appears, as reflected on UMB bank statements for Lopez's individual account dated December 31, 1997, and December 31, 1998, that UMB carried out the directives. [*See* SIPC Ex. A-5]. However, none of the statements before the court indicate that UMB ever acted on the March 18, 1997, directive to purchase an additional 3,000 shares of Eclipse stock or 30 shares of Active Leisure stock. [*See* SIPC Ex. A-5 & A-7; SIPC Ex. B, ¶ 48 (consisting of a state court complaint in which Claimants and UMB allege that UMB "held investments in the companies described in paragraph 14, *except for Active Leisure*, as trustee for the benefit of Dr. Nicholas Lopez") (emphasis added)]. In fact, none of the statements even list Active Leisure as a company in which any investment was made by UMB on Lopez's behalf. [*Id.*; *see also* Claimants' Ex. A-2, unnumbered p. 2

[5] Although the year is illegible in the date in this directive, the stock certificate was issued and the subordinated debenture was executed in January 2003. [*See* SIPC Ex. A, pp. C232-0120 & 0124].

(quarterly report of investments in Lopez's pension plan account provided by Davis and setting forth a list of investments that does not include an investment in Active Leisure)].[6]

After UMB purchased the Centrum and Eclipse securities, it received both interest and dividend payments relating to these investments that were credited to Lopez's individual account, as reflected in the UMB account statements. [*See* SIPC Ex. A-5 at pp. C232-0058, 0067, & 0070].[7] According to Lopez, total interest and dividend payments relating to investments in Centrum and Eclipse in the amount of $72,900, as reflected in the UMB account statements, were received between 1994 and 1998. [*Id.* at p. C232-0084 & 0085].

In addition to Lopez's dealings with Davis relating to investments with funds from his individual pension plan account at UMB, Claimants had three accounts opened at Debtors' clearing firm – separate IRA accounts for both Nicholas and Sylvia Lopez and a joint account in both of their names. [*See* Doc. # 746, Supp. Zaremba Aff., Ex. A; SIPC Ex. A-2; Claimants' Ex. J]. As explained by Davis and William Faulkner, also an officer of the Debtor corporations,[8] any accounts opened for Claimants were held not by Debtors but by a clearing firm. [Claimants' Ex. J, p. 65 (explaining that "the actual accounts are set up with the clearing firm"); Claimants' Ex. K, p. 73-74 (explaining that the account opened pursuant to deposition exhibit 32, which is a new account form for Claimants' joint account, is "held actually by the clearing corporation")].

In mid-1997, Claimants terminated their business relationship with Davis. [Doc. # 744, Claimants' Reply, Ex. L, p. 41; Claimants' Ex. A, ¶ 4].

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[6] The first page of the quarterly report received by Lopez from Davis is a summary of account balances and lists four accounts, one of which is the UMB individual account number 34-497-33-8. [Claimants' Ex. A-2, unnumbered p. 1]. The three additional accounts are IRA accounts for both Lopez and his wife and an account under the name "Nicholas & Sylvia Lopez Education Fund." It also lists under "Additional Items" an investment designated as "MidAm Bank Active Leisure" in the amount of $50,300 "as of December 31, 1995." [*Id.*]. However, as of March 31, 1996, Active Leisure is no longer listed as an investment and is not listed in the pages that follow detailing investments in each account on a quarterly basis from December 31, 1995, through June 30, 1997. [*Id.* at pp. 1-5]. It appears that at least as of December 31, 1995, Lopez owned an investment of some nature in Active Leisure but that this investment was not purchased by UMB for his individual trust account. That this investment in Active Leisure was Lopez's personal investment and not made by UMB on his behalf is consistent with Davis's later letter dated May 24, 2000, stating that the "[t]he enclosed check represents excess interest earned on the bank notes lent to Active Leisure. As you know the loan was paid off some time ago. This check for $1,383.25 is the spread between the bank loan interest paid and the Active Leisure interest earned." [SIPC Ex. A, p. C0232-0218]. The fact that the check was made out to Lopez and not UMB as trustee is also consistent with Lopez's individual ownership of the Active Leisure investment. The investments at issue in this case relate only to purchases made by UMB pursuant to the investment directives listed above.

[7] In addition, as late as December 2003, UMB reports interest income "to be received" from the Centrum and Eclipse investments. [*See* SIPC Ex. A-7, p. C232-0083]. The record is silent, however, as to whether the interest payments were actually made.

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

III. Communications Relating to the Transactions in Issue

In addition to the UMB account statements for Lopez's individual pension plan account, which detail the investments held in that account as well as the interest and dividend payments on account of those investments,[9] [*See* SIPC Ex. A-5 & A-7], Lopez also received, at his request, a report from Davis in June 1997 listing the investments in his pension plan account. With one discrepancy, the report includes the investments in Centrum and Eclipse that UMB was directed to purchase in the investment directives listed above.[10] [Claimants' Ex. A-2, unnumbered p. 2]. Two months earlier, in a letter dated April 30, 1997, Davis explained in detail Lopez's investment in Centrum:

> Your holdings in Centrum are both in common stock and corporate bonds. The Centrum common stock initial investment was $36,000. The current market value of your investment is $66,000. This is a 56% increase in value, in just twelve months. While this early performance is certainly encouraging, I believe developments at Centrum are just beginning. The company will report record sales and earnings for its 96 year end report, ending March 31st. 1997 will also be another record year for Centrum. Based on all the fundamentals of this company, I believe the stock value will increase to the $5.00 range by this time next year. That would put your market value at $120,000. The bonds are yielding 10% and have short (one year) maturities. Both the stock and bonds are readily marketable.

[SIPC Ex. A at C232-0211]. That letter was written in response to Lopez's April 21, 1997, letter to Davis asking for an update on certain investments and in which he instructed that he wanted "no further investments bought or sold at this time and, in particular, Active Leisure and Eclipse." [*Id.* at C232-0210]. According to Lopez, Davis had approached him regarding an investment in Active Leisure but he was not interested. [Claimants' Ex. L, Lopez Depo., p. 41-42].

IV. Legal Action and SIPA Claim

In 2001, Claimants, together with UMB, filed a lawsuit in state court against CCC. They did not name either of the Debtor corporations in the lawsuit. In their complaint, Claimants allege, among other things, that throughout their business contact with Davis, they "made it clear they were only interested in investing in conservative and liquid investment vehicles," that, in fact, Davis placed their funds in various high risk, non-liquid investments, while continuing to assure them that their investment objectives were being followed. [SIPC Ex. B, ¶¶ 6, 8-9]. Claimants further allege that, on April 21, 1997, they had inquired of Davis regarding several investments Davis had previously acquired for them, including investments in

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[9] Although the addressees on the 1997 and 1998 UMB account statements are individuals at Seaway Financial, in Toledo, Ohio, [*See* SIPC Ex. A-5, pp. C232-0055 and 0062], Lopez does not argue that he did not receive these statements on a regular basis and, in fact, has produced the statements as documentation of his claim.

[10] UMB was directed to purchase a total of 4 1/2 investment units in Eclipse; however, the June 1997 report provided by Davis lists only 3 1/2 units.

Centrum, that Davis responded by false representations regarding the value and marketability of their investments in order to induce Claimants to continue their business relationship with him, that Claimants did not take action to liquidate their investments in Centrum and certain other securities in reliance on Davis's representations, and that those securities rapidly declined in value. [*Id.* at ¶¶ 12-17]. In addition, Claimants allege that, on April 21, 1997, they also instructed Davis to neither buy nor sell investments in Active Leisure or Eclipse but that Davis failed to follow their instructions. [*Id.* at ¶¶ 12-13]. Based on these and other allegations,[11] Claimants asserted claims for breach of contract, fraudulent misrepresentation, negligent misrepresentation, breach of duty to provide reasonable investment advice, and breach of fiduciary duty. [*Id.* at ¶¶ 24-46]. On January 5, 2004, a consent judgment in favor of Claimants and UMB and against CCC was entered in the amount of $206,000. [SIPC Ex. A-3].

After the commencement of Debtors' liquidation proceedings, Claimants filed a claim for cash in the amount of $233,250 based on transactions for (1) $86,000 in promissory notes and $36,000 in stock of Centrum Industries and (2) $50,000 in debentures and $61,250 in stock of Eclipse Inc. [SIPC Ex. A, C232-0001, C232-0006 and 0007]. In their claim, they state that "Continental Capital Securities received cash for the securities in question, and Dr. Lopez and Mrs. Lopez have never seen the actual securities. Consequently, Dr. and Mrs. Lopez have a claim for cash under the applicable provisions of Rule 501." [SIPC Ex. A, p. C232-0007]. By letter dated June 7, 2004, Claimants provided additional information in response to the SIPA Trustee's request regarding their claim. [*Id.* at C232-0084 through C232- 0232]. The letter explains that the attached exhibit 1 represents a record of payments received on investments in Eclipse and Centrum, exhibit 2 contains stock certificates for Centrum and Eclipse, as well as subordinated debentures and promissory notes relating to the Centrum and Eclipse investments, and exhibit 3 contains copies of correspondence between Lopez and Davis. [*Id.* at C232-0084]. Claimants further explain in the June 7 letter that "Exhibit 4 contains copies of documents on which Dr. Lopez's signature was forged. I have concentrated these documents on the Centrum Industries and Eclipse investments." [*Id.* at C232-0085]. The letter itself makes no mention of a claim relating to any investment in Active Leisure. After the SIPA Trustee denied their claim, Claimants filed an Opposition to the Trustee's Determination, wherein they state that their claim includes a claim for $42,000 invested in 30 shares of Active Leisure stock, for a total claim in the amount of $275,250, and claiming SIPA customer status based on the fact that their funds were unlawfully converted. [Doc. # 347].

[11] Claimants also alleged that Davis failed to follow their instructions regarding their participation in a certain bridge loan in November 1997. [SIPC Ex. B, ¶¶ 18-20]. This particular investment is not the subject of any of the investment directives at issue in this case.

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 separately 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 their motion for summary judgment, Claimants claim customer status under SIPA based on their assertion that CCS wrongfully obtained and converted cash from Lopez's individual pension plan account at UMB by forging investment directives that were sent to UMB for the purchase of investments in Centrum, Eclipse, and Active Leisure. In response, and in its motion for summary judgment, SIPC argues that Claimants are not "customers" under SIPA because their claim is based on neither cash nor securities deposited with or held by Debtors, and that, in any event, they are estopped from arguing that the transactions at issue were not authorized due to their failure to object to those transactions in a timely manner. SIPC also argues that Claimants' claim is one for fraud and market loss that is not protected under

SIPA. Finally, SIPC argues that Claimants failed to amend their claim to include a claim for cash allegedly converted by CCS for the purchase of Active Leisure stock.

Because there is no evidence that Debtors ever received or held Claimants' cash or securities within the meaning of SIPA, the court will grant SIPC's motion for summary judgment and will deny Claimants' motion for summary judgment. The court does not address the parties' remaining arguments.

III. Claimants are not SIPA "Customers"

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). The statutory framework facilitates the return of customer property held by an insolvent firm and reimburses customers for cash and securities entrusted to the brokerage firm but mishandled or misappropriated by the firm. *Ahammed v. Sec. Investor Protection Corp. (In re Primeline Sec. Corp.)*, 295 F.3d 1100, 1106 (10th Cir. 2002). 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).

The transactions at issue here involve only purchases of certain investments in Centrum, Eclipse, and Active Leisure by UMB with funds allegedly converted by CCS from Lopez's individual pension account. Claimants' claim is based on their contention that Davis, acting as an agent of CCS, submitted investment directives to UMB that contained Lopez's forged signature, and thereby obtained cash for the purchase of the securities at issue. However, Claimants have failed to present any evidence from which the court could conclude that they are "customers" of Debtors as contemplated under SIPA.

First, Lopez's individual account from which funds were obtained to purchase the investments at

issue is held in the name of UMB Bank, N.A., as Successor Trustee of the Toledo Clinic Inc. Master Trust for Nicholas Lopez. There is no evidence that Sylvia Lopez had any interest in those funds. In fact, Lopez states that his claim in this case "is based on money taken out of my ERISA individual account #340497-33-8 maintained at UMB Bank" and that "[o]nly my money was in this account." [Claimants Ex. I, Lopez Second Supp. Aff. ¶ 1]. As Claimants' SIPA claim is based only on funds taken from that account, SIPC and the Trustee are entitled to summary judgment as to any claim of Sylvia Lopez.

While there is no dispute that the funds at issue came from Lopez's individual pension account at UMB, there is no evidence that Debtors, and in particular, CCS, ever received or held, within the meaning of the SIPA statute, any cash from Lopez's individual pension account.[12] For example, there is no evidence that an account ever existed at Debtors in which funds were deposited from the UMB account or in which securities relating to the disputed transactions were held. There is no evidence that Lopez ever received an account statement from Debtors or their clearing firm relating to investments made with funds from Lopez's individual pension account. The account statements submitted by Claimants setting forth the disputed transactions are statements of Lopez's individual pension account held by UMB that were received from UMB. Although Davis did provide, at Lopez's request, a summary of the investments in Lopez's individual pension account in June 1997, the summary identified the account as the "UMB Toledo Clinic Trust Fund" with the UMB account number, [*Compare* SIPC Ex. A-2, p. C232-0038 *with* SIPC Ex. A-5, p. C232-0055], and does not include a securities account number at CCS.

Nevertheless, Claimants argue that the following evidence proves that CCS received or acquired cash from Lopez's UMB account. First, in support of his argument that he had an account at CCS that contained the monies obtained from his UMB account, Claimants rely on deposition testimony of Davis that Debtors "primarily handled" the accounts of "individual investors like Dr. and Mrs. Lopez," [Claimants Ex. J, pp. 25-26], and Faulkner, that he "believe[s]" CCS handled transactions for Lopez, [Claimants Ex. K, p. 71], and that deposition exhibit 32 was a new account form for Claimants. However, both Davis and Faulkner testified that any accounts opened for Claimants were held not by Debtors but by a clearing firm. Moreover, their testimony does not support a finding that funds obtained from Lopez's UMB account were deposited into those accounts. In fact, the evidence is undisputed that Claimants had three accounts that

[12] Although Lopez's claim is a claim for cash, not securities, the court notes that Lopez also does not present any evidence, nor does he argue, that Debtors held the securities purchased as a result of the allegedly forged investment directives. The undisputed evidence indicates that UMB, not Debtors, held the securities acquired in accordance with the investment directives. Specifically, each of the investment directives at issue in this case provide that UMB is "further directed to retain the securities or other assets acquired in accordance herewith until otherwise directed by the undersigned." [Claimants' Ex. C]. Likewise, the Master Trust Agreement provides that trust property shall be held by UMB, as trustee. [SIPC Ex. A-1, p. C232-0012 ¶1; *see also* Thiedke Aff. Ex. A, p. C232-0049 ¶4].

were opened at Debtors' clearing firm – IRA accounts for both Nicholas Lopez and Sylvia Lopez and a joint account in both of their names. The new account form referred to by Faulkner in his deposition and that was marked as deposition exhibit 32 is the joint account opened by Claimants. However, none of these three accounts involve the funds obtained from Lopez's UMB account and, thus, do not relate to their claim in this case. *See Stafford v. Giddens (In re New Times Sec. Servs.)*, 463 F.3d 125, 127 (2d Cir. 2006) ("'The Act contemplates that a person may be a 'customer' with respect to some of his claims for cash or shares, but not with respect to others.'"(citing *SEC v. F.O Baroff Co.*, 497 F.2d 280, 282 n.2 (2d Cir. 1974)); *In re Stalvey & Assoc., Inc.*, 750 F.2d at 471 (explaining that "customer status in the course of some dealings with a broker will not confer that status upon other dealings . . . unless those other dealings also fall within the ambit of the statute"). The testimony to which Claimants point and deposition exhibit 32 thus do not create any genuine issue of material fact.

Claimants also rely on the investment directives themselves as proof that Debtors received the funds sent by UMB in accordance with those directives. Specifically, they rely on the instruction in three of the directives to send the checks required for the purchase of the securities directly to CCS and the instruction in the remaining directives at issue to send the check to CCC, which, according to Claimants referred to the same brokerage firm as CCS.[13] However, with respect to directives instructing UMB to send a check to CCC, the court agrees with SIPC and the Trustee that the use of CCC in the directives does not refer to CCS. While it is true that the original Continental Capital Corporation, a Michigan corporation, was renamed Continental Capital Securities, the renaming occurred in 1991. In 1991, a new corporation, also named Continental Capital Corporation was formed in Ohio. As there is no dispute that all of the directives at issue were submitted to UMB after 1991, the directives' reference to CCC is not a reference to the same company as CCS. Claimants' argument to the contrary is not supported by any evidence.

While it is true that three directives instruct UMB to send a check to CCS, one of those directives is the March 18, 1997, directive instructing UMB to purchase 3,000 shares of Eclipse stock and 30 shares of Active Leisure stock (directive number 8 above). As discussed above, there is no evidence that UMB ever acted on that directive. The other two directives specifically instruct UMB to make the check "payable to Virginia Mack" (directive number 4 above) and to make the check "payable to Eclipse" (directive number 7 above). Similarly, directives numbered 1, 3 and 5 each instruct UMB to make the check required for the purchase payable to the issuer.

[13] Although Claimants include in their argument the April 30, 1992, directive to purchase two investment units of Eclipse (directive numbered 6 above), that directive provided no instruction regarding to whom the check should be sent or to whom it should be made payable.

Although to whom a check is made payable may be a relevant factor, *see In re Brentwood Sec., Inc.*, 925 F.2d at 328 (finding that the debtor was not holding the claimants' cash at any time since they made their checks out directly to the issuer of the stock purchased), as one court explained, whether a claimant "deposited cash with the debtor" does not depend solely on to whom the check was delivered or made payable, *Focht v. Heebner (In re Old Naples Sec. Inc.)*, 223 F.3d 1296, 1302 (11th Cir. 2000). Rather, the relevant inquiry is whether the debtor brokerage firm actually received, acquired or possessed the claimant's property. *Id.* at 1302, 1303-04 (finding the debtor brokerage acquired control over all of the claimants' funds where the claimants' checks were made payable to a related entity and not the debtor but where the funds were used by or for the debtor to pay its expenses). Here, the checks were not made payable to CCS, and there is no evidence that Debtors ever deposited those checks in an account over which they had any control or that they even had the ability to do so. Thus, the court cannot conclude that cash was deposited with CCS so as to confer customer status on Claimants within the meaning of § 78lll(2).

To the extent that Claimants have presented evidence that Debtors, through Davis, committed fraud in causing funds to be withdrawn from Lopez's individual pension plan account at UMB, such a claim is not entitled to SIPA protection and they must look to the general assets of Debtors for any recovery. *See In re Bell & Beckwith*, 124 B.R. at 36.

CONCLUSION

Claimants having failed to meet their burden of proving their customer status under § 78lll(2), the court will deny their motion for summary judgment. SIPC and the Trustee having pointed out the absence of evidence in the record to support Claimants' customer status claim and Claimants having failed to show the existence of any such evidence, the court will grant the motion for summary judgment filed by SIPC and the Trustee. The court will enter a separate order in accordance with this memorandum of decision.