

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**KENNETH FELDMAN,**

**Plaintiff,**

**vs.**

**TD AMERITRADE HOLDING  
CORPORATION,**

**Defendant.**

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**8:06CV303**

**FINAL JURY INSTRUCTIONS**

**INSTRUCTION CONFERENCE DRAFT**

## **JURY INSTRUCTION NO. 1**

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning and during the trial are not repeated here.

## **JURY INSTRUCTION NO. 2**

Members of the jury, now that you have heard all of the evidence, it is my duty to instruct you in the law.

1. Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

2. It is my duty to tell you what the law is. It is your duty to decide what the facts are and to apply the law to those facts.

In determining what the facts are you must rely solely upon the evidence in this trial and the general knowledge that everyone has. You must disregard your personal knowledge of any other specific fact.

3. You must apply the law in these instructions, even if you believe that the law is or should be different.

No one of these instructions contains all of the law applicable to this case. You must consider each instruction in light of all of the other instructions.

The law demands of you a just verdict. You must not indulge in any speculation, guess, or conjecture. You must not allow sympathy or prejudice to influence your verdict.

### **JURY INSTRUCTION NO. 3**

The evidence from which you are to find the facts consists of the following:

1. The testimony of the witnesses;
2. Documents and other things received as exhibits;
3. Any facts that have been stipulated--that is, formally agreed to by the parties.

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the parties in this case;
2. Objections to questions;
3. Any testimony I told you to disregard; and
4. Anything you may have seen or heard about this case outside the courtroom or have overheard from one of the bench conferences between the lawyers and me.

#### **JURY INSTRUCTION NO. 4**

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

## **JURY INSTRUCTION NO. 5**

The parties have agreed that the following may be accepted as established facts for purposes of this case only:

1. TD Ameritrade Holding Corporation is a corporation headquartered in Nebraska, and was formerly known as Ameritrade Holding Corporation.

2. Kenneth Feldman is an individual residing in Scottsdale, Maricopa County, Arizona. The plaintiff formerly lived in Omaha and was employed by the defendant.

3. On or about May 1, 2004, the plaintiff and the defendant entered into an Employment Agreement and a Stock Option Agreement. By their terms, the Employment Agreement and Stock Option Agreement incorporated the provisions of the Ameritrade 1996 Long-Term Incentive Plan. Pursuant to the agreements, the plaintiff was granted an option that vested over a four year period in 25% increments on each anniversary of June 7, 2004, the date on which the plaintiff began his employment with the defendant.

4. On September 2, 2005, the defendant terminated the plaintiff "for Reasons Other Than Cause." As of the date of his termination, the plaintiff's option was 25% vested. Prior to August 30, 2006, the plaintiff exercised this portion of the option and purchased 25% of the shares granted under the option.

5. On August 30, 2006, the plaintiff notified the defendant of his desire to exercise his option to purchase an additional 25% of shares. The defendant received the plaintiff's notification, but indicated it would not act upon the exercise because of the dispute between the parties.

## **JURY INSTRUCTION NO. 6**

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight, that is, a preponderance, of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you must resolve that issue against the party who has the burden of proving it. The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

## **JURY INSTRUCTION NO. 7**

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. The defendant is a corporation. A corporation is entitled to the same fair trial as a private individual. All persons, including corporations, and other organizations stand equal before the law, and are to be treated as equals. A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of his or her duties as an employee of the corporation.

**JURY INSTRUCTION NO. 8** (page 1 of 3)

The Stock Option Agreement is ambiguous as a matter of law and you must determine whether the plaintiff's stock option was permitted to vest after the termination of the plaintiff's employment. It is your duty to determine the intent of the parties from all the facts and circumstances. In determining the intent of the parties, you are instructed to use the rules of construction provided for you in these jury instructions.

The dispute between the parties is whether, under the terms of the plaintiff's Stock Option Agreement, the defendant's 1996 Long-Term Incentive Plan, and the plaintiff's Employment Agreement, the option granted to the plaintiff continued to vest after his employment was terminated.

Paragraph 2 of the plaintiff's Stock Option Agreement provides:

Vesting Subject to the terms and condition of this Agreement and except as described in paragraph 4 below, the Option shall become vested and exercisable with respect to 31,250 of the shares of Stock awarded under this Agreement on the anniversary of the Grant Date every year until fully vested; provided, however, except for as described in Paragraph 4 below, that no portion of the Option shall vest or become exercisable after the date on which the Participant's employment with the Company terminates for any reason or after the date of a Forfeiture Event (as defined in paragraphs 13,14, and 15 of this Agreement), whichever is earlier.

Paragraph 3 of the plaintiff's Stock Option Agreement provides:

Exercise . . . [A]fter the Option becomes vested and exercisable pursuant to paragraph 2 and prior to the Expiration Date (defined below), the Option, to the extent then vested and exercisable, may be exercised in whole or in part by filing a written notice with the Secretary of the Company at its corporate headquarters. The exercise notice must be filed prior to the Expiration Date . . .

Paragraph 4(d) of the plaintiff's Stock Option Agreement provides:

4. Expiration of Option and Vesting and Exercisability Upon Termination and Change of Control. The "Expiration Date" for this Option shall be described below. All italicized terms in this paragraph 4, unless noted, are as defined in the Participant's Employment Agreement, effective June 7, 2004 ("Employment Agreement").

. . .

**JURY INSTRUCTION NO. 8** (page 2 of 3)

d. Upon Termination by the Company for Reasons Other Than Cause or upon Voluntary Resignation by the Executive for Good Reason or Termination of the Employment Agreement at the end of the renewal term, if the Participant complies with the terms of Sections 4 and 5 of the Employment Agreement, the Expiration Date shall be the one year anniversary of the *Participant's Date of Termination*.

Paragraph 8 of the plaintiff's Stock Option Agreement provides:

Plan Governs Notwithstanding anything in this Agreement to the contrary, the terms of this Agreement shall be subject to the terms of the [1996 Long-Term Incentive] Plan, a copy of which may be obtained by the Participant from the office of the secretary of the company.

Paragraph 12 of the plaintiff's Stock Option Agreement provides:

Defined Terms Unless the context clearly implies or indicates the contrary, a word, term or phrase used or defined in the [1996 Long-Term Incentive] Plan is similarly used or defined for purposes of this Agreement.

Section 6.4 of the defendant's 1996 Long-Term Incentive Plan provides:

Except as otherwise expressly provided in the Plan, an Option may be exercised, in whole or in part, in accordance with the terms and conditions established by the Board or the Committee at the time of grant; provided, however, that no Option shall be exercisable after the Expiration Date (as defined in Section 11) applicable to that Option and no Option or any portion thereof will first become exercisable after the Participant's termination of employment with the Company.

Section 3(c) of the Employment Agreement provides:

During the period of Executive's employment, each year of the Term constitutes a full vesting year for the stock options awarded Executive on his date of hire. Therefore, with respect to the options granted on Executive's date of hire Executive will be 75% vested in the options granted on his date of hire if he remains employed through the end of the Term.

**JURY INSTRUCTION NO. 8** (page 3 of 3)

The plaintiff contends the Expiration Date referenced in paragraph 4(d) of the Stock Option Agreement controls not only the last date he may exercise his option, but also the last date his option continues to vest. Conversely, the defendant contends the plaintiff's date of termination, September 2, 2005, controls the last date on which his option could vest and the Expiration Date is merely the last date on which he could exercise that portion of his option that was vested as of the date of his termination. The defendant further contends that Section 6.4 of the Long Term Incentive Plan and Section 3(c) of the Employment Agreement establish that the plaintiff's continued employment was a condition precedent to continued vesting of the stock option.

## **JURY INSTRUCTION NO. 9**

When construing an ambiguous contract, you must construe the whole contract, and if possible, give effect to every part of the contract. A party may not be permitted to pick and choose among the clauses of a contract, accepting only those which advantage it. An interpretation which gives effect to all parts of a contract is preferred over one that renders part of the contract redundant and useless. If a particular interpretation of the contract renders part of the contract meaningless, it is indicative that the interpretation is not in accord with the parties' intentions.

In construing a contract, words must be given their plain and ordinary meaning as reasonable persons would understand them. Where two or more provisions of a contract are in conflict, the more specific terms control over general terms.

A contract is to be construed to give effect to the parties' intentions at the time the contract was made. Instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are legally one instrument and will be construed together as if they were as much one in form as they are in substance. Instruments made in reference to and as part of the same transaction are to be considered and construed together, and the fact that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction between the parties.

In interpreting a contract, the expression in an instrument of one or more things implies the exclusion of all not expressed.

The title of a document or the caption of a provision within the document does not alter the meaning of the contents of the document, does not control the interpretation of the document or the relationship of the parties; and it does not determine the nature or character of the document. Rather, the written instrument must be construed in its entirety—single provisions or sentences are not to be disassociated from others referring to the same subject matter.

In interpreting a contract, evidence of prior or contemporaneous negotiations or understandings between the parties is admissible to discover the meaning that the party had reason to know would be given to the words by the other party. However, while preliminary negotiations between the parties may be considered to determine the intent of the parties, they cannot be used to vary or contradict the plain terms of the contract.

## **JURY INSTRUCTION NO. 10**

If you determine that the parties intended that the plaintiff's option could continue to vest upon the termination of plaintiff's employment, and he is entitled to vest in an additional 25% of the stock options under his June 7, 2004 Stock Option Agreement, then you must find for the plaintiff.

If you determine that the parties intended that the option would not continue to vest after the termination of plaintiff's employment, then you must find for the defendant.

**JURY INSTRUCTION NO. 11**

Your verdict must be agreed by all ten of you, that is, it must be unanimous.

## **JURY INSTRUCTION NO. 12 (Page 1 of 2)**

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all of the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the courtroom deputy signed by one or more jurors. Or, you may reach my chambers directly by lifting the receiver of the telephone in the jury room. The caller should clearly identify himself or herself as a member of the jury so that my staff will react accordingly. I will respond to your question as soon as possible either in writing or orally in open court. Remember that you should not tell anyone -- including me -- how your votes stand numerically.

## JURY INSTRUCTION NO. 12 (Page 2 of 2)

If you do not agree on a verdict by 5:00 o'clock p.m., you may separate and return for deliberation at 9:00 o'clock a.m. tomorrow. You may deliberate after 5:00 o'clock p.m., but if so, please advise the courtroom deputy of your intention to do so. You may also separate for meals during the course of your deliberations, but if you do separate for meals please contact the courtroom deputy to advise her of your intention to separate and when you expect to return to the jury room to reconvene your deliberations. If you do separate, then during that time, you are not allowed to discuss this case with anyone, even another juror.

Fourth, your verdict must be based solely on the evidence and law which I have given to you in my instructions. Nothing I have said or done is intended to suggest what your verdict should be -- that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, complete it pursuant to the instructions on the form, and advise the courtroom deputy when you are ready to deliver your verdict.

Submitted at \_\_\_\_\_ o'clock a.m. / p.m.

DATED this \_\_\_\_\_ day of June, 2007.

BY THE COURT:

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

KENNETH FELDMAN, )  
 ) 8:06CV303  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TD AMERITRADE HOLDING )  
 CORPORATION, )  
 )  
 Defendant. )

VERDICT FORM

We the Jury, duly impaneled and sworn in the above-entitled action, find the following. (Mark an "X" in the appropriate space).

\_\_\_\_\_ A. We conclude the plaintiff is entitled to vest in an additional 25% of the stock options under his June 7, 2004 Stock Option Agreement with the defendant, and therefore, we find in favor of the plaintiff Kenneth Feldman.

or

\_\_\_\_\_ B. We conclude the plaintiff is not entitled to vest in any stock options which were not vested as of the date of the plaintiff's termination, and therefore, we find in favor of the defendant TD Ameritrade Holding Corporation.

Note: You have finished your deliberations.

**The Foreperson shall sign and date the verdict form, and such signature shall mean that the verdict of the jury was unanimous.**

DATED: June \_\_\_\_, 2007

\_\_\_\_\_  
Foreperson