BEFORE FINRA DISPUTE RESOLUTION, INC.

IN THE MATTER OF THE ARBITRATION BETWEEN:

JONATHAN PERLMAN, ESQ., RECEIVER FOR CREATIVE CAPITAL CONSORTIUM, LLC, AND A CREATIVE CAPITAL CONCEPT$, LLC,	*	
Claimant,	*	
v.	*	Arb. No. 11-01693
TD AMERITRADE, INC., d/b/a thinkorswim, Inc.	*	
Respondent.	*	

* * * * * * * * * * * *

ANSWER TO "CLAIMANT'S SECOND AMENDED STATEMENT OF CLAIM"

Respondent TD Ameritrade, Inc., d/b/a thinkorswim, Inc. ("Respondent" or "thinkorswim")[1] denies the allegations and claims in the "Second Amended Statement of Claim" filed by Claimant Jonathan Perlman, Receiver.

In July 2013, the United States District Attorney for the Southern District of Florida unsealed an indictment of George L. Theodule, charging him with multiple counts of wire fraud. In late August 2013, Mr. Theodule was arraigned and taken into custody. In October 2013, Mr. Theodule pled guilty to one count of wire fraud.

The factual proffer entered in that case by Mr. Theodule as part of his guilty plea states that Mr. Theodule solicited investors to furnish him with money that he said he would invest in options trading. Mr. Theodule did, in fact, deposit a substantial portion of the investor funds into stockbrokerage accounts (including the account at issue in this arbitration case) where he traded stock options. In other

[1] The parent company of TD Ameritrade, Inc., acquired thinkorswim, Inc., in 2009.

words, to the extent that Mr. Theodule deposited funds into brokerage accounts and invested the funds, he was doing what he told those investors he would do. Unfortunately, the trading was not in the end profitable; instead, Mr. Theodule lost the money in the market.

Evidently, however, he lied to the investors about the success and profitability of his trading. Mr. Theodule apparently also simply stole some of the funds that he *said* would be invested; he never deposited those funds into any brokerage account, and instead, he used that money for his personal expenses.

Justice will be served, however: His crime carries a potential sentence of up to 20 years' incarceration, plus a fine of up to twice his ill-gotten gain from his wrongdoing, plus a further order requiring him to make restitution. (Mr. Theodule is already subject to a civil judgment for disgorgement of $5,099,512, plus a civil money penalty of $250,000, which was entered in the Securities and Exchange Commission's civil action against him.) Mr. Theodule is still in jail awaiting sentencing, which is currently scheduled to take place in February 2014.

Meanwhile, however, even as the guilty party, Mr. Theodule, is scheduled to be sentenced for his crime and to be ordered to make restitution to the victims, the Receiver is still pursuing this legally unsupportable, inequitable case against an ***innocent*** broker-dealer who happened to have maintained a ***wholly legitimate*** trading account for Creative Capital Concepts. In the account at issue here, Creative Capital Concepts deposited funds for investment, used those funds to engage in legitimate, self-directed market trading, and simply lost money trading in the market. In other words, ***in the account at issue here, Mr. Theodule actually did***

what we now know he told his investors he would do -- he invested the funds entrusted to him for investment, and he traded, as he said he would, in options. It is unfortunate that his trading ultimately was not profitable, but thinkorswim is not liable for the market results of his legitimate, self-directed trading.

There is simply no basis for a claim against thinkorswim here.

This is nonetheless Claimant's *fifth* version of his statement of claim in this case. Claimant has again misstated the facts and law in order to attempt to manufacture a claim where none exists. This has been Claimant's mode of operation throughout this arbitration, beginning with his original designation of a non-existent entity, "Creative Capital Concept$, LLC," as the Claimant, through Claimant's "correction" of the name of the Claimant to "A Creative Capital Concept$, LLC" (which never held any account with Respondent), to Claimant's "substitution" of himself as the Claimant, although none of the entities in receivership was ever a customer of Respondent.

Claimant has ultimately been forced to acknowledge that TD Ameritrade has been *correct* in what it has said all along about the inaccuracies in each of the prior four iterations of the statement of claim. *Respondent was correct* when it stated that it never maintained any account for "Creative Capital Concept$, LLC," which didn't even exist. *Respondent was correct* when it stated that it never maintained any account for "A Creative Capital Concept$, LLC" -- that entity existed but had never had any account with Respondent. *Respondent was correct* when it stated that the Receiver had no authority to act for the investment club called "Creative Capital Concepts" -- in fact, it was not until the Receiver sought and obtained a special Court

Order, entered in January 2013, that he had authority to act as the owner of that account. Even then, that Order re-stated the basic legal principle that *Respondent has correctly stated* repeatedly throughout this case: A Receiver stands in the shoes of the entity for which he is the Receiver; he can bring only those claims that the entity could have brought, and then, he is subject to all defenses to which the entity would be subject.

And *Respondent has been correct* all along when it has said, consistently, at every stage, that when, as here, a Respondent broker-dealer merely accepted the customer's account application based on the facts provided by the customer, opened the account exactly as requested by the customer, accepted the deposits made by the customer, and processed the transaction orders entered by the customer's authorized agent in its self-directed account, there is no basis for a claim brought by that customer.

Now, in this *fifth* iteration of the statement of claim, Claimant contends yet again that Respondent should have investigated what Claimant calls "red flags" relating to the account -- never mind that the Claimant has had the benefit of perfect hindsight based on the full resources of the United States Government's years-long investigation of George Theodule on which to base these allegations of these supposed red flags -- and Claimant contends that Respondents, in essence, had a *duty* to have refused to open the account, or to have shut the account down.

Now, Claimant contends that Respondent owed duties, not just to its client, the investment club called Creative Capital Concepts, but also to all of the "Receivership Entities" (such as "Reverse Auto Loan, LLC," "Unity Entertainment

Group, Inc.," and "G$Trade Financial, Inc.") even though they were *not* Respondent's clients. Claimant contends that the Receivership Entities somehow *became* Respondent's "customers" because Creative Capital Concepts deposited into its brokerage account money that may have come from one or more of the Receivership Entities.

There is no legal support whatsoever for this extraordinary proposition. It is not the law. It is wrong. In fact, as will be discussed in detail below, the law is the opposite of what Claimant contends in this case. The law is clear that a broker-dealer owes *no duties* to any non-customer, that is, a person or entity that is not the named holder of an account with that broker-dealer. Broker-dealers are not law enforcement agencies. They have no duty to the general public to catch criminals, even if the criminal happens to be the broker-dealer's customer. There are numerous cases specifically holding that *broker-dealers are not liable* to people or entities who allege -- like the Receivership Entities allege here -- that it was really their money that was deposited into the broker-dealer's customer's account, and that the broker-dealer's customer obtained the funds from them by fraud or some other wrongful means. Those people or entities are *not* the broker-dealer's customers, and *the broker-dealer owes them no duties.*

Alternatively, these "other Receivership Entities" from whom the Receiver contends Mr. Theodule "stole" the deposited funds *each also were alter egos of George Theodule.* The Receiver stands in the shoes of those alter-ego entities. This means he ***is*** these entities: he is the successor to George Theodule as the person in control of these entities, and as such, as a matter of law, he is bound by his

predecessor George Theodule's acts. The Receiver cannot disclaim Mr. Theodule's acts or their legal or financial consequences. No matter how he attempts to twist it, George Theodule's successor cannot sue thinkorswim for the market losses resulting from the trades George Theodule made in the account that thinkorswim opened for a George Theodule entity on the basis of what George Theodule's successor now claims were George Theodule's lies.

In this latest iteration of the statement of claim, Claimant also contends, for the first time, that deposits into the Creative Capital Concepts account at thinkorswim constituted "fraudulent transfers" *to thinkorswim.* A "fraudulent transfer" claim depends in the first instance on a showing that the defendant was actually the recipient of a "transfer," which thinkorswim was not. It never took or claimed ownership over the funds and assets in the Creative Capital Concepts account; it was never even the custodian of those funds or assets. All customer funds and assets were held by thinkorswim's clearing firm, Penson Financial Services, Inc., for the benefit of the account maintained by Creative Capital Concepts. Further, Creative Capital Concepts received full, equivalent value for its deposits; any time it made a transaction, it received the securities it had ordered, at the market price of the transaction, or received the cash proceeds from the market sales it ordered. There was no fraudulent transfer here. Once again, Claimant is misstating the facts and manipulating the law.

As discussed below, and as will be presented at the hearing, there is no legal or equitable basis for the Receiver's claims. They are without merit and should be dismissed.

I. Basic Facts Pertinent To This Answer.

Thinkorswim is an online, discount brokerage firm that offers a technology platform for self-directed traders. Its customers make all of their own investment and trading decisions. During the relevant time period, thinkorswim used Penson Financial Services, Inc., as its clearing broker-dealer. Customer accounts were "introduced" by thinkorswim, but were actually carried by Penson. All customer deposits were sent directly to Penson. All customer transactions actually were processed by Penson, which cleared all transactions in the account. Penson maintained custody of the securities and funds in customer accounts; thinkorswim never had custody of customer funds or assets.

On March 28, 2007, an investment club called "Creative Capital Concepts" submitted an application to open an account with thinkorswim and Penson. Three individuals -- George Theodule, Detra Pasby and Natalie Simon -- signed thinkorswim's Investment Club Account Agreement, in which they each represented and warranted that they were all partners in a general partnership known as Creative Capital Concepts, and they authorized thinkorswim and Penson to open a securities account for the partnership. Any or all of the partners were authorized to act for the account. (*See* Fla. Stat. Ch. 620.8301.)

Creative Capital Concepts specifically agreed that:

> You [thinkorswim] may conclusively assume that all action taken and instructions given by said agent and attorney-in-fact have been properly taken or given pursuant to authority vested in such agent and attorney-in-fact by all of the partners in the partnership. You are authorized to follow the instructions of the said agent and attorney-in-fact in every respect concerning said account, and to make delivery of securities and payment of moneys to him or as he may order and direct and to send to him all reports, confirmations and statements relating to the account.

(Investment Club Agreement, second paragraph.)

In the Client Agreement, Creative Capital Concepts covenanted and agreed that:

- Its governing instruments permitted it to enter into this Agreement; that all applicable persons authorized the Agreement and that the signatory was authorized to bind the entity;
- "no one other than [Creative Capital Concepts] has an interest in your account or accounts with" thinkorswim;
- Creative Capital Concepts would comply with all applicable laws, rules and regulations in connection with any accounts;
- Creative Capital Concepts was aware of the high degree of risk involved in option transactions;
- Creative Capital Concepts had given thinkorswim information to demonstrate that the account and the trading anticipated in the account are not unsuitable for Creative Capital Concepts in light of its investment objectives, financial situation and needs, experience and knowledge;
- Creative Capital Concepts (through its authorized representatives) was financially sophisticated and had experience in effecting transactions in equity securities, equity options and equity index options;
- Creative Capital Concepts would advise thinkorswim of any changes in Creative Capital Concepts's investment objectives, financial situation or other circumstances that may be deemed to materially affect the suitability of processing options transactions for its account; and

- Creative Capital Concepts specifically agreed that thinkorswim is not responsible for, and Creative Capital Concepts would not hold thinkorswim liable for, losses caused directly or indirectly by conditions beyond its control, including market volatility.

The Client Agreement also contained a section, entitled "Addendum 2, Client Terms And Conditions For Trading Equity Options," in which Creative Capital Concepts agreed that:

- Creative Capital Concepts understood that trading equity options is "highly speculative and contains a high degree of risk";

- Creative Capital Concepts acknowledged that it was financially capable of undertaking the risks associated with the trading of equity options contracts and it was financially able to endure any losses incurred by trading such products, including the total loss of premiums paid for long put and long call options positions and the margin requirements associated with short options positions, and transaction costs; and

- Creative Capital Concepts understood that it must specifically acknowledge, prior to entering its first options trade, that its representative had read and fully understood the Options Clearing Corporation's disclosure document entitled Characteristics And Risks Of Standardized Options, and that Creative Capital Concepts would, before trading, obtain any further clarification or information that it needed before certifying that it read and understood the document;

All three of the partners in the investment club provided their names, addresses and social security numbers. All were legal adults who had the right to open and maintain brokerage accounts. There is no allegation in any of the five iterations of the statement of claim, and Claimant has not produced in discovery *any* evidence, that the information they provided was fraudulent. Thinkorswim performed its Customer Identification and Anti-Money Laundering procedures based on the accurate information provided by the general partners; no alert or negative information was returned. There is no allegation, and no evidence, that there was any adverse information about any of them at that time – certainly, no public information of any criminal record. Further, thinkorswim learned during the discovery period that in October 2007, Mr. Theodule registered "Creative Capital Concepts" as a business name; in other words, he had the legal right to use that name for his business activity.[2]

The investment club, acting through its general partner and authorized representative Mr. Theodule, traded in the account for approximately one year, from June 2007 to July 2008. Most of the investment club's transaction orders were placed online. Thinkorswim personnel had limited interactions with the account or Mr. Theodule. He occasionally called customer service to ask about posting of

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[2] Claimant attempts to use this fact to suggest that this was a "fictitious name" account. It was not. Under Florida's Revised Uniform Partnership Act, no specific filing is required to establish a partnership; it is legally formed merely by holding out as a partnership, by verbal agreement, or even just by acting together as partners. Fla. Stat. Ch. 620.8202. Here, the partners represented and warranted that they were partners in a general partnership called Creative Capital Concepts. Mr. Theodule's subsequent registration of that name as a business name does not mean that the general partnership retroactively became a "fictitious name" entity. It does mean, however, that even if thinkorswim had had some responsibility or reason to check the name (as Claimant suggests it should have), it would have seen that the name had been duly registered by one of the general partners. This would have been considered a "green light," not a "red flag."

credits to the account; a few times, he called the trading desk to place orders or inquire about order executions. In his interactions with thinkorswim, he repeatedly demonstrated his understanding of the mechanics, costs, risks and potential consequences of the trades he was doing. Throughout that period, the investment club experienced profitable trades and losing trades. Several times, thinkorswim personnel checked with Mr. Theodule to ensure he understood the risks. He said he did. Ultimately, of course, whether the transactions were profitable or not depended on movement of the stock market, which thinkorswim does not control.

II. There Is No Basis Whatsoever For Thinkorswim To Be Held Liable Here.

A. Thinkorswim Owed No Duties To The "Receivership Entities," As They Were Not Its Customers.

Although the Receiver alleges that there is "ample authority" for his position that the Receivership Entities can be considered "customers" of thinkorswim because money that allegedly belonged to them before they sent it to Mr. Theodule was later deposited into the brokerage account, he cites only one case for that proposition, and the case does not say that. In fact, that case supports the opposite conclusion: That thinkorswim owed no duties to the Receivership Entities, as they were not its customers.

The lone case that the Receiver cites, at page 24, fn. 10 of the Second Amended Statement of Claim, is *Chaney v. Dreyfus Service Corp.*, 595 F.3d 219 (5th Cir. 2010).

In that case, an investment company, Liberty National Securities ("LNS"), which was controlled by "the now infamous felon, Martin Frankel," looted funds from several insurance companies. LNS had opened a "master account" at a financial

institution, Dreyfus Service Corp., and then LNS opened "subaccounts" for each of the insurance companies. LNS transferred funds from the subaccounts to the master account, and then out of the financial institution. The insurance companies were placed in Receivership; the Receivers sued the financial institution, alleging that *it* ought to be liable for the funds LNS stole from them. They claimed that if the financial institution had "properly discharged its duties," it would have uncovered the scheme and their losses would have been averted.

There, just like in this case, the Receivers' primary argument was that the financial institution was negligent—that its failure to monitor for suspicious activity or verify certain authority breached duties of care that it owed to the insurance companies, causing their losses. 595 F.3d at 229.

Accordingly, the first issue that the Court had to address was whether the financial institution owed any duty to the insurance companies, because there can be no claim (for negligence, or for that matter, for breach of contract or for any tort) absent some duty. The Court stated that because the law

> imposes significantly different duties on financial organizations depending on whether the claimant is a customer or a third party, *compare Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 286 (2d Cir.2006) ("As a general matter, '[b]anks do not owe non-customers a duty to protect them from the intentional torts of their customers.' ") *with de Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1305 (2d Cir.2002) ("No doubt, a duty of reasonable care applies to the broker's performance of its obligations to customers with nondiscretionary accounts."), we first consider whether the insurance companies were "customers" for the purpose of any of the accounts.

Id. at 230. This distinction between customers and non-customers, for purposes of determining whether a duty is owed, is based on important public policy:

> Although not explicit, it is clearly the fear of imposing on banks endless, unpredictable liability that drives New York's distinction between a bank's

customers and non-customers. *See Century Bus. Credit Corp. v. N. Fork Bank,* 246 A.D.2d 395, 668 N.Y.S.2d 18, 19 (N.Y.App.Div.1998) (stating that requiring a bank to monitor its customers' accounts for the benefit of its customers' creditors would "unreasonably expand banks' orbit of duty"); *Hamilton v. Beretta U.S.A. Corp.,* 96 N.Y.2d 222, 727 N.Y.S.2d 7, 750 N.E.2d 1055, 1061 (2001) (explaining that duties must be precisely defined to avoid imposing potentially "limitless liability"); *Eisenberg v. Wachovia Bank, N.A.,* 301 F.3d 220, 226 (4th Cir.2002) (noting that to extend a bank's duties of care to non-customers would "expose banks to unlimited liability for unforeseeable frauds").

Id. at 231.

1. **A financial institution owes no duty to its non-customers.**

As the Court stated in the *Chaney* case:

"[b]anks do not owe non-customers a duty to protect them from the intentional torts of their customers." *Lerner v. Fleet Bank, N.A.,* 459 F.3d 273, 286 (2d Cir.2006) (internal quotation marks omitted); *see also Renner v. Chase Manhattan Bank,* 1999 WL 47239, at *13 (S.D.N.Y.1999) (finding it "well settled" that a bank owes no duty to non-customer third-parties to prevent its customers from defrauding them). This principle is true even as to fiduciary accounts. *See Home Sav. of Am., FSB v. Amoros,* 233 A.D.2d 35, 661 N.Y.S.2d 635, 637 (N.Y.App.Div.1997) ("[A] depository bank has no duty to monitor fiduciary accounts ... to safeguard the funds in those accounts from fiduciary misappropriation.").

595 F.3d at 232.

In addition to the *Chaney* case cited by the Receiver, and the multiple cases cited in that opinion, there are numerous other cases making clear that a broker-dealer owes no duties to a non-customer. *See, e.g., Fernea v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 2011 WL 2769838 at *6 (Tex.App.-Austin) (Dismissing negligence claims by non-customer against broker-dealer alleging that broker-dealer's actions violated NYSE/NASD regulations, on the ground, *inter alia,* that the broker-dealer owed him no duty; stating, "Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or

circumstances"); *Public Service Co. of Okla. v. A Plus, Inc.*, 2011 WL 3329181 (W.D. Okla. 2011) (Dismissing claims alleging that bank negligently accepted and processed deposits from plaintiff into customer's account in violation of anti-money laundering and other rules, and holding that bank owed no duties to the plaintiff, which was not its customer; a defendant does not have "a duty to anticipate and prevent the intentional or criminal acts of a third party" which resulted in harm to the plaintiff); *In re Agape Litig.*, 681 F.Supp.2d 352, 359-361 (E.D.N.Y. 2010) ("It is well established that brokers such as [the defendant] do not owe a general duty of care to the public at large... Rather, '[a] duty of care arises only when the broker does business with the plaintiff'"); *Silverman Partners v. First Bank*, 687 F.Supp.2d 269, 282 (E.D.N.Y. 2010) (Dismissing negligence claim brought by victim of fraud against bank); *Kissinger v. HSBC Bank*, 2005 WL 995218 (Cal.App. 2005) (Holding that there is no duty to monitor a customer's account for the benefit of a non-customer, even where the non-customer alleges the defrauding party -- the financial institution's customer -- "deposited and simultaneously withdrew hundreds of thousands of dollars from" fraudulently-opened accounts and that this activity was "a sharp indicator of money laundering or other illegal activity"); *Compania de Elaborados v. Cardinal Cap. Mgmt.*, 401 F.Supp.2d 1270 (S.D. Fla. 2003) (Holding that the defendant financial advisory firm did not owe duties to plaintiff, which was not its client, even where plaintiff alleged that the financial advisory firm allowed its customer to use its accounts, securities, trading and transfer facilities and securities licenses for sham purposes, and where plaintiff alleged that the financial advisory firm should have known that the customer obtained the investment funds by means

of fraud; stating, "Under the common law, a person has no duty to control the conduct of another or to warn those placed in danger by such conduct unless a special relationship exists between the defendant and the persons whose behavior needs to be controlled or the foreseeable victim of such conduct." Absent a customer relationship, there was no such special relationship); *Software Design and Application Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal.App.4th 472 (1996) (Holding that financial institutions owe no duties to non-customers arising out of the opening of an account for a customer, or arising out of the acceptance of wire transfers into the customer's account, notwithstanding the plaintiff's allegations that the institution failed to follow its account opening and customer identification procedures, and notwithstanding the plaintiff's allegation that the bank accepted "suspicious" wire transfers of funds that had been stolen from plaintiff by means of the customer's fraud).

The *Chaney* opinion discussed a single, limited exception to this general principle: Under New York law, a financial institution may be held liable for its customer's misappropriation from an account held at the financial institution, "where (1) there is a fiduciary relationship between the customer and the non-customer, (2) the bank knows or ought to know of the fiduciary relationship, and (3) the bank has "actual knowledge or notice that a diversion is to occur or is ongoing." *Id.* at 232-33. The financial institution is held to "know" of the fiduciary relationship where it actually knows facts that "support the 'sole inference' that the funds being deposited are held in a fiduciary capacity." *Id.* at 233. "[K]nowledge that a third party's funds are being deposited into an account is certainly not enough, alone, to

show that the bank ought to have known that the funds were fiduciary." *Id.*

Unless a financial institution has *actual knowledge* of facts showing the fiduciary status of the account, the financial institution has no duty to investigate even "suspicious activity," even if that would have prevented theft from the account held at the financial institution. The Court explicitly rejected the Receivers' "suggestion that the many 'red flags' suggestive of money laundering gave rise to an obligation on behalf of DSC to investigate Frankel's account activity." *Id.* at 234. As the Court stated, "Because there is no independent obligation to investigate suspicious activity in non-fiduciary accounts, the nature and pace of Frankel's transactions could never have put DSC under a duty "to make reasonable inquiry and endeavor to prevent a diversion.' *Lerner,* 459 F.3d at 288." Indeed, the Court noted, there are "no cases suggesting some broad duty for financial institutions to monitor all their accounts for suspicious activity and to investigate that activity upon discovery," and the Court declined to "impose such an expansive obligation." *Chaney,* 595 F.3d at 234-35.

In the instant arbitration, Claimant argues that this "fiduciary" exception applies here to impose duties on thinkorswim toward the Receivership Entities. But New York law does not apply here, and even if it did, this limited exception to the general rule that financial institutions do not owe duties to non-customers also would be inapplicable. First, the "misappropriation" was not *from the account held at thinkorswim.* Rather, Claimant alleges that Theodule misappropriated funds from bank accounts held *elsewhere,* and deposited the funds *into* the account at thinkorswim. The New York "fiduciary account" exception applies only where there

is an ongoing misappropriation *from the account held at the defendant financial institution.* Second, there was no fiduciary relationship between *thinkorswim's customer* -- the investment club called Creative Capital Concepts -- and the non-customers. Claimant does not even allege that there was a fiduciary duty flowing from *Creative Capital Concepts* to the *Receivership Entities.* Claimant alleges only that *Theodule* owed a fiduciary duty to the Receivership entities. Third, thinkorswim did not know of any purported fiduciary relationship between its customer and the non-customer entities that were the source of deposits into the account at thinkorswim, nor did it know any facts from which that was the "sole inference" that could be drawn. Knowledge that funds came from third parties is insufficient as a matter of law. Fourth, thinkorswim had no knowledge that the funds deposited had been "diverted" in any way. Thinkorswim received information from its clearing firm, after the fact, that Creative Capital Concepts had deposited funds from persons and entities that were clearly associated with it. These were considered "first party" deposits made in the ordinary course. There were no indicia of theft or diversion of funds.

There is thus no basis upon which to hold that thinkorswim owed any duty to non-customer Receivership Entities.

2. Non-customers do not become customers merely because their funds are deposited into an account.

In the *Chaney* case, contrary to the Claimant's assertion here, the Court *did not* hold that the insurance companies became "customers" of the financial institution, DSC, merely because they were the source of deposits into LNS's master account. Rather, the Court held that the insurance companies were "customers" of

the financial institution because

> It is undisputed that the accounts were opened in abbreviated versions of the insurance companies' names using their real taxpayer identification numbers and addresses. It is also undisputed that the account holders were, in fact, separate and distinct legal entities and that DSC contacted them directly via monthly statements, albeit only by mail.
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> * * *
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> The funds in the accounts were registered to the insurance companies. The addresses and taxpayer identification numbers utilized in opening the accounts made it abundantly clear that the named entities were separate and distinct from LNS. Recognizing this fact, DSC sent the insurance companies monthly statements and confirmations of account activity.

595 F.3d at 230-31. Moreover, the statements that the financial institution sent to the insurance companies included a specific notice stating, "your dealer broker or financial institution has placed trades on your behalf," which the Court found indicated that DSC *itself* recognized the insurance companies as customers for the purpose of the subaccounts. *Id.* at fn. 5.

Having concluded that the insurance companies were "customers" *with respect to the accounts held in their names, using their real addresses and their unique taxpayer identification numbers,* the Court went on to conclude that those same insurance companies were *not* customers of the financial institution with respect to any other accounts held by LNS.

Applying these principles here, it is apparent that none of the "Receivership Entities" was a customer of thinkorswim *in any respect.* There was no thinkorswim account registered in the name of any of them, or using any address or taxpayer ID unique to any of them. Thinkorswim did not send them account statements or trade confirmations. The mere fact that some of the deposits into Creative Capital

Concepts' account originated from a bank account held in the name of another entity does not make that entity a "customer" of thinkorswim.

Thus, thinkorswim did not owe any of the "Receivership Entities" any of the duties that it would owe its customers.

3. Thinkorswim fulfilled the (limited) duties it owed Creative Capital Concepts, its customer.

It is well established that broker-dealers do not owe fiduciary duties *even to their customers* unless the broker-dealer accepts and exercises discretionary authority as to the management of the account. *Carr v. Cigna Secs., Inc.*, 95 F.3d 544, 547 (7th Cir. 1996) (Holding "a broker is not the fiduciary of his customer unless the customer entrusts him with discretion to select the customer's investments"); *de Kwiatkowski v. Bear Stearns, Inc.*, 306 F.3d 1293, 1302 (2d Cir. 2002) (Holding that a "broker ordinarily has no duty to monitor a nondiscretionary account"); *Arst v. Stifel, Nicolaus & Co.*, 86 F.3d 973, 978 (10th Cir.1996) (Same); *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Servs., Ltd.*, 823 F.2d 171, 173 (7th Cir.1987) (Broker does not owe fiduciary duties with respect to non-discretionary account); *Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb*, 769 F.2d 561, 567-68 (9th Cir. 1985) (Holding that a broker has no fiduciary duties in relation to a non-discretionary account"); *Stewart v. J.P. Morgan Chase,* 2004 WL 1823902 (S.D.N.Y. 2004) ("The courts have consistently held that where a brokerage client has a self-directed account, the broker ordinarily has no legal responsibilities beyond the prompt and accurate carrying out of any transaction directed by the client."). *Cf. Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543 (Fla. 2d DCA 2003) ("We have found no case holding that a bank breached a fiduciary duty owed to its

client by failing to investigate or disclose the manner in which the client or its authorized agents used their money").

Creative Capital Concepts did not have a discretionary account with thinkorswim. Accordingly, thinkorswim had no fiduciary duty to Creative Capital Concepts, and no duties to monitor the account, to advise the customer, or to warn Creative Capital Concepts of the risks of its self-directed trades.

In a non-discretionary account, the broker-dealer owes its customer only very circumscribed, limited duties. As the Court stated in *Chaney*:

> Because "[a] nondiscretionary customer by definition keeps control over the account and has full responsibility for trading decisions," a financial institution's duties are limited. *de Kwiatkowski,* 306 F.3d at 1302 (finding that no general duty of care exists between a broker and the holder of a nondiscretionary account). "On a transaction-by-transaction basis, the broker owes duties of diligence and competence in executing *the client's* trade orders, and is obligated to give honest and complete information when recommending a purchase or sale." *Id.* (emphasis added). Complementary to this duty to exercise diligence in the execution of trade orders is at least *some* duty to ensure that an individual purporting to trade on the customer's behalf is actually authorized to do so. *See Dubai Islamic Bank,* 126 F.Supp.2d at 667 (declining to dismiss, on a 12(b)(6) motion, claims that honoring unauthorized transfers out of a customer's account without attempting to verify authorization constituted negligence). This duty exists apart from any contractual obligations entered into by the parties, though it of course may also arise from or be satisfied by the parties' contractual arrangements. *See Indep. Order of Foresters,* 157 F.3d at 940–41 ("[W]here the terms of a nondiscretionary account require the customer's authorization on all transactions, a broker has a duty to obtain the client's authorization before making" trades).

595 F.3d at 235.

In this arbitration, Claimant alleges that thinkorswim breached even this limited duty, suggesting that Mr. Theodule was not authorized to act for the Creative Capital Concepts account because Mr. Theodule completed the paperwork so as to indicate that "Creative Capital Concepts" was an authorized agent for the account,

rather than indicating specific names.

Under Florida law, however, each partner of a general partnership is considered to be an agent of the partnership for the purpose of its business. Fla. Stat. Ch. 620.8301. All acts of any partner for apparently carrying on partnership business in its ordinary course -- including the execution of documents in the partnership's name -- bind the partnership unless that partner in fact had no authority to act for the partnership in that particular matter, and the person dealing with him knew it or received specific notification of that partner's lack of authority. *Id.*

Applying this governing law here, it is absolutely patent that Mr. Theodule was authorized to act for the general partnership, Creative Capital Concepts, and that his acts bound the partnership. He was listed as a partner on the new account form, and he and the other two partners certified that they were the partners of the general partnership, Creative Capital Concepts, that was opening the account. They stated that the general partnership's business was to be an investment club. It is self-evident that the business of an investment club is to invest, so all of Mr. Theodule's acts, ranging from signing the account opening documents and disclosures, to arranging for the deposit of funds, to ordering transactions for the account, were done in the ordinary course of its business. By the terms of the account documents, Mr. Theodule was clearly authorized to act on behalf of the investment club partnership.

Other than this meritless suggestion that Mr. Theodule lacked authority to act for Creative Capital Concepts, there is no allegation or claim of any other