

action dismissed or removed to Alabama. In other words, despite effecting her securities transactions in Minnesota, and contracting a sizeable debt in Minnesota, the Defendant argues that the trustee must pursue his action, if at all, in Alabama. The Defendant's arguments have no merit.

Procedural History

On September 27, 2001, pursuant to an application by the Securities Investor Protection Corporation ("SIPC"), the United States District Court for the District of Minnesota entered an Order which, among other things, placed MJK in liquidation under the Securities Investor Protection Act, 15 U.S.C. §78aaa *et seq.* ("SIPA"),¹ appointed James P. Stephenson, Esquire, as trustee (the "Trustee"), and removed the liquidation proceeding to this Court. Since that time, the Trustee, with SIPC's assistance, has endeavored to effect the provisions of SIPA, including the marshaling of "customer property" of the Debtor. *See* SIPA §78lll(4).

The Motion by the Defendant to Dismiss, Transfer, or Abstain ("Motion"), currently before the Court, seeks dismissal of the Trustee's Adversary Proceeding based on improper venue and Alabama state statute of limitations grounds, transfer of the action to a venue in Alabama, and, on its face, abstention by this Court. Although labelled as an abstention, as discussed *infra*, the latter request, relying on a determination of inconvenience and not comity, is actually one for a change of venue. Because the Defendant's arguments regarding venue impact the construction of SIPA, SIPC addresses them in this Response to the Defendant's Motion.² SIPC adopts the position of the

¹ Except as otherwise provided, references hereinafter to provisions of SIPA shall omit "15 U.S.C."

² Under SIPA §78eee(d), SIPC is a party in interest in this matter, with the right to be heard.

Trustee as to the statute of limitations issue. *See* Trustee's Response to Motion.

Relevant Facts

The Defendant opened her margin account at the securities broker-dealer R.J. Steichen & Co., a Minnesota corporation, by executing a margin loan agreement.³ The Defendant's margin account was subsequently assigned to the Debtor. *Id.* While maintaining her account in Minnesota with the Debtor, the Defendant borrowed money through the account. On or about the date the liquidation proceeding began, the Defendant owed the Debtor \$597,194.97. *Id.* The margin account contained no collateral securities. *Id.*

By letter dated January 18, 2002 to the Defendant, the Trustee requested payment of the outstanding principal and accrued interest in the margin account. On May 28, 2004, having received no response from the Defendant, the Trustee commenced this action seeking a turnover of the monies owed to the Debtor's estate.⁴

ARGUMENT

I. Venue in This Court is Proper

A. The Trustee Seeks to Recover Property of the Estate

SIPA §78fff(b) provides that "[t]o the extent consistent with this chapter, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under

³ *See* Affidavit of the Trustee, accompanying the Trustee's Response to Motion.

A margin account is an "account in which the firm lends the customer money on purchases or securities on short sales." New York Institute of Finance, *Introduction to Brokerage Operations Department Procedures* (2nd Ed. 1988) at 220-221

⁴ As of September 1, 2004, the outstanding balance in the Defendant's account was \$711,494.53, with interest continuing to accrue at a rate of 6% per year.

chapters 1, 3, and 5 and subchapters I and II of chapter 7 of title 11.” Consistent with SIPA,⁵ §541(a)(1) of the Bankruptcy Code, 11 U.S.C. §541(a)(1), broadly defines property of the estate as including “all legal or equitable interests of the debtor in property as of the commencement of the case.” Within the definition of a debtor’s property fall the debtor’s rights of action to collect debts owed to the estate. *See In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1101 (2d Cir. 1990); *In the Matter of Perry, Adams & Lewis Securities, Inc.*, 30 B.R. 845 (Bankr. D. Mo. 1983). Thus, there can be no dispute that the Defendant’s debt to the estate of the Debtor is property of the estate, and that the Trustee is entitled to pursue turnover of that property pursuant to §542 of the Bankruptcy Code.

B. SIPA Specifically Gives This Court Exclusive Jurisdiction Over the Debtor’s Property

As discussed above, SIPA incorporates specified provisions of the Bankruptcy Code, to the extent consistent with SIPA. However, SIPA also makes applicable provisions of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”). Except as otherwise provided in SIPA, the provisions of the Exchange Act apply as if SIPA were an amendment to, and was included as a section of, that Act. SIPA §78bbb.

SIPA references provisions of the Exchange Act in establishing where SIPC must file its application to initiate a SIPA case. Pursuant to SIPA §78eee(a)(3), SIPC files the suit “with any court of competent jurisdiction specified in section 78u(e) or 78aa” of the Exchange Act, 15 U.S.C.

⁵ A provision is inconsistent with SIPA only if it “conflicts with an explicit provision” of SIPA or if its application “would substantially impede the fair and effective operation of SIPA without providing significant countervailing benefits.” *SIPC v. Charisma Sec. Corp.*, 506 F.2d 1191, 1195 (2d Cir. 1974). *See SEC v. Securities Northwest, Inc.*, 573 F.2d 622, 625 (9th Cir. 1978).

§§78u(e) and 78aa. The latter sections of the Exchange Act refer to the federal districts courts and the United States courts of any territory or other place subject to the jurisdiction of the United States. Among other things, §78aa also provides that an action “to enforce any liability or duty created by this chapter ... may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business” MJK maintained its principal place of business in Minneapolis, Minnesota. Accordingly, SIPC filed its application for a customer protective decree as to MJK in the United States District Court for the District of Minnesota.

Upon the filing of the application by SIPC, the latter Court gained

exclusive jurisdiction of such debtor and its property wherever located (including property located outside the territorial limits of such court and property held by any other person as security for a debt or subject to a lien)

SIPA §78eee(b)(2)(A)(I). *See SIPC v. Barbour*, 421 U.S. 412, 416 (1975) (“mere filing of an SIPC application gives the court in which it is filed exclusive jurisdiction over the member and its property, wherever located”). *See also SIPC v. Goldberg*, 893 F.2d 1139, 1142 (10th Cir. 1990) (district court has exclusive jurisdiction over debtor’s property even absent personal jurisdiction over the parties).

Pursuant to SIPA §78eee(b)(4), the District Court ordered the proceeding removed to this Bankruptcy Court. Upon the removal, this Court acquired

all of the jurisdiction, powers, and duties conferred [under SIPA] upon the [district] court to which application for the issuance of the protective decree was made.

Id. *See In re Investment Bankers, Inc.*, 4 F.3d 1556 (10th Cir. 1993) (SIPA §78eee(b)(4) “clearly reveals that Congress intended to confer jurisdiction on the bankruptcy courts to preside over SIPA

liquidation proceedings”). Hence, the grant of exclusive jurisdiction to the District Court over the debtor’s property, wherever located, was transferred to this Bankruptcy Court.

C. SIPA’s Grant to this Court of Exclusive Jurisdiction Over the Debtor’s Property Renders Consideration of Venue Transfer Inapplicable

This Court’s exclusive jurisdiction under SIPA over the Debtor’s property trumps any consideration of change of venue of the Trustee’s adversary proceeding. It is a well-settled axiom that “[c]ourts created by statute can have no jurisdiction but such as the statute confers.” *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988), citing *Sheldon v. Sill*, 8 How. 441, 449, 12 L.Ed.1147 (1850). The bestowal under SIPA of “exclusive jurisdiction” upon this Court evidences the legislative intent that it adjudicate all matters within the SIPA proceeding.⁶ That outcome is particularly appropriate where, as here, the action is one to recover property of the estate. SIPA’s legislative history reinforces this concept.

As originally enacted, §5(b)(2) of SIPA, 15 U.S.C. §78eee(b)(2) (1970), provided that: “Upon the filing of an application [for a customer protective decree] ... the court to which application is made shall have exclusive jurisdiction of the debtor involved and its property wherever located” Pub. L. No. 91-598 (Dec. 30, 1970), 84 Stat. 1636. Amendments to SIPA in 1978 which produced section 78eee(b)(2)(A)(I) in its current form added the language: “... (including property located outside the territorial limits of such court and property held by any other person as security for a debt or subject to a lien.”) Pub. L. No 95-283, 92 Stat. 249 (1978). The reasons for adding the parenthetical are discussed in the Senate Report:

⁶ There, the Supreme Court also noted “[t]he age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists” *Id.*, 486 U.S. at 818.

Added here, as well, are jurisdictional provisions which reflect case law developed under chapter X. Although the proposed amendment retains the language of the present Act (which was drawn from chapter X), it is thought prudent to include also the precedents developed under that section, lest a court be tempted to interpret the language differently now that it is divorced from chapter X of the Bankruptcy Act. Accordingly, it is provided in §5(b)(2)(A)(I) that the court may issue orders protecting property in the actual or constructive possession of the debtor located outside the territorial limits of the court. *See, e.g. Continental Illinois Nat'l Bank & Trust Co. v. Chicago Rock Island & Pacific Ry.*, 294 U.S. 648 (1935). This protection is not available in ordinary bankruptcy.⁷

Senate Report No. 763, 95th Cong., 2d Sess., pp. 24-25.

This Court's exclusive jurisdiction over the Debtor's property renders arguments to transfer the venue of matters within a SIPA liquidation proceeding of no merit.

D. Even Assuming, *Arguendo*, that Title 28 Venue Provisions Applied, the Proper Venue is in this Court

Even assuming, *arguendo*, that the venue provisions contained in Title 28 for ordinary bankruptcy cases applied in SIPA cases, venue of the Trustee's adversary proceeding is proper in this Court. In ordinary bankruptcy, the venue of civil proceedings brought in bankruptcy court is governed by 28 U.S.C. §1409. In pertinent part, §1409 provides:

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

Subsection (b) referenced in the section does not apply because it pertains to suits for the recovery of less than \$1,000 in property or less than \$5,000 in consumer debts. Likewise, subsection 1409(d)

⁷ While specifying that a SIPA proceeding was not to be conducted as a reorganization, the original version of SIPA incorporated certain provisions of chapters 1 through 7 and chapter X of the Bankruptcy Act. 15 U.S.C. §78fff(c) (1970). In 1978, SIPA was amended to incorporate specifically the liquidation provisions of the Bankruptcy Act. 15 U.S.C. §78fff(b) (1978).

is inapplicable for the reasons discussed below. Under the circumstances, assuming the applicability of section 1409(a), venue is proper in this Court because this is the court in which the liquidation proceeding is pending. See *In re Etalco, Inc.*, 273 B.R. 211, 219 (9th Cir. BAP 2001) (“The purpose of §1409(a) is to provide the debtor with a ‘home court’ advantage”). See also *In re B&L Oil Co.*, 834 F.2d 156, 159 n.8 (10th Cir. 1987) (citing legislative history).⁸

D. The Defendant’s Arguments Have No Merit

The Defendant argues that the proper venue for the adversary proceeding is the United States District Court for the Northern District of Alabama. Her argument fails for at least a few reasons.

First, the Defendant erroneously relies on 28 U.S.C. §1409(d). Section 1409(d) relates to claims arising after the commencement of the case. The Trustee’s cause of action did not arise after the commencement of the liquidation proceeding.⁹ It is based on a pre-SIPA liquidation contract executed, and debt incurred, by the Defendant. Thus, subsection (d) of §1409 is inapplicable.

Second, the Defendant’s argument that the Trustee makes his claim against the Defendant in connection with the Trustee’s continuation of the business of the Debtor not only is wrong as a matter of fact, but misconstrues applicable law. The Trustee has never operated the business of the Debtor and it would be unlawful for him to do so. Under SIPA, the purposes of the proceeding include the trustee’s sale or transfer of offices or other productive units of the debtor’s business, and

⁸ It bears mention that in situations where a trustee has a choice of courts, the decision to sue other than in the home court is “an unusual circumstance, to say the least.” 1 *Collier on Bankruptcy*, ¶4.02[3][b] (15th Ed. Rev. 2004).

⁹ “Claim” is broadly defined under the Bankruptcy Code to include any right to payment whether or not “reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.” 11 U.S.C. §101(5). Thus, from the time the Defendant borrowed money, the Debtor had a “claim.”

the liquidation of the business of the debtor. *See* SIPA §78fff(a)(2) and (4). The Trustee cannot do business on behalf of the debtor. SIPA specifies that “[i]t shall be unlawful for any broker or dealer for whom a trustee has been appointed [under SIPA] ... to engage thereafter in business as a broker or dealer, unless the [SEC] otherwise determines in the public interest.” §78jjj(b). The SEC has not made such a determination regarding the Debtor. Thus, there is, and has been, no continuation of the Debtor’s business. *See also In re Weis Securities, Inc.*, 3 B.C.D. 88, 89 (Bankr. S.D.N.Y. 1977)(“[t]he trustee’s role is not that of a substitute broker”).

Finally, the Defendant’s reliance on 28 U.S.C. §1391(a) is erroneous. Section 1391(a) applies only to civil actions “wherein jurisdiction is founded only on diversity of citizenship.” As alleged in the Complaint herein and as discussed above, the jurisdiction of this Court is premised on provisions of SIPA, and not on diversity. Accordingly, 28 U.S.C. §1391(a) is irrelevant.

II. This Court Should Not Transfer This Adversary Proceeding

The Defendant’s assertions regarding abstention are equally without merit. The Defendant contends that this Court should abstain from hearing this case. However, rather than arguing that abstention is mandated in the interest of comity or judicial economy pursuant to 28 U.S.C. §1334(c), the Defendant actually makes an argument for a change of venue. In effect, she asserts that this Court’s exercise of jurisdiction is inconvenient. She submits that transfer to Alabama is warranted in the interest of justice because this proceeding would be extremely burdensome on her, presumably because she lives in Alabama and not Minnesota.

For the reasons previously discussed, this Court has exclusive jurisdiction over the liquidation proceeding, and the Trustee’s present action for turnover of property of the estate. Thus, the express language of SIPA precludes transfer of the action. *See, e.g., Hays v. Postmaster Gen.*

of U.S., 868 F.2d 328, 330-331 (9th Cir. 1989) (statutory scheme placing exclusive jurisdiction for certain claims in the Federal Circuit mandated transfer); *Dobard v. Johnson*, 749 F.2d 1503, 1507 (11th Cir. 1985) (transferring habeas corpus petition to court having exclusive jurisdiction).

Even assuming, for the sake of argument, that this Court did not have exclusive jurisdiction and ordinary bankruptcy principles applied, no basis for a change of venue exists. 28 U.S.C. §1412 governs the change of venue of an adversary proceeding in ordinary bankruptcy. In pertinent part, the section provides that “[a] district court may transfer a ... proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.”

The burden is on the movant to show by a preponderance of the evidence that transfer of venue is warranted. See *Gulf States Exploration Co. v. Manville Forest Prods. Corp. (In re Manville Forest Products Corp.)*, 896 F.2d 1384, 1390 (2d Cir. 1990); *Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co. (In re Commonwealth Oil Refining Co.) (“CORCO”)*, 596 F.2d 1239, 1241 (5th Cir. 1979). In the instant case, the Defendant has submitted no evidence to satisfy her burden. She merely asserts, without more, that venue in Minnesota is inconvenient and burdensome.

The Debtor’s choice of forum is entitled to great weight if venue is proper. See *In re Ocean Properties of Delaware, Inc.*, 95 B.R. 304, 305 (Bankr.D.Del. 1988). See also *CORCO*, 596 F.2d at 1241 (“the court should exercise its power to transfer cautiously”). The district in which the underlying bankruptcy case is pending is presumed to be the appropriate district for hearing and determination of a proceeding in bankruptcy. See *Gulf States Exploration Co. v. Manville Forest Prods. Corp.*, 896 F.2d at 1391, citing *In re Lionel Corp.*, 24 B.R. 141, 143 (Bankr. S.D.N.Y. 1982). Merely shifting the inconvenience from one party to the other, as would be the outcome in this case

were the Defendant to prevail, is not sufficient to warrant transfer of venue. *See In re Enron Corp.*, 274 B.R. 327, 343 (Bankr. S.D.N.Y. 2002); *In re Garden Manor Assoc., L.P.*, 99 B.R. 551, 553 (Bankr. S.D.N.Y. 1988); *In re Great American Resources, Inc.*, 85 B.R. 444 (Bankr. N.D. Ohio 1988). The Defendant has failed to meet her substantial burden of showing that a change of venue is permissible at law or warranted in fact.

CONCLUSION

For all of the foregoing reasons, the Defendant's Motion to Dismiss, Transfer, or Abstain, should be denied in all respects.

DATED: October 29, 2004

Respectfully submitted,



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