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To: **Lisa Lasher**

Fax: **301-527-4868**
From: **Michelle Izzo, Paralegal**

Date: **February 1, 2013**

No. Pages: **10**

Comments: **Creative Capital Concepts$, LLC vs. TD Ameritrade d/b/a Think or Swim**
Case No: 11-01693

Re: **Respondent, TD Ameritrade, Inc.'s Amended Answer.**

Thank you.

Please call (561) 864-5100 if there is a problem with the transmission of this document.

cc **Jeffrey B. Kaplan, Esq.**
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February 1, 2013

Via US Mail and Fax 301-527-4868
Lisa D. Lasher
Senior Case Administrator
FINRA Dispute Resolution
5200 Town Center Circle
Tower I – Suite #200
Boca Raton, Florida 33486

Re: Creative Capital Concept$, LLC v. TD Ameritrade, Inc. d/b/a Thinkorswim, Inc., and Penson Financial Services, Inc.
FINRA Case No.: 11-01693

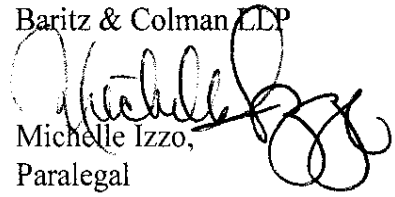
Dear Ms. Lasher:

Enclosed please find the Amended Answer of Respondent TD Ameritrade, Inc., Pursuant to Order on "Claimant's" Notice of Substitution/Correction of Parties.

Please call me if you have any questions.

Very truly yours,

Baritz & Colman LLP



Michelle Izzo,
Paralegal

Cc . Jeffrey Kaplan, Esq. US Mail and Fax 305-374-1961

BEFORE FINRA DISPUTE RESOLUTION, INC.

IN THE MATTER OF THE ARBITRATION BETWEEN:

A CREATIVE CAPITAL CONCEPT$, LLC,	*	
Claimant,	*	
v.	*	Arb. No. 11-01693
TD AMERITRADE, INC., d/b/a thinkorswim, Inc.	*	
Respondent.	*	

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

AMENDED ANSWER OF RESPONDENT TD AMERITRADE, INC., PURSUANT TO ORDER ON "CLAIMANT'S NOTICE OF SUBSTITUTION/ CORRECTION OF PARTIES"

Respondent TD Ameritrade, Inc., doing business as thinkorswim, Inc. ("thinkorswim")[1] hereby files this Amended Answer pursuant to the Panel's Order on "Claimant's Notice Of Substitution/ Correction Of Parties," issued on January 2, 2013. There, the Panel ordered that the name, "A Creative Capital Concept$, LLC" be substituted as the name of the Claimant. The Order further provided that Respondent may amend its answer to address this change.

After that Order was issued, on January 18, 2013, Claimant A Creative Capital Concept$, LLC, filed a "Motion For Clarification" of the Panel's Order. (Although it is styled as a motion for "clarification," in fact it seeks reconsideration of its initial request that Jonathan Perlman, the Receiver for A Creative Capital Concept$, LLC, be substituted as the Claimant in this matter.) Presumably in support of that request, on January 28, 2013,

[1] Penson Financial Services, Inc., filed for bankruptcy on January 11, 2013. All claims against it are subject to automatic stay. Its involvement in the case has therefore terminated.

Claimant filed in this arbitration proceeding a copy of an Order issued by the United States District Court for the Southern District of Florida, which provides that the Receiver "has title to the [thinkorswim account at issue in this arbitration] by operation of law and stands in the shoes of the account holders. He may therefore assert any causes of action that may have been asserted by the account holders subject to the same defenses that may have been asserted against them."

The correction of the name "A Creative Capital Concept$, LLC," does not salvage this claim. "A Creative Capital Concept$, LLC" was never a customer of Respondent thinkorswim, and therefore, thinkorswim owed it no duties whatsoever as a matter of law. A Creative Capital Concept$, LLC, has no claims against thinkorswim.

The substitution of the Receiver as a party would not salvage the claim, either. As Respondent has previously pled, and as the Court's Order confirms, the Receiver "stands in the shoes" of the account holder. He has no greater rights or claims than the account holder would have, can only assert claims that the account holder could have brought, and is subject to all of the defenses to which the account holder's claims would be subject. And here, it is absolutely patent that the account holder has no claim, which means that the Receiver has no claim.

The allegations in this case boil down to the assertion that "I lied to you, and you didn't catch me in my lies, so you are liable to me for the market results of the trades I made in the account you opened for me on the basis of my lies." To state this assertion is to refute it. There is no legal basis for any claim that the Respondent broker-dealer should be liable to the customer for accepting the customer's account application based on the facts provided by the customer, opening the account exactly as requested by the customer, and

processing the transaction orders entered by the customer's authorized agent in its self-directed account.

Thinkorswim has previously stated the facts, law and affirmative defenses in its Answers to the initial and amended Statements of Claim. In the interest of brevity, Respondent shall summarize below the principal arguments that remain applicable given the changes in the parties, and respectfully incorporates the pertinent sections of its previously-filed Answers here.

1. Claimant cannot state a claim for "negligence" as it was not a customer of Respondent, and broker-dealers owe no duties to non-customers.

A Creative Capital Concept$, LLC, was never a customer of thinkorswim; indeed, the claim alleges that the account was opened in the name of an investment club called Creative Capital Concepts, and that the opening of the account in this name constituted a fraud against Claimant or its investors. The law is clear, however, that a broker-dealer owes no duties to a non-customer. *See, e.g., Compania de Elaborados v. Cardinal Cap. Mgmt.*, 401 F.Supp.2d 1270 (S.D. Fla. 2003), and other cases previously cited by Respondent.

Claimant also alleges that Respondent owed it duties arising out of its own "internal operating procedures," but the law is clear that a broker-dealer's internal policies and procedures do not create legal duties that it owes others, and alleged violation of those policies and procedures cannot form the basis for a claim of negligence or breach of duty. *See Boutilier v. Chrysler Ins. Co.*, 2001 WL 220159 (M.D. Fla., Jan. 31, 2001) (The mere fact that a company has internal policies does not create a legal duty to third parties to act consistently with those policies), and other cases previously cited by Respondent.

To establish a negligence claim, a Claimant must establish that the Respondent owed it a duty, that the Respondent breached the duty that it owed the Claimant, and that the

breach is what caused the Claimant to suffer damages. None of these elements is present here. Thinkorswim owed Claimant no duty; it cannot have breached a duty that it did not owe; and Claimant cannot allege that it suffered damages, as it did not hold any account with thinkorswim and suffered no loss. There is no legal basis for Claimant to pursue claims for negligence against Respondent.[2]

2. Claimant cannot state a claim for "breach of contract" because it never entered into any contract with Respondent.

In order to establish a claim for breach of contract, Claimant must prove (a) the existence of a valid contract between itself and Respondent; (b) substantial performance by Claimant; (c) a breach by Respondent, and (d) damages resulting from Respondent's breach of their agreement. *Reger Development LLC v. National City Bank*, 592 F.3d 759, 764 (7th Cir. 2010) (Illinois law) (which applies to any claims against thinkorswim).

Here, Claimant *never* entered into any contract with Respondent. It cannot have breached contractual obligations that it did not have.

3. Claimant cannot state a claim for "breach of fiduciary duty" because Respondent did not owe Claimant any fiduciary duty.

Claimant cannot state a claim for breach of fiduciary duty against thinkorswim because, as discussed above and in thinkorswim's Answer to the Amended Statement of Claim, the law is clear that broker-dealers owe no duties whatsoever to non-customers, and

[2] Likewise, thinkorswim owed no duties to the investors who allegedly were defrauded by the Ponzi scheme. They were not customers of the broker-dealer and thus, as a matter of law, they have no claim against it. Moreover, there is no basis for the Claimant's fundamental factual allegation that thinkorswim should somehow have concluded that the Creative Capital Concepts investment club was really an LLC that was conducting a Ponzi scheme. As discussed in thinkorswim's prior Answers, at the time the investment club opened its account, the "A Creative Capital Concept$, LLC" entity did not exist, and the Ponzi scheme was not even alleged to have begun, so Claimant's allegation is literally factually impossible. A broker-dealer's obligation under Customer Identification rules is, at the time of account opening, to verify the identity of the customer. Broker-dealers have no obligation to check possible alternate spellings of its customer's stated name, or to investigate the activities of possible related entities. Claimant's position -- that thinkorswim should have "detected" that a Ponzi scheme would later be conducted through "A Creative Concept$, LLC" -- is absurd.

here, Claimant was not a customer of thinkorswim.

4. Even if the Receiver were substituted as the Claimant in this matter, he can bring only those claims that could have been brought by the Creative Capital Concepts investment club (the customer), but it has no claims against Respondent, either.

a. The Receiver cannot state a claim for negligence.

The customer could not state a claim for the reasons set forth in detail in thinkorswim's Answer to the original Statement of Claim, which it incorporates here. It could not state a claim arising out of the purported "unsuitability" of the transactions the customer ordered for its account, because the law is clear that a broker who is not recommending a security transaction has no duty to assess the suitability of that transaction or monitor an account. As broker-dealers do not owe their customers the duties allegedly breached, and as the Receiver can bring only those claims that could have been brought by the customer, the Receiver has no claim here.

Likewise, the customer -- and therefore, the Receiver -- could not state a claim for violation of the "Know Your Customer" rule or for FINRA Rules because (1) thinkorswim was not a member of the NYSE and not subject to its rules; (2) there is no private right of action for alleged violation of NYSE or FINRA Rules, and (3) Claimant has not identified any FINRA Rule that is applicable to thinkorswim which it is alleged to have violated.

Moreover, to the extent the customer suffered financial loss, those damages were caused entirely by the actions of George Theodule and by market movements in the securities he selected to trade, and not by anything thinkorswim did or did not do.

b. The Receiver cannot state a claim for breach of contract.

Claimant has failed to identify any provision in any contract between Respondent and Creative Capital Concepts that it contends Respondent breached. This is because there

is none. Thinkorswim fully performed its contractual obligations to its customer.

c. The Receiver cannot state a claim for breach of fiduciary duty.

A broker-dealer does not owe fiduciary duties *even to its customers* unless the broker-dealer accepts and exercises discretionary authority as to the management of the account. *See 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"), and other cases previously cited by Respondent. Here, the account in question was self-directed; thinkorswim was never entrusted with discretion to select investments for the account. Creative Capital Concepts did not repose any special trust or confidence in thinkorswim, nor did thinkorswim agree to act in a fiduciary capacity towards Creative Capital Concepts. Thinkorswim was not Claimant's fiduciary, and therefore, thinkorswim cannot be liable for breach of a duty that it did not have.

5. This Claim Fails As A Matter Of Law For Additional Reasons.

As set forth in thinkorswim's prior filings, there are a number of further reasons that this claim should be denied, including:

a. The investment club is solely and entirely responsible for its own trading decisions, and is bound by the orders and instructions given by its authorized representative. Any negligence in the handling of its account was entirely the customer's, as its authorized representative made all trading and investment decisions for its account. Its or his contributory or comparative negligence would bar any claim for negligence that it might attempt to make. Moreover, the economic loss rule would bar any recovery for "negligence" where, as here, the alleged injury is purely financial. *See Testa v. Southern Escrow and Title,* 36 So.3d 713 (Fla. 1st DCA 2010).

b. The customer assumed all risk of loss in its account. The risks arising from self-directed trading in the securities market and in options are obvious, and were known to the customer from its own experience. Further, Respondent provided the customer with appropriate risk disclosures, which the customer specifically acknowledged that it had received and read prior to entering any transaction orders for the account.

c. The customer's losses were caused by its selection of securities/ options to trade, and by market forces beyond Respondent's control. Respondent is not liable for market losses. Indeed, as the customer itself (via Mr. Theodule) asserted during one conversation, it is improper to assess the wisdom or propriety of trade orders in hindsight, depending on the market results of the transactions.

d. The customer failed to mitigate its damages. It could have stopped trading when it suffered its first losing trade. Instead, the investment club continued to trade, and to deposit additional funds, thus increasing and continuing its exposure to loss. Had it stopped, however, it would not have experienced such losses.

FOR ALL OF THESE REASONS, Respondent TD Ameritrade, Inc., doing business as thinkorswim, Inc., respectfully submits that the claims of Claimant A Creative Capital Concept$, LLC, should be DENIED, the award should be entered in favor of Respondent, all costs should be taxed against Claimant, and the Panel should consider awarding sanctions against Claimant for filing and maintaining this frivolous action.

Submitted By:

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On behalf of Respondent TD Ameritrade, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of February 2013, a true and correct copy of the foregoing was sent via facimille and first class mail, to:

Jeffrey B. Kaplan, Esq.
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/s/
for Dana S. Gloor