
**Dated: November 30 2009**

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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

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

The matter before the court in this broker-dealer liquidation proceeding involves claims filed by J.R. Stevens ("Stevens"). The specific issue raised by the motion for summary judgment filed by the Securities Investor Protection Corporation ("SIPC") and the liquidating trustee is whether Stevens 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 claims 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 in part and deny in part 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., ("CCIS") and Continental Capital Securities, Inc., ("CCS") (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 proceeding 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 and deadline for filing claims in this case. [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].

Stevens timely filed with the Trustee claims for cash in the amounts of $1,090,837.64, designated as claim number 199, and $834,194.42, designated as claim number 201. [Doc. # 1001, Zaremba Aff., Exs. A & B].[1] By letters dated December 29, 2005, the Trustee notified Stevens that his claims were being denied. [Ex. D & E]. As to both claims, the Trustee concluded that the he was unable to verify a nexus between the investments claimed by Stevens and an account with a Debtor and that, to the extent the investments were made, they appear to have been legitimate investments when made. He explained that SIPA does not protect against investment risks, market losses or interest on losses. [ Ex. D & E]. Stevens filed with the court a timely objection to the Trustee's determinations. [Doc. # 299]. The claims are now before the court on the motion for summary judgment filed by SIPC and the Trustee [Doc. # 1001], Stevens's opposition [Doc. # 1319], and SIPC's and the Trustee's reply [Doc. # 1334].

[1] Unless otherwise noted, all exhibits referred to in this opinion are attached to Trustee Zaremba's affidavit.

## FACTUAL BACKGROUND

The following facts, unless otherwise stated, are undisputed. Stevens is a physician who, prior to his retirement in late 1990, was an owner of Regueyra & Stevens, M.D.'s Inc. and participated in the company's profit sharing plan and money purchase plan (collectively, "the Retirement Plans"). [Doc. # 1319, Stevens' Aff. ¶ 5]. The Retirement Plans were invested through William C. Davis ("Davis") at the entity known by Stevens as "Continental Capital." [*Id.* at ¶¶ 3 & 7]. After his retirement in 1990, Stevens was required to move his funds from the Retirement Plans to individual retirement accounts ("IRAs"), which he accomplished with the assistance of Davis by establishing new accounts at "Continental Capital." [*Id.* ¶ 8-9]. Stevens's claims are based upon transactions from as early as 1989 that he contends involved the unauthorized purchase of promissory notes with funds from the Retirement Plan and IRA accounts maintained by "Continental Capital."

### I. The Continental Capital Entities

Debtors were broker dealers and subsidiaries of Continental Capital Corporation ("CCC"). [Doc. # 1001, Zaremba Aff., ¶ 3]. Debtor CCS is a Michigan corporation that first filed for authority to do business in Ohio in 1984 under the name Continental Capital Corporation. [[*See* Doc. # 746, Ex. C, unnumbered pp. 1, 18, 21, 31, 36-37].[2] In March 1991, the company changed its name to Continental Capital Securities, Inc., and registered as such in Ohio. [*Id.* at 36-37]. CCS continued in business until approximately January 2002, at which time its business operations, customers and customer accounts were transferred to CCIS. [Doc. # 1001, Zaremba Aff. ¶ 3]. The Continental Capital Corporation that exists today is a separate Ohio corporation, incorporated in January 1991, and is not a debtor in this proceeding. [Doc. # 746, Ex. C, unnumbered pp. 1, 4-9]. Davis was a director and officer of both CCS and non-debtor CCC.

Debtors were introducing brokers.[3] After February 18, 1994, CCS used WFS Clearing Services, a division of Wheat, First Securities, Inc., to perform clearing services on its behalf, including, among other things, the holding of cash and securities on behalf of Debtors' customers and providing statements of

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[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] Introducing brokers are broker-dealers without the financial resources, technology, personnel, or expertise to clear securities. These broker-dealers enter into clearing agreements and "introduce" their customer accounts to clearing firms to provide a wide range of functions the introducing firms cannot or elect not to perform themselves. Clearing firms "clear" transactions – paying for securities purchased and delivering securities sold in the accounts introduced to them pursuant to clearing agreements. They perform this function as members of clearing houses that are organized in conjunction with the securities exchanges or the over-the-counter markets where the underlying transactions are executed. Henry F. Minnerop, *The Role and Regulation of Clearing Brokers*, 48 Bus. Law. 841, 841-43 (1993).

accounts to Debtors' customers. [Doc. # 1001, Zaremba Aff. ¶ 4 & Ex. B(4), p. 159]. Sometime in early 2000, Wheat, First Securities, Inc., was acquired by First Union Corporation, and the brokerage changed its name to Wheat First Union. Thereafter, the clearing services for CCS and for CCS customers after their accounts were transferred to CCIS were performed by First Clearing Corporation ("First Clearing"). [*Id.* at ¶ 4]. Before February 18, 1994, CCS used the clearing services of Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation ("Pershing"). [Ex. B(4), p. 159; Ex. M].

**II. Stevens's Accounts Relating to Claims 199 and 201**

In support of his claims, Stevens provided a number of spreadsheets describing the investments in his various accounts. [*See* Exs. I, J, K, L]. Stevens did not participate in the production or development of these account spreadsheets [Doc. # 1319, Stevens Aff. ¶ 17]; however, there is no dispute that he did receive them.

Included among those received by Stevens are spreadsheets dated between October 2, 1989, and June 30, 1991, with the heading "Regueyra & Stevens MDS Inc. Profit Sharing Plan & Trust FBO J.R. Stevens, M.D. Account # 3DY-013088." [Zaremba Aff., ¶ 18 & Ex. K]. Stevens also provided a statement for that account that indicates it was a CCS account clearing through Pershing. [Ex. M].

Also included in the spreadsheets received by Stevens are the following: (1) spreadsheets dated between October 2, 1989, and June 30, 1991, with the heading "Regueyra & Stevens MDS Inc. Money Purchase Pension Plan FBO J.R. Stevens Account # 3DY-013096," [Ex. L], and (2) three spreadsheets dated between December 31, 1991, and May 19, 1993, for account # 3DY-039026, two of which include the heading J.R. Stevens, IRA.[4] [Ex. J]. As indicated above, in mid-February 1994, CCS ceased using the clearing services of Pershing and transferred the accounts held by Pershing to WFS Clearing Services. [ Ex. B(4), p. 159]. Stevens received a letter dated March 16, 1994, referring specifically to account # 3DY-039026 and stating the account has been "transferred to another broker-dealer." [Ex. J, unnumbered p. 5]. The letter instructed the investment representative to send all assets and cash to "Continental Capital" account # 7532-8799 ("Account 8799"). [*Id.*]. Account 8799 was an account opened at CCS and cleared through WFS Clearing Services. [Ex. H]. The account was held in the name of Delaware Charter Guarantee & Trust FBO J.R. Stevens MD IRA R/O dtd 3/13/91. [*Id.*].

In addition, account # 7533-2212 ("Account 2212") was an account opened at CCS and cleared through WFS Clearing Services. [Ex. G]. The account was held in the name of Delaware Charter Guarantee & Trust FBO J.R. Stevens IRA. [*Id.*]. Stevens signed an account agreement with WFS Clearing Services

[4] The heading on the third spreadsheet simply states "J.R. Stevens, MD" but indicates it is for account # 3DY-039026. [Ex. J, p. 1].

that included the following provision: "Ratification. The information set forth on all documents sent to me by Wheat will be deemed conclusive unless objected [sic] by me within 10 days of it being provided." [Ex. F, p. 2]. The same provision was included on each account statement received by Stevens for both Account 8799 and Account 2212. [Exs. G & H].

**III. The Disputed Transactions**

Although Stevens does not specifically identify the transactions upon which his claims are based, according to documents attached to the claim, the Trustee identified ten transactions relating to claim # 199 and five transactions relating to claim # 201. In his opposition, Stevens does not refute that the ten loan transactions identified by the Trustee as 199-1 through 199-10 and five transactions identified by the Trustee as 201-1 through 201-5 are those for which he seeks recovery. The transactions involve the alleged use of funds from Stevens's Retirement Accounts and IRAs to purchase promissory notes from the following private placement entities: Americus Communications #1 LP, Americus Communications, Interactive Video Educational Systems, Inc. ("IVES"), and Capital Medical, as well as one promissory note executed on behalf of Continental Capital Corporation. The court sets forth the specific transactions included in Stevens's claims below.

**A. Transactions Relating to Claim 199**

Stevens seeks SIPA protection with respect to the following ten loan transactions included in claim 199:

**1. Transaction 199-1:** A loan on February 12, 1990, in the principal amount of $6,000 plus interest of $15,814.57. [Ex. A, p. 28]. Except for an attached "Amortization Schedule" that does not refer to either Debtor or identify to whom the funds were loaned, the claim includes no evidence of a transaction on this date and in this amount.

**2. Transaction 199-2:** A loan to Americus Communications #1 LP on November 9, 1990, in the principal amount of $30,000 plus interest of $3,600. [*See id.* at 27 & 29]. Pershing issued a check to this company on that date in the amount of $30,000, referencing Stevens's Money Purchase Pension Plan account 3DY-013096 and indicating that "this check is in full settlement" of an Americus Communications 12% 1 year note. [*Id.* at 27]. A spreadsheet dated May 19, 1993, that was received by Stevens sets forth investments under Stevens's IRA account 3DY-039026 and includes this promissory note. [Ex. J, unnumbered p. 2]. According to Stevens, he neither authorized nor knew of this investment, did not receive a copy of the promissory note, and has not received any payment of the note. [Ex. C, Stevens Aff. ¶ 5].

**3. Transaction 199-3:** A loan to "Americus Communications" on October 12, 1989 in the principal amount of $40,000 plus interest of $110,083.94. [Ex. A, pp. 30 & 44]. Pershing issued a check made

payable to "Americus Communications" on that date and in the amount of $40,000, referencing the account of "Regueyra & Stevens FBO Regueyra" and account # 3DY-013112. [*See id.* at 26 & 44]. This transaction does not appear on any spreadsheet provided by Stevens in support of his claim.

**4. Transaction 199-4:** A loan to "Americus Communications" on October 12, 1989, in the principal amount of $60,000 plus interest of $165,125.92. [*See id.* at 25 & 31]. Pershing issued a check made payable to "Americus Communications" on that date and in the amount of $60,000, referencing the account of "Regueyra & Stevens FBO Stevens" and account # 3DY-013088. [*See id.* at 25]. This transaction appears on spreadsheets for account #3DY-013088 that are dated December 31, 1989 and March 30, 1990, and on a later spreadsheet for account # 3DY-039026 that is dated May 19, 1993, a date after Stevens had retired and rolled over his Retirement Plan accounts to an IRA. [Ex. K, pp. 2-3 & Ex. J, p. 2]. According to Stevens, he did not authorize this transaction, did not receive a copy of the promissory note, and the note remains unpaid. [Ex. C, ¶ 2].

**5. Transaction 199-5:** A loan on May 20, 1990, in the principal amount of $50,000 plus interest of $127,200.83. [Ex. A, p. 32]. Except for an attached "Amortization Schedule" that does not refer to either Debtor or identify to whom the funds were loaned, the claim includes no evidence of a transaction on this date and in this amount. According to Stevens, he had no knowledge of this transaction. [Ex. C, ¶ 4].

**6. Transaction 199-6:** A loan to IVES on July 22, 1993, in the principal amount of $10,000 plus interest of $26,179.03. [Ex. A, p. 33]. A Purchaser Confirmation Statement dated July 22, 1993 acknowledging that Delaware Charter Guarantee & Trust Co. FBO J.R. Stevens purchased an IVES debenture that was being resold from another party who was an original purchaser was signed by a Delaware Charter representative. [*Id.* at 45]. The confirmation included the following handwritten notations: "Delaware Charter C/F JR Stevens IRA 3DY-039026" and "Purchase of 1 unit ($10,000) IVES - from UMB - McCarthy." [*Id.*]. According to Stevens, he did not authorize or know of this investment at the time it was made. [Ex. C, ¶ 9]. He did, however, provide the Purchase Confirmation Statement in support of his claim.

Spreadsheets for account # 3DY-013088 and # 3DY-039026, which pre-date this July 22, 1993 transaction, show that Stevens had previously invested in IVES. [Exs. J & K]. Later spreadsheets for account 8799 also describe investments in IVES, Inc. and Ives Technology but do not specifically set forth an investment dated July 22, 1993. Letters sent by IVES regarding Stevens's investments either pre-date the July 22, 1993 investment, [*see* Ex. O, unnumbered pp. 1-8], do not specify to which original investment it is referring [*see id.* at unnumbered pp. 9-14], or are addressed not to Stevens but to the trustee of Stevens's IRA "c/o Continental Capital" at Debtors' address at 5580 Monroe Street, Sylvania, Ohio, [*see* Ex. A, p. 48-51; Ex. G (showing the address for CCS)].

**7. Transaction 199-7:** Loan to "Americus Communications" on May 29, 1992 in the principal amount of $11,000 plus interest of $21,140.95. [*See* Ex. A, pp. 17, 19 & 34]. Pershing issued a check made payable to "Americus Communications FBO JR Stevens MD" on that date and in the amount of $11,000, referencing account # 3DY-039026. [*Id.* at 19]. Also on that date, Davis executed a promissory note for $11,000 on behalf of "Americus Communications" and in favor of "Delaware Charter C/F J.R. Stevens, IRA Account # 3DY-039026." [*Id.* at 17]. An undated Consent, Waiver, and Release refers to this note and is purportedly signed by Stevens.[5] [*Id.* at 16]. Also, while a September 1992 spreadsheet for Stevens's IRA account describes this investment, it does not appear on a May 19, 1993 spreadsheet for the account. [Ex. J, pp. 1-2]. In any event, according to Stevens, he did not authorize or know of this transaction and the note remains unpaid. [Ex. C. Stevens Aff. ¶ 6].

**8. Transaction 199-8:** Loan to Capital Medical Service on July 22, 1993 in the principal amount of $5,000 plus interest of $8,089.52. [*See* Ex. A, pp. 35, 46]. Stevens provided a Purchaser Confirmation Statement dated July 22, 1993, acknowledging that Delaware Charter Guarantee & Trust Co. FBO J.R. Stevens purchased a Capital Medical Service debenture that was being resold from another party who was an original purchaser. [*Id.* at 46]. The confirmation included the following handwritten notations: "Delaware Charter JR Stevens IRA 3DY-039026" and "Purchase of 1/2 unit ($5,000) from FI Regueyra Pension Plan (3DY-013104)." [*Id.*]. At the time of the transaction, Stevens neither authorized nor knew of this investment. [Ex. C, Stevens Aff. ¶ 8].

Spreadsheets for account # 3DY-039026, letters from Capital Medical, and at least one check from Capital Medical made payable to Stevens's IRA, all of which predate the July 22, 1993 transaction, show that Stevens had previously invested in Capital Medical debentures. [Ex. J, pp. 1-2; Ex. P, unnumbered pp. 1-4]. Letters sent to Stevens by Capital Medical after the July 22, 1993, do not specify the debenture to which they refer and at least suggest that they refer to an earlier investment.[6]

**9. Transaction 199-9:** A loan dated November 27, 1990, in the principal amount of $30,000 plus interest of $71,143.38. [*See* Ex. A, p. 36]. In support of his claim, Stevens produced an undated Consent, Waiver, and Release regarding a loan to Americus Communications #1 LP evidenced by a note on that date in the amount of $30,000, [Ex. A, p. 39], and an undated Consent to Refinancing and Subordination

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[5] Although Stevens states that, in early 2003, he became aware that he was the victim of several forgeries committed most likely by or at the direct of William Davis, he does not specify what documents were forged. [*See* Doc. # 1319, Stevens Aff. ¶ 13].

[6] For example, in a letter dated October 13, 1993, less than three months after the July 22, 1993 transaction, Davis states on behalf of Capital Medical that a check is enclosed "for one quarter's interest" and that "[w]ith this payment we are now only one quarter behind in payments." [Ex. P, unnumbered p. 5].

regarding a note in an undisclosed amount dated November 24, 1990, the stated holder of which is Delaware Charter TTE, FBO J.R. Stevens, MD IRA. Both documents are purportedly signed by Stevens.

None of the spreadsheets provided by Stevens include this transaction as an investment in any of his accounts with Debtor. According to Stevens, he did not authorize or know of the November 27, 1990 transaction, did not receive a copy of the promissory note reflecting that transaction, and the note remains unpaid. [Ex. C, ¶ 4].

**10. Transaction 199-10:** A loan to "Americus Communications, Inc." on October 3, 1989 in the principal amount of $60,000 plus interest of $225,636.66. [*See* Ex. A, p. 37]. On that date, Davis executed a promissory note for $60,000 on behalf of "Americus Communications, Inc." and in favor of "Regueyra & Stevens MDS Inc. P/S FBO J.R. Stevens." A note issued on this date and in this amount does not appear on any of the account spreadsheets provided by Stevens. According to Stevens, he did not authorize or know of this transaction and the note remains unpaid. [Ex. C, ¶ 4].

**B. Transactions Relating to Claim 201**

Although Stevens includes five "Amortization Schedules" for transactions relating to Claim 201, an explanation provided by him in support of his claim makes clear that the claim involves only three original transactions. [*See* Ex. B(4), p. 173; Ex B, pp. 6, 8, 10]. Two of the Amortization Schedules included with his claim relate to earlier transactions that allegedly were renewed and interest continued to accrue. [Ex. B, pp. 7 & 9]. For ease in presentation, these transactions are set forth below in reverse order from that presented in the Trustee's motion.

**1. Transaction 201-4 & 201-5:** Two "Amortization Schedules"attached to Claim 201 refer to a loan to "Americus" on June 30, 1994, in the original principal amount of $100,000 that was apparently renewed on June 30, 1995, and under which Stevens claims he is owed, in addition to the principal amount due, $139,412.44 in interest. [*See* Ex. B, pp. 9-10, Ex. B(4), p. 173]. Spreadsheets received by Stevens for account 8799 dated as early as August 31, 1995, through December 31, 2002, include this $100,000 promissory note. [*See* Ex. I, unnumbered pp. 3-7, Ex. B, pp. 23, 35]. However, WFS Clearing Services' June 1994 statement for account 8799 does not show this transaction as having occurred, nor does it show that there were sufficient funds in the account for this transaction to have occurred. [Ex. H, p. 1].

**2. Transaction 201-2 & 201-3:** Two additional "Amortization Schedules"attached to Claim 201 refer to a loan to "Americus" on December 31, 1994, in the original principal amount of $150,000 that was apparently renewed on December 31, 1995, and under which Stevens claims he is owed, in addition to the principal amount due, $192,504.38 in interest. [*See* Ex. B, pp. 7-8, Ex. B(4), p. 173]. Spreadsheets received by Stevens for account 8799 dated as early as August 31, 1995, through December 31, 2002, include this

$150,000 promissory note. [*See* Ex. I, unnumbered pp. 3-7, Ex. B, pp. 23, 35]. However, WFS Clearing Services' statement for account 8799 does not show this transaction as having occurred, nor does it show that there were sufficient funds in the account for this transaction to have occurred. [Ex. H, unnumbered p. 7]. Also, spreadsheets for account 8799 dated between December 31, 2000 and December 31, 2001, reflect that the note was valued at zero by December 31, 1999. [Ex. I, p. 7; Ex. B, pp. 23, 35].

**3. Transaction 201-1:** A loan to non-debtor Continental Capital Corporation on December 31, 2001, in the principal amount of $332,000 plus interest of $56,912.99. [Ex. B., p. 6, 14]. On that date, Davis executed a cognovit promissory note in the amount of $332,000 in favor of "Delaware Charter Guarantee & Trust, ttee fbo J.R. Stevens, MD." [Ex. B, p. 14]. At the bottom of the note is the following notation: "This note incorporates the debt owed by Americus, IVES, Capital Medical and Centrum Industries." [*Id.*]. Although dated December 31, 2001, Stevens was unaware of the note until December 12, 2002, at which time he received a letter from Davis informing him of the note and stating that it "represent[s] your principal investments in Americus Communications, Capital Medical, IVES, Inc. and Centrum Industries" and that the note "renews automatically this year." [*Id.* pp. 24-25].

After learning of the CCC promissory note, Stevens retained counsel and, on March 7, 2003, obtained a judgment on the cognovit note in the amount of $332,000 plus interest at the rate of ten percent per annum. [Ex. B(4), p. 196-97; Ex. C, Stevens Aff. ¶ 12]. Stevens's affidavit in support of that judgment states that the note was executed without his knowledge or consent and that it was provided as substitution of assets in his IRA account with CCIS. [Ex. B(4), pp. 194-95]. Stevens has since collected $32,135.39 in garnishments of CCC accounts. [Ex. C, Stevens Aff. ¶ 12].

Although the total principal and interest of the transactions that form the basis of claim 201 total $970,829.01, Stevens has subtracted not only the amount collected by way of garnishment of CCC's accounts but also amounts reflected in eight checks totaling $106,500 made payable to "JR Stevens IRA" issued by Americus Communications #1 LP between March 4, 1997, and October 4, 1999, [*see* Ex. B, pp. 29-55], and one $25,000 check made payable to "JR Stevens" that was issued by CCS, [*see id.* at 50]. Account 8799 is noted on all of these checks. These amounts reduce Stevens's claim to $834,194.42. Stevens states, however, that he never saw nor received any of these checks and cannot determine whether they were deposited into his account.[7] [Ex. C, Stevens Aff. ¶ 12].

[7] At least with respect to the CCS check issued on December 31, 1996 in the amount of $25,000, it appears that check was issued from Stevens's own account 8799, resulting in a withdrawal from his account on that date. [*See* Ex. H, p. unnumbered p. 17; Ex. B(2), p. 50]. It, therefore, does not appear to be a payment of any amount owed to Stevens.

**IV. The Private Placement Entities at Issue**

Americus Communications #1 L.P. had legitimate business operations relating to the operation of four radio stations in Wisconsin from 1987 until February 1997, at which time the last of its radio stations were sold. [*Id.*, Zaremba Aff. ¶ 24 & Ex. Q]. After February 1997, this company became nothing more than a checkbook that Davis used to facilitate customer theft and a Ponzi scheme. [*Id.*, Ex. Q, p. 1]. The Trustee's investigation revealed similarly named entities used by Davis, including "Americus Communications" and "Americus Communications Corporation," that were fictitious entities never registered in Ohio or Wisconsin or that had no legitimate business operations. [*Id.*].

IVES, Inc. had legitimate business operations from 1983 until at least 1995. [*Id.*, Zaremba Aff. ¶ 25 & Ex. R]. Capital Medical was formed in the late 1980's. It sold its assets and ceased all business operations in the mid-1990's. [*Id.*, Zaremba Aff. ¶ 26].

## 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.*

**II. Overview of Arguments**

Stevens asserts customer status under SIPA, arguing that Debtors held his retirement and IRA accounts and used funds from those accounts without his knowledge or authorization to purchase the

promissory notes at issue. In its motion for summary judgment, SIPC argues that Stevens cannot meet his burden of proving his customer status with respect to those promissory note transactions. Specifically, SIPC argues that (1) there is no evidence that transactions 199-1, 199-5, 199-9, 201-2, 201-3, 201-4 and 201-5 ever occurred, let alone that they occurred as a result of entrusting cash or securities with a Debtor; (2) there is no connection between the transactions for which Stevens seeks SIPA protection in claim 199 and an account at Debtors; (3) the account statements for Account 8799, the account for which Stevens seeks protection in claim 201, show that Stevens did not have sufficient funds in the account to fund transactions 201-2 through 201-5; and (4) there is no evidence that any funds in an account at Debtors were used to fund transaction 201-1. The Trustee also argues that Stevens is estopped from asserting that the transactions at issue were not authorized due to his failure to object to those transactions in a timely manner.

**III. Customer Status Under SIPA**

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 over general creditors in the distribution of a separate fund of customer property. *In re Bell & Beckwith,* 66 B.R. 703, 705 (N.D. Ohio 1986). In addition, SIPC, a non-profit private membership corporation created under SIPA,15 U.S.C. § 78ccc, maintains a reserve fund, 15 U.S.C. § 78ddd, 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, 15 U.S.C. § 78fff-3(a); *see In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 72-73 (2d Cir. 2004). Not all investor losses 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" 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 entitled to customer status are relegated to sharing in the separate general estate with other general creditors of the defunct 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 Klein*, *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 New Times Sec. Servs.,* 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. *New Times Sec. Servs.*, 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, Stevens bases his claims for cash on alleged unauthorized purchases of promissory notes using funds deposited in his accounts with Debtor. 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).

Courts have found, however, 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., 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). Courts have also recognized that "under appropriate circumstances, the failure to object to confirmation slips or monthly account statements may give rise to a ratification even in the absence of a contractual objection requirement." *In re Mason Hill & Co., Inc.*, Case No. 95-99999, Adv. No. 02-8030A, 2004 WL 2659579, 2004 LEXIS 1573 (Bankr. S.D.N.Y. Oct. 18, 2004) (citing *Tripi v. Prudential Sec., Inc.*, 303 F. Supp. 2d 349, 354 & n. 7 (S.D.N.Y. 2003)); *Jakisch v. Thomson McKinnon Sec ., Inc.*, 582 F. Supp. 485, 496-97 (S.D.N.Y.1984)); *cf. Pavlovich v. National City Bank*, 435 F.3d 560, 566 (6th Cir. 2006) (stating that "a failure timely to object to transactions depicted in bank statements generally amounts to ratification").

**A. Transactions 199-1, 199-3, 199-5, 201-1 through 201-5**

The court finds that Stevens has failed to set forth specific facts from which a reasonable factfinder could find that he has customer status under SIPA with respect to transactions 199-1, 199-3, 199-5, and 201-1 through 201-5.

The only evidence offered in support of transactions 199-1 and 199-5 are "Amortization Schedules" that neither refer to Debtors nor identify the source of the schedules. These schedules are insufficient to show that there were funds entrusted with a Debtor, and the record is otherwise silent as to any transaction in the amounts and on the dates that these transactions allegedly occurred.

Transaction 199-3 involves one for which a Pershing check made payable to "Americus Communications" was issued on account of "Regueyra & Stevens FBO Regueyra" and references an account number other than those associated with Stevens's accounts discussed above. None of the spreadsheets in evidence include this transaction. Although Stevens states in his affidavit that "to the best of [his] knowledge and belief" the funds belonged to him rather than to Regueyra and there was an error on the check stub, this averment, which is not based on his personal knowledge, is insufficient to create a factual dispute regarding the source of the funds. *See* Fed. R. Civ. P. 56(e) (requiring an affidavit supporting or opposing summary judgment to be made on personal knowledge).

As to transactions that form the basis of claim 201, Stevens also offers "Amortization Schedules" that neither refer to Debtors nor identify the source of the schedules. In addition, he offers spreadsheets for Account 8799, which account clearly is a Debtor account. Although the spreadsheets reflect Americus Communications promissory notes in the amounts of $100,000 and $150,000 as set forth in transactions 201-2 through 201-5, WFS Clearing Services' statements for account 8799 for the months in which these transactions allegedly took place fail to show that these transactions occurred and, thus, fail to show that cash deposited with or held by Debtors were used to purchase those promissory notes.

As to transaction 201-1, the $332,000 CCC promissory note, there is no evidence that any funds from an account held by Debtors were used to purchase that note. Rather, both Davis's December 2002 letter to Stevens and Stevens's affidavit submitted in support of his state court action on the note acknowledge that the promissory note from non-debtor CCC was simply issued as a substitute for other transactions. Accordingly, the court finds no genuine issue of material fact regarding Stevens's customer status with respect to transactions 199-1, 199-3, 199-5 and 201-1 through 201-5 and will grant SIPC and the Trustee summary judgment as to those transactions.

**B. Transactions 199-2, 199-4, 199-6 through 199-10**

All of these remaining transactions occurred between October 1989 and July 1993, dates before Debtors began using WFS Clearing Services and, thus, before Accounts 2122 and 8799 at Debtors were opened, which accounts were opened using WFS Clearing Services. Thus, SIPC and the Trustee argue that Stevens has failed to show a connection between these transactions and an account at a Debtor. The court disagrees.

The evidence shows that CCS used the clearing services of Pershing during the time period that these transactions occurred and before switching to WFS Clearing Services. Exhibit M is a CCS statement issued through Pershing for account 3DY-013088 held in the name of Regueyra & Stevens MDs Inc. Profit Sharing Plan & Trust FBO J R Stevens. Exhibit L consists of spreadsheets labeled "Regueyra & Stevens MDs, Inc. Money Purchase Pension Plan FBO J.R. Stevens, Account # 3DY-013096. Exhibit J includes spreadsheets labeled Delaware Charter C/F J.R. Stevens, M.D. IRA, Account # 3DY-039026. The evidence suggests that these three accounts were cleared through Pershing. Checks that were issued by Pershing and that relate to several of the remaining transactions specifically refer to the accounts. [*See* Ex. A, pp. 19, 25, 27]. Stevens's affidavit testimony states that his retirement and IRA accounts were always at the entity he knew as "Continental Capital" and that after he retired in 1990 from Regueyra & Stevens MDs Inc., he transferred funds from the Retirement Plan accounts to IRAs, which he accomplished by establishing new accounts at Continental Capital. Viewing all inferences in a light most favorable to Stevens, as the court must do, this evidence, together with evidence that Debtors' accounts cleared through Pershing were eventually transferred to accounts cleared through WFS Clearing Services, a reasonable factfinder could find a sufficient connection between the "Pershing" accounts and Accounts 2122 and 8799 and that these accounts were all accounts at Debtors.

Furthermore, there is sufficient evidence, when viewed in a light most favorable to Stevens, that shows transactions199-2, 199-4, and 199-6 through 199-10 actually occurred. As to transactions 199-2, 199-4, and 199-7, Pershing checks referring to Stevens's Retirement Plan and IRA accounts were issued on the date and in the amount of the alleged loans and were made payable to either "Americus Communications" or "Americus Communications #1 LP." Transaction 199-7 is also evidenced by a promissory note in favor of Stevens's IRA account # 3DY-039026 that was executed by Davis on behalf of "Americus Communications." Each of these transactions is also reported on spreadsheets for Stevens's Retirement Plan and IRA accounts. Although transaction 199-4 is reported on spreadsheets in 1989 and 1990 for Stevens's profit sharing account 3DY-013088 and is later reported on a 1993 spreadsheet for his IRA account # 3DY-039026, this is consistent with Stevens's affidavit testimony that he was required to transfer his Retirement Plan accounts to IRAs after his retirement in 1990.

As to transactions 199-6 and 199-8, purchaser confirmation statements were signed on the specific date of the alleged investments that acknowledge the purchase of debentures of IVES, Inc., and Capital Medical Services, respectively, and specifically note Stevens's IRA account # 3DY-039026 and the dollar amount of the purchases. As to transaction 199-9, a Consent, Waiver and Release refers to a loan to Americus Communications #1 LP on the date and in the amount of the alleged transaction. A Consent to

Refinancing and Subordination and Release also refers to a loan to that entity on that date. Both documents indicate that the loan was held in the name of Stevens's IRA, which, according to Stevens, was an account at an entity known to him as Continental Capital.

And finally, as to transaction 199-10, Stevens submitted a promissory note executed by Davis on behalf of "Americus Communications" on the date and in the amount of the alleged transaction. Although SIPC and the Trustee argue that this transaction and transaction 199-4 are likely only one transaction, both involving the same amount and occurring only nine days apart, that is a factual issue for trial.

As to all of these transactions, Stevens states in his affidavit that he had no knowledge of and did not authorize the transactions. Viewing all of this evidence and inferences from such evidence in a light most favorable to Stevens, a reasonable factfinder could conclude that he entrusted funds to Debtors and that Debtors used the funds for transactions that were not authorized at the time they were made. Even so, however, SIPC and the Trustee argue that Stevens's failure to object to these transactions precludes him from now claiming customer status based upon his contention that the transactions are unauthorized.

They first argue that the broker-customer agreement for Account 2122 and account statements for Accounts 2122 and 8799 all set forth the requirement that a customer must provide notice of objection within a ten-day period or the information contained in the documents received will be deemed conclusive. While courts generally enforce such provisions in broker-customer agreements,[8] the agreement and statements in evidence all post-date the transactions for which Stevens's customer status remains at issue – transactions 199-2, 199-4, 199-6 through 199-10. There are no broker-customer agreements in evidence for the accounts from which funds were allegedly used to complete these transactions, namely, account #3DY-013088, #3DY-013096, and #3DY-039026.

Nevertheless, as discussed above and as argued by SIPC and the Trustee, even in the absence of a contractual objection requirement, a failure to object to a transaction after receiving notice thereof may give rise to a ratification of the transaction. *See In re Mason Hill & Co.*, 2004 WL 2659579 at *7; *Jakisch*, 582 F. Supp at 496-97. In this case, Stevens provided purchaser confirmation statements that he received regarding the purchase of promissory notes that are the subject of transactions 199-6 and 199-8 as well as a Consent, Waiver and Release and a Consent to Refinancing and Subordination, both of which were signed by him,[9] that relate to transaction 199-9. Although Stevens states that he did not know of these transactions,

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[8] A broker-customer agreement for Account 8799 is not in evidence. The court questions whether simply including such a provision on the back of the account statement has any binding effect on the party receiving the statement.

[9] Although Stevens states in his affidavit that he became aware that he was the victim of several forgeries, he does not identify the documents he believes were forged.

he does not deny having received the documents. Stevens offers no explanation that would excuse his duty to review the documents received and to object to the transactions reflected in those documents in a timely manner. His failure to object when he had a reasonable opportunity to do so constitutes a ratification of the transactions. *See Jaksich*, 582 F. Supp. at 496-97 (finding that the plaintiff's failure to object to the broker's unauthorized purchase of securities after receiving confirmation of the purchase constituted ratification of the purchase). Thus, while these transactions may have been unauthorized at the time they occurred, they became authorized by Stevens's failure to object. There being no material fact in dispute, SIPC and the Trustee are entitled to summary judgment as to transactions 199-6, 199-8 and 199-9.

However, the court finds the remaining four transactions, transactions 199-2, 199-4, 199-7, and 199-10, on different footing. The entity to which the Pershing checks relating to transactions 199-4 and 199-7 were issued is "Americus Communications." And the entity that allegedly issued the promissory note that is the subject of transaction 199-10 is "Americus Communications, Inc." According to the Trustee's investigative report entered into evidence at Davis's criminal sentencing hearing, these entities are fictitious entities or had no known legitimate business operations. To the extent that these were not legitimate business entities and Stevens received any documentation setting forth these three transactions, his failure to object to the transactions is not a ratification. "Ratification occurs when it is clear from all the circumstances, including failure to object within a reasonable time, that the customer intends to adopt the trade as his own." *Tripi*, 303 F. Supp. 2d at 355 n.7. Where the circumstances include a trade involving a fictitious entity or an entity with no legitimate business operations, a factfinder could not reasonably conclude that the trade was ratified as a result of a failure to object.

Finally, as to transaction 199-2, only one spreadsheet dated May 19, 1993, refers to this transaction. The transaction is reported on that spreadsheet along with three other Americus Communications transactions and numerous other transactions. Although transaction 199-2 occurred on November 9, 1990, spreadsheets dated December 31, 1991, and September 30, 1992, received by Stevens did not report the transaction. [*See* Ex. J]. There is no other evidence that Stevens received notice of the transaction. The court finds a factual issue exists as to whether reporting the transaction over two years after the transaction occurred and reporting it along with other similar transactions provided sufficient notice of that specific transaction such that a factfinder could conclude that by his failure to object, Stevens intended to adopt the transaction as his own.

## CONCLUSION

SIPC and the Trustee having pointed out the absence of evidence in the record to support Stevens's claims regarding his customer status under SIPA with respect to transactions 199-1, 199-3, 199-5, and 201-1

though 201-5, and having set forth evidence showing the ratification of transactions 199-6, 199-8, and 199-9, and Stevens having failed to show the existence of evidence regarding these transactions from which the court could find in his favor at trial, the court will grant the motion for summary judgment filed by SIPC and the Trustee as to these transactions. However, the court finds genuine issues for trial with respect to transactions 199-2, 199-4, 199-7 and 199-10 and will deny the motion for summary judgment as to these transactions.[10] The court will schedule a further pretrial conference on the issues remaining for trial.

**THEREFORE,** for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that the Motion for Summary Judgment [Doc. # 1001] filed by SIPC and the Trustee be, and hereby is, **DENIED** as to transactions 199-2, 199-4, 199-7 and 199-10 and is **GRANTED** as to claim 201 and all remaining transactions in claim 199; and

**IT IS FINALLY ORDERED** that Dr. J.R. Stevens's Objection as to Determination of Claims No. 199 and 201 [Doc. #299] be and hereby is set for a Further Pretrial Status and Scheduling Conference on **December 15, 2009, at 1:30 o'clock p.m.** in Courtroom No. 2, Room 103, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio.

[10]The claims for transactions 199-2, 199-4, 199-7 and 199-10 for which summary judgment is being denied include interest. The Trustee's determination letter [Ex. D] includes as a basis for denial of Claim 199 that "[y]our claim for approximately $302,000 in interest is not protected under SIPA." This issue is not argued in the motion for summary judgment and is therefore not decided one way or another by this memorandum of decision.