

**Award**  
**FINRA Dispute Resolution Services**

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In the Matter of the Arbitration Between:

Claimants

Case Number: 19-00519

Janet Anderson  
Beth Bader  
Alexander Belous  
Linda Belous  
Stephanie Blubaugh  
Stephen Boatwright  
Timothy Donmeyer  
Anna Jane Eathorne  
Melinda Farrington  
Jamie Fatas  
Steven Funk  
Kenneth George  
Jaclyn Guintard  
Michael Guintard  
Cindy Hamer  
Kurt Hamer  
Daniel Haugland  
Susan Haugland  
David Jensen  
Mark Johnson  
Margareta Kahla  
Katherine Merolo as Executrix of Peter Cahoon Estate  
Deanna Kimes  
Michelle Leavitt  
John Lefton  
Sandra Lefton  
Irwin Levin  
Marna Levin  
James Livanavage  
Robert Loeb  
Max Kay as Executor of the Avery Kay Estate and as  
Trustee for the Avery Kay Survivor's Trust and the Eleanor  
Kay Decedent's Trust  
Kimberly Moore  
Mark Moore  
Robert Mottram  
Barbara Patterson  
Donald Pottenger  
Virginia Pottenger  
Richard Rardin  
George Sadowski  
Alena Sharp

Jan Spieczny  
Stephen Boathwright as Trustee for the Edith Wroten Trust  
Frances Stern  
Ralph Stern  
Eric Swaringen  
Darin Thomason  
Kristi Thomason  
George Whitehead  
Jason Wright  
Nolan Yonkman  
David Zumbach

vs.

Respondents  
Purshe Kaplan Sterling Investments  
TD Ameritrade, Inc.

Hearing Site: Phoenix, Arizona

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Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Customers vs. Members

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

### **REPRESENTATION OF PARTIES**

For Claimants Janet Anderson (“Anderson”), Beth Bader (“Bader”), Alexander Belous (“Alexander Belous”), Linda Belous (“Linda Belous”), Stephanie Blubaugh (“Blubaugh”), Stephen Boatwright (“Boatwright”), Timothy Donmeyer (“Donmeyer”), Anna Jane Eathorne (“Eathorne”), Melinda Farrington (“Farrington”), Jamie Fatas (“Fatas”), Steven Funk (“Funk”), Kenneth George (“George”), Jaclyn Guintard (“Jaclyn Guintard”), Michael Guintard (“Michael Guintard”), Cindy Hamer (“Cindy Hamer”), Kurt Hamer (“Kurt Hamer”), Daniel Haugland (“Daniel Haugland”), Susan Haugland (“Susan Haugland”), David Jensen (“Jensen”), Mark Johnson (“Johnson”), Margareta Kahla (“Kahla”), Katherine Merolo as Executrix of Peter Cahoon Estate (“Merolo”), Deanna Kimes (“Kimes”), Michelle Leavitt (“Leavitt”), John Lefton (“John Lefton”), Sandra Lefton (“Sandra Lefton”), Irwin Levin (“Irwin Levin”), Marna Levin (“Marna Levin”), James Livanavage (“Livanavage”), Robert Loeb (“Loeb”), Max Kay as Executor of the Avery Kay Estate and as Trustee for the Avery Kay Survivor’s Trust and the Eleanor Kay Decedent’s Trust (“Max Kay”), Kimberlly Moore (“Kimberlly Moore”), Mark Moore (“Mark Moore”), Robert Mottram (“Mottram”), Barbara Patterson (“Patterson”), Donald Pottenger (“Donald Pottenger”), Virginia Pottenger (“Virginia Pottenger”), Richard Rardin (“Rardin”), George Sadowski (“Sadowski”), Alena Sharp (“Sharp”), Jan Spieczny (“Spieczny”), Stephen Boathwright as Trustee for the Edith Wroten Trust (“Stephen Boathwright”), Frances Stern (“Frances Stern”), Ralph Stern (“Ralph Stern”), Eric

Swaringen (“Swaringen”), Darin Thomason (“Darin Thomason”), Kristi Thomason (“Kristi Thomason”), George Whitehead (“Whitehead”), Jason Wright (“Wright”), Nolan Yonkman (“Yonkman”), and David Zumbach (“Zumbach”): Adam J. Gana, Esq., Gana Weinstein LLP, New York, New York.

Hereinafter, Anderson, Bader, Alexander Belous, Linda Belous, Blubaugh, Boatwright, Donmeyer, Eathorne, Farrington, Fatas, Funk, George, Jaclyn Guintard, Michael Guintard, Cindy Hamer, Kurt Hamer, Daniel Haugland, Susan Haugland, Jensen, Johnson, Kahla, Merolo, Kimes, Leavitt, John Lefton, Sandra Lefton, Irwin Levin, Marna Levin, Livanavage, Max Kay, Kimberly Moore, Mark Moore, Mottram, Patterson, Donald Pottenger, Virginia Pottenger, Rardin, Sadowski, Sharp, Spieczny, Stephen Boathwright, Frances Stern, Ralph Stern, Swaringen, Darin Thomason, Kristi Thomason, Whitehead, Wright, Yonkman, and Zumbach are collectively referred to as “Claimants”.

For Respondent Purshe Kaplan Sterling Investments (“PKS Investments”): Sanay B. Panchal, Esq., O’Hagan Meyer, LLC, Newport Beach, California.

For Respondent TD Ameritrade, Inc. (“TD Ameritrade”): Neil S. Baritz, Esq., Baritz & Colman, LLP, Boca Raton, Florida.

Hereinafter, PKS Investments and TD Ameritrade are collectively referred to as “Respondents”.

### **CASE INFORMATION**

Statement of Claim filed on or about: February 15, 2019.

Amended Statement of Claim filed on or about: May 7, 2019.

Second Amended Statement of Claim filed on or about: June 30, 2020.

Anderson, Bader, Alexander Belous, Linda Belous, Eathorne, Fatas, Michael Guintard, Jaclyn Guintard, Daniel Haugland, Susan Haugland, Jensen, Leavitt, John Lefton, Sandra Lefton, Irwin Levin, Marna Levin, Loeb, Max Kay, Patterson, Donald Pottenger, Virginia Pottenger, Rardin, Sadowski, Sharp, Spieczny, Kristi Thomason, Darin Thomason, Whitehead, Wright, and Yonkman signed the Submission Agreement: February 15, 2019.

Blubaugh, Boatwright, Donmeyer, Farrington, Funk, George, Cindy Hamer, Kurt Hamer, Johnson, Kahla, Merolo, Kimes, Livanavage, Kimberly Moore, Mark Moore, Mottram, Stephen Boathwright, Ralph Stern, Frances Stern, Swaringen, and Zumbach signed the Submission Agreement: May 7, 2019.

Statement of Answer to the Amended Statement of Claim and Crossclaim filed by PKS Investments on or about: June 3, 2019.

Answer to the Second Amended Statement of Claim filed by PKS Investments on or about: October 2, 2020.

Amended Crossclaim filed by PKS Investments on or about: February 10, 2020.

PKS Investments signed the Submission Agreement: July 8, 2019.

Statement of Answer to Second Amended Statement of Claim filed by TD Ameritrade on or about: September 18, 2020.

Answer to the Crossclaim filed by TD Ameritrade on or about: October 7, 2019.

Answer to the Amended Crossclaim filed by TD Ameritrade on or about: February 21, 2021.  
TD Ameritrade did not sign the Submission Agreement.

## **CASE SUMMARY**

In the Statement of Claim, Claimants asserted the following causes of action against PKS Investments: suitability; misrepresentations and omissions in violation of federal law, Arizona's blue sky laws, and FINRA Rules 2020 and 2210; violation of Arizona Consumer Legal Remedies Act; violation of FINRA Rule 2010 and IM-2310-2; respondeat superior; and failure to supervise.

In the Amended Statement of Claim, Blubaugh, Boatwright, Donmeyer, Farrington, Funk, George, Cindy Hamer, Kurt Hamer, Johnson, Kahla, Merolo, Kimes, Livanavage, Kimberlly Moore, Mark Moore, Mottram, Stephen Boathwright, Ralph Stern, Frances Stern, Swaringen, and Zumbach were named as additional Claimants. Loeb was removed as a Claimant.

In the Second Amended Statement of Claim, Claimants named TD Ameritrade as an additional Respondent and asserted the following causes of action against TD Ameritrade: failure to supervise; misrepresentations and omissions of federal law, Arizona's blue sky laws, and FINRA Rules 2020 and 2210; violation of Arizona Consumer Legal Remedies Act; and violation of FINRA Rule 2010 and IM-2310-2.

The causes of action relate to alleged fraudulent, unsuitable and excessive trading of unspecified securities within Claimants' accounts.

In their respective Statements of Answer, Respondents denied the allegations made in the Amended and Second Amended Statements of Claim and asserted various affirmative defenses.

In its Crossclaim, PKS Investments asserted failure to supervise under FINRA Rule 2360 as its sole cause of action against TD Ameritrade.

In its Amended Crossclaim, PKS Investments asserted the following additional causes of action: fraud; negligence; and equitable indemnity. The causes of action relate to the alleged mismanagement of Claimants' accounts.

In the Answers to the Crossclaim and the Amended Crossclaim, TD Ameritrade denied the allegations made in the Crossclaim and Amended Crossclaim and asserted various affirmative defenses.

## **RELIEF REQUESTED**

In the Statement of Claim, the Amended Statement of Claim, and the Second Amended Statement of Claim, Claimants requested:

1. Compensatory damages for a sum to be determined at hearing;
2. Interest at the statutory rate;
3. Attorneys' fees;
4. Expert fees;
5. Forum fees;
6. Punitive damages; and
7. Such other and further relief the Panel deems just and proper.

In the Statements of Answer to the Amended Statement of Claim and the Second Amended Statement of Claim and the Crossclaim, PKS Investments requested:

1. Claimants take nothing by way of their Statement of Claim; and
2. Such other and further relief as the Panel deems just and proper.

In the Statement of Answer to the Second Amended Statement of Claim, TD Ameritrade requested:

1. Denial of the claim in its entirety;
2. Costs incurred in connection with its defense of this matter; and
3. Such further relief as the Panel deems just and proper.

In the Crossclaim and the Amended Crossclaim, PKS Investments requested the following relief from TD Ameritrade:

1. Compensatory damages in an amount determined by the Panel;
2. Punitive damages;
3. Attorneys' fees; and
4. Pre-judgment and post-judgment interest at the Arizona statutory rate.

In the Answers to the Crossclaim and the Amended Crossclaim, TD Ameritrade requested:

1. Dismissal of the Crossclaim in its entirety; and
2. Attorneys' fees and costs under the doctrine of "tort of another".

### **OTHER ISSUES CONSIDERED AND DECIDED**

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

TD Ameritrade did not file a properly executed Submission Agreement but is required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code") and having answered the claim, is bound by the determination of the Panel on all issues submitted.

On December 11, 2019, PKS Investments filed a motion to dismiss Claimants' Amended Statement of Claim. On December 12, 2019, Claimants filed their opposition to the motion. On December 23, 2019, the Panel denied the Motion to Dismiss.

On February 10, 2020, PKS Investments filed a motion to amend the Crossclaim. On February 20, 2020, TD Ameritrade filed a response. On March 6, 2020, the Panel ordered that deliberation on the motion be deferred until after a related court decision. On January 28, 2021, PKS Investments filed a motion to confirm that the operative Crossclaim is the one filed with the motion to amend dated February 10, 2020. On February 1, 2021, TD Ameritrade filed its opposition to the motion. On February 4, 2021, the Panel granted the motion and allowed the amendment to the Crossclaim.

On June 30, 2020, Claimants filed an unopposed motion to amend the Amended Statement of Claim. On August 21, 2020, the Panel granted the Claimants' motion.

On December 4, 2020, Claimants filed a notice of settlement and voluntary dismissal of all claims asserted against TD Ameritrade with prejudice. On March 1, 2021, Claimants filed a notice of settlement and voluntary dismissal of all claims asserted against Respondents. Therefore, the Panel made no determination with respect to any of the claims made by Claimants.

The Award in this matter may be executed in counterpart copies.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the hearing, and any post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. PKS Investments' Crossclaim is denied in its entirety.
2. PKS Investments is liable for and shall pay to TD Ameritrade the sum of \$400,000.00 in attorneys' fees and costs pursuant to Arizona's exception to the American Rule for "tort of another" and pursuant to other provisions of Arizona law providing for attorney's fees awards.
3. Any and all claims for relief not specifically addressed herein, including requests for punitive damages, are denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution Services assessed a filing fee\* for each claim:

Initial Claim Filing Fee	= \$	1,575.00
Third Party Filing Fee	= \$	1,700.00

*\*The filing fee is made up of a non-refundable and a refundable portion.*

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated persons at the time of the events giving rise to the dispute.

Accordingly, as a party, PKS Investments is assessed the following:

Member Surcharge	= \$	1,900.00
Member Process Fee	= \$	3,750.00

Accordingly, as a party, TD Ameritrade is assessed the following:

Member Surcharge	= \$	1,900.00
Member Process Fee	= \$	3,750.00

**Discovery-Related Motion Fees**

Fees apply for each decision rendered on a discovery-related motion.

Two (2) decisions on discovery-related motions on the papers with one (1) Arbitrator @ \$200.00/decision	= \$	400.00
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Claimants submitted two (2) discovery-related motions

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Total Discovery-Related Motion Fees	= \$	400.00
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The Panel has assessed \$350.00 of the discovery-related motion fees to PKS Investments.

The Panel has assessed \$50.00 of the discovery-related motion fees to TD Ameritrade.

**Contested Motion for Issuance of Subpoena Fees**

Fees apply for each decision on a contested motion for the issuance of a subpoena.

One (1) decisions on contested motions for the issuance of a subpoena with one Arbitrator @ \$200.00	= \$	200.00
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One (1) decisions on contested motions for the issuance of a subpoena with Three Arbitrators @ \$600.00	= \$	600.00
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Total Contested Motion for Issuance of Subpoena Fees	= \$	800.00
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The Panel has assessed \$500.00 of the contested motion for issuance of subpoena fees to PKS Investments.

The Panel has assessed \$300.00 of the contested motion for issuance of subpoena fees to TD Ameritrade.

**Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the Arbitrator(s), including a pre-hearing conference with the Arbitrator(s), which lasts four (4) hours or less. Fees associated with these proceedings are:

Seven (7) pre-hearing sessions with the Panel @ \$1,125.00/session	= \$	7,875.00
Pre-Hearing Conferences: May 21, 2019	1 session	
December 17, 2019	1 session	
February 11, 2020	1 session	
May 7, 2020	1 session	
September 15, 2020	1 session	
December 11, 2020	1 session	

	January 8, 2021	1 session	
Seventeen (17) hearing sessions @ \$1,125.00/session			= \$ 19,125.00
Hearings:	January 18, 2021	2 sessions	
	January 19, 2021	2 sessions	
	January 20, 2021	2 sessions	
	January 21, 2021	2 sessions	
	February 16, 2021	2 sessions	
	February 17, 2021	1 session	
	February 19, 2021	2 sessions	
	February 22, 2021	2 sessions	
	February 23, 2021	2 sessions	
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Total Hearing Session Fees			= \$ 27,000.00

The Panel has assessed \$16,875.00 of the hearing session fees to PKS Investments.

The Panel has assessed \$10,125.00 of the hearing session fees to TD Ameritrade.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.



**ARBITRATION PANEL**

Richard D. Fincher	-	Public Arbitrator, Presiding Chairperson
Delores Manwar	-	Public Arbitrator
Kenneth Layne Morrill	-	Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

**Concurring Arbitrators' Signatures**

***Richard D. Fincher***

Richard D. Fincher  
Public Arbitrator, Presiding Chairperson

**04/08/2021**

Signature Date

***Delores Manwar***

Delores Manwar  
Public Arbitrator

**04/08/2021**

Signature Date

***Kenneth Layne Morrill***

Kenneth Layne Morrill  
Public Arbitrator

**04/08/2021**

Signature Date

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

April 08, 2021

Date of Service (For FINRA Dispute Resolution Services use only)