FINANCIAL INDUSTRY REGULATORY AUTHORITY

FINRA CASE NO. 11-01693

IN THE MATTER OF ARBITRATION BETWEEN

CREATIVE CAPITAL CONCEPT$, L.L.C.,

Claimant,

v.

THINKORSWIM, INC., and
PENSON FINANCIAL SERVICES, INC.,

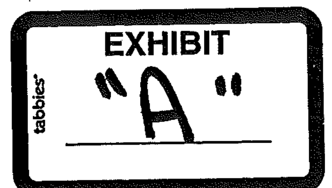
Respondents.
____/

CLAIMANT'S FIRST AMENDED STATEMENT OF CLAIM

Claimant, CREATIVE CAPITAL CONCEPT$. L.L.C., ("Creative Capital" or "Claimant"), hereby files its First Amended Statement of Claim against THINKORSWIM, INC ("ThinkorSwim") and PENSON FINANCIAL SERVICES, INC. ("Penson"), and alleges as follows.

I. INTRODUCTION

Claimant brings this arbitration to recover funds lost due to Respondents' failure to adhere to their basic duties when opening, supervising, and administering an options account. The account was opened at Respondent ThinkorSwim (the "introducing broker") and Respondent Penson served as the "clearing broker" responsible for the receipt of funds, holding securities, and clearing trades. Respondents' independent and multiple failures led to the loss of millions of dollars in Claimant's account. Had either Respondent met its obligations, Claimant's account would have been closed before any trades were made in Claimant's account. But instead, a wildly speculative options strategy was undertaken in the account, which resulted in the loss of well over 95% of the value of



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the account – or approximately $5.8 million dollars.

Claimant, Creative Capital, is an entity now subject to a Receivership Order entered in a Securities and Exchange Commission ("SEC") enforcement action pending in the Southern District of Florida.[1] The enforcement action itself concerns a multi-state Ponzi scheme through which George Theodule ("Theodule"), along with others, stole nearly $70 million dollars from hard-working Haitian-Americans. Claimant was a Florida limited liability corporation controlled by Theodule and his co-conspirators (the "Schemers"), and some of the funds raised by their Ponzi scheme were placed in the account at issue here. As such, the Federal Court has appointed the Receiver, Jonathan E. Pearlman, Esq. (the "Receiver"), to take control of Creative Capital (along with certain other related entities that are subject to the Receivership Order) and to pursue and recover any and all funds owed to the Claimant for the ultimate distribution of those funds to victims of the Ponzi scheme. Pursuant to controlling law, the Receiver stands in the shoes of Claimant and has standing to bring this arbitration proceeding.

Ultimately, nearly $6 million dollars was lost in the options account opened for Claimant at Respondent ThinkorSwim and through ThinkorSwim's clearing broker, Respondent Penson. Those funds belonged to hardworking members of the Haitian-American community, many of whom turned over their life savings to Theodule. Theodule invested the funds of the working-class Haitian-Americans (a fact Respondents either knew or should have known) in wildly reckless and senseless options trading.

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[1] *SEC v. Creative Capital, et. al,* Case No. 08-18565-CIV-HURLEY/HOPKINS (S.D. Fla.).

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Had Respondents met their "Know Your Customer" responsibilities, the Schemers would not have been able to open an options account for Claimant, and millions of dollars of innocent victims' money would not have been lost.[2] Similarly, had Respondents met their responsibilities under applicable FINRA rules regarding the opening of an options account, the Schemers would not have been able to open Claimant's account with Respondents, and millions of dollars would not have been lost. Had Respondents properly met their obligations as broker-dealers when supervising an options account, millions of dollars would not have been lost. And finally, had Respondents complied with their own internal operating procedures, millions of dollars would not have been lost.

The bottom line is that Respondents' failures to discharge their common-law and regulatory duties and obligations directly led to the loss of millions of dollars by Claimant. Accordingly, Respondents now stand liable for those losses.

II. JURISDICTION, PARTIES, AND RELATED PERSONS, AND VENUE

1. FINRA has jurisdiction over this matter pursuant to Rule 12200 of the FINRA Code of Arbitration Procedure because this dispute is between FINRA members and a customer.

2. Claimant, Creative Capital Concept$, LLC, is a no-longer-active Florida limited liability company subject to an SEC Receivership Order. This arbitration is brought by the Receiver in his capacity as Claimant.

3. Respondent ThinkorSwim, Inc. is a FINRA-member firm. Respondent is both primarily liable for its own misconduct and vicariously liable for the acts and omissions of its employees and agents by well-established legal principles, such as the doctrines of *respondeat*

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[2] *See* FINRA incorporated NYSE Rule 405(1).

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superior and actual or apparent authority.

4. Respondent Penson Financial Services, Inc. is a FINRA-member firm. Respondent is primarily, and independently liable for its own misconduct as the clearing broker for Claimant's account.

III. Facts Common to All Claims

A. The Theodule Ponzi Scheme

5. Holding himself out as a Christian pastor, Theodule ingratiated himself with Haitian-American investors by claiming he was offering his investment expertise to help build wealth within the Haitian community. Theodule falsely claimed that part of the trading profits garnered by the Receivership Entities were used to fund start-up companies and other business projects in the Haitian-American community and in the countries of Haiti and Sierra Leone.

6. Investors were attracted primarily through word-of-mouth. Theodule and others appointed by him made representations during face-to-face meetings with small groups during which they touted their ability to double investor funds in only 90 days by trading stocks and options. The presentations were rudimentary, typically depicted on dry-erase boards or flip charts without any other significant written information or evidence to support the verbal representations made.

7. Theodule stressed to potential investors the need to begin investing as soon as possible in order to take full advantage of the proposed high rates of return. For example, Theodule told at least one investor that he had made millionaires out of a significant number of other investors during the time the prospective investor had been deciding whether to invest, and pressured her to liquidate the equity in her home to invest with him.

8. The presentations emphasized the safety and security of investing with the

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Receivership Entities. They guaranteed prospective investors 100% (double) returns with no risk, and claimed to invest in the stocks and options of well-known companies such as Google, John Deere, Monsanto, Best Buy, Gamestop, and others.

9. To add to the investors' false sense of security, Theodule created Smart Investment Management Services, LLC ("SIMS"), a Florida limited liability company, purportedly to help the investors form investment clubs and to operate as a regulatory agency to protect investors through independent verification and monitoring of their deposits.

10. Theodule told investors that SIMS was an independent public regulatory agency. But SIMS was just a private company with no regulatory authority or investment expertise whatsoever, which was operated by a former Creative Capital employee. Theodule used SIMS as a hub for channeling investment funds collected in the operation of the Ponzi scheme.

11. The investment clubs pooled investor funds and sent them to Creative Capital and certain other of the Receivership Entities for an anticipated 90-day period, during which time the investors believed that Theodule would trade stocks and options on their behalf to multiply their money as promised.

12. The investment club members did not participate in making investment decisions, rarely held club meetings, and deposited funds exclusively with the Receivership Entities as opposed to seeking a broader spectrum of investment opportunities. The investment clubs served exclusively as a mechanism to funnel funds to the Receivership Entities, and then to Theodule himself, his wife, Dorothy, and to his friends and family.

13. The investment clubs typically required a minimum $1,000 investment. Investors were precluded from withdrawing their funds during the purported 90-day investment period. The

investment clubs pooled the investor funds, and remitted the money to Creative Capital and other Receivership Entities, minus a 10% club commission.

14. At the end of the 90-day investment period, when the Receivership Entities purportedly had doubled the investment amount, principal and profits were to be returned back to the investment clubs, minus a 40% commission paid to the Receivership Entities on the investment profits. Prior to distributing the proceeds to the individual club members, the investment clubs would be paid yet a second 10% commission on the investment principal.

15. Some of the initial investors were paid double "returns" on their investments in accordance with the investment plan presented by Theodule. "Commissions" also were paid to the Receivership Entities and investment clubs and reflected upon the investment statements of some of the initial investors. But the stated investment returns and paid commissions were pure fiction. The "returns" were paid for no other purpose than to perpetrate the Ponzi scheme and to encourage potential new investors to join the charade.

16. Theodule hid his scheme from investors by transferring approximately $20.8 million from new investor funds to investment clubs, falsely calling the payments profit and return of principal.

17. Theodule ultimately misappropriated investment funds in excess of $20.6 million for his personal use. This amount includes transfers of $18.1 million to Theodule's personal brokerage accounts, over $2 million to Theodule's personal bank accounts, including cash withdrawals of more than $1 million, and more than $700,000 for personal expenses. Theodule also misappropriated an additional $23.6 million that he gave to his wife, friends, family and associates.

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B. The Respondents Improperly Open a Brokerage Account for Claimant

18. Against that backdrop, on June 12, 2007, Claimant opened its options account with Respondent ThinkorSwim.[3]

19. Because Respondent Penson acted as Respondent ThinkorSwim's "clearing broker," the account opened with Respondent ThinkorSwim was carried on the books and records of Respondent Penson, through which Penson would accept funds, hold securities, and settle all transactions.

20. Because Respondent ThinkorSwim acted as an introducing broker and Respondent Penson acted as the clearing broker, Claimant's account could not be opened unless each Respondent independently approved the opening of the account.

21. As FINRA-registered broker-dealers, each Respondent was required to discharge its "Know Your Customer" obligations independently when opening Claimant's account.

22. Those obligations included learning and taking note of essential facts about Claimant, such as Claimant's other holdings, financial situation and needs, tax status, and investment objectives.

23. Each Respondent, however, failed miserably at meeting these obligations, which was a critical factor in the losses suffered by Claimant.

24. For example, Claimant's account opening documents (which were filled out by Theodule) represented that Claimant was an "investment club" and a partnership, without distinguishing whether it was an L.P., and LLC or some other type of entity.

25. In fact, the "New Account Approval Form" for Claimant's account lists absolutely no information related to the Claimant. The form only lists information related to Theodule as an individual.

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[3]A copy of the Account Opening documents are attached hereto as Exhibit A.

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The net result was that Respondents had virtually no information regarding the Claimant itself.

26. Further, Claimant was neither an "investment club" nor a partnership, but rather, a Florida limited liability company. The fact that Claimant was not a partnership was easily verifiable through numerous sources including publicly available searches at www.sunbiz.org, the Florida Division of Corporations website, which Respondents each should have checked as part of their "Know Your Customer" obligations. Additionally, by requesting Claimant's formation documents (which each Respondent should have done as part of their account opening process) the misleading and in some instances untrue information provided by Theodule, would have been discovered, and prevented the account from being opened at all.

27. Moreover, upon information and belief, Respondent ThinkorSwim knew that Claimant was not an "investment club." But Respondent had informed and instructed Claimant that opening an account in that capacity would permit Theodule, through Claimant, to manage and invest the funds of others (read: victims) while avoiding any regulatory requirement to register as an investment advisor, which Theodule did not wish to do.

28. The above examples are only several of the many ways in which Respondents failed to meet their duties when opening Claimant's account. Other, significant failings by Respondents included:

- Claimant's Investment Club account opening documents identify the membership of the club as consisting of three (3) partners representing that each is a partner in a general partnership named "Creative Capital," which clearly was inconsistent with other account opening documents;

- Claimant's Investment Club Account Agreement purports to appoint "Creative Capital Concept$" as the "attorney-in-fact of the partnership." The representation was nonsensical as it essentially appointed the entity as its own attorney-in-fact;

- Claimant's Investment Club Account Agreement provided no authority to any individual to act for Claimant, and neither Respondent requested any form of resolution stating who had such authority; and

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- The U.S. Citizen Signature Card reflects that George Theodule's social security number also is listed as the Tax ID number for Claimant, which neither Respondent noted or questioned about when opening the account.

29. Thus, there were no set of circumstances under which Claimant's account ever should have been opened by Respondents.

C. <u>Respondents' Options-Specific Account Opening Failures</u>

30. Thus, Respondents opened an account for Claimant so that Theodule could invest the funds of others, but utterly failed to discharge their "Know Your Customer" obligations to the individuals whose money was actually being invested – the victims of the Ponzi scheme.

31. The application that Theodule filled out and submitted curiously states that the investment objectives for the account were (1) **long term growth with safety**; (2) **income;** and (3) speculative. The options trading at issue should not have been permitted in an account with these conservative primary and secondary objectives.

32. Despite the fact that (i) Claimant was not an "investment club," but rather an entity under the control of an individual seeking to avoid registering as an investment advisor while managing the funds of others; and (ii) Claimant's two primary investment objectives were safety and income, Respondents opened the account for Claimant for the purpose of trading options.

33. Remarkably, not only did Respondents improperly open an options account for Claimant, upon information and belief, Respondents also failed to provide Claimant with an Options Agreement and Disclosure form as required by FINRA Rule 2360.

34. In short, Respondents failed to do virtually everything Respondents should have done when opening Claimant's account.

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D. Improper Wire Activity in Claimant's Account

35. Just as egregious as Respondents' many account-opening failures, were Respondent Penson's complete failure to make any inquiries with Claimant when it received $2.6 million in wire transfers directly from Theodule's personal bank account into Claimant's account.

36. That failure was troubling for a number of reasons.

37. First, Penson's internal operating procedures forbid Penson from accepting third-party wires into a customer account. But that is exactly what happened when Penson permitted Theodule to wire $2.6 million directly into Claimant's account.

38. That violation of internal Penson operating procedures is even more egregious considering that the account opening documents provided to Penson reflected that Theodule only had a personal net worth of between $40,000 and $60,000. Such a huge disparity between Theodule's stated net worth and the amount of money wired in from Theodule's personal bank account was a glaring red flag.

E. Respondents Fail to Properly Supervise Claimant's Options Account

39. Immediately after Claimant's account was opened, options were traded in the account, at an increasingly large rate and with no apparent rational strategy.

40. During that period, no other securities or investments were purchased in the account.

41. Instead, from mid-2007 and into 2008, on a monthly basis, Claimant bought and sold call options – without ever matching the number of calls written to the number of calls purchased– such that each month Claimant purchased calls in excess of the calls written, almost always resulting in a loss.

42. Moreover, the reckless options strategy in Claimant's account was done so in extremely large sums.

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43. To wit, the account suffered the following monthly losses during this period:[4]

Month	Gain/ (Loss)
June, 2007	(3,385.73)
July, 2007	9,490.91
August, 2007	(5,948.82)
September, 2007	708.66
October, 2007	(10,036.06)
November, 2007	(261,212.58)
December, 2007	(1,129,235.59)
January, 2008	(654,023.90)
February, 2008	(246,233.19)
March, 2008	(1,149,458.27)
April 2008	(273,202.99)
May, 2008	774,076.71
June, 2008	(915,071.55)
July, 2008	(2,000,159.85)

44. Despite the large amounts being invested and lost, Respondent ThinkorSwim failed to take adequate measures to ensure that options transactions in Claimant's account were compatible with Claimant's stated investment objectives (in fact, they were not), as required by FINRA Rule 2360(20)(c)(I).

C. <u>Respondents Fail to Timely Follow Up On Other Red Flags</u>

45. In April 2008, Respondent ThinkorSwim, apparently taking notice of large sums of

[4]A chart demonstrating amounts invested, lost, and commissions earned by Respondent ThinkorSwim is attached hereto as Exhibit B.

money being wired into Claimant's account, sent an email to Respondent Penson requesting a complete list of wires into Claimant's account.[5]

46. On information and belief, Respondent ThinkorSwim's request was part of an Anti-Money Laundering ("AML") review of Claimant's account.

47. Remarkably, the information provided by Respondent Penson demonstrated that Theodule, who had previously listed his net worth as between $40,000 and $60,000, had wired more than $2,600,000 into Claimant's account in less than one year, from his personal bank account.

48. Even more remarkably, even though such information should have led Respondents each to conduct more thorough investigations into Claimant's account, no such investigations appear to have taken place.

49. Thus, despite being on notice of improper wires, which were violation of Respondent Penson's internal operating procedures, and clear red flags indicating improper activity, neither Respondent made any effort to investigate further.

50. It goes without saying that, because Respondents failed to take any actions to learn the profiles of the Haitian-American individuals whose money comprised the assets in the account, Respondents also failed to ensure that the options transactions occurring in the account were compatible with those individuals' investment objectives and ability to withstand losses.

51. Following the date of the email between ThinkorSwim and Penson, Claimant's account suffered nearly $2.5 million in additional losses, much of which likely would have been avoided had Respondents properly supervised Claimant's account.

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[5]A copy of Respondent's April 18, 2008 email to Penson is attached hereto as Exhibit C.

52. Ultimately, by July 2008, due to Respondents' multiple failures to properly open, monitor, and supervise Claimant's account, or to properly supervise the options activity occurring within the account, Claimant lost nearly $6 million dollars.

IV. RESPONDENTS VIOLATED DUTIES OWED TO CLAIMANTS

53. By virtue of the conduct alleged herein, Respondents violated FINRA rules and common law duties they owed to Claimant.

Negligence

54. The rules and regulations of FINRA were established to protect securities investors, such as Respondents' customers. As a result of those rules and regulations – as well as applicable state common law – Respondents each owed a multitude of duties to Claimant, including:

a. duty to learn the essential facts relative to every customer;[6]

b. a duty to learn the essential facts relative to every order placed in each customer's accounts;[7]

c. a duty to monitor all activities within the customer's account, including wire and deposit activity;

d. a duty to follow-up red flags and suspicious activity within a customer account;

e. a duty to learn the essential facts regarding every cash or margin account accepted or carried by such organization;[8]

f. a duty to obtain information regarding the customer's investment objectives, a component of which is the customer's tolerance to risk of principal, prior to

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[6] *See* FINRA Incorporated NYSE Rule 405(1).

[7] *See* id.

[8] *See* id.

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approving a customer account for options trading;[9]

g. a duty to have reasonable grounds – based on information furnished by the customer after reasonable inquiry by Respondents concerning the customer's investment objectives, financial situation, and risk tolerance – to believe that an options transaction is not unsuitable for the customer and that the customer can bear the risks;[10] and

h. a duty to properly supervise an options account and to ensure the compatibility of options transactions with investment objectives and with the types of transactions for which the account was approved.

55. Respondents also owed a duty to properly supervise the options account opened for Claimant, to inform Claimant of the risks of its wildly speculative options trading strategy, and to recognize and inform Claimant that its options trading strategy was directly contrary to Claimant's stated investment objectives. But Respondents breached their duty of care by failing to warn Claimant of any of those things.[11] Respondents knew, or through the exercise of reasonable care should have known, that their failure to warn Claimant placed Claimant within a foreseeable zone of harm.

56. Respondents also breached their duties to Claimant, especially their duty to "Know Your Customer" pursuant to Rule 405. Respondents either failed to gather all the essential facts regarding Claimant – and the individuals whose money was actually being invested in Claimant's account, or failed to follow-up on the obvious red flags that would have led them to such information–despite being plainly on notice of those red flags. Rather than comply with the duties owed to their customers, Respondents

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[9] *See* FINRA Rule 2360(b)(16).

[10] *See* FINRA Rule 2360(19).

[11] *See* Palmer v. Shearson Lehman Hutton, Inc., 622 So.2d 1085 (Fla. 1st DCA 1993); Twiss v. Kury., 25 F.3d 1551 (11th Cir. 1994); *see also* SII Investments, Inc. v. Jenks, 2006 U.S. Dist. LEXIS 51753 (M.D. Fla. 2006).

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watched silently as Claimant's account was decimated by ridiculously speculative options trading, all the while pocketing the revenues generated by that very trading.

57. As a direct result of Respondents' negligence described above, Claimant has suffered financial devastation.

Breach of Contract

58. The self-regulatory organizations of which Respondents are members, including FINRA, set forth rules and regulations that Respondents have agreed to comply with for the benefit of their customers, including Claimant. There is an implied, if not actual, agreement between Respondents and Claimant that Respondents will each abide by FINRA rules, as well as SEC and other regulatory rules and regulations, and all state and federal laws. Respondents each have breached the agreement materially by failing to abide by the rules designed to protect Claimant, as described above. As a result, Claimant suffered damages in the amounts described herein.

Breach of Fiduciary Duty

59. Respondents each were required to deal with their clients in good faith and owed Claimant a fiduciary duty of loyalty and care.[12] As broker-dealers, each with independent duties regarding Claimant's account, each Respondent owed specific duties to Claimant, including:

a. the duty to inform Claimant of the risks involved with regard to *each* transaction entered in its account;

b. the duty to inform Claimant of the risks of any trading strategy being utilized in its account; and

[12] *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. (Fla.) 1987); *Ward v. Atlantic Sec. Bank*, 777 So.2d 1144, 1147 (Fla. 3d DCA 2001); *Ohio Bureau of Workers' Compensation v. MDL Active Duration Fund*, 476 F. Supp.2d 809, 821 (S.D. Ohio 2007); *Byrley v. Nationwide Life Insurance Company*, 640 N.E.2d 187, 198 (Ohio App. 1994).

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c. the duty to ensure the suitability of *each* transaction entered in Claimant's account.

60. Respondents each breached their independent fiduciary duties owed to Claimant (and those owed to the individuals whose money actually was held in the account) by the conduct described above.

61. Specifically, each Respondent failed to learn the essential facts about the individuals whose money was actually invested in the account, *i.e.*, the hard-working Haitian-American victims of the Ponzi scheme. Each Respondent also made no effort to determine whether the options transactions occurring in Claimant's account were suitable for those individuals. And all of this occurred despite each Respondent being on notice of red flags related to incoming wires transfers which should have signified irregularities in Claimant's account.

62. Moreover, Respondents each knew that Claimant was engaging in an unsupportable and risky options trading program that made little or no sense, at all and which bore absolutely no relationship to Claimant's investment objectives. Respondents knew that Claimant's two (2) primary investment objectives, long term safety and growth, and income, were directly contradictory to engaging in high-risk options trading.

63. As a direct and proximate result of Respondents' multiple breaches of their fiduciary duties, Claimant lost nearly $6 million dollars.

IV. Damages

64. Respondents' wholesale failure to comply with their obligations resulted in massive losses in Claimant's account. Specifically, Claimant lost $5,863,960.20. Claimant should be fully compensated for its losses, including costs and pre- and post-judgment interest.

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V. CLAIMS

65. Respondents negligently violated the high standards of commercial honor and just and equitable principles of trade to which they are each subject. The violations that occurred as a result of Respondents' actions and inaction described herein include the following:

a. failure to treat Claimant in a just and equitable manner;
b. breach of fiduciary duty;
c. negligence;[13] and
d. breach of contract.

VI. RELIEF SOUGHT

66. As a result of the conduct set forth above, Claimant requests that a decision be rendered against Respondents, and that the Panel grant the following relief:

(a) damages based on fairness and equity;[14]

(b) compensatory damages of $5,863,960.80, as applicable, plus prejudgment interest at the statutory rate; and

(c) punitive damages and such other and additional relief as this Panel may deem appropriate.

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[13]The standards of the profession are set forth in the rules of the FINRA (including its Notices to Members), the NYSE, and the SEC; federal and state statutes, the Securities and Exchange Act; firm compliance manuals and procedures and relevant case law. Respondents were obligated to provide competent, professional securities services in accordance with those industry rules, regulations, customs and practices. Even though those standards may not be deemed to constitute separate causes of action, they are properly asserted as standards of care against which Respondents' conduct must be measured in determining its liability. *See, e.g., Lange v. Hentz*, 418 F. Supp. 1376, 1383 (N.D. Tex. 1976) (FINRA Rules are evidence of the present standard of care that the FINRA member should achieve). Respondents failed to abide by many of those FINRA and NYSE rules as demonstrated above.

[14]Arbitrators may do justice as they see fit by applying their own sense of equity to the facts and by making an award reflecting the spirit of the agreement between the parties. *See Silverman v. Benmor Coats, Inc.*, 461 N.E.2d 1261 (N.Y. App. Div. 1984).

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Respectfully Submitted,

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By: ______________________
Jeffrey B. Kaplan, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and four copies of Claimant's AMENDED STATEMENT OF CLAIM were served by Federal Express on this 2nd day of March, 2012, to: **Lisa D. Lasher**, FINRA Dispute Resolution, Boca Center Tower 1, 5200 Town Center Circle, Suite 200, Boca Raton, FL 33486; **Neil S. Baritz, Esq.**, Baritz & Colman, LLP, 1075 Broken Sound Parkway, Suite 102, Boca Raton, Florida, 33487; and **Penson Financial Services, Inc.,** 1700 Pacific Avenue - Suite 1400, Dallas, TX 75201.

By: ______________________
Robert E. Linkin