

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

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In the Matter of the Arbitration Between:

Claimants

Deukmedjian Revocable Family Trust U/A Dtd  
03/18/1987  
Theresa Irene Deukmedjian IRA Contributory

Case Number: 19-02176

vs.

Respondents

Charles Schwab & Co., Inc.  
David Pathe

Hearing Site: San Diego, California

Counter Claimant

David Pathe

vs.

Counter Respondents

Deukmedjian Revocable Family Trust U/A Dtd  
03/18/1987  
Theresa Irene Deukmedjian IRA Contributory

Cross Claimant

Charles Schwab & Co., Inc.

vs.

Cross Respondent

David Pathe

Cross Claimant and Third Party Claimants

David Pathe  
David Pathe Trust Dtd 7/17/2002  
David Pathe IRA Contributory

vs.

Cross Respondent and Third Party Respondent

Charles Schwab & Co., Inc.

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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. Member and Non-Member  
                                    Non-Member vs. Customers  
                                    Member vs. Non-Member  
                                    Non-Member and Customers vs. Member

This case was decided by an all-public panel.

The evidentiary hearing was conducted by videoconference.

### **REPRESENTATION OF PARTIES**

For Claimants Deukmedjian Revocable Family Trust U/A Dtd 03/18/1987 (“Deukmedjian Trust”) and Theresa Irene Deukmedjian IRA Contributory (“Theresa Deukmedjian IRA”): Nicholas H. Berg, Esq., Reasonover & Berg, LLC, New Orleans, Louisiana.

Hereinafter, Deukmedjian Trust and Theresa Deukmedjian IRA are collectively referred to as “Claimants”.

For Charles Schwab & Co., Inc. (“Charles Schwab”): Gilbert R. Serota, Esq., Arnold & Porter L.L.P., San Francisco, California.

For David Pathe, David Pathe Trust Dtd 7/17/2002 (“Pathe Trust”), and David Pathe IRA Contributory (“Pathe IRA”),: George C. Miller, Esq. and Katherine S. Bowles, Esq., Shustak Reynolds & Partners, P.C, San Diego, California.

Hereinafter, David Pathe, Pathe Trust, and Pathe IRA are collectively referred to as “Pathe Parties”.

### **CASE INFORMATION**

Statement of Claim filed on or about: August 2, 2019.

Amended Statement of Claim filed on or about: June 22, 2020.

Answer to David Pathe’s Counterclaim filed on or about: September 3, 2020.

Claimants signed the Submission Agreement: August 2, 2019.

Statement of Answer and Claim Against David Pathe filed by Charles Schwab on or about: September 24, 2019.

Amended Answer and Claim Against David Pathe filed by Charles Schwab on or about: October 15, 2019.

Answer to Claimants’ Amended Statement of Claim and Counterclaim Against Claimants filed by David Pathe on or about: August 14, 2020.

Answer to Charles Schwab's Amended Claim filed by David Pathe on or about: December 6, 2019.

Claim Against Charles Schwab filed by the Pathe Parties on or about: December 6, 2019.  
Answer to the Pathe Parties' Claim filed by Charles Schwab on or about: January 9, 2020.

Charles Schwab signed the Submission Agreement: September 23, 2019.  
Pathe Parties signed the Submission Agreement: December 5, 2019.

### **CASE SUMMARY**

In the Statement of Claim, Claimants asserted the following causes of action against Charles Schwab: breach of fiduciary duty and negligence. The causes of action relate to a put options strategy involving an exchange traded fund ("ETF"), Proshares Short VIX Short-Term Futures ETF ("SVXY").

In the Amended Statement of Claim, Claimants reasserted all causes of action set forth in the original Statement of Claim against Charles Schwab and added David Pathe as an additional respondent.

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

In the Answer to Claimants' Amended Statement of Claim, David Pathe denied the allegations made in the Amended Statement of Claim and asserted various affirmative defenses.

In its Claim and Amended Claim Against David Pathe, Charles Schwab asserted indemnification as the sole cause of action. The cause of action relates to trades made by David Pathe in Claimants' trust account and IRA.

In his Answer to Claimants' Amended Claim Against David Pathe, David Pathe denied the allegations and asserted various affirmative defenses.

In the Counterclaim Against Claimants, David Pathe asserted indemnification as the sole cause of action. The cause of action relates to SVXY.

In the Answer to David Pathe's Counterclaim, Claimants denied all the allegations made in David Pathe's Counterclaim.

In the claim against Charles Schwab, the Pathe Parties asserted the following causes of action: fraudulent misrepresentation; fraudulent concealment; negligent misrepresentation; negligent concealment; negligence; unsuitability; failure to supervise; breach of fiduciary duty; breach of contract; breach of implied covenant of good faith and fair dealing; elder abuse under California Law; violation of State and Federal Securities Laws; violation of FINRA, NASD and NYSE Rules; and respondeat superior. The causes of action relate to Pathe Parties' alleged losses in their investment accounts which utilized SVXY.

In the Answer to the Pathe Parties' claim, Charles Schwab denied the allegations made by the Pathe Parties.

**RELIEF REQUESTED**

In the Statement of Claim, Claimants requested:

1. Damages in an amount according to proof, but approximately \$1,000,000.01 - \$5,000,000.00, as a result of Charles Schwab's improper actions;
2. Interest;
3. Costs, expenses and disbursements associated with the filing of this claim, including expert witness fees; and
4. Such other and additional relief as the Panel deems just and proper.

In the Amended Statement of Claim, Claimants requested:

1. The demand and request for relief as stated in the original Statement of Claim;
2. Panel award damages against David Pathe for the amount of their investment losses, plus interest, costs, expenses, attorneys' fees, if the Panel declines to award damages against Charles Schwab, as to any part of Claimants' investment losses; and
3. Such other and additional relief as the Panel deems just and proper.

In the Statement of Answer and Amended Statement of Answer, Charles Schwab requested:

1. All claims in the Statement of Claim be dismissed; and
2. All costs and forum fees be assessed against Claimants.

In the Answer to Claimants' Amended Statement of Claim and Counterclaim against Claimants, David Pathe requested:

1. Claimants' claims be denied in their entirety;
2. All of his costs and disbursements, including, but not limited to, all expert fees incurred in defending Claimants' claims be awarded;
3. All filing, forum, and hearing fees and costs be reimbursed;
4. Damages in an amount to be determined at the hearings, including, but not limited to, compensatory, incidental and punitive damages;
5. Pre-award and prejudgment interest at the legal rate (10% or the applicable rate in California);
6. Post-award and post-judgment interest at the legal rate (10% or the applicable rate in California);
7. Attorneys' fees and costs pursuant to California Code of Civil Procedure Section 1021.6; and
8. Such other and further relief as the Panel may deem just and proper.

In the Answer to David Pathe's Counterclaim, Claimants requested dismissal of David Pathe's Counterclaim.

In the Claim and Amended Claim Against David Pathe, Charles Schwab requested:

1. Any award against Charles Schwab be indemnified in whole by David Pathe who is also responsible for reimbursement of Charles Schwab's costs of defense of this entire proceeding; and
2. Any additional relief as the Panel may deem appropriate.

In the Answer to Charles Schwab's Amended Claim Against David Pathe, David Pathe requested:

1. Charles Schwab's claims be denied in their entirety;
2. All of his costs and disbursements, including, but not limited to, all expert fees incurred in defending Charles Schwab's claims be awarded; and
3. All filing, forum, and hearing fees and costs be reimbursed.

In the Claim against Charles Schwab, the Pathe Parties requested:

1. Damages in an amount to be determined at the hearing, including, but not limited to, compensatory, incidental, and punitive damages;
2. Pre-award and prejudgment interest at the legal rate (10% or the applicable rate in California);
3. Post-award and post-judgment interest at the legal rate (10% or the applicable rate in California);
4. Treble damages pursuant to California Welfare & Institutions Code Section 15657.5 and 15610.30 and California Civil Code Section 3345;
5. Attorneys' fees and costs incurred in bringing this action pursuant to California Welfare & Institutions Code 15657.5 and any other applicable grounds; and
6. Such other and further relief as the Panel may deem just and proper.

In the Answer to the Pathe Parties' Claim, Charles Schwab requested:

1. Dismissal of each of Pathe Parties' counterclaims;
2. The Panel enter an award in favor of Charles Schwab; and
3. All FINRA costs be assessed against Pathe Parties.

At the hearing, Claimants requested:

1. Compensatory damages in the amount of \$1,140,954.00; and
2. Charles Schwab absorb all hearing session fees.

At the hearing, Charles Schwab additionally requested that all hearing session fees and related miscellaneous costs be borne by Claimants.

At the hearing, David Pathe additionally requested all costs associated with his participation in the hearing, in the amount of \$269,412.11, against Claimants.

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

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

On June 22, 2020, Claimants filed a Motion to Amend the Statement of Claim. On July 2, 2020, David Pathe filed his opposition to Claimants' motion. Charles Schwab did not file a response. On July 6, 2020, Claimants filed their reply. By Order dated July 8, 2020, the Panel granted Claimants' motion.

On April 1, 2021, Charles Schwab and the Pathe Parties filed a joint notice of a partial settlement in that Charles Schwab and the Pathe Parties have settled and resolved all claims between each other and dismissed those claims with prejudice. Therefore, the Panel made no

determination with respect to any claims by Charles Schwab against David Pathe, and claims by the Pathe Parties against Charles Schwab.

The Panel 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.

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

## **FINDINGS**

This claim and counterclaim hinged on several important questions. First, did the representative for Charles Schwab purposely manipulate information concerning experience levels in trading stocks and options on account and limited power of attorney forms so David Pathe could trade options in Claimants' accounts? Second, did David Pathe purposely mislead and pressure Claimants into making risky investments using his put options strategy? Third, were Claimants unwitting and ill-informed investors in options trading? Finally, was the put option strategy employed by David Pathe a product of his own doing and that of another third-party in any way connected to Charles Schwab? And if so, does Charles Schwab have some accountability for the losses incurred by Claimants as a result of this strategy?

After several days of hearings involving testimony of involved parties and experts, plus the introduction of dozens of exhibits, the Panel reached a series of unanimous decisions. First, that Claimants were not unwitting participants when they agreed to participate in David Pathe's option strategy. David Pathe had employed the strategy in his own account with some success before introducing it to Claimants. This strategy was developed, with the help of a third-party not associated with Charles Schwab and employed solely by him on a self-directed basis. Charles Schwab had no role in developing the strategy.

It was also clear to the Panel that Claimants, even though they might have been less experienced than David Pathe, knew what the risks and rewards were associated with David Pathe's strategy. And, that Claimants had considerable confidence in David Pathe to eventually make options trades in their accounts by granting him a limited power of attorney to do so. It was also clear to the Panel that David Pathe spent considerable time advising Claimants regarding the status of their investments both verbally and in writing. Early on, Claimants experienced success with the strategy employed by David Pathe. But an unforeseen and historic "Black Swan" event occurred involving extreme market volatility, which was largely, almost solely responsible for Claimants' significant losses. The Panel also noted that David Pathe suffered even greater losses in his individual account which necessitated the sale of his home to cover his market debts. It was particularly telling that during their testimony, Claimants admitted that David Pathe had done nothing wrong. In doing so, Claimants effectively released David Pathe from any liability and hearing session costs in the case.

Although it was clear to the Panel that the options strategy employed by Claimants and David Pathe were not developed by Charles Schwab personnel, and that all of the options trades subject to this arbitration were self-directed, the Panel did express some concern regarding the process used by Charles Schwab to categorize the suitability for these clients to engage in such risky trading. More specifically, the process used to elevate them from level "0" trading to level "1" seemed confusing. Clearly, there was pressure by these clients to convince Charles Schwab they deserved a higher risk level of options trading. But, at times, the process seemed clumsy

without rigorous oversight. Although the Panel's concern did not rise to the level of a damages award against Charles Schwab, the Panel felt that Charles Schwab should review these approval processes and perhaps, improve upon them for future investors. While a damages award against Charles Schwab was not deemed appropriate, the Panel felt that Charles Schwab should bear responsibility for all evidentiary hearing session fees.

## **AWARD**

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

1. Claimants' claims are denied in their entirety.
2. Claimants are jointly and severally liable for and shall pay to David Pathe the sum of \$254,000.00 in attorneys' fees and related costs incurred during the arbitration, pursuant to Blue Sky Laws. Any other claims by David Pathe against Claimants are denied in their entirety.
3. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages and treble damages, 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	= \$	2,000.00
Counterclaim Filing Fee	= \$	2,000.00
Third Party Filing Fee	= \$	3,400.00

*\*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 firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Charles Schwab is assessed the following:

Member Surcharge	= \$	3,025.00
Member Process Fee	= \$	6,175.00

### **Late Pre-Hearing Cancellation Fees**

Fees apply when a pre-hearing conference is cancelled within three business days of the scheduled conference:

January 22, 2020, cancellation requested by Claimants	= \$	300.00
Total Late Pre-Hearing Cancellation Fees	= \$	300.00

The Panel has assessed \$300.00 of the late pre-hearing cancellation fees jointly and severally to Claimants.

## **Contested Motion for Issuance of Subpoena Fees**

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

One (1) decision on a contested motion for the issuance of a subpoena = \$ 200.00  
with one Arbitrator @ \$200.00

Total Contested Motion for Issuance of Subpoena Fees = \$ 200.00

The Panel has assessed \$100.00 of the contested motion for issuance of subpoena fees jointly and severally to Claimants.

The Panel has assessed \$100.00 of the contested motion for issuance of subpoena fees jointly and severally to Respondents.

## **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 Arbitrators, including a pre-hearing conference with the Arbitrators, which lasts four (4) hours or less. Fees associated with these proceedings are:

Five (5) pre-hearing sessions with the Panel @ \$1,400.00/session = \$ 7,000.00

Pre-Hearing Conferences: April 20, 2020	1 session
June 8, 2020	1 session
December 9, 2020	1 session
April 30, 2021	1 session
July 22, 2021	1 session

Ten (10) hearing sessions @ \$1,400.00/session = \$ 14,000.00

Hearings:	August 3, 2021	2 sessions
	August 4, 2021	2 sessions
	August 5, 2021	2 sessions
	August 6, 2021	2 sessions
	December 20, 2021	2 sessions

Total Hearing Session Fees = \$ 21,000.00

The Panel has assessed \$5,016.66 of the hearing session fees jointly and severally to Claimants

The Panel has assessed \$1,516.66 of the hearing session fees jointly and severally to the Pathé Parties.

The Panel has assessed \$14,466.66 of the hearing session fees to Charles Schwab.

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

**ARBITRATION PANEL**

Robert B. Hansohn	-	Public Arbitrator, Presiding Chairperson
Mark R. Lee	-	Public Arbitrator
Janice L. Sperow	-	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**

***Robert B. Hansohn***

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Robert B. Hansohn  
Public Arbitrator, Presiding Chairperson

**01/27/2022**

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Signature Date

***Mark R. Lee***

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Mark R. Lee  
Public Arbitrator

**01/28/2022**

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Signature Date

***Janice L. Sperow***

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Janice L. Sperow  
Public Arbitrator

**01/27/2022**

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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.

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January 28, 2022

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