BEFORE FINRA DISPUTE RESOLUTION, INC.

IN THE MATTER OF THE ARBITRATION BETWEEN:

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

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

ANSWER OF TD AMERITRADE, INC.

Respondent TD Ameritrade, Inc., doing business as thinkorswim, Inc. ("TOS")[1] denies the allegations and claims filed on behalf of Claimant Creative Capital Concept$, LLC ("CCC") by its court-appointed Receiver, Jonathan E. Perlman, Esq.

This arbitration fails to raise any issue that constitutes a claim against TOS.

At the threshold, we observe that the case is brought in the name of CCC, by the Receiver for CCC, and therefore, can legitimately pertain only to claims *by CCC*.

It is patently ridiculous, however, for CCC to claim that TOS is liable for assessing the "suitability" of the transactions that CCC's principal, George Theodule, independently selected and ordered for CCC's account. TOS never made a recommendation to CCC or solicited a transaction. Claimant admits that Mr. Theodule was authorized to act on CCC's behalf, and that he decided how much to invest, and what and when to trade. Claimant nonetheless asserts that TOS should have questioned the

[1] TD Ameritrade, Inc., acquired thinkorswim, Inc., in 2009, after the events at issue in this arbitration. Thinkorswim, Inc. operates as a division of TD Ameritrade, Inc.

wisdom of Mr. Theodule's individual orders and should have overruled his instructions. CCC says TOS, having processed CCC's self-directed orders, should be liable for the market losses CCC incurred on its trades or withdrawals it made for itself.

Claimant thus not only ignores the key facts, but also turns the law on its head. Contrary to Claimant's assertions, the law is clear that CCC, acting through its authorized representative, was free to invest or trade as it saw fit, without being second-guessed by TOS. As TOS did not recommend Claimant's trades, TOS had no obligation to monitor or evaluate their suitability or wisdom.

It is likewise preposterous for CCC to object that TOS opened an options account in the name of CCC upon the application of its own authorized representative. There is no basis for CCC to complain that TOS did what CCC's authorized representative asked it to do, on the basis of the information that its authorized representative provided.

It is equally facetious for CCC to claim that TOS breached its agreement with CCC by processing the orders placed by its authorized representative -- in other words, by doing what CCC instructed TOS to do. TOS's duty was to process the customer's orders promptly and accurately, and that is what TOS did. That is not a *breach* of contract; it is contract *performance*.

On its face, it is clear that this case by CCC against TOS has no merit whatsoever. It is nothing more than a transparent attempt by the Receiver to pick the "deep pockets" of an innocent broker-dealer who happened to have maintained an account for CCC, in a cynical effort to extract assets for possible distribution to the third parties who gave money to *CCC*.

This is utterly improper. The Receiver's cynical exploitation of the natural sympathy for Ponzi scheme victims is improper. The allegations that CCC turned out to be a Ponzi scheme, and the allegations about the damage allegedly caused to CCC's investors as a result of that scheme are **irrelevant** to any claims *by CCC* against TOS, which had no knowledge of or involvement in the alleged scheme. The Receiver acknowledges that he "stands in the shoes of Claimant", which is CCC. He is CCC, for this purpose. But CCC cannot sue anyone for damages caused by CCC's own conduct, and the law is clear that CCC and its Receiver have no standing or authority to bring claims on behalf of the people who contributed money to CCC. If the third parties who gave money to CCC believed they had claims against CCC or some other party, those people would have to bring their own claims; the CCC investors, however, are complete strangers to TOS, and have no claim whatsoever against it.

This case is meritless and should be rejected, and the Panel should consider imposing sanctions on the Receiver for subjecting TOS to this frivolous claim.

## FACTS AND APPLICABLE LAW

### A. A very brief overview of thinkorswim's business.

Thinkorswim is an online, discount brokerage firm that offers an advanced, innovative technology platform designed for self-directed traders. It also provides stock and options trading education and resources for customers.

TOS's customers make their own investment and trading decisions. TOS has service/ trading desks to support customers and assist them in placing their orders, but TOS does not make transaction or investment recommendations to its customers. Customers choose TOS because of the sophistication of its market information and order-

entry technology, the breadth and variety of the trading it can support, and the education resources it provides. They do not want the services of a traditional brokerage firm, which would provide investment recommendations (and be responsible for the suitability of those recommendations) but which would charge higher commission rates.

In 2007 - 2008, thinkorswim used Penson Financial Services, Inc., as its clearing broker-dealer. Customer accounts were "introduced" by thinkorswim, but were actually carried and administered, and transactions were processed, by Penson.

B. Claimant And Its Account.

On March 28, 2007, Creative Capital Concept$ began the process of opening an account with TOS. CCC's principal, George Theodule, completed the online account application, providing all of the required information. CCC indicated that it was an investment club, which Penson treats like a general partnership. For all accounts, including those to be registered in the name of an entity, Penson required that customers provide the social security number of the individual principally responsible for the account, in this case, Mr. Theodule. Mr. Theodule provided that information. On June 8, 2007, CCC completed the application by submitting a signed customer agreement and other required documents, including the Investment Club Account Agreement.

In the Investment Club Account Agreement, CCC represented and warranted that it was a general partnership with three partners -- George Theodule, Detra Pasby, and Natalie Simon -- any or all of whom were authorized to direct the account. CCC specifically agreed that:

> You [TOS] 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, CCC 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 [CCC] has an interest in your account or accounts with" TOS;

• CCC would comply with all applicable laws, rules and regulations in connection with any accounts;

• CCC was aware of the high degree of risk involved in option transactions;

• CCC had given TOS information to demonstrate that the account and the trading anticipated in the account are not unsuitable for CCC in light of its investment objectives, financial situation and needs, experience and knowledge;

• CCC (though its authorized representatives) was financially sophisticated and had experience in effecting transactions in equity securities, equity options and equity index options;

• CCC would promptly notify TOS if there were significant changes to the net worth, income level or employment status listed on the new account forms;

• CCC would advise TOS of any changes in CCC's investment objectives, financial situation or other circumstances that may be deemed to materially affect

the suitability of executing options transactions for its account; and

• CCC specifically agreed that TOS is not responsible for, and CCC would not hold TOS 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 CCC agreed that:

• CCC understood that trading equity options is "highly speculative and contains a high degree of risk";

• CCC 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;

• CCC 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 CCC would, before trading, obtain any further clarification or information that it needed before certifying that it read and understood the document;

• CCC understood that options are traded for a limited period of time; and

• CCC understood and that volatility, liquidity issues and system failures may make order execution extremely difficult.

Contrary to assertions by the Claimant, TOS provided CCC with written risk

disclosure documents, including the Options Clearing Corporation's booklet, "Characteristics And Risks Of Standardized Options". As the title suggests, it describes in great detail the risks of trading each type of standardized options. CCC subsequently acknowledged that it had carefully read and fully understood the information in the booklet, and other pertinent disclosure information provided by TOS.

TOS performed its Customer Identification and Anti-Money Laundering procedures. No alert or negative information was returned.

Once the account was opened, CCC placed most of its transaction orders online. TOS personnel had limited interactions with the account or Mr. Theodule. He occasionally called customer service to ask about posting of credits to the account; a few times, he called the trading desk to place orders or inquire about order executions. In his interactions with TOS, he repeatedly demonstrated his understanding of the mechanics, costs, risks and potential consequences of the trades he was doing for CCC.

CCC, acting through Mr. Theodule, traded in the account for approximately one year, from June 2007 to July 2008. Throughout that period, CCC experienced profitable trades and losing trades. Several times, TOS personnel checked with him to ensure he understood the risks. Ultimately, of course, whether the transactions were profitable or not depended on movement of the stock market, which TOS does not control.

C. TOS Complied With All Applicable Rules In Opening And Maintaining Claimant' Accounts.

1. TOS Gathered All Required Information From Claimant.

FINRA Rule 3110(c) "Customer Account Information" provides:

> Each member shall maintain accounts opened after January 1, 1991 as follows:
> (1) for each account, each member shall maintain the following information:
> (A) customer's name and residence;

(B) whether customer is of legal age;

(C) signature of the registered representative introducing the account and signature of the member or partner, officer, or manager who accepts the account; and

(D) if the customer is a corporation, partnership, or other legal entity, the names of any persons authorized to transact business on behalf of the entity;

(2) for each account other than an institutional account, and accounts in which investments are limited to transactions in open-end investment company shares that are not recommended by the member or its associated persons, each member shall also make reasonable efforts to obtain, prior to the settlement of the initial transaction in the account, the following information to the extent it is applicable to the account:

(A) customer's tax identification or Social Security number;

(B) occupation of customer and name and address of employer; and

(C) whether customer is an associated person of another member.

In July 2007, NASD Rule 2860 was in effect. It provided that brokers are not permitted to accept a customer's order to purchase or write options unless the broker first provided the customer with the appropriate risk disclosure documents, and approved the account for options trading. That Rule further provided, in pertinent part:

> In approving a customer's account for options trading, a member or any person associated with a member shall exercise due diligence to ascertain the essential facts relative to the customer, his financial situation and investment objectives. Based upon such information, the branch office manager or other Registered Options Principal shall specifically approve or disapprove in writing the customer's account for options trading. ...

In compliance with these Rules, TOS requested the legal name of the customer, residence address, date of birth, social security number, occupation, name and address of the customer's employer, and whether the customer is an associated person of another FINRA member firm. In addition, as the account was to be registered to a partnership (investment club), TOS requested the names of any persons authorized to transact business on its behalf. Further, as a predicate to determining whether to approve the account for options trading, TOS requested the customer's income, net worth, investment and trading experience, and objectives.

Mr. Theodule provided the information, certified to its accuracy, and agreed to advise TOS of any changes in CCC's circumstances that might affect the suitability of effectuating options transactions for CCC's account. TOS was entitled to rely on the information that Mr. Theodule provided, and TOS exercised its reasonable, good faith judgment in determining, based on that information, to approve CCC's application to trade in options. TOS provided CCC with the appropriate risk disclosure documents, including the Characteristics And Risks Of Standardized Options booklet, prior to accepting any orders to trade options.

TOS thus complied with the applicable rules in opening the account and approving it for options trading.[2]

2. TOS Complied With Applicable Law Governing Anti-Money Laundering And Verification Of Customer Identity.

Federal law and FINRA rules requires broker-dealers to develop and implement procedures to comply with anti-money laundering laws and to develop and implement programs to verify customers' identity. TOS has robust Anti-Money Laundering and Customer Identification Programs in place and meets the requirements of the Rules.

When CCC opened its account, TOS followed its Customer Identification and Anti-Money Laundering procedures. The identifying data provided by CCC was sent to a database service, which verified that the customer name matched the customer address, date of birth and social security number; checked the name against the list maintained by the Office of Financial Assets Control's Sanctions Program; and conducted other checks.

[2] These are the only rules governing collection of customer information that apply here. NYSE Rule 405 ("Know Your Customer") does not apply because TOS was not a member of the New York Stock Exchange.

No alerts or negative information were returned.[3]

TOS complied fully with its responsibilities under these rules and laws.

3. TOS Complied With Applicable Law And Its Contract In Accepting And Processing Claimants' Orders.

As with most TOS customers, CCC accessed its TOS account via Internet. CCC typically entered its transaction orders electronically, whereupon TOS routed the orders to the appropriate exchange or market center. (TOS is not a market center, and does not make a market in any security.) The vast majority of TOS's customer transactions are routed, executed and settled electronically, without further human involvement.

Claimant baldly misstates the law when it asserts that TOS was obliged to assess the "suitability" of the transaction orders that CCC's authorized representative placed for its account. In reality, once an account has been approved for options transactions, the "suitability" rule applies only where the broker is recommending the transaction, and as noted above, TOS made no recommendations here. There is no rule, regulation or other legal requirement that a broker review, monitor or assess customers' orders for "suitability" prior to processing them. To the contrary, the FINRA/ NASD rules and the law of agency are clear that brokers should promptly act on customers' orders and instructions, not stop and evaluate the "suitability" of self-directed orders. *See, e.g.,*

[3] Contrary to CCC's claim, TOS did not "fail" to take required steps in opening this account. Even ignoring the obvious problem that CCC cannot complain that TOS did not discover facts about CCC that CCC itself knew but did not reveal, CCC's underlying assertion -- that TOS had to conduct some sort of full-blown investigation -- is so much hot air, unsupported by any law or rule. Plus, there is no reason to believe that TOS would have learned anything significant even if it had taken the extraordinary investigation CCC now says it should have undertaken against CCC. CCC suggests that TOS should have unearthed CCC's Ponzi scheme by conducting pre-account-opening inquiries, but this is nonsense. First, although the Receiver does not say it here, the Receiver asserts in other cases that the Ponzi scheme began in *November* 2007 -- months *after* the TOS account was opened. TOS cannot have detected a scheme that did not yet exist. Second, CCC's suggestion that TOS should have discovered that CCC was registered as an LLC in Florida is pointless; the customer's LLC registration does not indicate a Ponzi scheme in the making. Moreover, if the trail to this alleged Ponzi scheme were so "easily marked" as CCC now claims, the *investors*, not TOS, were principally responsible for following it, and for protecting themselves.

NASD Rule 2320 ("Best Execution And Interpositioning") (Requiring, among other things, that brokers act promptly to ensure that customers obtain the best price prevailing on the market at the time of the order).[4] *See also Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F.Supp. 107 (N.D. Ala. 1971), *aff'd*, 453 F.2d 417 (5th Cir. 1972) (A broker's duty is to buy and sell securities pursuant to the customer's order; stating, "the affair entrusted to a broker who is to buy or sell through an exchange is to execute the order, not to discuss its wisdom.").

Consistent with the law, in the Client Agreement, TOS agreed to "act as your broker to purchase and sell securities for your account based on your instructions transmitted through electronic communications." There is no provision in the Client Agreement or any other agreement by which TOS agreed to review, monitor or assess the "suitability" or wisdom of any customer's specific order.

TOS processed CCC's orders promptly and accurately, and thus complied fully with TOS's responsibilities under the law and the Client Agreement.

4. TOS Had No Fiduciary Duty To CCC,
And Thus, Cannot Have Breached Any Such Duty.

"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." *Stewart v. J.P. Morgan Chase,* 2004 WL 1823902 (S.D.N.Y. 2004). *See also DeKwiatkowski v. Bear Stearns*, 306 F.3d 1293 (2d Cir. 2002) ("A broker ordinarily has no duty to monitor a nondiscretionary account, or to give advice to such a customer on an ongoing basis. ... A nondiscretionary customer by definition keeps control over the account and has full

[4] This NASD Rule is still in effect and will remain so until FINRA adopts a rule to replace it.

responsibility for trading decisions."); *Tapia v. Chase Manhattan Bank, N.A.*, 149 F.3d 404, 412 (5th Cir.1998) (Where the broker does not have discretionary control over the account, "any fiduciary relationship between [the customer] and the Defendants was limited to making investments approved by [the customer]"); *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) (Same).

CCC did not have a discretionary account with TOS. Rather, CCC had a self-directed account, directed by CCC's authorized principal, Mr. Theodule. Accordingly, TOS had no fiduciary duty to CCC, and no duties to monitor the account, to advise the customer, or to warn CCC of the risks of its self-directed trades. *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").

5. Contrary To Claimant's Allegation, TOS Did Not "Fail" To Follow Up On "Red Flags".

CCC attaches to its statement of claim an email that TOS sent to its clearing broker on April 17, 2008, requesting information about wires into CCC's account, and the clearing firm's response. CCC speculates that TOS sent its email request because it observed "large sums of money being wired in and out of Claimant's account" which Claimant further speculates "led TOS to become concerned about its obligations under Anti-Money Laundering laws with regard to the sources of these funds". Claimant then claims, essentially, that TOS should somehow have discovered the Ponzi scheme by conducting unspecified "follow-up" inquiries on the information it received.

Claimant is once again mistaken.

In fact, on April 17, 2008, Mr. Theodule placed a large order by telephone to TOS's trading desk. The TOS representative who answered the call escalated it, because of the size of the order, to a manager. That particular manager makes it his practice, when he is working with a customer by phone, to compare the size of the order to the overall account and, if he thinks it appropriate, to check that the customer understands the magnitude of the risk. The manager checked with Mr. Theodule, who assured TOS that he understood, and CCC accepted, the risk. TOS processed the order as CCC instructed.

The manager thought it would be wise, however, to inquire as to the source of the funds. He asked TOS's AML team to check. TOS's email was sent *6 minutes* after the manager's conversation with Mr. Theodule. TOS received the information the next day, and analyzed it immediately; it confirmed that all funds wired into the CCC account at TOS came from accounts with the name of Creative Capital, or from Mr. Theodule, one of the principals of CCC. TOS's inquiry confirmed that the funds originated from accounts that CCC owned or with which it was evidently affiliated.

Thus, the emails show that TOS acted properly and responsibly. TOS identified a concern, promptly obtained the information necessary to confirm the source of the funds, and observed that the funds came from appropriate sources. Having reasonably resolved its concern, TOS had no further obligations under the Rules.[5]

[5] The Receiver blithely asserts that "proper inquiries would have uncovered the true source of the funds" -- in other words, that TOS would have single-handedly unearthed the whole Ponzi scheme if it had "followed-up" on an observation that the dollar value of the wires exceeded the amount Theodule had indicated, a year earlier, as his net worth. Of course, the Receiver does not describe these supposed "proper inquiries", or how TOS could possibly have obtained the information he now claims TOS should have obtained. TOS had confirmed that all wires came from bank accounts in the name of Creative Capital or Theodule. Perhaps the Receiver is suggesting that Mr. Theodule would have confessed to the whole scheme, maybe if TOS had asked especially politely. Never mind that Mr. Theodule has refused to answer the Receiver's or the SEC's questions about the sources of the funds. The Receiver himself, with subpoena power, all of the resources of the SEC and the power of the federal courts at his disposal, still has not fully uncovered the true sources of the funds. In short, the Receiver's assertion against TOS is ridiculous.

D. CCC Is Barred From Bringing These Claims Against TOS, As The Claims Arise From CCC's Own Misconduct, And The Receiver Is Not Permitted To Bring Claims On Behalf Of The Investors In CCC.

In Florida, a receiver steps into the shoes of the corporation, individual or estate whose interests he was appointed to protect and therefore takes the rights, causes and remedies that were available to the entity he was chosen to represent. *In re Wiand Receivership cases*, 2007 WL 963162 at *13 (M.D. Fla. 2007). This means the Receiver has no claims or rights that the entity itself does not have; the Receiver may not bring claims that CCC could not bring on its own.

Under the doctrine of *in pari delicto,* a plaintiff who has participated in the wrongdoing may not recover damages resulting from the wrongdoing. *Id.* As the federal Court in Florida explained,

> The Latin phrase *"in pari delicto"* means "of equal fault." The doctrine is premised upon the equitable principle that " '[n]o [c]ourt will lend its aid to a man who founds his cause of action upon an immoral or illegal act.'" Under the doctrine, a plaintiff may not maintain a claim against a defendant if the plaintiff bears equal or greater fault for the claim asserted.

*Id. (citations omitted)*

Where the entity in receivership was created to serve as the vehicle for a fraud, and was controlled exclusively by the people who engaged in and benefitted from the fraud, there is no way to separate the fraud of the insiders from those of the entity itself. *See Freeman,* 865 So.2d at 552. As one court colorfully stated, in this situation, the corporation is merely the "robotic tool" or "evil zombie" of the principal. *Scholes v. Lehmann,* 56 F.3d 750, 754 (7th Cir. 1995). In that situation, the entity itself is fully chargeable with the fraud by its insiders, and it cannot maintain any claim against any other party based on that misconduct. *Freeman,* 865 So.2d at 552; *see also O'Halloran*

*v. First Union Nat'l Bk.*, 350 F.3d. 1197, 1203 (11th Cir. 2003) ("Greater Ministries, whose primary existence was as a perpetrator of the Ponzi scheme, cannot be said to have suffered injury from the scheme it perpetrated.")

Here, CCC alleges that Theodule created CCC as a vehicle for his fraud, that Theodule controlled CCC, that Theodule's trading was an integral part of his scheme, and that Theodule benefitted from the fraudulent scheme. CCC had no existence apart from Theodule and his scheme; CCC was Theodule's "evil zombie." Thus, as a matter of law, CCC is fully chargeable with Theodule's conduct, and cannot maintain any claim based on it. *Freeman*, 865 So.2d at 551-52.

But here, CCC is attempting to make claims against TOS based on CCC's own wrongdoing, claiming that TOS is liable, in essence, for failing to detect and prevent CCC's fraud against the investors in CCC's alleged Ponzi scheme. Its claims are barred by the doctrine of *in pari delicto*.

It seems apparent that the Receiver is not seriously making any claim on behalf of CCC, however, given how silly it is for CCC to blame TOS for the purported unsuitability of its own transaction orders, or to claim that TOS should have known that CCCs own representations about itself were untrue. It seems, rather, that the Receiver is really attempting to represent the interests of the *"investors"* in CCC. This is made clear throughout the statement of claim, in all of the allegations relating to the Ponzi scheme. In this vein, the Receiver alleges that if TOS had detected the Ponzi scheme, the "victims' money would not have been lost"; he alleges that the victims of the Ponzi scheme were TOS's "ultimate customers"; and he even goes so far as to suggest that TOS was somehow responsible for learning "the victims' other securities holdings, financial

situation and needs, tax status and investment objectives". Indeed, as CCC suffered no legally recoverable injury resulting from its own conduct, the only people whose interests were affected by the losses were the CCC investors/ Ponzi scheme victims. Any money recovered in this or other actions would be distributed to these investors.

But the law is clear that the Receiver may NOT represent or purport to represent the CCC investors/ creditors/ victims, for several reasons articulated by the United States Supreme Court. *See Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972). First, it is unclear to what extent they would even have a claim; they cannot recover more than they lost, so the amount they could theoretically claim is limited to any amount unreimbursed by the receivership proceedings, which cannot be determined until the receiver has finished gathering the estate's assets and has determined how much each creditor will recover. *Id.* at 431. Second, once the receivership has reached that ending stage, there is no reason for the receiver to represent the creditors' interests; they "are capable of deciding for themselves whether or not it is worthwhile" to try and recover any remaining, unreimbursed losses by suing the third party. *Id.* The creditors -- who are the people "truly affected" by the suit against the third party -- "should make their own assessment of the respective advantages and disadvantages, not only of litigation, but of various theories of litigation." *Id.*

Third, there are conflicts of interest between the Receiver and the investors, and the inefficient and unfair prospect of duplicative or multiple actions:

> ... a suit by [the receiver] on behalf of [creditors] may be inconsistent with any independent actions that they might bring themselves. Petitioner and the SEC make very plain their position that a suit by the [receiver] does not pre-empt suits by individual [creditors]. They maintain, however, that it would be unlikely that such suits would be brought since the [creditors] could reasonably expect that the [receiver] would vigorously prosecute the claims of all debt investors. But,

> independent actions are still likely because it is extremely doubtful that the [receiver] and all [creditors] would agree on the amount of damages to seek, or even on the theory on which to sue. Moreover, if the [third party] wins the suit brought by the [receiver], unless the [creditors] are bound by that victory, the proliferation of litigation that petitioner seeks to avoid would then ensue. Finally, a question would arise as to who was bound by any settlement.

*Id.* at 431-32.

Finally, even if the Receiver could represent the CCC investors' interests, the CCC investors would have no claim against TOS, as they were not its customers, and had no interactions with TOS whatsoever. TOS had no role in their decisions to invest with CCC, and had no duties with respect to them. *See Freeman,* 865 So. 2d at 553-555.

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

1. Claimant has failed to state a claim upon which relief can be granted. As discussed above, as a matter of law, a broker who is not recommending a security transaction has no duty to assess the suitability of that transaction or monitor an account. As Respondent does not owe the duties allegedly breached, there is no claim.

2. Claimant has failed to state a claim for breach of contract, as it has not identified any contract provision which allegedly was breached. In reality, TOS fulfilled its contractual obligations.

3. Claimant has failed to state a claim for negligence. CCC 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 CCC's, as its authorized representative made all trading and investment decisions for its account. Moreover, the economic loss rule bars 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).

4. Claimant assumed all risk of loss. The risks arising from self-directed trading in the securities market and in options are obvious, and were known to Claimant from its own experience.

5. Claimant has failed to state a claim for breach of fiduciary duty; as discussed above, the law is clear that a broker's duty to a client with a non-discretionary account is limited to processing client orders promptly and accurately. Here, Claimant had a non-discretionary account, and it does not contend that Respondent failed to process its orders promptly and accurately. (To the contrary, here, CCC complains *because* Respondent processed its orders promptly and accurately.)

6. Claimant has failed to state a claim for violation of the "Know Your Customer" rule or for FINRA Rules because (1) Respondent 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 TOS which TOS is alleged to have violated.

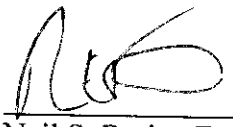
7. Claimant is not entitled to the damages it seeks. Claimant's losses were caused by Claimant's selection of securities/ options to trade, and then by market forces beyond Respondent's control. Respondent is not liable for market losses. Indeed, as CCC itself (via Mr. Theodule) asserted during one conversation,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

8. Claimant failed to mitigate its damages. Claimant could have stopped trading when it suffered its first losing trade. Instead, CCC 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 the losses it now claims.

FOR ALL OF THESE REASONS, Respondent TD Ameritrade, Inc., respectfully submits that the claims of Claimant 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:



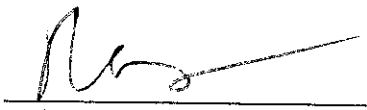
Neil S. Baritz, Esq.
Florida Bar No: 0003468
Robert C. Harris, Esq.
Florida Bar No: 0026205
Baritz & Colman LLP
1075 Broken Sound Parkway
Suite 102
Boca Raton, FL 33487
561.864.5100
nbaritz@baritzcolman.com

Dana S. Gloor, Esq.
Baritz & Colman LLP
25 S. Charles Street, Suite 2130
Baltimore, MD 21201
410.528.5477
dgloor@baritzcolman.com

Attorneys for Respondent
TD Ameritrade, Inc.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2011, I sent a true and correct copy of the foregoing, by electronic and first class mail, to: Jeffrey Kaplan, Esq., Dimond Kaplan & Rothstein, PA, Offices at Grand Bay Plaza 2665 S. Bayshore Drive, Penthouse 2B, Miami, Florida 33133, Lisa Lasher , FINRA Dispute Resolution, 5200 Town Center Circle, Tower I-Suite 200, Boca Raton, Florida 33486



Robert C. Harris, Esq.