FINANCIAL INDUSTRY REGULATORY AUTHORITY

FINRA CASE NO. ______________

IN THE MATTER OF ARBITRATION BETWEEN

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

Claimant,

v.

TD AMERITRADE, INC.,
d/b/a thinkorswim,

Respondent.
____/

STATEMENT OF CLAIM

Claimant, CREATIVE CAPITAL CONCEPT$, L.L.C. ("Creative Capital" or "Claimant"), hereby initiates this FINRA arbitration proceeding against TD AMERITRADE, INC. d/b/a thinkorswim, and alleges as follows.

I. INTRODUCTION

Claimant brings this arbitration to recover funds lost due to Respondent's failure to adhere to its basic duties when opening and supervising an "options account." That failure led to the loss of millions of dollars as a result of the wildly speculative and bizarre options strategies employed in Claimant's account. Those strategies resulted in the loss of well over 95% of the value of 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

DIMOND KAPLAN & ROTHSTEIN, P.A.
OFFICES AT GRAND BAY PLAZA. 2665 SOUTH BAYSHORE DRIVE. PENTHOUSE 2B. MIAMI, FL 33133 · TEL. 305.374.1920 FAX. 305.374.1961

of Florida.[1] The enforcement action itself concerns a multi-state Ponzi scheme through which George Theodule ("Theodule"), along with others, stole nearly $70 million dollars from hard-working Haitian-Americans. Claimant was a Florida limited liability corporation controlled by Theodule and his co-conspirators (the "Schemers"), and some of the funds raised by their Ponzi scheme were placed in the account at issue here. As such, the Court has appointed the Receiver, Jonathan E. Pearlman, Esq. (the "Receiver"), to take control of Creative Capital Concept$ (along with certain other entities which 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. Those funds belonged to the hardworking members of the Haitian-American community, many of whom turned over their life savings to Theodole, which Theodule claimed to be investing for the working-class Haitian-Americans (a fact Respondent either knew or should have known).

Had Respondent met its "Know Your Customer" responsibilities[2]," the Schemers would not have been able to open an options account with Respondent for Claimant, and millions of dollars of innocent victims' money would not have been lost. Similarly, had Respondent met its responsibilities under applicable FINRA rules regarding the opening of an options account, the

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

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

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Schemers would not have been able to open an options account for Claimant with Respondents, and millions of dollars would not have been lost. And finally, had Respondent properly met its obligations as a broker-dealer when supervising an options account, millions of dollars would not have been lost.

The bottom-line is that Respondent's failure to discharge its common-law and regulatory duties and obligations directly led to the loss of millions of dollars by the Claimant. Accordingly, Respondent now stands 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 a FINRA member and a customer.

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

3. Respondent, TD Ameritrade, 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 superior* and actual or apparent authority.

III. FACTS COMMON TO ALL CLAIMS

A. The Theodule Ponzi Scheme

4. 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

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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.

5. Investors were attracted primarily through word-of-mouth. Theodule and others appointed by him, made representations during face-to-face meetings with small groups in which they touted the ability to double investor funds in just 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.

6. 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 people in the time it had taken her to decide to invest, and pressured her to liquidate the equity in her home to invest with him.

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

8. 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 their investment clubs and to operate as a regulatory agency to protect investors through independent verification and monitoring of their deposits.

9. Although Theodule informed investors that SIMS was an independent public regulatory agency, in reality, SIMS was just a private company with no regulatory authority or

investment expertise whatsoever. SIMS was operated by a former employee of Creative Capital, a company used by Theodule as a major hub for channeling investment funds collected in the operation of the Ponzi scheme.

10. 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 investments as promised.

11. The members of the investment clubs 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.

12. The investment clubs typically required a minimum $1,000 investment deposit. Investors were precluded from withdrawing the investment 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.

13. At the end of the 90-day investment period, when the Receivership Entities had purportedly 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.

14. Some of the initial investors were paid double "returns" on their investments in

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

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

16. 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.

B. The Respondent Improperly Opens an Options Account for Claimant

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

18. As a FINRA registered broker dealer, when opening Claimants' account Respondent was required to discharge its "Know Your Customer" obligations.

19. Those obligations included learning essential facts about Claimant (and its ultimate customers, the victims of the Ponzi scheme), such as: Claimant's (and the victims') other securities holdings, financial situation and needs, tax status and investment objectives.

20. Respondent, however, failed miserably at meeting these obligations, which was a critical

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

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factor in the losses suffered by Claimant.

21. For example, Claimant's account opening documents (which were filled out by Theodule) represented that Claimant was an "investment club" and a partnership.

22. Of course, Claimant was neither an "investment club" nor a partnership, but rather, a Florida limited liability corporation. And, 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 Respondent should have checked as part of its "Know Your Customer" obligations.

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

24. Had they actually investigated who the members of the alleged investment club or partnership were, Respondent would have learned that Theodule's victims and Respondent's ultimate customers were not, in fact, members of an investment club or partnership and therefore not involved in any investment decisions. Rather, an unlicensed individual – Theodule or one of his accomplices – was illegally acting as an investment advisor.

25. Additionally, had they followed the easily marked trail that would have led Respondent to learn the identify and investor profiles of their ultimate customers.

26. For example, Respondent made absolutely no inquiries with Claimant or Theodule when it received $2.6 million in wires directly from Theodule's bank account despite the fact that Respondent was given information reflecting that Theodule only had a net worth of between $40,000 and $60,000.

27. Finally, the application filled out by Theodule and submitted to Respondent curiously

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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.

28. 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, Respondent opened the account for Claimant for the purposes of trading options.

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

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

C. Respondent Fails to Properly Supervise Claimant's Options Account

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

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

33. Instead, from mid-2007 and into 2008, on a monthly basis, Claimant would buy and sell calls on securities – 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.

34. Moreover, the bizarre strategy employed in Claimant's account was done so in extremely large sums.

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35. 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)

36. Despite the large amounts being invested and lost, Respondent made no effort to ensure that the options transactions occurring 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). Indeed, in light of the fact that the account assets actually belonged to numerous individual victims of Theodole's Ponzi scheme, which Respondent should have known, there should have been active supervisory and compliance inquiries as the losses mounted.

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

D. Respondent Fails to Timely Follow Up On Other Red Flags

37. In April 2008, due to large sums of money being wired in and out of Claimant's account, Respondent sent an email to its clearing broker requesting a complete list of wires into Claimant's account.[5] Upon information and belief, Respondent was concerned about its obligations under Anti-Money Laundering laws with regard the sources of these funds. Yet, notwithstanding that Respondent apparently recognized these numerous large wire transfers as a red flag, it failed to follow-up on these red flags to determine the sources of such funds. Of course, had it done so, it would have discovered that the funds actually belonged to the Ponzi scheme's victims and that Theodole was illegally "managing" money for others without the requisite licenses in place.

38. Remarkably, the information provided by the clearing firm demonstrated that Theodule, who had previously listed his net worth as between $40,000 and $60,000, had wired more than $3,700,000 into Claimant's account in less than one year, from his personal account. Again, Respondent failed to follow-up on this red flag. Just as before, proper inquiries would uncovered the true source of the funds and Theodole's unlicensed business practices.

39. Even more remarkably, even though such information should have led Respondent to conduct a more thorough investigation into Claimant's account, no such investigation appears to have taken place. And it goes without saying that, because Respondent failed to take any actions to learn the profiles of the Haitian-American individuals whose money comprised the assets in the account, Respondent also failed to ensure that the options transactions occurring in the account were compatible with those individuals' investment objectives and ability to withstand losses.

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

40. Following the date of Respondent's email to the clearing firm, Claimant's account suffered nearly $2.5 million in additional losses, much of which likely would have been avoided had Respondent properly supervised Claimant's account.

41. Ultimately, by July 2008, due to Respondent's failure to properly open Claimant's account, and failure to properly supervise the incoming wire transfers and the options activity occurring in the account, Claimant lost nearly $6 million dollars.

IV. RESPONDENT VIOLATED DUTIES OWED TO CLAIMANTS

42. By virtue of the conduct alleged herein, Respondent violated FINRA rules and common law duties it owed to Claimant.

Breach of Fiduciary Duty

43. Respondent must deal with its clients in good faith and owes them a fiduciary duty of loyalty and care.[6] As Claimant's broker-dealer, 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 their Claimant of the risks of any trading strategy being utilized in its account; and

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

44. Respondent breached its fiduciary duties owed to Claimant (and those owed to the individuals whose money was actually held in the account) by the conduct described above.

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[6] *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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45. Specifically, 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. Respondent also made no effort to determine whether the options transactions occurring in Claimant's account were suitable for those individuals.

46. Moreover, Respondent 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. Respondent 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.

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

Negligence

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

(a) a duty to learn the essential facts relative to every customer;[7]

(b) a duty to learn the essential facts relative to every order placed in each customer's accounts;[8] and

(c) a duty to learn the essential facts regarding every cash or margin account accepted or

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

[8] *See* id.

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carried by such organization;[9]

49. And, as it related to Claimant trading options in its account, Respondent had the following, additional, options related obligations:

(a) 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 approving a customer account for options trading; and[10]

(b) 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;[11] and

(c) 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.[12]

50. Respondent 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 Respondent breached its duty of care by failing to warn Claimant of any of those things.[13]

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[9] *See* id.

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

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

[12] *See* FINRA Rule 2360(20).

[13] *See* Palmer v. Shearson Lehman Hutton, Inc., 622 So.2d 1085 (Fla. 1st DCA 1993); Twiss v. Kury., 25 F.3d 1551 (11th

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Respondent knew, or through the exercise of reasonable care should have known, that its failure to warn Claimant placed Claimant within a foreseeable zone of harm.

51. Respondent also breached its duties to Claimant, especially its duty to "Know Your Customer" pursuant to Rule 405. Respondent failed to gather all the essential facts regarding Claimant – and the individuals whose money was actually being invested in Claimant's account. Rather than comply with the duties owed to its customers, Respondent watched silently as Claimant's' account was decimated by ridiculously speculative options trading, all the while pocketing the revenues generated by that very trading.

52. As a direct result of Respondent's negligence described above, Claimant has suffered financial devastation.

Breach of Contract

53. The self-regulatory organizations of which Respondent is a member, including FINRA, set forth rules and regulations that Respondent has agreed to comply with for the benefit of its customers, including Claimant. There is an implied, if not actual, agreement between Respondent and Claimant that Respondent will abide by FINRA rules, as well as SEC and other regulatory rules and regulations, and all state and federal laws. Respondent has materially breached the agreement 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.

IV. DAMAGES

54. Respondent's wholesale failure to comply with its obligations resulted in massive losses in Claimant's account. Specifically, Claimant lost $5,863,960.20. Claimant should be fully compensated

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Cir. 1994); *see also* SII Investments, Inc. v. Jenks, 2006 U.S. Dist. LEXIS 51753 (M.D. Fla. 2006).

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for its losses, including costs and pre- and post-judgment interest.

V. CLAIMS

55. Respondent negligently violated the high standards of commercial honor and just and equitable principles of trade to which it is subject. The violations that occurred as a result of Respondent's 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;[14] and
d. breach of contract.

VI. RELIEF SOUGHT

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

(a) damages based on fairness and equity;[15]

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[14]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.

[15]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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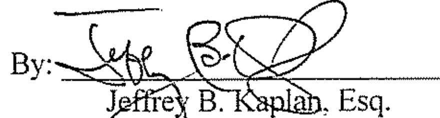
(b) compensatory damages, as applicable, plus prejudgment interest at the statutory rate; and

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

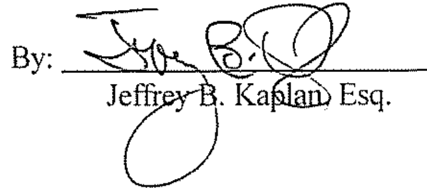
Respectfully Submitted,

DIMOND KAPLAN & ROTHSTEIN, P.A.
Counsel for Claimant
Offices at Grand Bay Plaza
2665 South Bayshore Drive, PH-2B
Miami, Florida 33133
Telephone: (305)374-1920
Facsimile: (305) 374-1961
E-Mail: jkaplan@dkrpa.com

By: 
Jeffrey B. Kaplan, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that Claimant's STATEMENT OF CLAIM was filed via FINRA's on-line filing service on this 28th day of April, 2011.

By: 
Jeffrey B. Kaplan, Esq.