

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimants

Philip Stuart Lane
Jennifer Susan Lona

Case Number: 19-01802

vs.

Respondent

TD Ameritrade, Inc.

Hearing Site: Seattle, Washington

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. Member

The evidentiary hearing was conducted by videoconference.

REPRESENTATION OF PARTIES

For Claimants Philip Stuart Lane (“Philip Lane”) and Jennifer Susan Lona (“Jennifer Lona”): Mark K. Davis, Esq., Dethlefs Sparwasser Reich Dickerson, PLLC, Edmonds, Washington.

Hereinafter, Philip Lane and Jennifer Lona are collectively referred to as “Claimants”.

For Respondent TD Ameritrade, Inc. (“Respondent”): James J. Vihstadt, Esq., TD Ameritrade, Inc., Omaha, Nebraska.

CASE INFORMATION

Statement of Claim filed on or about: June 24, 2019.

Claimants signed the Submission Agreement: July 15, 2019.

Statement of Answer filed by Respondent on or about: September 11, 2019.

Respondent signed the Submission Agreement: September 11, 2019.

CASE SUMMARY

In the Statement of Claim, Claimants asserted the following causes of action: violations of FINRA Rule 2310 (direct participation program); FINRA Rule 2010 (standards of commercial honor & principles of trade); FINRA Rule 2090, supplemental materials to FINRA Rule 2090, and incorporated NYSE Rule 405(1) (know your customer); NASD Rule IM-2310-2 (fair dealing

with customers); NASD Rule 3010 (supervision); NASD Rule 3012 (supervisory control system); Sections 10(b) and 20 of the U.S. Securities Exchange Act of 1934; Washington State Consumer Protection Act, RCW 19.86 *et seq.*; and Washington State Securities Act, RCW 21.20 *et seq.* The causes of action relate to a trust investment account (“Trust Account”) and the liquidation of the following securities: Amazon, Apple, Facebook, Costco, Microchip Technology, and Monolithic Power Systems.

In the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimants requested:

1. Compensatory damages in the amount of \$39,909.26;
2. Statutory and treble fees in the amount of \$25,000.00 pursuant to RCW 19.86.140;
3. Interest in the amount of at least \$1,862.43 pursuant to RCW 21.20.430; and
4. Attorneys’ fees, costs, and exemplary damages in an amount to be proven at hearing pursuant to RCW 21.20.430 and RCW 19.86.090.

In the Statement of Answer, Respondent requested:

1. The claims asserted in the Statement of Claim be denied;
2. All costs be assessed to Claimants; and
3. Such further relief as determined by the Arbitrator.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges having read the pleadings and other materials filed by the parties.

The Arbitrator has provided an explanation of the decision in this award. The explanation is for the information of the parties only and is not precedential in nature.

FINDINGS

The facts are largely undisputed. Claimants are a son and daughter of Mansel Lane.

In July 2010, their father, Mansel Lane, established a living trust and a trust account at Scottrade. At the time, Mansel Lane was the sole trustee of the Trust Account. Among other things, the Trust Account agreement provided for liquidation and distribution of Trust shares after Mr. Lane’s death.

On July 13, 2010, Mansel Lane signed a Scottrade Trust Account Certification in which he identified himself as the sole Trustee, and Philip Lane, Jennifer Lona, and a former daughter-in-law as successor trustees. Mansel Lane agreed that Scottrade would be informed in writing of any amendments to the Trust Account agreement including identity of the trustees, and that “until such written notice shall have been received Scottrade and its assigns could rely on these representations, warranties and certifications.”

On November 16, 2011, Mansel Lane gave his son Philip Lane a nondurable power of attorney with authority to trade in the Trust Account that was effective until disability, incompetence or

death. After the Trust Account was opened, Mansel made four amendments to the Trust agreement. In the second amendment, on October 15, 2013, Jennifer Lona was designated a co-trustee. Jennifer Lona testified that she had check writing privileges, and from time to time wrote checks on the Trust Account. There was no evidence that Scottrade was advised of the amendments to the Trust Account agreement prior to Mansel Lane's death. There also was no evidence of the authority under which Jennifer Lona wrote checks.

Respondent acquired Scottrade in September 2017. There was no evidence that Respondent was advised of the amendments to the Trust Account agreement prior to Mansel Lane's death. Mansel Lane died on September 15, 2018.

On September 16, 2018, Philip Lane notified Respondent by telephone of his father's death. Philip Lane subsequently tried to access the online Trust Account. However, Respondent had blocked access. On Monday, September 17, 2018, Respondent sent an email letter to Philip Lane in which it stated that in order to respond to his inquiries about access to the Trust Account, Respondent would need three items: (1) a completed Trust Account Conversion Form; (2) a copy of the complete Trust Account documents; and (3) a death certificate. The letter also stated:

Please allow 10 to 14 business days for us to review and/or process the documents once we receive them. . . . In the meanwhile, for your protection and the protection of the account assets, we've placed a restriction on the inherited account(s) to prevent online access, trading, and the distribution of any funds. Check writing (if applicable) will also be removed from that account.

Philip Lane and Jennifer Lona had two meetings with one of Respondent's financial consultants, at Respondent's Bellevue, Washington office. Claimants filled out the Trust Account Registration Conversion Form with help from the financial consultant, assembled and delivered the Trust Account agreement and amendments and, on September 27, 2018, provided the death certificate. Philip Lane called Respondent repeatedly to convey his frustration with the delay in accessing the Trust Account and the urgency he felt to liquidate the account.

On October 8, 2018, Respondent restored access to the online Trust Account. Philip Lane immediately logged in and liquidated the account.

Claimants' Claims. Claimants contend the value of the assets in the Trust Account decreased by \$39,909.26 from the time Philip Lane wanted to close out the Trust Account on September 17, 2018 until he was able to liquidate on October 8, 2018. They seek compensatory damages in that amount under theories of negligence, breach of contract, breach of fiduciary duty, violation of the federal Securities Act of 1933 and Securities Exchange Act of 1934, the Washington Securities Act, 21.20, and the Washington Consumer Protection Act, 19.86. In addition, Claimants seek punitive damages, interest, attorneys' fees and costs under the federal securities acts, the Washington Securities Act, and the Washington Consumer Protection Act. Each claim is addressed hereafter.

Negligence. To establish negligence, Claimants must show (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.

As Claimants argue, Respondent had a duty to know its customer under FINRA Rule 2090

(Know Your Customer) that requires firms to use "reasonable diligence," not only in the opening but also in the maintenance of every account, to know the "essential facts" concerning every customer. Under the rule, the "essential facts" include those needed to understand the authority of each person acting on behalf of the customer. Claimants argue that Respondent failed to satisfy its duty in that it did not know that Jennifer Lona had become a co-Trustee, authorized to act on behalf of the Trust Account or that she and Philip Lane were the successor trustees.

As Respondent argues, the Trust Account and the trustees owed a contractual duty to Respondent to notify it of any changes in the identity of the trustees entitled to act on behalf of the Trust Account. But even if Claimants had provided such notice, such notice would not likely have changed what occurred after Philip Lane notified Respondent of Mansel Lane's death.

Jennifer Lona's authority to trade in the Trust Account during Mansel Lane's lifetime apparently did not become an issue during his lifetime. Jennifer Lona's and Philip Lane's authority only became critical when Philip Lane notified Respondent of his father's death and thereafter sought to liquidate the Trust Account.

Respondent's initial restriction on the Trust Account and request for the three documents necessary to determine who had authority to act on behalf of the Trust Account was a reasonable step in fulfilling its duty to know its customer, the Trust Account, after Mansel Lane's death. However, the follow-up question is whether Respondent was reasonably diligent in ascertaining who then had authority to act on the Trust Account's behalf. Rule 2090 does not offer specific guidance on this question. Rule 2090 offers only that the question depends on the facts and circumstances of the particular case. Neither party offered evidence of industry customs, practices or standards.

It was reasonable for Respondent to wait to receive the death certificate and the complete set of Trust Account documents, from which it was apparent that Jennifer Lona was a co-trustee and that Philip Lane and Jennifer Lona were successor co-Trustees (as they had been since the time of the initial Trust Account Certification in July 2010). Under all the facts and circumstances, restrictions should have been lifted promptly after Respondent had these documents on September 27, 2018. It was not reasonable to restrict access to the Trust Account until October 8, 2018, during which time the account suffered a significant loss in value. Under the facts and circumstances of this case, it would have been reasonable to release the restriction by no later than October 1, 2018. It is clear that Claimants intended to promptly liquidate the account and did so when the restriction was lifted. The overlong restriction resulted in injury to the Trust Account and proximately caused it damages.

Damages are calculated as \$34,650.39 (\$780,436.96, the Trust Account value at September 30/October 1, 2018, less the funds dispersed after the October 8, 2018 trades of \$745,786.57). Therefore, Claimants are awarded \$34,650.39 on their negligence claim.

Breach of Contract. Although Claimants asserted in their Statement of Claim that Respondent breached certain contractual duties and thereby caused Claimants' damages, they did not identify any specific contractual provision that was breached, did not argue a breach of contract in their Arbitration Brief or at the hearing and waived such claim, if any.

Breach of Fiduciary Duty. Generally, absent discretion or special circumstances, there is no fiduciary duty between a broker and a customer. Claimants argue that by restricting access to

the Trust Account during the period Respondent sought to confirm Claimants' authority to act with respect to the Trust Account, Respondent became a fiduciary liable to the trustees and trust beneficiaries to the same extent as if it were a designated trustee in relation to the exercise or non-exercise of the trustees' power or authority under RCW 11.100.130. However, the authority to direct or control the acts of the trustees or the trust investments was not conferred on Respondent, and Respondent did not attempt to control either the fiduciaries or the investments, but merely to determine the rightful trustees and their authority, which it did. The evidence did not establish that Respondent breached fiduciary duties of loyalty, good faith and fair dealing.

Washington Consumer Protection Act. Claimants did not establish a violation of the Washington Consumer Protection Act, RCW 19.86. In particular, they did not establish an unfair or deceptive act or practice that has the capacity to deceive a substantial part of the investing public. While Claimants urged that Respondent omitted to state that Claimants' request for access to the Trust Account could be expedited, even if there were such an omission, it does not rise to the level of an unfair or deceptive act or practice or an omission of a material fact necessary to make any statement that Respondent made not misleading. Further, it does not appear that Respondent offered or provided expedited access. Respondent requested in writing that Claimants allow 7-14 business days after the requested documents were provided to restore account access, and restored that access on October 8, 2018, seven business days after the documents were delivered to Respondent, within the scope of its September 17 email. Claimants also did not establish a public interest; that is, that others likely would be injured by Respondent's conduct. For these reasons, Claimants' request for treble damages, costs and attorneys' fees under RCW 19.86.140 is denied.

Washington Securities Act. Claimants did not establish an entitlement to compensatory damages, interest, attorneys' fees, costs and exemplary damages under the Washington Securities Act, RCW 21.20.430. Section 430 establishes civil liability for any person who offers, sells or purchases a security in violation of any provisions of RCW 21.20.010 (unlawful offers, sales and purchases), 140 (1) or (2) (required registration for broker-dealers and salespersons), or .180 through 230 (generally, registration of securities). This case did not involve the unlawful offer, sale or purchase of a security, registration of TDA or its salespersons, or the registration of any securities, and Claimants offered no evidence or argument to that effect. Consequently, the remedies of RCW 21.20.430 are not available.

Federal Securities Acts. Claimants' requests for damages under the Securities Act of 1933 and the Securities Exchange Act of 1934 are similarly inapt. Consequently, Claimants' assertion that Respondent is a control person under the applicable sections of each Act does not establish its liability.

AWARD

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

1. Respondent is liable for and shall pay to Claimants the sum of \$34,650.39 in compensatory damages.

- Respondent is liable for and shall pay to Claimants \$225.00 to reimburse Claimants for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services.
- Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys' fees, are denied.

FEES

Pursuant to the Code of Arbitration Procedure ("Code"), the following fees are assessed:

Filing Fees

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

Initial Claim Filing Fee	= \$	975.00
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**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 firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge	= \$	1,100.00
Member Process Fee	= \$	2,250.00

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

June 23-25, 2020, postponement requested by parties	=	WAIVED
July 8-10, 2020, postponement requested by parties	=	WAIVED

Hearing Session Fees and Assessments

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

Two (2) pre-hearing sessions with a single Arbitrator @ \$450.00/session	= \$	900.00
Pre-Hearing Conferences: November 12, 2019	1 session	
March 9, 2021	1 session	
One (1) hearing session @ \$450.00/session	= \$	450.00
Hearing: November 2, 2021	1 session	
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Total Hearing Session Fees	= \$	1,350.00

The Arbitrator has assessed \$900.00 of the hearing session fees to Respondent.

The Arbitrator has waived \$450.00 of the hearing session fees.

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

ARBITRATOR

Katherine Hendricks

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Sole 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.

Arbitrator's Signature

Katherine Hendricks

Katherine Hendricks
Sole Public Arbitrator

11/12/2021

Signature Date

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November 12, 2021

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