FINANCIAL INDUSTRY REGULATORY AUTHORITY
FINRA CASE NO. ______________

IN THE MATTER OF ARBITRATION BETWEEN

JONATHAN PERLMAN, ESQ., as court-appointed
Receiver of Creative Capital Consortium, LLC, *et. al.*,
and as assignee of Gabrielle Alexis, Detra Pasby and
Edwidge Benoit,

Claimant,

v.

OPTIONSXPRESS, INC.,

Respondent.
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STATEMENT OF CLAIM

Claimant, JONATHAN PERLMAN, ESQ., as court-appointed Receiver of Creative Capital Consortium, LLC, *et. al.*, and as assignee of Gabrielle Alexis, Detra Pasby and Edwidge Benoit, ("Mr. Perlman" or "Receiver"), hereby initiates this FINRA arbitration against OPTIONSXPRESS, INC., and alleges as follows.

I. INTRODUCTION

Claimant brings this arbitration to recover more than $9 million that was lost as a result of Respondent's failure to adhere to its basic duties when opening, administering, and supervising Claimant's options accounts. Respondent's failures permitted the improper opening and negligent administration of the accounts as well as the wrongful allowance of a wildly speculative and reckless options strategy in the accounts, all of which led to Claimant's massive losses.

Claimant, Jonathan Perlman, Esq., is a Court Appointed Receiver (the "Receiver") *via* a Receivership Order entered in a Securities and Exchange Commission ("SEC") enforcement action

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pending in the Southern District of Florida.[1] The Receiver is the proper Claimant by virtue of his having received assignments of claims held by the titular owners of the accounts at issue in this Statement of Claim.[2]

The enforcement action concerns a multi-state Ponzi scheme through which George Theodule ("Theodule"), along with others, stole nearly $70 million dollars from hard-working Haitian-Americans. The assignors conspired with Theodule and others (the "Schemers") to perpetrate the Ponzi scheme, and some of the funds raised by the Ponzi scheme were placed in the accounts at issue here (which were accounts held jointly with Theodule or Theodule's wife, Dorothy Delisfort). As such, the Court has appointed the Receiver to take control of the receivership entities and to pursue and recover any and all funds owed to the receivership entities for the ultimate distribution of those funds to victims of the Ponzi scheme. In furtherance of that goal, the Receiver has been provided with assignments that provide the Receiver with standing to bring this arbitration.[3]

Ultimately, more than $9 million dollars was lost in the accounts at issue. Those funds belonged to hardworking members of the Haitian-American community, many of whom turned over their life savings to Theodule (facts Respondent either knew or should have known).

Had Respondent met its "Know Your Customer" responsibilities, the options accounts at issue would not have been opened, and millions of dollars of innocent victims' money would not

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

[2]The accounts at issue are sometimes referred to herein as the "Alexis/Theodule" account, the "Pasby/Theodule" account, and the "Delisfort/Benoit" account. Collectively, these assignors are sometimes referred to as the "Account Holders."

[3]A true and correct copy the assignments for each Assignor (Ms. Alexis, Ms. Pasby and Mr. Benoi attached hereto as Exhibit A.

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have been lost.[4] Similarly, had Respondent met its responsibilities regarding the opening and ongoing administration and monitoring of accounts, 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 in Claimant's options accounts. 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, JONATHAN PERLMAN, ESQ., is an SEC Receiver, appointed by a Federal Court judge *via* the entry of an SEC receivership order. In his capacity as Receiver, Mr. Perlman has acquired assignments of claims from the owners of the options accounts at issue here. This case is brought by the Receiver in his capacity as assignee of those account owners and he seeks recovery for the benefit of the victims of the Theodule Ponzi scheme.

3. Respondent, OPTIONSXPRESS, 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 *respondeat superior* and actual or apparent authority.

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

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III. FACTS COMMON TO ALL CLAIMS

A. The Theodule Ponzi Scheme

4. Holding himself out as a Christian pastor, Theodule ingratiated himself with working-class Haitian-Americans by claiming he was offering his investment expertise to help build wealth within the Haitian community. In fact, he was stealing the money of those Haitian-Americans through a Ponzi scheme that he operated through entities now subject to the pending receivership (the "Receivership Entities).

5. Theodule encouraged the Haitian-Americans (read: "victims") to form investment clubs, through which they would pool their money and then send it to the Receivership Entities, purportedly so Theodule could invest and grow their money.

6. In reality, the investment clubs served exclusively as a mechanism to funnel funds to the Receivership Entities, and then to Theodule himself, his wife, Dorothy Delisfort, and to his friends and family.

7. In classic Ponzi-scheme fashion, Theodule used new investor funds to pay "profits" and "return of principal" to earlier investors. Theodule ultimately misappropriated in excess of $20.6 million from his victims for his personal use. This amount includes transfers of $18.1 million to brokerage accounts ($9 million of which is at issue in this claim), over $2 million to personal bank accounts, 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 Joint "Theodule" Accounts

8. Against that backdrop, in January 2007, Theodule opened the first of the three accounts at issue with Respondent for the purpose of investing other peoples' money. The second

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account at issue was opened by Theodule approximately fifteen months later, and the third account at issue was opened several months thereafter.[5]

9. In total, Theodule and the members of his Ponzi scheme opened nineteen (19) options accounts with Respondent. Of those 19 accounts, six (6) were opened with Theodule as a joint account holder, one (1) was opened with Theodule as the sole account holder, and one (1) was opened for an entity (called "Wow We Made Double"), which listed Theodule as a corporate officer. In other words, eight (8) of the 19 accounts actually listed Theodule as having an interest in the account opened with Respondent. Two of the accounts for which Theodule served as joint account holder are the subject of this case. Theodule's wife, Dorothy Delisfort, was the joint account holder of the third account at issue in this case.[6]

10. As a FINRA-registered broker-dealer, when opening any of these accounts Respondent was required to discharge its "Know Your Customer" obligations.

11. Those obligations included learning essential facts about Theodule and each Account Holder, such as: each Account Holder's other securities holdings, financial situation and needs, income, net worth, tax status, and investment objectives.

12. Respondent failed miserably at meeting these obligations, which was a critical factor in Claimant's losses.

13. For example, the account opening documents for each of the accounts at issue reveal a treasure trove of information presenting a host of "red flags," which, at a minimum, should have

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[5]A copy of each Assignor's Account Opening documents are attached hereto as part of composite Exhibit B.

[6]The Receiver has yet to obtain assignments from certain of the other joint account holders. As such, no claims are being brought yet concerning investment losses in those accounts.

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led Respondent to ask more questions.

14. First, George Theodule was a joint account holder in at least six accounts with Respondent, two of which are at issue in this case.[7] The fact that Mr. Theodule opened so many joint accounts with Respondent, was, in and of itself, a "red flag" that something was amiss.

15. The account opening documents themselves also were confusing, filled with errors and irregularities as to the accounts at issue.

16. For example, the account opened by Assignor Pasby and Mr. Theodule listed each as having the same job ("manager" of the "Thriftway of Pahokee") and the same address, while stating that Ms. Pasby was "single" and Mr. Theodule was "married." Each listed the same income ("50K-100K"), net worth ("25K-50K"), and liquid net worth ("25K-50K").

17. In contrast, when Mr. Theodule opened the joint account with Assignor Gabrielle Alexis, Mr. Theodule's job, income, net worth, and marital status were all listed differently. In fact, Mr. Theodule listed various and conflicting occupations, income, net worth, and martial status on

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[7]The third account at issue was a joint account owned by Mr. Benoit and Dorothy Delisfort. Ms. Delisfort was Mr. Theodule's wife and also had several accounts with Respondent.

each of the account opening documents. To wit:

Joint Account Holder	**Theodule's Stated Marital Status**	**Theodule's Stated Employment**	**Theodule's Stated Income**	**Theodule's Stated Net Worth**	**Theodule's Stated Liquid Net Worth**
Gabrielle Alexis	single	Business Development (Creative Capital)	250K	250K	250K
Detra Pasby	married	Manager (Thriftway)	50K-100K	25K-50K	25K-50K
Derek Woods	single	Manager (Creative Capital)	250K	250K	250K
Elza Theodule	none	Project Manager (Komtech)	50-100K	50K-100K	50K-100K
Fritz Nivoise	widowed	retired	50K-100K	250K	250K
Yollete Fabre	widowed	CEO (CCC)	250K	250K	250K
George Theodule (individual account)	widowed	Manager (Thriftway)	50K-100K	250K	100K-250K

18. Thus, Theodule alternatively told Respondent that he was: (a) a "CEO," "Business Developer," "Project Manager," "Manager" of a Thriftway, and "Retired;" (b) single, widowed, and married; and (c) earning anywhere from a modest $50,000 per year up to $250,000 per year.

19. Theodule's personal information reflected on the new account forms was inconsistent across accounts with no discernible reason. Yet, Respondent failed to question or inquire about these inconsistencies or otherwise attempt to reconcile the inconsistencies. At bottom, Respondent did not "know its customer."

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20. Thus, Respondent opened these multiple Theodule-related accounts (including the accounts at issue here) in the face of glaring "red flags," and failed to meet its "Know Your Customer" obligations in each instance.

21. Had Respondent fulfilled its "Know Your Customer" obligations and investigated and followed-up on the obvious "red flags," it would have learned, among other things, that (a) Theodule had been providing inconsistent and untrue information about himself and (b) Theodule was not registered as an investment advisor and did not otherwise possess the necessary licensing to invest money on behalf of others. Respondent also would have learned that the options trading that ultimately ensued was unsuitably risky for the working-class Haitian-Americans whose money was deposited in the accounts at issue.

C. The Delisfort-Benoit Account is Similarly Suspect

22. The account opening documents for the joint account opened by Assignor Edwidge Benoit and Dorothy Delisfort (Theodule's wife) also was replete with "red flags."

23. For example, the documents indicate that the account was being opened by two unemployed individuals with limited income, net worth, and liquid net worth. As detailed more fully below, these "red flags" and others became more apparent as a result of the activity in the account.

D. Respondent Fails to Detect Suspect Wire Activity

24. Once the accounts at issue were opened, Respondent continued to fail either to investigate or detect obviously suspect activity occurring within the accounts. This was especially true regarding clearly suspect wire activity in the accounts.

25. For example, Respondent made absolutely no inquiries with either Ms. Alexis or Theodule when that account repeatedly received wires into a personal, jointly held account from Ms.

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Alexis' attorney trust (IOLTA) account. In total, nearly $6.5 million in funds were received into the account from Ms. Alexis' trust account.

26. The Pasby/Theodule account also had suspect wire activity in that $2 million was wired into the account *on a single day.* Considering that the account-opening documents state that Ms. Pasby and Theodule each had income of "50k-100k" and liquid net worth of less than "50k," the $2 million wire from Mr. Theodule's personal bank account was suspicious to say the least.[8]

27. Finally, the Benoit/Delisfort joint account also had multiple, large incoming wire transfers despite the fact that both Ms. Delisfort and Mr. Benoit had each represented in their account opening documents that each was "unemployed," had limited income, and virtually no liquid assets.

28. Remarkably, when faced with this suspect wire activity Respondent failed to make the slightest inquiry. Even a minimal investigation would have led Respondent to discover that each of these accounts never should have been opened, and that each should be shut-down, immediately because the information that Respondent had concerning its customers was inconsistent with the activity in the accounts.

29. In short, Respondent failed to do virtually everything Respondent should have done when opening and then administering Claimant's accounts.

E. <u>Respondent Fails to Properly Supervise Claimant's Options Accounts</u>

30. Immediately after the accounts at issue were opened, options were traded at increasingly large rates and with no rational strategy.

31. From early-2007 and into 2008, and on a monthly basis, there was irrational options

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[8]The account also received single-day wire transfers of $300,000 and $160,000 – both of which were many multiples of the liquid assets either account holder had represented they had available to them.

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trading in each of the accounts at issue, such that the trades occurring almost always resulted in losses. Moreover, the reckless options trading in each account was done so in extremely large sums.

32. To wit, the accounts at issue suffered the following losses:

Account	Loss
Alexis/Theodule (Account No. 0549-6260)	$6,417,000
Pasby/Theodule (Account No. 0319-5377)	2,442,200
Delisfort/Benoit (Account No. 0540-0635)	205,000

33. Despite the large amounts being invested and lost, Respondent made no effort to ensure that the options transactions were suitable for the Account Holders (or the ultimate investors, read: the Ponzi victims) – as required by FINRA Rule 2360(20)(c)(I). Indeed, in light of the fact that the money actually belonged to numerous individual victims of Theodule's Ponzi scheme, which Respondent should have known, there should have been active supervisory and compliance inquiries as the losses mounted, and the accounts should have been shut down. But Respondent failed to take any action as these accounts racked-up more than $9 million in losses.

IV. RESPONDENT VIOLATED DUTIES OWED TO CLAIMANTS

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

Negligence

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

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a. learn the essential facts relative to every customer;[9]

b. learn the essential facts relative to every order placed in each customer's accounts;[10]

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

d. follow-up on red flags and suspicious activity in a customer account;

e. learn the essential facts regarding every cash or margin account accepted or carried by such organization;[11]

f. obtain information regarding the customer's investment objectives, a component of which is the customer's risk tolerance, prior to approving a customer account for options trading;[12]

g. have reasonable grounds – based on information furnished by the customer after reasonable inquiry by Respondent 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;[13] and

h. 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.

36. Respondent also owed a duty to properly supervise each options account opened, and to inform the Account Holders of the risks of their wildly speculative options trading strategy. But

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

[10] *See* id.

[11] *See* id.

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

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

Respondent breached its duty of care by failing meet these duties.[14] Respondent knew, or through the exercise of reasonable care should have known, that its failures would place its customers within a foreseeable zone of harm.

37. Respondent breached its duties to the Account Holders, including its "Know Your Customer" duty and its duty concerning the administration and oversight of incoming wire transfers. Respondent either failed to gather all the essential facts regarding the Account Holders or failed to follow-up on obvious red flags presented by the facts it did gather. Indeed, Respondent failed even to investigate and resolve the inconsistencies among the investor profiles that Theodule provided to Respondent across the accounts at issue. And Respondent never resolved those inconsistencies.

38. Rather than comply with its duties, Respondent watched silently as questionable wire transfers deposited money into the accounts and each account was decimated by ridiculously speculative options trading, all the while pocketing the revenues generated by that very trading.

39. As a direct result of Respondent's negligence described above, Claimant, as the Assignee of the Account Holders, has suffered financial devastation.

Breach of Contract

40. 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 the Account Holders. There is an implied, if not actual, agreement between Respondent and the Account Holders that Respondent will abide by FINRA rules, as well as SEC and other regulatory rules and regulations, and all state and federal laws. Respondent breached the

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[14] *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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agreement materially by failing to abide by the rules designed to protect the Account Holders, as described above. As a result, Claimant, as the Assignee of the Account Holders, suffered damages in the amounts described herein.

Breach of Fiduciary Duty

41. Respondent was required to deal with its clients in good faith and owed the Account Holders a fiduciary duty of loyalty and care. Respondent owed specific duties to the Account Holders, including:

a. to inform Account Holders of the risks involved with regard to *each* transaction entered in their accounts;

b. to inform Account Holders of the risks of any trading strategy being utilized in their accounts;

c. to ensure the suitability of *each* transaction entered in the Account Holder's accounts; and

d. to monitor suspicious activities, including suspicious wire transfers.

42. Respondent breached its fiduciary duties owed to each Account Holder (and those owed to the individuals whose money actually was held in each of the accounts at issue) by the conduct described above.

43. Respondent failed to resolve the inconsistencies among Theodule's various investor profiles and failed to learn the essential facts about the individuals whose money was actually invested in each account, *i.e.*, the hard-working Haitian-American victims of the Ponzi scheme. All of this occurred despite Respondent being on notice of red flags related to incoming wire transfers, which also should have signified irregularities in each account.

44. Moreover, Respondent knew that each Account Holder was engaging in an

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unsupportable and risky options strategy that made little or no sense, especially for the working-class Haitian-Americans whose money was being invested.

45. As a direct and proximate result of Respondent's multiple breaches of its fiduciary duties, Claimant, as Assignee of the Account Holders, lost more than $9 million dollars.

V. Damages

46. Respondent's wholesale failure to comply with its obligations resulted in massive losses. Specifically, Claimant, as Assignee of each of these accounts, lost $9,064,200. Claimant should be fully compensated for these losses, including costs and pre- and post-judgment interest.

VI. Claims

47. 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;[15] gross negligence; and
d. breach of contract.

VII. Relief Sought

48. As a result of the conduct set forth above, **Claimant requests an all-public Panel,** that a decision be rendered against Respondent, and that the Panel grant the following relief:

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[15]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. Respondent was 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 Respondent's 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). Respondent failed to abide by many of those FINRA and NYSE rules as demonstrated above.

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(a) damages based on fairness and equity;[16]

(b) compensatory damages of $9,064,200, 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.

Respectfully Submitted,

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By: ______________________
Jeffrey B. Kaplan, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that Claimant's **STATEMENT OF CLAIM** was filed by FINRA's online filing system on this 10th day of April 2012 on: FINRA, Inc., Office of Dispute Resolution, 165 Broadway, 27th Floor, New York, NY 10006.

By: ______________________
Jeffrey B. Kaplan

[16] 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).