

The court incorporates by reference in this paragraph and adopts as the findings and analysis 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.

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CLERK U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
TOLEDO



Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

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

**MEMORANDUM OF DECISION REGARDING**  
**MOTION FOR SUMMARY JUDGMENT**

The matter before the court in this broker-dealer liquidation proceeding is the claim of Fred C. Durfey fbo David R. Durfey (“Durfey”). The specific issue raised by the motion for summary judgment filed by the Securities Investor Protection Corporation (“SIPC”) and the liquidating trustee is whether Claimant 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 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.

### **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). 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 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.6-7]. Thereafter, the claimant is required within thirty days to file with the court an objection to the Trustee’s determination. [*Id.* at 7].

Durfey filed a claim, designated as claim number 267, with the Trustee for cash in the amount of \$8,417.49. [Doc. # 1008, Zaremba Aff., Ex. A]. By letter dated October 4, 2006, the Trustee notified Durfey that the claim was being denied because the Trustee was not able to locate any account at Debtors in Durfey’s name and because he had allowed and already paid other claims based on the two transactions identified as forming the basis of claim number 267. [*Id.* Ex. B]. Durfey filed with the court a timely objection to that determination. [Doc. # 542]. The claim is now before the court on the unopposed motion for summary judgment filed by SIPC and the Trustee [Doc. # 1007].

### **FACTUAL BACKGROUND**

The following facts are undisputed. Durfey’s claim number 267 is based on two transactions involving Americus Communications – one for \$5,200 dated September 11, 2001, and one for \$2,000 dated September 5, 2001 (“the Americus transactions”). [*See* Doc. # 1008, Zaremba Aff., Ex. A, pp. C267-0001 & 0007]. Although the claim includes attached spreadsheets that reference the Americus transactions, neither the claim nor the spreadsheets refer to any account at Debtors or at First Clearing Corporation, the clearing service used by Debtors. [Zaremba Aff. ¶ 5 & Ex. A]. Similar spreadsheets were prepared for various customers of William Davis, a director and/or officer of Debtors, by his assistant and were used as part of a criminal ponzi scheme for which Davis has been found guilty and sentenced to prison. [*Id.* ¶ 9].

According to the Trustee, the spreadsheets are not necessarily indicative of a customer account and are not necessarily accurate respecting either the existence or value of investments they purport to record. [*Id.*].

On or about the same date as Durfey's claim number 267 was filed, Durfey and other members of his family filed six other claims. In particular, claim number 220 was filed "on behalf of Durfey individually"<sup>1</sup> and sought recovery for various transactions, including one for Americus in the amount of \$5,200. That claim was allowed and paid in an amount that included the \$5,200 Americus transaction. [*Id.* at ¶ 6]. Claim number 266 was filed on behalf of Durfey fbo Debra Durfey and sought recovery for various transactions that included one for Americus in the amount of \$2,000. That claim was also allowed and paid in an amount that included the \$2,000 Americus transaction. [*Id.*]. Claim number 267 is the only one of the Durfey family claims that is the subject of an objection. [*Id.* at ¶ 8].

## LAW AND ANALYSIS

### **I. Summary Judgment Standard**

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). With respect to issues on which the nonmoving party bears the burden of proof, the burden on the moving party may be discharged by pointing out to the court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325. Where the moving party has met its initial burden, the adverse party "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

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<sup>1</sup> In his affidavit, the Trustee refers to Fred C. Durfey fbo David Durfey as "Durfey." [Doc. # 1008, Zaremba Aff. ¶ 5]. While it does not impact the outcome of this motion, it is unclear whether claim number 220 was filed "individually" by Fred C. Durfey or David Durfey.

## II. Durfey Is Not A Customer Entitled To SIPA Protection

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 (9<sup>th</sup> 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). Not all investor losses, however, qualify for SIPC advances. 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” being 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. 78III(2). Claimants not awarded customer status are relegated to sharing in the general estate with other general creditors of the firm and are not entitled to advances from SIPC. 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 (5<sup>th</sup> 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 (11<sup>th</sup> 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 proceeding. *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 (10<sup>th</sup> Cir. 2002) (citing *Sec. Investor Prot. Corp. v. Wise (In re Stalvey & Assocs.)*, 750 F.2d 464, 472 (5<sup>th</sup> 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, an account in Durfey’s name as set forth in claim number 267 cannot be ascertained from Debtors’ books, and the Trustee has already allowed and paid other claims filed by or on behalf of members of the Durfey family that include the Americus transactions in the amount of \$5,200 and \$2,000 that form the basis of claim number 267. Although Durfey contends in his objection that representations were made by Debtor and its agents that an account was established and maintained in the name of Fred C. Durfey fbo David Durfey, that approximately \$10,000 was withdrawn from this account in May 2001, and that a check in the amount of \$6,224.47 was delivered to Debtor with directions to place the funds in this account, [*see* Doc. # 542], it was incumbent upon him, as the party with the burden of proof, to present some evidence showing that there is a genuine issue of material fact as to whether the allegations in his objection are true and that claim number 267 is a “customer” claim as defined by SIPA. He has, however, failed to present any such evidence.

## **CONCLUSION**

SIPC and the Trustee having pointed out the absence of evidence in the record to support Durfey's claim of customer status under § 78Ill(2) with respect to claim number 267, and Durfey 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 the Memorandum of Decision.